

FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

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ABSTRACT

Over the past decade, the Internet has brought increased attention to the adequacy of the remedies available in defamation cases. Defamation plaintiffs are understandably frustrated. In almost all cases, money damages will not fully compensate them for the reputational and emotional harms they are suffering, and many defendants lack the ability to pay damages in any event. Yet it has long been a fixture of Anglo-American law that plaintiffs are not entitled to injunctive relief in defamation actions; their remedies are solely monetary. Indeed, it has been repeated as a truism: “equity will not enjoin a libel.” It is a precept that 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 the belief that equity will not enjoin a libel may not be true, at least not anymore. While 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 involving injunctions in defamation cases. Reviewing these cases, it draws out the rationales, both constitutional and equitable, for the no-injunction rule. The article concludes that while 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 can be structured so that it would be both effective and compatible with the First Amendment.

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TABLE OF CONTENTS

INTRODUCTION 1

I. REPUTATIONAL HARMS AND EQUITABLE REMEDIES 5

 A. The Changing Face of Defamation Litigation..... 6

 B. Irreparable Injuries and Inadequate Remedies 9

II. THE NO-INJUNCTION RULE IN DEFAMATION CASES..... 11

 A. Equitable Limitations on Injunctive Relief 13

 1. Maintaining a Check on Judicial Power..... 14

 2. A Preference for Legal Over Equitable Remedies 16

 3. Concerns About the Efficacy of Speech Injunctions 18

 B. Constitutional Limitations on Injunctive Relief..... 20

 1. Prior Restraints and Subsequent Sanctions 22

 2. “First Amendment Due Process” 26

III. A NEW APPROACH EMERGES IN THE TWENTIETH CENTURY 29

 A. Exceptions to the No-Injunction Rule 31

 1. Speech That Impugns Property Interests..... 31

 2. Speech That is Part of a Continuing Course of Conduct..... 33

 3. Speech That Has Been Adjudged to Be Defamatory 34

 B. Problems of Overbreadth and Underinclusiveness 36

 1. Type I Injunctions 36

 2. Type II Injunctions 37

 3. Type III Injunctions..... 38

 4. Type IV Injunctions 39

IV. AN EQUITABLE REMEDY THAT ACCORDS WITH FREE SPEECH PRINCIPLES 40

 A. Crafting a Narrowly Tailored, Yet Effective Injunction 40

 1. Requiring Full-Adjudication of Claims..... 41

 2. Preserving the Jury’s Role as a Check on Judicial Power..... 44

 3. Ensuring Narrow Tailoring 46

 4. Allowing Robust Debate on Issues of Public Concern 48

 5. Demonstrating Effectiveness..... 55

CONCLUSION 58

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.¹ Indeed, it has been repeated as a truism: “equity will not enjoin a libel.”² It is a precept that

¹ See, e.g., *Brandreth v. Lance*, 8 Paige Ch. 24, 26, 1839 WL 3231 (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 Assur. Co v. Knott*, (1874) 10 Ch. App 142, 145, 1874 WL 16312 (Ch.) (refusing to grant an injunction and stating, “Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction”); *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.”); *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.”).

² 2 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 9:85 (2d. ed. 1999) (“One of the unwavering precepts of the American law of remedies has long been the axiom that equity will not enjoin a libel.”); see also 1 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

rests on one of the strongest presumptions in First Amendment jurisprudence, that injunctions against libel and other kinds of speech are unconstitutional prior restraints.³ 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.⁴ Prior to the widespread availability of digital publishing, most defamation lawsuits in the United States involved claims 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 can not prevent reputational harms that arise from defamatory falsehoods, they may only order money damages after the harms occur – has faced considerable criticism. As Professor Douglas Laycock observed, such a rule “sounds absurd to people who are not lawyers nor economists.”⁵ And even to many lawyers, the no-injunction rule often seems illogical.⁶

While 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.⁷ 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

courts will not enjoin libels. . . . The absoluteness of this rule is crucial.”); BRUCE W. SANFORD, LIBEL AND PRIVACY §13.3.3A (rev. 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 __, at 43-45, 96-98. The distinctions between the claims are not germane to the present analysis, so this article uses the general label of defamation.

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 __, at 164-65; Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin A Libel or Slander?*, 48 BROOK. L. REV. 231, 262-63 (1982); William O. Bertelsman, *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); Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115, 118-22 (1923); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 648 (1916).

⁷ See *infra* Part III.

number of cases, for example, judges issued astonishingly broad injunctions, including injunctions that ordered defendants to never again mention the plaintiff's name,⁸ or to remove entire websites because a single page contained defamatory content.⁹ 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 and view 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.¹⁰ It is an issue, however, that has not received significant attention by legal scholars.¹¹

This article aims to rectify that 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 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.¹² All speech now has digital echoes, whether it is 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,

⁸ See, e.g., *Eppley v. Iacovelli*, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009); *Apex Technology Group, Inc. v. Doe*, No. MID-L-7878-09, Order (N.J. Superior Ct., Law Division, Middlesex County Dec. 23, 2009); *Cochran v. Tory*, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *vacated*, 544 U.S. 734 (2005).

⁹ See, e.g., *Bluemile, Inc. v. Yourcolo, LLC*, 2011 U.S. Dist. LEXIS 62178 (S.D. Ohio June 10, 2011); *Burfoot v. May4thcounts.com*, No. CL10-2735 (Norfolk Cir. Ct., Va. April 21, 2010), *withdrawn*, 80 Va. Cir. 306 (Cir. Va. 2010); *In re Davis*, 334 B.R. 874, 888 (Bankr. W.D. Ky. 2005), *rev'd in part*, 347 B.R. 607 (W.D. Ky. 2006).

¹⁰ Oral statement of Eugene Volokh on January 5, 2013, at the Association of American Law School's Section on Defamation and Privacy which the author attended.

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, 176-97 (1998), as have a few other scholars, who have examined various aspects of the no-injunction rule, see Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655 (2008); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157 (2007) [hereinafter Chemerinsky, *Injunctions*]; Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating A Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087 (2001); Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1 (2000); Bertelsman, *supra* note ____.

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, 313-16 (2010) (noting that judicial remedies are largely ineffective at dealing with reputational harms) [hereinafter Ardia, *Reputation in a Networked World*].

“a court of equity will not do a useless thing.”¹³ 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.¹⁴

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 sole remedy is monetary damages. But money is not what defamation plaintiffs want most. They want vindication and they want the defendant to stop 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 235 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 rule was firmly ingrained in Anglo-American law long before the U.S. Constitution was ratified. While the First Amendment has a lot to say on the question of injunctions in speech cases, the no-injunction rule is based on, among other rationales, respect for the role of juries in free speech controversies, a preference for legal rather than equitable remedies, and skepticism about the effectiveness of speech injunctions.

Nevertheless, as Part III shows, judges have been increasingly granting injunctions in defamation cases, often without considering whether the injunction is constitutional or consistent with long-standing principles of equity. A review of the case law reveals that at least 51 decisions have granted or affirmed an injunction directed at defamatory speech, with an especially sharp increase in such cases after 2000.¹⁵ While the number of injunctions is still small relative to

¹³ N.Y. Times Co. v. United States, 403 U.S. 713, 744 (1971) (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) (Marshall J., concurring).

¹⁴ The recent dispute in the U.K. 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 TV star illustrates the ineffectiveness of these injunctions. See Peter Preston, *Twitter And Wikileaks Have Made A Mockery of the Courts*, THE OBSERVER UK, May 22, 2011, at 28. As the *New York Times* reported, “tens 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 MP 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>.

¹⁵ Of the 51 decisions granting or affirming injunctive relief, 31 were issued after January 1, 2000. See *infra* notes ___ - ___ and accompanying text. This follows the trend other scholars have noted with regard to the granting of injunctions generally, which appears to have increased throughout

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,¹⁶ it allows judges to order injunctive relief if there has been a finding of defamation and the injunction is limited to speech adjudged to be defamatory. Part III examines these cases 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 considers whether the no-injunction rule still makes sense today. It concludes that while 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,¹⁷ is a dignitary tort directed at remedying harm to a plaintiff’s reputation caused by false statements of fact.¹⁸ 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 was either negligent or acted 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*).¹⁹

While this may seem like a straightforward cause of action, defamation lawsuits are complex and difficult for plaintiffs to win.²⁰ Moreover, defamation law does not impose liability for every statement that harms reputation. The law

the twentieth century. See Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 347 (1981) (observing that “contemporary judges grant more injunctions than their predecessors”); *Developments in the Law: Injunctions*, 78 HARV. L. REV. 996, 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., *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 306 (Ky. 2010); *Wagner Equip. Co. v. Wood*, 2012 WL 4466644, at *2 (D.N.M. Sept. 24, 2012).

¹⁷ See *supra* note ____.

¹⁸ See Ardia, *Reputation in a Networked World*, *supra* note ____, at 277-82.

¹⁹ See RESTATEMENT (SECOND) OF TORTS § 558 (1977). These elements are discussed *infra* in Part IV.A.1.

²⁰ See Ardia, *Reputation in a Networked World*, *supra* note ____, at 304-05; David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 520 (2001); Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 4 (1996); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488-90 (1991).

places a number of obstacles in the path of an aggrieved plaintiff.²¹ 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.

A. The Changing Face of Defamation Litigation

Although defamation is one of the oldest torts in the common law,²² 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.²³ This led to extensive substantive and procedural changes that were imposed by the Court to ensure that speakers have the “breathing space” they need to engage in robust public discourse.²⁴ For example, the Court requires defamation plaintiffs to prove – in addition to falsity²⁵ – that the defendant was at fault when he published a defamatory statement.²⁶ More recently, defamation took on a decidedly medium-specific aspect when Congress passed section 230 of the Communications Decency Act,²⁷ which granted operators and users of websites and other interactive computer services broad protection from defamation claims based on the speech of third parties.²⁸

But not only has defamation law undergone doctrinal evolution, the nature of defamation litigation also has changed. In the 1980s, seventy percent of all libel actions in the United States involved claims against the mass media.²⁹ Today, bloggers, users of social media, and “citizen journalists” are more often

²¹ See Ardia, *Reputation in a Networked World*, *supra* note ____, at 303-16.

²² See NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 3* (1986) (noting that “[t]he common law crime of libel can claim a long and broad . . . ancestry”).

²³ *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

²⁴ *Sullivan*, 376 U.S. at 271-72 (observing that “erroneous statement is inevitable in free debate, and that 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)).

²⁵ See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-778 (1986).

²⁶ See, e.g., *Sullivan*, 376 U.S. at 280 (requiring that public officials suing for libel prove that the defendant acted with actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (requiring that private figures in matters of public concern must prove at least negligence on the part of the defendant).

²⁷ 47 U.S.C. § 230 (1996). In deceptively simple language, section 230 of the Communications Decency Act (“Section 230”) 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.” *Id.* § 230(c)(1).

²⁸ See 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* in 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.

the targets of defamation claims.³⁰ 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.³¹ For example, George Freeman, vice president and assistant general counsel at the *New York Times*, says that for the first time in his 29 years at the *Times*, there are no active domestic libel suits.³²

While there are no comprehensive studies of defamation litigation in the United States,³³ anecdotal evidence indicates that defamation claims are actually increasing.³⁴ It is just that plaintiffs are filing their lawsuits against a different type of publisher. Media lawyers who represent or study online publishers have been seeing 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 2009.³⁵ 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

³⁰ See, e.g., Debra Cassens Weiss, *As Sites Like Yelp Increase in Popularity, More Consumers Get Sued for Defamation*, ABA JOURNAL, Dec. 6, 2012, http://www.abajournal.com/news/article/as_sites_like_yelp_increase_in_popularity_more_consumers_get_sued_for_defam/; Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES, May 31, 2010, at A1.

³¹ See John Koblin, *The End of Libel?*, THE NEW YORK OBSERVER, June 9, 2010, <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 LAW 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 *Id.*

³³ Several researchers have done limited empirical studies, primarily in the 1970s and 1980s. See MEDIA LAW RESOURCE CENTER, REPORT ON TRIALS AND DAMAGES (Feb. 2012) (providing report, previously published annually and now published biannually, of trials against media defendants involving libel, privacy, and related claims); RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987); Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985); Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795 (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 (1980).

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

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 U.S. See *Online Defamation Cases in England and Wales 'Double'*, BBC NEWS UK, Aug. 26, 2011, <http://www.bbc.co.uk/news/uk-14684620> (noting that “[t]he number of court cases brought by people who say they have been defamed online has more than doubled in a year”).

publishers, ranging from copyright infringement claims against celebrity-gossip bloggers to defamation claims against operators of hyper-local journalism sites.³⁶

It is not just the defendants who are different in today's defamation cases, however. 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.³⁷ This makes intuitive 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 nearly so well known. They are what defamation law calls private figures.³⁸ 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,³⁹ and Edward Saadi, a Lebanese-American 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."⁴⁰

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 having to prove that the defendant acted with actual malice,⁴¹ they still face the hard reality that their legal remedies are limited. Mr.

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

³⁷ See Franklin, *Suing Media for Libel*, *supra* note __, at 807 (finding that of 291 reported libel cases filed against the media between 1977 and 1981, more than two-thirds of the identifiable plaintiffs were public officials, business managers, government employees, professionals, or commercial corporations).

³⁸ 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, 3 (2009) (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 345.

³⁹ See *Burbage v. Burbage*, 2011 WL 6756979, at *1 (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*, 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*, 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." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). There are no comprehensive studies of the success rates of different types of plaintiffs in defamation cases. Nevertheless, in an

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 in Mr. Burbage’s case overturned the injunction, concluding that “defamatory speech is not sufficiently injurious to warrant prior restraint.”⁴²

B. Irreparable Injuries and Inadequate Remedies

Tort law aspires to provide a plaintiff with a complete remedy for every injury.⁴³ The remedies available to a specific plaintiff, however, will vary depending on the nature of her claims.⁴⁴ “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.”⁴⁵ Most tort plaintiffs request money in the form of compensatory and punitive damages, which are considered to be “legal remedies.”⁴⁶ When a plaintiff asks the court to order the defendant to refrain from specified conduct or to perform an affirmative act, it is called an “equitable remedy.”⁴⁷

Naturally, a remedy that prevents harm altogether is the most complete remedy for a plaintiff, and is “closer to the ideal of corrective justice.”⁴⁸ For that reason, plaintiffs often request an injunction, “equity’s premier remedy,”⁴⁹ in addition to money damages. However, unlike compensatory damage awards, which a plaintiff is entitled to upon presenting adequate proof of liability, a plaintiff has 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

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 (85%). *See Logan, supra* note __, at 510. In that same study, private figure plaintiffs did nearly 20% better in avoiding dismissal. *See id.*

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) [hereinafter LAYCOCK, REMEDIES].

⁴⁵ *See* LAYCOCK, REMEDIES *supra* note __, at 1.

⁴⁶ BLACK’S LAW DICTIONARY (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) [hereinafter Rendleman, *Irreparability*].

⁴⁸ LAYCOCK, *supra* note __, at 4.

⁴⁹ Rendleman, *Irreparability*, *supra* note __, at 1643-44. The term “injunction” encompasses any “court order commanding or preventing an action.” BLACK’S LAW DICTIONARY. This includes temporary restraining orders, preliminary injunctions, permanent injunctions, and similar court orders directed at expressive conduct.

be tailored to arrive at an equitable result under the circumstances.”⁵⁰ Moreover, under general principles of equity a judge must first “determine the adequacy of a remedy in law before resorting to equitable relief.”⁵¹ If a court believes that money damages provide an adequate remedy for the plaintiff, it will not consider granting an injunction.⁵²

Given the law’s preference for legal remedies, there often is a gap between what plaintiffs want and what is available to them. The no-injunction rule widens this gap by making the general preference for money damages a veritable edict in defamation cases. As a result, money damages are typically the only remedy available to defamation plaintiffs.⁵³ 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 twenty percent of plaintiffs sued to obtain money as compensation for their reputational harms.⁵⁴ Instead, Professor Bezanson’s research revealed that what libel plaintiffs desire most is a correction or retraction.⁵⁵

The irony for those who are suffering 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 the plaintiff’s emotional distress go away.⁵⁶ Furthermore, because of the procedural protections available to libel defendants,⁵⁷ a plaintiff must incur substantial legal costs to see a defamation lawsuit through to completion, but “[v]ery few plaintiffs suffer enough provable pecuniary loss to justify litigating” their case.⁵⁸

The inadequacy of monetary damages is made all the more apparent when defamatory speech is published online, where many different actors likely play a role in disseminating the injurious statements. In our increasingly networked world, online speech invariably passes through the hands of countless

⁵⁰ Monica E. McFadden, *Provisional and Extraordinary Remedies*, 2 LITIGATING TORT CASES § 13:3 (Roxanne Barton Conlin & Gregory S. Cusimano, eds. 2012) (citing *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960)).

⁵¹ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

⁵² *See id.* at 75-76.

⁵³ A plaintiff can, of course, negotiate a retraction or correction as part of a settlement of the case. However, the few studies that have looked at settlement rates in defamation litigation found that defamation cases rarely end in settlement. *See* Randall B. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (reporting that approximately 15% of libel cases settle).

⁵⁴ *Id.* at 228.

⁵⁵ BEZANSON, *supra* note ___, at 24 (finding that 71% 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 (1979) (commenting that money cannot compensate for loss of “personal reputation”); LAYCOCK, *supra* note ___, 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 ___, at 542.

intermediaries who transport, host, and index the billions of webpages, emails, and social media posts that make up our digital lives.⁵⁹ These intermediaries, however, are largely immune from defamation liability because of section 230 of the Communications Decency Act,⁶⁰ which grants operators of websites and other interactive computer services broad protection from defamation claims based on the speech of third parties,⁶¹ including protection from injunctive relief.⁶²

This leaves defamation plaintiffs in the unenviable position of being able to sue only the initial speaker or publisher of the defamatory speech, even when an online content provider such as Facebook or Google is continuing to make the information available to others. Unless these online intermediaries voluntarily remove the defamatory speech, a court cannot force them to do so.⁶³ As a result, injurious falsehoods can live indefinitely on the Internet, waiting to be pulled up and recycled by a search engine.⁶⁴ Even for those plaintiffs who ultimately achieve some legal vindication, the genie cannot be fully put back in 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 24 hours. Broadcasts simply disappeared into the ether. While 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 a trial, were not a permissible remedy in a defamation action.⁶⁵ The rule's lineage can be traced to the backlash that arose from

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

⁶⁰ 47 U.S.C. § 230.

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

⁶² See, e.g., *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000).

⁶³ See, e.g., *Bobolas v. Does*, 2010 WL 3923880, at *2-3 (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 (N.D. Ill. 2009) (refusing to enjoin third-party website operator under Fed. R. Civ. Pro. 65).

⁶⁴ The largest of these online repositories is the Internet Archive, a non-profit digital library that contains over 150 billion web pages archived from 1996 onward. See <http://www.archive.org/web/web.php>. 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 (2009).

⁶⁵ See THOMAS STARKIE, *A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS* 3 (1813) (observing that “communications concerning reputation cannot be

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.”⁶⁶

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.⁶⁷ The first such published decision was the 1839 New York case of *Brandreth v. Lance*.⁶⁸ 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.”⁶⁹ If a court were to enjoin libelous speech prior to publication, 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.⁷⁰

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 two hundred decisions addressing injunctive relief in defamation cases⁷¹ reveals that the no-injunction

[] prohibited”); *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.”).

⁶⁶ 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) [hereinafter Meyerson, *Neglected History*] (quoting William Smith, *Letter to Printer*, N.Y. GAZETTE; OR WKLY. POST-BOY, Mar. 19, 1770, at 1420). 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 *Amici Curiae* of Historians Alfred L. Brophy et al. Supporting Petitioners, *Tory v. Cochran*, 544 U.S. 734 (2005), 2004 WL 2582553, at *11 [hereinafter *Brief Amici Curiae of Historians*].

⁶⁷ See, e.g., *Brandreth v. Lance*, 8 Paige Ch. 24, 26, 1839 WL 3231 (N.Y. Ch. 1839); STARKIE, *supra* note __, at 3.

⁶⁸ 8 Paige Ch. 24 (N.Y. Ch. 1839).

⁶⁹ *Id.* at 26.

⁷⁰ *Brandreth*, 8 Paige Ch. at 24.

⁷¹ 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 235 decisions. 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).

rule is based on both equitable and constitutional concerns about the power of judges to silence speech. In more than three-quarters of these decisions, courts refused to grant injunctive relief, citing one of four reasons for doing so: that the court did not have the power to issue an injunction directed at defamatory speech; that money was an adequate – and preferred – remedy for the injured plaintiff; that an injunction would not be effective in providing relief to the plaintiff; or that an injunction directed at defamatory speech would be an unconstitutional prior restraint. 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

The most often cited reason American courts initially adopted the no-injunction rule 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,⁷² common-law judges originally lacked the authority to grant any equitable relief. When the Crown abolished the Star Chamber in 1641, English common-law courts began to hear defamation claims.⁷³ 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.⁷⁴

In the United States, this same division of power between courts of law and equity existed until 1938, when enactment of the Federal Rules of Civil Procedure formally merged law and equity jurisdiction in the federal courts.⁷⁵ Merger in most states followed shortly thereafter.⁷⁶ 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* 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.⁷⁷

⁷² 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).

⁷³ See *Brief Amici Curiae of Historians*, *supra* note __, at *12.

⁷⁴ See *id.*; *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.”).

⁷⁵ See FED. R. CIV. P. 2 (1938) (“There shall be one form of action to be known as ‘civil action.’”).

⁷⁶ See 2 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 20:2 (noting “[t]he 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, *Irreparability*, *supra* note __, 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.’”).

⁷⁷ *Brief Amici Curiae of Historians*, *supra* note __, at *13. *Tory v. Cochran*, 544 U.S. 734 (2005), is discussed *infra* in Part II.B.

Indeed, American judges were quick to dismiss requests for injunctions directed at defamatory speech.⁷⁸ Although law and equity courts had merged in most jurisdictions in the United States by the middle of the twentieth century, judges continued to deny requests for injunctions targeting defamatory speech on the basis that they had no authority to grant such relief.⁷⁹ 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 role 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. 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 later. In *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, for example, 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.⁸⁰

In fact, the expanding role of juries in civil and criminal cases tracks 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's role initially was limited to deciding only the question of whether the defendant *published* the statements

⁷⁸ The earliest decisions almost uniformly rejected requests for injunctions on the basis that the court had no jurisdiction to grant equitable relief. *See, e.g.*, *Brandreth v. Lance*, 8 Paige Ch. 24, 26, 1839 WL 3231 (N.Y. Ch. 1839); *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 70 (1873); *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70, 74 (1873); *Flint v. Hutchinson Smoke-Burner Co.*, 110 Mo. 492 (1892); *Reyes v. Middleton*, 36 Fla. 99, 108 (1895); *Dailey v. Superior Court of City & County of San Francisco*, 112 Cal. 94, 98 (1896).

⁷⁹ *See, e.g.*, *Am. Univ. of Antigua Coll. of Med. v. Woodward*, 2010 WL 5185075, at *3 (E.D. Mich. Dec. 16, 2010); *Kessler v. Gen. Services Admin.*, 236 F. Supp. 693, 698 (S.D.N.Y. 1964); *Weiss v. Weiss*, 5 So. 3d 758, 760 (Fla. Dist. Ct. App. 2009); *Prucha v. Weiss*, 233 Md. 479, 484 (1964); *Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239, 239 (N.Y. App. Div. 2002); *Schmoldt v. Oakley*, 390 P.2d 882, 886 (Okla. 1964).

⁸⁰ 171 F. 553, 556 (C.C.M.D. Ala. 1909).

plaintiff sued upon.⁸¹ Jurors had no role in determining whether the speech was defamatory or what relief the plaintiff should receive.⁸²

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. After the judge ruled that truth was not a defense and that it was his 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.⁸³ 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.”⁸⁴ When the jury returned a verdict of not guilty, “there were three Huzzas in the Hall which was crowded with people.”⁸⁵

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,⁸⁶ and for the expansion of the jury's role in libel cases,⁸⁷ which now encompasses determinations 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.”⁸⁸ As the historian Michael Meyerson observed: “Liberty in America was seen as protection from, not by, colonial judges.”⁸⁹

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 was the way others would understand that speech.⁹⁰ While this might seem like a straightforward inquiry, assessing 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

⁸¹ See Meyerson, *Neglected History*, *supra* note __, at 306.

⁸² *Id.*

⁸³ *Id.* at 318-19 (quoting FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 47, 60 (Leonard W. Levy ed., 1966) [hereinafter FREEDOM OF THE PRESS]).

⁸⁴ *Id.* at 319 (quoting FREEDOM OF THE PRESS, *supra* note __, at 59).

⁸⁵ *Id.* (quoting FREEDOM OF THE PRESS, *supra* note __, at 61).

⁸⁶ 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).

⁸⁷ See ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH AND PRESS 40 (1955) (“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 punishing talk is decided by plain citizens on a jury.”).

⁸⁸ Meyerson, *Neglected History*, *supra* note __, at 319; see also Siegel, *supra* note __, at 698 (concluding that “in 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”).

⁸⁹ Meyerson, *Neglected History*, *supra* note __, at 320.

⁹⁰ See, e.g., *MacLeod v. Tribune Pub. Co.*, 52 Cal. 2d 536, 546 (1959).

prejudices of the relevant community.”⁹¹ 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.”⁹²

2. A Preference for Legal Over Equitable Remedies

The law’s antipathy toward injunctions in defamation cases also is rooted in the longstanding view that legal remedies are preferable over equitable remedies.⁹³ This principle is so ingrained in our legal system that the Supreme Court has stated “it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief.”⁹⁴ While 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.⁹⁵

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.⁹⁶ 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.⁹⁷ Some judges also describe this reason for denying injunctive relief in terms of the plaintiff’s failure to demonstrate “irreparable injury,”⁹⁸ which is simply another way of saying that the plaintiff has an adequate remedy at law.⁹⁹ Both approaches

⁹¹ Ardia, *Reputation in a Networked World*, *supra* note __ at 296 (quoting Lidsky, *supra* note __, 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.

⁹² Siegel, *supra* note __, at 729.

⁹³ *See* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1 (1978).

⁹⁴ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

⁹⁵ *See* *Franklin*, 503 U.S. at 75-76; FISS, *supra* note __, at 1.

⁹⁶ *See* *Bihari v. Gross*, 119 F. Supp. 2d 309 (S.D.N.Y. 2000); *Tilton v. Capital Cities/ABC Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993); *Georgia Soc. of Plastic Surgeons, Inc. v. Anderson*, 257 Ga. 710, 715 (1987); *Ashinsky v. Levenson*, 256 Pa. 14, 19 (1917); *Daugherty v. Allen*, 729 N.E.2d 228, 235 (Ind. Ct. App. 2000); *Greenberg v. De Salvo*, 254 La. 1019, 1031 (1969); *Mescalero Apache Tribe v. Allen*, 81 N.M. 561, 562 (1970); *Cullum v. White*, 2011 WL 6202800 (Ct. App. Tex., Dec. 14, 2011); *Perez v. Dietz Dev., LLC*, 2012 WL 6761997 (Va. Dec. 28, 2012); *Kwass v. Kersey*, 139 W. Va. 497, 507 (1954).

⁹⁷ *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. Austin 2003).

⁹⁸ *See, e.g.*, *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); *Bobolas v. Does*, 2010 WL 3923880, at *3 n.2 (D. Ariz. Oct. 1, 2010); *Bynog v. SL Green Realty Corp.*, 2005 WL 3497821, at *3-4 (S.D.N.Y. Dec. 22, 2005); *Evans v. Evans*, 162 Cal. App. 4th 1157, 1169 (Cal. App. 4th Dist. 2008); *Cohen v. Advanced Med. Group of Georgia, Inc.*, 269 Ga. 184, 184 (1998).

⁹⁹ *See* *U.S. v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) (noting that “inadequacy of available remedies goes only to the existence of irreparable injury”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (stating “these two contentions are here closely related, if not identical”).

ultimately function as a means of channeling plaintiffs toward monetary relief and away from equitable remedies such as injunctions.

Rather surprisingly, for those courts that held that the plaintiff had an adequate remedy at law, it does not appear that the content of the defamatory speech was relevant to their conclusion and they engaged 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 were serious questions about the defendant's ability to pay damages¹⁰⁰ or the defamatory conduct was continuing to cause harm.¹⁰¹ A review of the cases reveals that courts denied injunctions in a wide variety of circumstances, including where the defendant police department was continuing to display the plaintiff's photograph in its "rogues' gallery" after criminal charges were dropped,¹⁰² where the defendant was publishing a circular that falsely stated that the plaintiff attorney was a "shyster egomaniac [who had made] deliberately false statements" in legal proceedings,¹⁰³ and where the plaintiff's mother-in-law was slandering her to plaintiff's husband so as to alienate his affections.¹⁰⁴

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 a court's reliance on them as masking an antipathy for injunctions. Douglas Laycock, who has written a cogent critique of the irreparable injury rule,¹⁰⁵ concludes that "because the legal remedy is almost never adequate," the rule obscures the real reasons judges make remedial choices.¹⁰⁶ 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.¹⁰⁷ 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

¹⁰⁰ 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*, 482 Pa. 377, 383 (1978) ("The 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.").

¹⁰¹ See *infra* notes __-__ [next three notes] and accompanying text.

¹⁰² *Owen v. Partridge*, 40 Misc. 415, 417, 423 (N.Y. Sup. Ct. 1903).

¹⁰³ *Garipey v. Springer*, 318 Ill. App. 523, 525 (Ill. App. Ct. 1943).

¹⁰⁴ *Devine v. Devine*, 20 N.J. Super. 522, 529 (Ch. Div. 1952).

¹⁰⁵ LAYCOCK, *supra* note __, 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.

¹⁰⁶ *Id.* at 164.

¹⁰⁷ *Id.* at 165.

against tortious or criminal speech.”¹⁰⁸ While 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.¹⁰⁹ According to Professor Laycock, “[s]uch interests include burdens on the defendant, the court, or the public, and countervailing policies of substantive law.”¹¹⁰

The preference for legal remedies also reflects a preference 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.¹¹¹ Long-standing principles of equity serve to limit this form of strategic behavior.¹¹² “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.”¹¹³

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.¹¹⁴ 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.”¹¹⁵

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 under inclusive. 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.¹¹⁶ Speech is notoriously difficult to restrain, especially

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 266.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 213-14. In a number of cases, plaintiffs did just that. *See infra* note ____.

¹¹² *See, e.g.,* *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962).

¹¹³ Rendleman, *Irreparability*, *supra* note __, at 1645.

¹¹⁴ *eBay Inc. v. MercExchange, L.L.C.*, 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”).

¹¹⁵ *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall J., concurring); *see also* *Mitchell v. Chambers Const. 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.”).

¹¹⁶ *See* Rendleman, *Irreparability*, *supra* note __, at 1650.

when the topic relates to a matter of public interest.¹¹⁷ 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.”¹¹⁸

Indeed, among the reasons judges evince for refusing to grant injunctive relief 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 relief.¹¹⁹ 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.¹²⁰

In *Devine v. Devine*, for example, the plaintiff sued her mother-in-law for making false statements to her husband that she alleged were intended to wreck her marriage.¹²¹ 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.”¹²² 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.¹²³

And 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 under inclusive. Given the socially constructed interest that defamation law seeks to protect,¹²⁴ an injunction must do more than just restrain the specific words a defendant has used; it must target the defamatory

¹¹⁷ See *infra* Part IV.A.4 and 5.

¹¹⁸ Rendleman, *The Inadequate Remedy at Law Prerequisite*, *supra* note __ at 357.

¹¹⁹ See, e.g., *Oakley, Inc. v. McWilliams*, 2012 WL 2970534, at *3 (C.D. Cal. 2012) (“The injunction here, like injunctions against defamation in general, would also be ineffective, overbroad, or both.”); *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1166 (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.”).

¹²⁰ See Rendleman, *The Inadequate Remedy at Law Prerequisite*, *supra* note __, 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) (“Sometimes injunctions are . . . difficult to enforce, or difficult for appellate courts to supervise.”).

¹²¹ 20 N.J. Super. 522 (Ch. Div. 1952).

¹²² *Id.* at 529.

¹²³ *Id.*

¹²⁴ See Ardia, *Reputation in a Networked World*, *supra* note __, at 267-69.

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."¹²⁵

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 plaintiff perjured himself prohibit the defendant from saying that the plaintiff was "disingenuous"? What if the defendant merely carries placards that say 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 Johnny Cochran, Jr., who sued him for defamation.¹²⁶

It should be obvious that these statements cannot be understood apart from their context. Defamatory meaning is highly dependent on the 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.¹²⁷ This leaves judges with few viable options when enjoining defamatory speech. As Erwin Chemerinsky points out, "[a]ny effective injunction will be overbroad, and any limited injunction will be ineffective."¹²⁸

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 where a court considered granting an injunction directed at defamatory speech, it refused to do so on the basis that the injunction would be an unconstitutional prior restraint.¹²⁹

¹²⁵ Chemerinsky, *Injunctions*, *supra* note ___, at 171; *see also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 567 (1976) (reversing injunction and noting the "difficulty of drafting an order that will effectively" prevent the harm from occurring).

¹²⁶ *See* Cochran v. Tory, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *vacated*, 544 U.S. 734 (2005).

¹²⁷ *See, e.g.*, Greenbelt Coop. Publ'ing Ass'n v. Bresler, 398 U.S. 6, 13-14 (1970); MacElree v. Philadelphia Newspapers, Inc., 544 Pa. 117, 126 (1996).

¹²⁸ Chemerinsky, *Injunctions*, *supra* note ___, at 171.

¹²⁹ *See, e.g.*, Crosby v. Bradstreet Co., 312 F.2d 483, 485 (2d Cir. 1963); Oakley, Inc. v. McWilliams, 2012 WL 2970534, at *3 (C.D. Cal. 2012); Gunder's Auto Ctr. v. State Farm Ins., 617 F.Supp.2d 1222, 1225 (M.D.Fla. 2009); 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); Paradise Hills Associates v. Procel, 1 Cal. Rptr. 2d 514, 519 (Cal. Ct. App. 1991); Ellerbee v. Mills, 262

FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

The prior restraint doctrine is generally understood to bar government restrictions on speech that are imposed in advance of publication. While many kinds of government acts can be prior restraints, injunctions directed at speech are considered to be an archetypal form of prior restraint.¹³⁰ Such injunctions may restrain specific aspects of a communication or may prohibit all speech entirely.¹³¹ 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.¹³²

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.¹³³ It was not until 1931, in *Near v. Minnesota*,¹³⁴ that the Supreme Court first invoked the First Amendment's free speech guarantees to invalidate an injunction. In *Near*, local officials used a "public nuisance" law to charge that *The Saturday Press* was printing defamatory stories about them and obtained an injunction barring the paper from publishing or distributing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."¹³⁵ According to the Court, the injunction was unconstitutional because it "would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication."¹³⁶ "This is the essence of censorship," Chief Justice Hughes concluded.¹³⁷

Ga. 516, 517 (1992); *Montgomery Ward & Co. v United Retail, W. & D. Store Employees*, 400 Ill. 38, 45 (1948); *St. Margaret Mercy Healthcare Centers, Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Guste v. Connick*, 515 So. 2d 436, 438 (La. 1987); *Wolf v. Harris*, 184 S.W. 1139, 1141 (Mo. 1916); *Lindsay & Co. v. Montana Fed'n of Labor*, 96 P. 127, 131 (Mont. 1908); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983).

¹³⁰ See Bendor, *supra* note __, at 298; John Calvin Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 426 (1983).

¹³¹ Emerson, *supra* note __, at 656.

¹³² *United States v. New York Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y.) (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).

¹³³ Long before the U.S. 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.*, *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 180 (1876) (Missouri constitution); *State v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 746 (1882) (U.S. and Louisiana constitutions); *Dailey v. Superior Court of City & County of San Francisco*, 112 Cal. 94, 98 (1896) (California constitution).

¹³⁴ 283 U.S. 697 (1931).

¹³⁵ *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 PRESS* (1981).

¹³⁶ 283 U.S. at 712. Whether the publisher would be free from punishment depended upon whether 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.

¹³⁷ *Id.*

Although the Court cautioned that the principle it was applying was “not absolutely unlimited,”¹³⁸ it did not elucidate any limits.¹³⁹ Instead, it noted in *dicta* four “exceptional cases” where an injunction might be permitted.¹⁴⁰ 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.¹⁴¹

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.¹⁴² 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, the “lack of a generally accepted definition, plus the unprincipled gaps created by the exceptions, has led to a situation in which the prior restraint doctrine is increasingly derided by legal scholars and frequently misunderstood by the Court itself.”¹⁴³ 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. Although the label is more a conclusion than an analytical device, it highlights the increased concerns that arise from certain types of speech restrictions.

But what is it about defamation injunctions that strike courts as highly suspect? If we look carefully at the cases, we can identify 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 there has been a final determination that the speech is defamatory, there is significant danger 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

¹³⁸ *Near*, 283 U.S. at 716.

¹³⁹ See Meyerson, *supra* note ___, at 1087 (noting that the Court in *Near* “neither defined prior restraint, nor explained precisely why injunctions fit within a definition of prior restraint”).

¹⁴⁰ *Near*, 283 U.S. at 716. These exceptions are: “actual obstruction [of the Government’s] recruiting service or the publication of the sailing dates of transports or the number and location of troops”; “primary requirements of decency . . . against obscene publications”; “incitements to acts of violence and the overthrow by force of orderly government . . . words that may have all the effect of force”; and “[protection of] private rights according to the principles governing the exercise of the jurisdiction of courts of equity.” *Id.* 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.

¹⁴¹ See Bendor, *supra* note ___, at 299; LAYCOCK, *supra* note ___, at 168; THOMAS IRWIN EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 51-53 (1966). 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).

¹⁴² 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) (observing that “relevant case law does not provide a concise and logically coherent definition of prior restraint on speech”).

¹⁴³ Meyerson, *supra* note ___, at 1087-88.

The prior restraint doctrine initially arose as a response to government efforts to restrict speech prior to its public expression.¹⁴⁴ Sir William Blackstone summarized this view, which predominated on both sides of the Atlantic in the eighteenth century, 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.”¹⁴⁵

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.¹⁴⁶ This 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,¹⁴⁷ while others argue that the distinction is unnecessary or even illusory.¹⁴⁸ “After all, the point of subsequent punishment is to restrain speech in advance, too.”¹⁴⁹

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 where 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.¹⁵⁰ The Texas Supreme Court’s opinion

¹⁴⁴ See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (stating that “the 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. 304, 313-14 (1825)).

¹⁴⁵ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151-52 (1769).

¹⁴⁶ See *id.* 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 Pub. Co.*, 443 U.S. 97 (1979) (striking down statute making it a crime for a newspaper to publish the name of a juvenile without prior approval of the court).

¹⁴⁷ See, e.g., Scordato, *supra* note __, 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”); Redish, *supra* note __, at 53 (arguing that the prior restraint doctrine “assumes that prior restraints are more harmful to free speech interests than other forms of regulation”).

¹⁴⁸ See, e.g., Siegel, *supra* note __, at 735 (“Modern commentators find the prior restraint / subsequent punishment distinction overdrawn because both regimes deter and chill speech.”); Jeffries, *supra* note __, at 429 (concluding “it 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”).

¹⁴⁹ Steven Helle, *Prior Restraint*, in *COMMUNICATION AND THE LAW* 60 (W. Wat Hopkins, ed. 2011).

¹⁵⁰ See, e.g., *Montgomery Ward & Co. v. United Retail, W. & D. Store Employees*, 400 Ill. 38, 45 (1948); *St. Margaret Mercy Healthcare Centers, Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Greenberg v. De Salvo*, 254 La. 1019, 1029 (1969); *Lindsay & Co. v. Montana Fed’n of Labor*, 96 P. 127, 131 (Mont. 1908); *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133 (1902); *Ex parte Tucker*, 110 Tex. 335, 338 (1920).

in *Ex parte Tucker* exemplifies the view that an injunction restraining defamatory speech prior to publication is incompatible with fundamental notions of liberty:

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.¹⁵¹

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.”¹⁵²

Categorizing a speech restriction as either prior restraint or subsequent sanction, however, can sometimes be difficult.¹⁵³ This is especially so in the context of injunctions, where 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: “obey the law or you will face punishment.”¹⁵⁴ 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 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.¹⁵⁵ In other words, a defendant can be jailed or fined for violating an injunction, even

¹⁵¹ 110 Tex. 335, 337-38 (1920).

¹⁵² 420 U.S. 546, 559 (1975) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

¹⁵³ See Lemley & Volokh, *supra* note __, 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.”).

¹⁵⁴ These cases are discussed *infra* in Part III.B.2.

¹⁵⁵ See *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”); *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980) (stating that “persons 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”).

if a court later finds that the injunction was improperly issued or the First Amendment fully protects the enjoined speech.¹⁵⁶ 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 but violation of the unconstitutional injunction remained punishable by contempt.¹⁵⁷

Failing to distinguish between prior restraints and subsequent sanctions also overlooks the coercive effect of judicial orders, which in practical terms operate as immediate restraints on speakers.¹⁵⁸ Indeed, the cases themselves reveal that parties facing a judicial directive to refrain from speaking typically remain silent, even when they believe their speech is fully protected from subsequent sanction.¹⁵⁹ Chief Justice Burger noted the pernicious effect such orders have in *Nebraska Press Association v. Stuart*, where 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.¹⁶⁰

A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or

¹⁵⁶ See Meyerson, *supra* note __, at 1140-41; Redish, *supra* note __, at 93-99. 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." Blasi, *supra* note __ at 32. 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).

¹⁵⁷ See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975); Chemerinsky, *Injunctions*, *supra* note __, at 165. Because of the harshness of the collateral bar rule, some courts have been unwilling to apply it in First Amendment cases. In *Walker v. City of Birmingham*, for example, 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 speech injunction can, under certain circumstances, be ignored and then challenged. See, e.g., *Providence Journal Co.*, 820 F.2d 1342, 1344 (1st Cir. 1986); *State v. Coe*, 679 P.2d 353 (Wash. 1984); *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594 (Ariz. 1966).

¹⁵⁸ 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, 714 (1931).

¹⁵⁹ See, e.g., 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); 6 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 22.7 (2007) (noting similar impact of injunctions in copyright cases, even when defendants have meritorious defenses).

¹⁶⁰ 427 U.S. 539 (1976).

civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time.¹⁶¹

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

2. “First Amendment Due Process”

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.”¹⁶² In *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, that this illegality had been judicially determined before the court issued the injunction, and the injunction did not prohibit political expression.¹⁶³

Some commentators interpret this language from *Pittsburgh Press* as setting forth an additional – independent – bar to speech restrictions and consider any restraint imposed prior to full adjudication to be an impermissible prior restraint.¹⁶⁴ As they see it, “prior” means before a competent legal decision, not merely prior to publication. But even those who are critical of this reading of prior restraint doctrine concede that before a court may restrain speech, there must be some judicial finding that the targeted speech is susceptible to sanction.¹⁶⁵ The question is how exhaustive that finding must be and what procedural safeguards

¹⁶¹ *Nebraska Press Ass’n*, 427 U.S. at 559.

¹⁶² 413 U.S. 376, 390 (1973). While the Court stated that certain categories of speech are “unprotected by the First Amendment,” no speech is entirely invisible to the constitution. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 383 (1992) (instructing that “statements [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”).

¹⁶³ *Id.* at 390-91

¹⁶⁴ See William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 280-81 (1982); Redish, *supra* note __, at 55; Lemley & Volokh, *supra* note __, at 170; Bendor, *supra* note __, at 356-57.

¹⁶⁵ See, e.g., Wells, *supra* note __, at 21. As Geoffrey Stone points out, “[t]he Court begins with the presumption that the First Amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the First Amendment.” Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

are necessary to ensure that there has been an adequate determination that the speech is subject to restraint under the First Amendment.¹⁶⁶

Of course, the challenge of determining the procedural protections mandated by the Constitution before a right can be limited or extinguished is not unique to cases involving speech. As Justice Frankfurter observed, “[t]he history of American freedom is, in no small measure, the history of procedure.”¹⁶⁷ Yet the question is of particular importance in the context of speech; as the Supreme Court has cautioned, even speech that falls outside First Amendment protection is entitled to procedural safeguards.¹⁶⁸ Professor Monaghan calls this body of constitutional law “first amendment due process,”¹⁶⁹ a term I have adopted here.

While scholars disagree over the precise contours of any such first amendment due process right, all appear to agree that *preliminary* injunctions in speech cases are highly suspect.¹⁷⁰ Indeed, the Supreme Court has repeatedly rejected speech restrictions that were imposed based on a mere “likelihood of success” or other speculative standard.¹⁷¹ According to the Court, “our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove [speech] from circulation.”¹⁷² Not surprisingly, most courts that have addressed the propriety of granting a preliminary injunction

¹⁶⁶ *See Se. Promotions, Ltd.*, 420 U.S. at 559 (“The settled rule is that a system of prior restraint ‘avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.’”) (*quoting* *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

¹⁶⁷ *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J. concurring).

¹⁶⁸ *See, e.g., Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 181 (1968) (instructing that “even where this presumption [against prior restraints] might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit”).

¹⁶⁹ Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 519 (1970) (asserting that “wherever first amendment claims are involved, sensitive procedural devices are necessary to insure that the Court is called upon to balance competing interests of state and citizen only when the judgment that conduct should be punished has been made in a setting which is designed to discriminate between protected and unprotected activity”).

¹⁷⁰ *See, e.g., Lemley & Volokh, supra* note __, at 171; Siegel, *supra* note __, at 735; Wells, *supra* note __, at 65. Judges also have been forceful in their condemnation of preliminary injunctions and TROs in speech cases. *See, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226–27 (6th Cir. 1996) (noting that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible).

¹⁷¹ *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (instructing that “injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”); *New York Times Co.*, 403 U.S. at 727 (observing that “the 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 relatively slight delay before full adjudication).

¹⁷² *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989).

directed at defamatory speech have concluded that such relief would be unconstitutional.¹⁷³

Even if an injunction follows a finding of defamation, however, it remains an open question whether the First Amendment would permit such relief. 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*,¹⁷⁴ but when the plaintiff died a week after oral argument, the Court decided the case on narrow grounds.

In *Tory*, a client of widely renowned attorney Johnnie Cochran Jr.'s law firm felt that the firm had treated him badly and that Cochran owed him money. Ulysses Tory complained to the local bar association, wrote threatening letters to Cochran demanding \$10 million, picketed Cochran's office holding up signs containing insults and obscenities, and, along with others, pursued Cochran while chanting similar threats and insults.¹⁷⁵ Cochran sued and requested a temporary restraining order, preliminary injunction, and permanent injunction to stop the defamatory speech. Cochran did not seek money damages.¹⁷⁶

The Superior Court for the State of California 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.¹⁷⁷ 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.¹⁷⁸ 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 injunction¹⁷⁹ and the California Supreme Court denied review.

¹⁷³ 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 (Cal. App. 4th 2008); *Cohen v. Advanced Med. Group of Georgia, Inc.*, 269 Ga. 184, 184 (1998); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 305 (Ky. 2010); *Wolf v. Harris*, 184 S.W. 1139, 1141 (Mo. 1916).

¹⁷⁴ 544 U.S. 734 (2005).

¹⁷⁵ *Tory*, 544 U.S. at 735.

¹⁷⁶ Erwin Chemerinsky, who represented Ulysses Tory and his wife Ruth Craft in the U.S. Supreme Court, noted that "Tory was judgment-proof, there were no assets to be had." Chemerinsky, *Tucker Lecture*, *supra* note ___, at 1459.

¹⁷⁷ *Tory*, 544 U.S. at 735.

¹⁷⁸ *Cochran v. Tory*, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *vacated*, 544 U.S. 734 (2005). 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, *Tucker Lecture*, *supra* note ___, at 1459.

¹⁷⁹ *Cochran v. Tory*, 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005).

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.”¹⁸⁰ Seven days after the case was argued before the Court, Johnnie Cochran died.¹⁸¹ Writing for the majority, Justice Stephen Breyer explained that the case was not moot because the injunction remained in effect.¹⁸² 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.”¹⁸³ 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.¹⁸⁴

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,” the Court in *Tory* left the door open by stating that an injunction, “tailored to these changed circumstances,” “may still be warranted.”¹⁸⁵ 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.¹⁸⁶

III. A NEW APPROACH EMERGES IN THE TWENTIETH CENTURY

¹⁸⁰ *Tory*, 544 U.S. at 736.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 737.

¹⁸⁴ *Id.* at 738.

¹⁸⁵ *Id.* at 738-39.

¹⁸⁶ 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, *Injunctions*, *supra* note __, at 163. Several years later, he wrote that an injunction “limited 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, *Tucker Lecture*, *supra* note __ at 1458, 1460.

FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

As Part II demonstrates, 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 235 decisions involving injunctions directed at defamatory speech reveals that at least 51 decisions have granted or affirmed injunctions, with an especially sharp increase in such decisions after 2000.¹⁸⁷ While these cases covered a broad range of expression, including oral statements,¹⁸⁸ books,¹⁸⁹ letters,¹⁹⁰ trade publications,¹⁹¹ signs,¹⁹² and even cars,¹⁹³ the majority involved speech on the Internet.¹⁹⁴

¹⁸⁷ Of the 51 decisions the author could find granting or affirming injunctive relief, 31 were issued after January 1, 2000. Only 6 decisions prior to 1950 granted or affirmed an injunction directed at libelous or slanderous speech. *See* Carter v. Knapp Motor Co., 11 So. 2d 383 (Ala. 1943); Menard v. Houle, 11 N.E.2d 436 (Mass. 1937); Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673 (8th Cir. 1926); Hawks v. Yancey, 265 S.W. 233 (Tex. Civ. App. 1924); American Malting Co. v. Keitel, 209 F. 351 (2d Cir. 1913); Emack v. Kane, 34 F. 46 (N.D. Ill. 1888). A table listing the cases granting injunctive relief is included in the appendix to this article.

¹⁸⁸ *See* Aguilar v. Avis Rent A Car Sys., 980 P.2d 846, 858 (Cal. 1999); Barlow v. Sipes, 744 N.E. 2d 1 (Ind. Ct. App. 2001); Hawks v. Yancey, 265 S.W. 233, 236 (Tex. Civ. App. 1924).

¹⁸⁹ *See* Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W. 2d 1 (Minn. 1984).

¹⁹⁰ *See* Lothschuetz v. Carpenter, 898 F.2d 1200 (6th Cir. 1990); American Malting Co. v. Keitel, 209 F. 351 (2d Cir. 1913).

¹⁹¹ *See* Chamber of Commerce of Minneapolis v. Fed. Trade Comm'n, 13 F.2d 673, 682 (8th Cir. 1926); Emack v. Kane, 34 F. 46 (N.D. Ill. 1888).

¹⁹² *See* San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters, 125 F.3d 1230 (9th Cir. 1997); Martin v. Reynolds Metals Co., 224 F. Supp. 978 (D. Or. 1963); Wallace v. Cass, 2008 WL 626475 (Cal. Ct. App. 2008); Cochran v. Tory, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *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 (N.Y. App. Div. 1992).

¹⁹³ *See* Carter v. Knapp Motor Co., 11 So. 2d 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, 834 (Tex. App. 1982) (enjoining use of the word "lemon" on defendant's car), *rev'd*, 647 S.W.2d 253 (Tex. 1983).

¹⁹⁴ 27 of the 51 cases granting injunctive relief involved speech on the Internet. *See, e.g.*, North America Recycling, LLC v. Texamet Recycling, LLC, 2012 WL 3283380 (S.D. Ohio 2012); American University of Antigua College of Medicine v. Woodward, 837 F. Supp. 2d 686 (E.D. Mich. 2011); Bluemile, Inc. v. Yourcolo, LLC, 2011 U.S. Dist. LEXIS 62178 (S.D. Ohio June 10, 2011); Eppley v. Iacovelli, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009); Int'l Profit Associates, Inc. v. Paisola, 461 F. Supp. 2d 672, 679-80 (N.D. Ill. 2006); Evans v. Evans, 2007 WL 5490538 (Cal. Sup. Ct. May 25, 2007), *rev'd*, 76 Cal. Rptr. 3d 859 (Cal. App. 4th 2008); Griffis v. Luban, 2002 WL 338139 (Minn. Ct. App. 2002); Apex Technology Group, Inc. v. Doe, No. MID-L-7878-09, Order (N.J. Superior Ct., Law Division, Middlesex County Dec. 23, 2009); Bat World Sanctuary v. Cummins, No.352-248169-10 (Dist. Ct., Tarrant Cty. Tex. May 4, 2011); Cullum v. White, 2010 WL 3333056 (Ct. App. Tex., Aug. 25, 2010).

Although some courts neglected to address the relevant constitutional and equitable principles involved before granting an injunction,¹⁹⁵ those courts that did analyze the propriety of injunctive relief invariably noted the rule against injunctions in defamation cases, but nevertheless relied on at least one of three justifications for departing from the rule: the speech impugned the plaintiff's property interest; the defendant was engaged in a continuing course of conduct that was causing the plaintiff harm; or 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 recognized exceptions to the no-injunction rule was rooted in the belief that a court could issue an injunction if the order was directed at preserving business or other property interests.¹⁹⁶ For example, we see the solicitude for property rights in cases where the defendant is alleged to have defamed the plaintiff by questioning the legitimacy of his patents¹⁹⁷ or the quality of his products or services,¹⁹⁸ and in claims for tortious interference with contracts or business relationships.¹⁹⁹ In essence, these courts held that an injunction was a proper remedy because the plaintiff was deemed to have an interest in something other than personal reputation.

The indulgent treatment accorded to plaintiffs when property interests are at stake is especially evident in copyright cases, where courts are “unquestionably

¹⁹⁵ See, e.g., *Ordonez v. Icon Sky Holdings LLC*, 2011 WL 3843890 (S.D. Fla. Aug. 30, 2011); *Bluemile, Inc. v. Yourcolo, LLC*, 2011 U.S. Dist. LEXIS 62178 (S.D. Ohio June 10, 2011); *Frontier Management Co., Inc. v. Balboa Ins. Co.*, 622 F.Supp. 1016 (D. Mass. 1985); *Bat World Sanctuary v. Cummins*, No.352-248169-10 (Dist. Ct., Tarrant Cty. Tex. May 4, 2011); *Apex Technology Group, Inc. v. Doe*, No. MID-L-7878-09, Order (N.J. Superior Ct., Law Division, Middlesex County Dec. 23, 2009); *Dietz Development, LLC v. Perez*, No. 2012-16249 (Fairfax County Circuit Court, VA Dec. 5, 2012); *Stutz, Artiano, Shinoff & Holtz v. Maura Larkins*, No. 37-2007-0076218 (Cal. Sup. Ct. Oct. 30, 2009), *rev'd*, 2011 WL 3425629 (Cal. Ct. App. Aug. 5, 2011).

¹⁹⁶ See *Brandreth v. Lance*, 1839 WL 3231 (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 v. Knapp Motor Co.*, 243 Ala. 600, 604 (1943) (discussing disagreement on this point).

¹⁹⁷ 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 (E.D. Wis. 1903); *Emack v. Kane*, 34 F. 46, 52 (C.C.N.D. Ill. 1888).

¹⁹⁸ See, e.g., *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W. 2d 1, 11 (Minn. 1984); *Mazzocone v. Willing*, 369 A.2d 829, 831 (Pa. Super. 1976), *rev'd*, 482 Pa. 377 (1978); *Hajek v. Bill Mowbray Motors, Inc.*, 645 S.W.2d 827, 834 (Tex. App. 1982), *rev'd*, 647 S.W.2d 253 (Tex. 1983).

¹⁹⁹ See, e.g., *American Malting Co. v. Keitel*, 209 F. 351 (2d Cir. 1913); *Amalgamated Acme Affiliates v. Minton*, 33 S.W.3d 387 (Tex. App. Austin 2000); *Wolf v. Gold*, 9 A.D.2d 257, 259 (N.Y. App. Div. 1959); *Guion v. Terra Mktg.*, 523 P.2d 847, 848 (Nev. 1974).

more favorable to plaintiffs than to defendants.”²⁰⁰ According to 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.²⁰¹ Indeed, in intellectual property cases, the courts view protection of the plaintiff’s property interests as clearly superior to any countervailing speech interests. As Professor Wendy Gordon notes, “[t]he incantation ‘property’ seems sufficient to render free speech issues invisible” in such cases.²⁰²

Given that “property interests” enjoy no special dispensation under the First Amendment,²⁰³ 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 while 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 a complete remedy for Sipes Body’s economic injury, but also for its reputational harm.²⁰⁴

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.²⁰⁵ The argument here is that commercial speech “is more objective, and hence more verifiable, than other types of

²⁰⁰ Lemley & Volokh, *supra* note __, 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 __, at 678.

²⁰¹ Lemley & Volokh, *supra* note __, 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 __, at 84 (observing that some courts have interpreted *eBay* as barring presumptions of irreparable harm in copyright cases).

²⁰² 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).

²⁰³ See Lemley & Volokh, *supra* note __, 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.”); Gordon, *supra* note __, at 1537; Diane 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).

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

²⁰⁵ 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).

speech.”²⁰⁶ 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.”²⁰⁷

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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰

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 granting or affirming injunctions on this basis, 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*, it was the defendant’s very act of publishing websites and videos accusing the plaintiff doctor of causing her ailments that the court relied on in concluding that injunctive relief was proper because the defendant had “engaged in an intentional ‘smear campaign’ through defamatory internet publications.”²¹¹ Similarly, in *W. 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

²⁰⁶ *Amalgamated Acme Affiliates*, 33 S.W.3d at 394 (citing *Friedman v. Rogers*, 440 U.S. 1, 10 (1979)).

²⁰⁷ *Id.* at 394 (quoting *Friedman*, 440 U.S. at 10); *see also* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) (noting in *dicta* that commercial speech “may also make inapplicable the prohibition against prior restraints”).

²⁰⁸ 2003 WL 22451378 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005).

²⁰⁹ *See, e.g.*, *San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990); *Chamber of Commerce of Minneapolis v. Fed. Trade Comm’n*, 13 F.2d 673, 686 (8th Cir. 1926); *Eppley v. Iacovelli*, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 984 (D. Or. 1963); *Carter v. Knapp Motor Co.*, 243 Ala. 600, 604 (1943); *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1158 (2007); *Bingham v. Struve*, 591 N.Y.S. 2d 156, 158 (N.Y. App. Div. 1992); *Guion v. Terra Mktg. of Nevada, Inc.*, 90 Nev. 237, 240 (1974).

²¹⁰ *See, e.g.*, *Eppley*, 2009 WL 1035265; *Martin*, 224 F. Supp. at 984; *W. Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 869 (N.Y. Sup. Ct. 1960); *Guion*, 90 Nev. at 240; *Hajek v. Bill Mowbray Motors, Inc.*, 645 S.W.2d 827, 834 (Tex. App. 1982), *rev’d*, 647 S.W.2d 253 (Tex. 1983); *Hawks*, 265 S.W. at 239.

²¹¹ 2009 WL 1035265, at *4 (S.D. Ind. Apr. 17, 2009).

settlement of the claims of and the action brought by defendant against [plaintiffs' business]."²¹²

3. Speech That Has Been Adjudged to Be Defamatory

By far the most often cited reason courts have relied upon when departing from the no-injunction rule is that the injunction will only restrain speech that a court or jury has determined is defamatory. In 1975, Ohio and Georgia became the first states to adopt this exception.²¹³ Nearly a decade later, the Minnesota Supreme Court followed suit in *Advanced Training Systems v. Caswell Equipment Co.*, affirming a permanent injunction restraining the defendant from publishing marketing materials that a jury found contained libelous statements about the plaintiff's products.²¹⁴ 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.²¹⁵

The California Supreme Court found this reasoning persuasive and adopted this approach in 2007 in *Balboa Island Village Inn v. Lemen*, one of the most influential decisions rejecting the no-injunction rule.²¹⁶ The case, not unlike many 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. In an effort to document these problems, Lemen photographed and videotaped customers entering and leaving the building, sometimes calling them "drunks" and "whores."²¹⁷ She told customers entering the Inn, "The food is shitty" and told neighbors "there was child pornography and prostitution going on in the Inn, and that the Village Inn was selling drugs and [] alcohol to minors."²¹⁸

²¹² 23 Misc. 2d 867, 869 (N.Y. Sup. Ct. 1960).

²¹³ See *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 246 (1975) ("Once 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."); *Retail Credit Co. v. Russell*, 234 Ga. 765, 779 (1975) (permitting an injunction "so long as the suppression is limited to the precise statements found libelous after a full and fair adversary proceeding").

²¹⁴ 352 N.W. 2d 1 (Minn. 1984).

²¹⁵ *Advanced Training Systems*, 352 N.W. 2d at 11 (citing *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 246 (1975) and *Retail Credit Co. v. Russell*, 234 Ga. 765, 778 (1975)).

²¹⁶ 40 Cal. 4th 1141 (2007).

²¹⁷ *Balboa Island Vill. Inn*, 40 Cal. 4th at 1144.

²¹⁸ *Id.* at 1145.

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. 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.²¹⁹ The Court of Appeal affirmed the trial court’s decision, but substantially limited the injunction.²²⁰

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.²²¹

After reviewing the equitable and constitutional principles that led to the no-injunction rule, the California Supreme Court held that an injunction that is narrowly tailored, directed at stopping a continuing course of repetitive speech, and granted only after a final determination that speech is unprotected does not constitute an unlawful prior restraint.²²² 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.”²²³

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.”²²⁴ To date, no state supreme court has expressly rejected this approach, although several courts have held that the free speech guarantees in their state constitutions pose an independent bar to injunctive relief in defamation cases.²²⁵

²¹⁹ See *Balboa Island Vill. Inn*, 40 Cal. 4th at 1146.

²²⁰ The Court of Appeal affirmed the provision in the injunction that precluded the defendant from filming within 25 feet of the Village Inn, but invalidated the provisions that limited defendant’s contact with plaintiff’s employees and prohibited her from making defamatory statements about plaintiff, holding that they violated the defendant’s right to free speech under the California and federal Constitutions. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 121 Cal. App. 4th 583 (2004), *aff’d in part*, 40 Cal. 4th 1141 (2007).

²²¹ *Balboa Island Vill. Inn*, 40 Cal. 4th at 1149-50 (emphasis in original).

²²² *Id.* at 1155-56.

²²³ *Id.* at 1160.

²²⁴ *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 309 (Ky. 2010) (vacating injunction on grounds of overbreadth, but stating that narrowly tailored injunctions would be permissible). Several Missouri cases also appear to suggest in *dicta* that an injunction would be permissible if the injunction follows a jury’s verdict that the speech is defamatory. 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).

²²⁵ See, e.g., *Willing v. Mazzocone*, 482 Pa. 377, 382 (1978) (holding that Pennsylvania constitution does not permit injunctions in libel cases); *Howell v. Bee Pub. Co.*, 100 Neb. 39, 39 (1916) (Nebraska constitution); *Mitchell v. Grand Lodge, Free & Accepted Masons of Texas*, 121

Of the 5 federal circuit courts of appeal to have addressed this issue, 3 have held that injunctions are permissible if there has been a finding of defamation.²²⁶ 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”²²⁷ 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: “we 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.”²²⁸

In summary, while the overall number of decisions granting injunctions is still small relative to the total number of cases involving requests for injunctive relief, it is clear that a trend is emerging within both state and federal courts that permits injunctions if the speech in question has been adjudged to be defamatory.

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 where an injunction follows a finding that the speech is defamatory, it may still be an impermissibly broad restraint on speech. Crafting a narrowly tailored injunction that will achieve a plaintiff’s purposes without being overbroad or under inclusive is no easy task.

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 our analysis of the injunctions courts have issued, we can place them into four general category types (I-IV), roughly in order from broadest to narrowest in scope.

1. Type I Injunctions

S.W. 178, 179 (Tex. Civ. App. 1909) (Texas constitution); *Lindsay & Co. v. Montana Fed’n of Labor*, 96 P. 127, 131 (Mont. 1908) (Montana constitution); *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173, 180 (1876) (Missouri constitution); *Dailey v. Superior Court of City & County of San Francisco*, 112 Cal. 94, 98 (1896) (California constitution); *State v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 746 (1882) (Louisiana constitution). My focus here is on the limitations imposed by the U.S. Constitution.

²²⁶ See *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990). 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 (“An interlocutory injunction based on a ‘reasonable probability’ of malice, is, by hypothesis, not based on ‘actual malice.’”) (Kozinski, J., dissenting).

²²⁷ *Metro. Opera Ass’n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int’l Union*, 239 F.3d 172, 178 (2d Cir. 2001).

²²⁸ *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 606 (7th Cir. 2007) (vacating injunction that prohibited the defendant from “alleg[ing] or assert[ing] that Plaintiffs are spammers or other like term”).

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.²²⁹ In fact, this is precisely the type of injunction at issue in *Cochran v. Tory*, where the trial judge issued an order permanently enjoining the defendant and his non-party wife from “orally uttering statements about Cochran and/or Cochran’s law firm.”²³⁰ Apart from ordering someone not to speak at all, an obviously impermissible injunction that did 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 speech that has not been adjudged to be defamatory, and under even the most generous application of libel law could never be found to be defamatory, they are plainly overbroad and therefore unconstitutional.²³¹ Not surprisingly, in many of the cases where a court granted such an injunction, it was reversed on appeal or subsequently dissolved by the trial court.²³²

2. Type II Injunctions

No less problematic are “Type II” injunctions, which prohibit a party from publishing any *defamatory* statements about the plaintiff.²³³ 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.²³⁴ In *Near v. Minnesota*, the Supreme Court struck down just such an injunction that barred the defendant from publishing or distributing “any publication whatsoever which is a malicious,

²²⁹ See, e.g., *Eppley v. Iacovelli*, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009); *Stutz, Artiano, Shinoff & Holtz v. Maura Larkins*, No. 37-2007-0076218 (Cal. Sup. Ct. Oct. 30, 2009), *rev’d*, 2011 WL 3425629 (Cal. Ct. App. Aug. 5, 2011); *Cochran v. Tory*, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *vacated*, 544 U.S. 734 (2005); *Apex Technology Group, Inc. v. Doe*, No. MID-L-7878-09, Order (N.J. Superior Ct., Law Division, Middlesex County Dec. 23, 2009).

²³⁰ 2002 WL 33966354.

²³¹ See *supra* notes ___ - ___ and accompanying text.

²³² See *Tory v. Cochran*, 544 U.S. 734 (2005); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *Stutz, Artiano, Shinoff & Holtz v. Maura Larkins*, 2011 WL 3425629 (Cal. Ct. App. Aug. 5, 2011); *Wallace v. Cass*, 2008 WL 626475, *8-9 (Cal. Ct. App. 2008); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W. 2d 740, 747 (Neb. 1997); *Cullum v. White*, 2011 WL 6202800 (Tex. App. Dec. 14, 2011).

²³³ See, e.g., *Chamber of Commerce of Minneapolis v. Fed. Trade Comm’n*, 13 F.2d 673, 682 (8th Cir. 1926); *Ordonez v. Icon Sky Holdings LLC*, 2011 WL 3843890 (S.D. Fla. Aug. 30, 2011); *Bluemile, Inc. v. Yourcolo, LLC*, 2011 U.S. Dist. LEXIS 62178 (S.D. Ohio June 10, 2011); *Barlow v. Sipes*, 744 N.E. 2d 1 (Ind. Ct. App. 2001).

²³⁴ See 7 J. MOORE, FEDERAL PRACTICE § 65.60[2] (3d ed. 2007) (“Loose injunctive orders are neither easily obeyed nor strictly enforceable, and are apt to be oppressive. Hence Rule 65(d) further provides that every restraining order and injunction be specific . . .”). As a result, in many of the cases where a court granted such an injunction, it was reversed on appeal or subsequently dissolved by the trial court. See *Near*, 283 U.S. at 706; *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 86 (5th Cir. 1976); *Oorah, Inc. v. Schick*, 2012 WL 3233674, at *4 (E.D.N.Y. 2012); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658-59 (1975); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 869 (Cal. App. 4th 2008); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 311 (Ky. 2010); *Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239, 239 (N.Y. App. Div. 2002); *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101 (Tex. App. 2003).

scandalous or defamatory newspaper.”²³⁵ 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.²³⁶ As Chief Justice Hughes warned in *Near*, this type of injunction is “the essence of censorship.”²³⁷

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.²³⁸ A Type III injunction, for example, might order the 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 tends to be common when the defendant has not put on a vigorous defense, including cases where 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.²³⁹ While 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 to be defamatory. Indeed, in several of the cases where a judge issued such an injunction, it was ultimately withdrawn or overturned on appeal.²⁴⁰

²³⁵ 283 U.S. at 706.

²³⁶ *See, e.g.*, *Wilson v. Superior Court*, 13 Cal. 3d 652, 661 (1975) (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.’”).

²³⁷ *Near*, 283 U.S. at 706.

²³⁸ *See, e.g.*, *San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir. 1997); *North America Recycling, LLC v. Texamet Recycling, LLC*, 2012 WL 3283380, at *2 (S.D. Ohio 2012); *Frontier Management Co., Inc. v. Balboa Ins. Co.*, 622 F.Supp. 1016, 1021 (D. Mass. 1985); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 984 (D. Or. 1963), *aff’d*, 337 F.2d 780 (9th Cir. 1964); *Emack v. Kane*, 34 F. 46 (N.D. Ill. 1888); *Carter v. Knapp Motor Co.*, 243 Ala. 600, 605 (Ala. 1943); *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846, 858 (Cal. 1999); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W. 2d 1 (Minn. 1984); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393 (Tex. App. 2000).

²³⁹ *See, e.g.*, *Glassman v. Feldman*, No. 102988/2012 (N.Y. Sup. Ct. Oct. 2, 2012) (granting TRO because defendant failed to appear); *Bat World Sanctuary v. Cummins*, No. 352-248169-10 (Dist. Ct., Tarrant Cty. Tex. May 4, 2011) (enjoining 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 LAW & POLICY BLOG (Dec. 26, 2012), <http://pubcit.typepad.com/clpblog/2012/12/prior-restraint-doctrine-protects-negative-yelp-review-against-preliminary-injunction.html>.

²⁴⁰ *See* *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 606 (7th Cir. 2007); *In re Davis*, 347 B.R. 607, 613 (W.D. Ky. 2006); *Perez v. Dietz Dev., LLC*, 2012 WL 6761997 (Va. Dec. 28,

4. Type IV Injunctions

The narrowest of the four injunction categories is a “Type IV” injunction, which prohibits further publication, or orders the removal, of only the specific statements a court or jury has found are defamatory.²⁴¹ The injunction approved by the California Supreme Court in *Balboa Island Village Inn*²⁴² is an example of a Type IV injunction. 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, but the California Supreme Court 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.”²⁴³

Because a Type IV injunction only restrains 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 getting 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.²⁴⁴ The trial court enjoined the defendant from making a number of statements, including stating that the plaintiff “is a liar.”²⁴⁵ 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

2012); *Burfoot v. May4thcounts.com*, 80 Va. Cir. 306 (Cir. Va. 2010); *St. Margaret Mercy Healthcare Centers, Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); *Am. Broad. Companies, Inc. v. Smith Cabinet Mfg. Co., Inc.*, 160 Ind. App. 367, 378 (1974); *Krebiozen Research Found. v. Beacon Press, Inc.*, 334 Mass. 86, 91 (1956); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983).

²⁴¹ See, e.g., *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1209 (6th Cir. 1990); *American University of Antigua College of Medicine v. Woodward*, 837 F. Supp. 2d 686 (E.D. Mich. 2011); *Int'l Profit Associates, Inc. v. Paisola*, 461 F. Supp. 2d 672, 680 (N.D. Ill. 2006); *Wallace v. Cass*, 2008 WL 626475, at *8-9 (Cal. Ct. App. 2008); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W. 2d 1, 11 (Minn. 1984).

²⁴² 40 Cal. 4th 1141 (2007). For a discussion of the facts of the case, see *supra* notes ___ - ___ and accompanying text.

²⁴³ *Balboa Island Vill. Inn*, 40 Cal. 4th at 1146. 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 and acts as a whorehouse; Plaintiff serves tainted food.” *Id.*

²⁴⁴ 2002 WL 338139 (Minn. Ct. App. 2002).

²⁴⁵ *Griffis*, 2002 WL 338139, at *6.

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.”²⁴⁶

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 under inclusive 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.

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 is defamatory likely would be constitutional. In fact, a narrowly tailored injunction may be less burdensome on speech than subsequent money damages because the injunction can target only 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.²⁴⁷

Moreover, when the defendant is engaged 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.²⁴⁸ “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.”²⁴⁹

A. Crafting a Narrowly Tailored, Yet Effective Injunction

If there is to be a formal retreat from the no-injunction rule, the First Amendment and equitable principles necessitate that certain safeguards

²⁴⁶ *Id.* at *6-7.

²⁴⁷ Jeffries, *supra* note __, at 429.

²⁴⁸ See Rendleman, *The Inadequate Remedy at Law Prerequisite*, *supra* note __ at 357 (noting that “administrative celerity may favor equity, for injunctions may serve efficient, economical administration”).

²⁴⁹ *Developments in the Law: Injunctions*, 78 Harv. L. Rev. 997, 1009 (1965).

accompany all injunctions directed at defamatory speech. 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 targets only 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 an injunction will actually be effective in reducing her harm.

1. Requiring Full-Adjudication of Claims

As a threshold matter, no injunction should issue unless a court has found 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.”²⁵⁰ This means that a judge cannot issue a preliminary injunction, temporary restraining order, or other restraint directed at defamatory speech based on a mere “likelihood of success” or other speculative standard.²⁵¹

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.²⁵² 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 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.”²⁵³ The granting of an injunction, therefore, is often “the end of the ball game; the parties simply cannot await the results of a full trial.”²⁵⁴

Once a court has made an adequate determination that the targeted speech is defamatory, the First Amendment likely would not preclude injunctive relief.²⁵⁵ The question, however, is how exhaustive the finding of defamation must be and what procedural safeguards are necessary to ensure that speech that is not

²⁵⁰ *Pittsburgh Press Co.*, 413 U.S. at 390; see also *Nebraska Press Ass’n*, 427 U.S. at 590.

²⁵¹ See *supra* note __ 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 & Volohk, *supra* note __, at 171; Siegel, *supra* note __, at 735; Wells, *supra* note __, at 65.

²⁵² John M. Newman, *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).

²⁵³ *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 793-94 (1994) (Scalia, J., concurring in part and dissenting in part).

²⁵⁴ Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 774 (1982).

²⁵⁵ See *supra* notes __ - __ and accompanying text.

properly subject to restraint is protected.²⁵⁶ At a minimum, there must be a finding on the merits that the speech is false and defamatory.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ He and others who support declaratory judgment actions assert that the elimination of libel damages would remove the “chilling effect” that impelled the Court to interject a fault standard into the common law tort of defamation in *New York Times v. Sullivan*.²⁶⁰

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.²⁶¹ 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

²⁵⁶ See Monaghan, *supra* note __, at 520 (“The government . . . may regulate certain types of activity, but it must make sure, via proper procedural safeguards, that protected speech is not the loser.”).

²⁵⁷ For a discussion of the elements of a defamation claim, see *supra* notes __-__ and accompanying text.

²⁵⁸ These are separate, although not always distinct, inquiries: not all false statements of fact create actionable harm sufficient to support a defamation claim. See Ardia, *Reputation in a Networked World*, *supra* note __, at 282-95.

²⁵⁹ Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 810 (1986). In return for this expansion of the scope of liability, Professor 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.

²⁶⁰ See Franklin, *supra* note __, 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); David A. Barrett, *Libel Reform and Declaratory Judgments: A Better Alternative*, 74 CALIF. L. REV. 847, 863 (1986).

²⁶¹ There are a number of concerns associated with dropping the fault requirement, including some that have been raised by its early proponents. See Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, in REFORMING LIBEL LAW 273-74 (John Soloski & Randall P. Bezanson eds. 1992) [hereinafter Smolla, *Annenberg Libel Reform Proposal*]. 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 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 (emphasis in original).

must have the breathing room necessary to risk errors in order to engage in public discourse.²⁶² 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*.²⁶³

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 themselves in 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 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.²⁶⁴

The high cost of defending a libel lawsuit has not gone unnoticed by judges.²⁶⁵ 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.²⁶⁶ “It is inaccurate, then, to isolate damage verdicts as the sole component of the ‘chilling effect’ of libel suits.”²⁶⁷

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.²⁶⁸ Consequently, courts should require that plaintiffs establish all of

²⁶² *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

²⁶³ Cf. Smolla, *Annenberg Libel Reform Proposal*, *supra* note __ at 274 (“Because so many journalists instinctively blanch at any version of a involuntary ‘truth trial,’ as a practical matter such a regime would tend to chill free expression.”).

²⁶⁴ RODNEY A. SMOLLA, *SUING THE PRESS* 74 (1986). *But see* Franklin, *supra* note __, 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).

²⁶⁵ *See, e.g., Nebraska 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”).

²⁶⁶ 376 U.S. at 279 (noting that “would-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.”).

²⁶⁷ Paul Gaffney, *First Amendment Analysis of the Annenberg Libel Reform Proposal*, 1990 U. CHI. LEGAL F. 601, 610 (1990).

²⁶⁸ *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (instructing that “neither 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.”).

the elements of a defamation claim before considering whether an injunction is appropriate.

2. 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. In order to preserve this check on judicial power, juries must be involved in at least two ways. First, no injunction should issue unless a jury has determined that the plaintiff has established all of the elements of her defamation claim or the defendant has 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."²⁶⁹ 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."²⁷⁰ 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."²⁷¹

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.²⁷² While imperfect, juries remain an important part of the checks and balances within our free speech jurisprudence.²⁷³ These checks allow judges to limit the power of juries through procedural devices such as directed verdicts and judgments

²⁶⁹ Siegel, *supra* note __, at 729.

²⁷⁰ Monaghan, *supra* note __, at 528-29; *see also* Siegel, *supra* note __, at 729; Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986).

²⁷¹ 131 S. Ct. 1207, 1219 (2011) (quoting *Bose Corp.*, 466 U.S. at 510).

²⁷² *See, e.g.*, The Trial of Mr. John Peter Zenger (1735), 17 HOWELL'S ST. TRIALS 675 (1816); LAYCOCK, *supra* note __, at 166 (noting that "juries 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").

²⁷³ *See, e.g.*, RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 27 (2003) (noting that "juries fit into an overall scheme of a government of checks and balances").

N.O.V.²⁷⁴ Meanwhile, judges themselves are subject to independent appellate review in defamation cases,²⁷⁵ 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.”²⁷⁶

The right to have a jury determine whether the elements of a defamation claim have been established must exist even in cases where the plaintiff is requesting only equitable relief. Concededly, this would require a change in how 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. While 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.²⁷⁷ “For fair or for foul, the injunction process concentrates power in the judge to find the facts, apply the law, formulate relief, and enforce the order.”²⁷⁸

Under a system in which juries do not play a role in awarding injunctive relief, plaintiffs could request only an injunction in order to deprive their opponents of a jury trial.²⁷⁹ In fact, in a number of defamation cases where plaintiffs sought injunctive relief, they did not also ask for money damages.²⁸⁰ While there is no way to know whether these plaintiffs requested only an injunction in order to avoid a jury trial, the end result is the same: a remedy that is solely in the discretion of the judge. The no-injunction rule has traditionally served to limit such strategic behavior.²⁸¹ If the rule is relaxed, trial by jury

²⁷⁴ See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 443-45, 489-91 (1996).

²⁷⁵ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-511 (1984) (requiring *de novo* review by appellate courts over findings of actual malice in defamation cases).

²⁷⁶ Siegel, *supra* note __, 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., Pound, *supra* note __, at 656-57; Bertelsman, *supra* note __, at 323; Sedler, *supra* note __ at 153-54.

²⁷⁷ See Rendleman, *Irreparability*, *supra* note __, 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 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 (Ariz. 1966), as does Louisiana, see *Bonneau v. Blalock*, 484 So. 2d 275 (La. Ct. App. 3d Cir. 1986).

²⁷⁸ Rendleman, *Irreparability*, *supra* note __, at 1650; see also FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 189-91 (1930) (voicing concern about the power of a single judge in labor injunction cases); *Madsen v. Women’s Health Center*, 512 U.S. 753, 793 (1994) (warning “[t]he 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).

²⁷⁹ LAYCOCK, *supra* note __, at 213-14.

²⁸⁰ See, e.g., *Tory v. Cochran*, 544 U.S. 734 (2005); *Goldblum v. Nat’l Broad. Corp.*, 584 F.2d 904 (9th Cir. 1978); *Robinson v. Am. Broad. Companies*, 441 F.2d 1396 (6th Cir. 1971); *Balboa Island Vill. Inn v. Lemen*, 40 Cal. 4th 1141 (2007).

²⁸¹ See *supra* notes __-__ and accompanying text.

should be an option for all defendants who are facing requests for injunctive relief.

3. 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,²⁸² yet the Supreme Court still held that it was unconstitutional.²⁸³ In vacating the injunction, Justice Breyer made a point of noting that “the injunction, as written, amounts to an *overly broad* prior restraint on speech.”²⁸⁴ 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 had found were defamatory.

It is a central precept of First Amendment law that content-based restrictions on speech must be precise and narrowly tailored.²⁸⁵ 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.²⁸⁶ In other words, an injunction is not narrowly tailored if restricts non-defamatory speech.²⁸⁷ 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.”²⁸⁸

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 been published.²⁸⁹ It would not otherwise be possible for a court or jury to make the necessary factual finding of defamation.²⁹⁰ Whether a statement is capable of a defamatory

²⁸² *Cochran v. Tory*, 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.

²⁸³ See *supra* notes __ - __ and accompanying text.

²⁸⁴ *Tory*, 544 U.S. at 738 (emphasis added).

²⁸⁵ See *Tory*, 544 U.S. 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 and Comm’rs of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

²⁸⁶ See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421-22 (1996).

²⁸⁷ See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

²⁸⁸ Volokh, *Permissible Tailoring*, *supra* note __, at 2422.

²⁸⁹ See *supra* notes __ - __ and accompanying text.

²⁹⁰ As Justice Blackman 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)).

meaning is a highly fact-specific inquiry. Courts are instructed not to evaluate a statement in isolation, but must take into account contextual factors such as the time, place, and manner of the speech.²⁹¹ 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.²⁹² Injunctions that prohibit future speech on the basis of speculation about what might be said or how it might be expressed cannot rest on an adequate factual basis for a finding of defamation.²⁹³

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.²⁹⁴ 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.²⁹⁵

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 prohibiting only the further publication of that page; if the injunction orders the removal of the entire website, it is impermissibly overbroad. This rules out Type III injunctions. Such 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.²⁹⁶

This leaves Type IV injunctions, which prohibit only 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.²⁹⁷ In that case, the jury found that the defendant defamed Mr. Saadi by posting statements online falsely stating that he was a terrorist, a

²⁹¹ See, e.g., *Greenbelt Publishing v. Bresler*, 398 U.S. 6, 13-14 (1970). 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).

²⁹² See *Griffis v. Luban*, 2002 WL 338139, at *6 (Minn. Ct. App. 2002) (noting the importance of context in determining whether speech is defamatory); cf. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (cautioning that “the 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”).

²⁹³ See Blasi, *supra* note __, at 87 (noting that “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”).

²⁹⁴ *Tory*, 544 U.S. at 738 (holding injunction was overbroad); see also *supra* note __ (citing cases rejecting Type I injunctions).

²⁹⁵ See *supra* notes __ - __ and accompanying text (citing cases rejecting Type II injunctions).

²⁹⁶ See *supra* note __ (citing cases rejecting Type III injunctions).

²⁹⁷ No. 07-CV-01976-T-24, 2009 WL 3617788 (M.D. Fla. Nov. 2, 2009).

criminal, and that he had received money stolen from the Lebanese government.²⁹⁸ After the jury awarded \$90,000 in compensatory and punitive damages, the district court issued a permanent injunction prohibiting the defendant from continuing to publish the specific “statements contained in Trial Exhibits 19 and 20 that were found by the jury to be defamatory.”²⁹⁹ The court made it clear that “the scope of the injunction must be limited to those statements.”³⁰⁰

Several other courts have issued similarly narrow Type IV injunctions.³⁰¹ Because such injunctions are limited to speech that has been found to be defamatory, and thus amenable to government sanction under the First Amendment, they would not be impermissibly overbroad.

4. 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.³⁰² There are 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 relates to a matter of public concern. Third, injunctions directed at speech on matters of public concern are less likely to be effective because the court will 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.³⁰³ 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.”³⁰⁴ Indeed, the Court has repeatedly held that the First Amendment protects such speech, even if

²⁹⁸ *Id.* at *1.

²⁹⁹ *Id.* at *3.

³⁰⁰ *Id.*

³⁰¹ See *supra* note ___ (citing cases granting or affirming Type IV injunctions).

³⁰² As Professor Siegel observes, “there 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.” Seigel, *supra* note ___, at 735 n.434 (citing Bertelsman, *supra* note ___, at 322; Gold, *supra* note ___, at 257–58; Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 159 (1964)).

³⁰³ 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 *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 534 (1980); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

³⁰⁴ *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted).

it is offensive and harmful.³⁰⁵ 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.”³⁰⁶ This debate would be excessively chilled, the Court reasoned, if speakers faced liability for every erroneous statement.³⁰⁷

In contrast, speech solely on matters of private concern has received far less First Amendment protection.³⁰⁸ This divergent treatment first appeared in the defamation context in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, where the Court held that punitive damages can be awarded without a showing of “actual malice” when the defamation is not on a matter of public concern.³⁰⁹ 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.”³¹⁰ 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.³¹¹

While a number of scholars have been critical of 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,³¹² the Court further ingrained the distinction in First

³⁰⁵ See, e.g., *Snyder*, 131 S. Ct. at 1215; *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

³⁰⁶ 376 U.S. at 270.

³⁰⁷ *Id.* at 271.

³⁰⁸ See *Leading Cases*, 125 Harv. L. Rev. 192, 192 (2011).

³⁰⁹ 472 U.S. at 761-62. 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, 325 (1974).

³¹⁰ See *Dun & Bradstreet*, 472 U.S. at 760.

³¹¹ *Dun & Bradstreet* involved only 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*, 475 U.S. 767 (1986) 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.” *Id.* at 775.

³¹² See, e.g., Eugene Volokh, *The Trouble with “Public Discourse” As a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103

Amendment doctrine when it recently held in *Snyder v. Phelps* that the intentional infliction of emotional distress tort could not be used to impose liability if the distress is caused by speech on a matter of public concern.³¹³ Chief Justice Roberts explained that government efforts to restrict speech on matters of public concern raises additional constitutional problems:

Whether the First Amendment prohibits holding [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.³¹⁴

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.³¹⁵ 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. Whether we examine the state’s interest as part of the traditional balancing of interests that courts apply when evaluating equitable remedies,³¹⁶ or as an element in the strict scrutiny test under the First Amendment, which requires a “compelling government interest,”³¹⁷ some examination of the state’s interest in providing an injunctive remedy is necessary before a court can issue an injunction.

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.³¹⁸ 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 counter-speech because the

HARV. L. REV. 603, 667-79 (1990); 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).

³¹³ 131 S. Ct. at 1220.

³¹⁴ *Id.* at 1215-16 (internal citations omitted).

³¹⁵ 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.”).

³¹⁶ See DOBBS, *supra* note ___, § 2.4, at 52-54 (describing how courts balance the equities before granting injunctive relief).

³¹⁷ See Volokh, *Permissible Tailoring*, *supra* note ___, at 2421-22.

³¹⁸ 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.” Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 778 (2003).

issue is of public concern.³¹⁹ 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.³²⁰

The preference for self-help is deeply embedded in First Amendment doctrine and necessitates that courts look to the availability of private remedies, including counter-speech, 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.³²¹ In *Gertz v. Robert Welch, Inc.*, the Court required that public figures must prove actual malice to make out a defamation claim, noting that they “enjoy greater access to the channels of effective communication” than do private individuals and thus have greater opportunity to redress the harm caused by defamatory speech.³²² According to the Court:

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.³²³

To be clear, a rule that limits injunctive relief to speech on matters of private concern will make it very unlikely that public officials and public figures will be able 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 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

³¹⁹ 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, 35 (1987).

³²⁰ See Bell, *supra* note __, at 749-62; 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.”)

³²¹ See Bell, *supra* note __, at 749-51; Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 845 (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[]”).

³²² 418 U.S. 323, 344 (1974). The *Gertz* Court also stated that public figures should have to prove actual malice because they voluntarily “assumed roles of especial prominence in the affairs of society.” *Id.* at 345.

³²³ *Gertz*, 418 U.S. 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.”).

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 plaintiff is a private figure. After all, counter-speech is a viable alternative for public officials and public figures because the public has an interest in their doings.

Furthermore, when speech relates to a matter of public concern and the plaintiff can engage in self-help through counter-speech, an injunction will not be the least restrictive remedy available.³²⁴ Because “courts seek the most efficient means of alleviating the social costs of free speech,”³²⁵ 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.”³²⁶

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.³²⁷ 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.”³²⁸ Injunctions that prohibit speech from entering the public sphere distort the marketplace of ideas.³²⁹ By prohibiting the government from restraining speech before its public dissemination, the no-injunction rule permits speakers to present their views 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.”³³⁰

Moreover, when speech relates to a matter of public concern, a speaker 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:

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

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

³²⁵ Bell, *supra* note __, at 763.

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

³²⁷ See *supra* notes __ - __ and accompanying text.

³²⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

³²⁹ See Bendor, *supra* note __, at 314 (stating that “the central rationale for the doctrine of prior restraint and its recognized exceptions is the production of maximal amounts of speech”).

³³⁰ See *Brief Amici Curiae of Historians*, *supra* note __, at *11.

message to the public. Therefore in this context prior and subsequent restraints are not coterminous.³³¹

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. Because a court would be attempting to restrain members of a community “from discussing a subject intimately affecting life within it,”³³² 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 additional challenges.

Of course, the line between speech on matters of public and private concern can sometimes be difficult to draw.³³³ While 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 “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other 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.’”³³⁴ 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.³³⁵

The reality, however, is that courts already apply the distinction between speech on matters of public concern and private concern in a number of doctrinal areas,³³⁶ 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

³³¹ Kalven, *supra* note __, at 34.

³³² *Neb. Press Ass'n*, 427 U.S. at 567 (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.”).

³³³ See *Snyder*, 131 S. Ct. at 1216-18; 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.”).

³³⁴ *Snyder*, 131 S. Ct. at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983) and *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84 (2004)); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-494 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (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”).

³³⁵ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985). In order 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).

³³⁶ See Papandrea, *supra* note __, at 579-80 (describing its application in defamation and privacy cases); *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 104 N.J. 125, 144-45 (1986) (citing cases).

libel.³³⁷ Furthermore, a handful of courts have relied on the distinction between public and private concern when assessing whether an injunction directed at defamatory speech is³³⁸ or is not³³⁹ 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.³⁴⁰ In *Krebiozen*, the plaintiff filed suit to permanently enjoin the publication of a book it claimed falsely impugned a cancer drug it was developing. 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.³⁴¹

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

³³⁷ 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”).

³³⁸ See, e.g., *Robinson v. Am. Broad. Companies*, 441 F.2d 1396, 1401 (6th Cir. 1971) (refusing to grant injunction and noting “[e]specially 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 and stating it “constitutes a prior restraint by the United States against the publication of facts which the community has a right to know”); *Queen v. Tennessee 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.”); *Howell v. Bee Pub. Co.*, 100 Neb. 39, 39 (1916) (“It follows that a court cannot use its equity powers to prevent the publication of political matter”); *Am. Broad. Companies, Inc. v. Smith Cabinet Mfg. Co., Inc.*, 160 Ind. App. 367, 376-77 (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”).

³³⁹ See, e.g., *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 “[w]e 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 (N.Y. App. Div. 1992) (affirming injunction and concluding that allegation of rape “does not advance [] societal interests and, indeed, concerns a private individual”).

³⁴⁰ 334 Mass. 86 (1956).

³⁴¹ *Id.* at 94-95.

the balance, of the public interest in the discussion of cancer cures would be sufficient basis here for the denial of an injunction.”³⁴²

5. Demonstrating Effectiveness

Before a court may issue any injunction, even one that is narrowly tailored and directed only at speech on a matter of private concern, the plaintiff must also 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 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 costs of sanction if they are found to be in violation.³⁴³

While 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. 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.³⁴⁴ Moreover, “[w]here an injunction is unenforceable, it is difficult to see that it has a greater vindicatory effect than an award of damages.”³⁴⁵

The admonition that a court must assess whether an injunction will be effective is both a long-standing equitable principle³⁴⁶ and an essential part of a court’s assessment of whether a restriction on speech is constitutional. The

³⁴² *Id.* at 99.

³⁴³ See Golden, *supra* note __, at 1402 (“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.”).

³⁴⁴ See, e.g., *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.”); *Frick v. Stevens*, 43 Pa. D. & C.2d 6, 29 (Pa. Com. Pl. 1967) (“[I]njunctive 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.”).

³⁴⁵ Normann Witzleb, *‘Equity Does Not Act in Vain’: An Analysis of Futility Arguments in Claims for Injunctions*, 32 SYDNEY L. REV. 503, 506 (2010)

³⁴⁶ 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.”).

Supreme Court has repeatedly warned that the government may not suppress speech by means that are ineffective,³⁴⁷ or that fail to serve,³⁴⁸ further,³⁴⁹ or directly advance³⁵⁰ the state's interest. We see this quite clearly in the Supreme Court's decision in *Nebraska Press Association v. Stuart*, which invalidated an injunction that restricted the press's ability to report certain "implicative" information about a murder defendant.³⁵¹ 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.³⁵² 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."³⁵³ Examining the likely effectiveness of the gag order issued by the trial court, 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 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.³⁵⁴

As Chief Justice Burger noted, speech injunctions may also be ineffective because of the limits of judicial authority.³⁵⁵ 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.³⁵⁶ 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, if they are to be effective in restraining speech, must reach every speaker and location where speech is disseminated.³⁵⁷

³⁴⁷ See, e.g., *Nebraska Press Ass'n*, 427 U.S. at 567.

³⁴⁸ See, e.g., *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 610 (1982).

³⁴⁹ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

³⁵⁰ See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

³⁵¹ 427 U.S. 539 (1976).

³⁵² *Id.* at 565.

³⁵³ *Id.* at 565-66.

³⁵⁴ *Id.* at 567.

³⁵⁵ *Id.* at 565-66.

³⁵⁶ See *Pennoy v. Neff*, 95 U.S. 714, 722 (1877); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 404 (1985).

³⁵⁷ See *Witzleb*, *supra* note ___, at 520.

Speech, on the other hand, does not respect state boundaries. Like water, it flows over borders and around obstacles. Since the advent of the Internet, we are all publishers, capable of directing our expression to millions of people around the world.³⁵⁸ The gate-keeping function once performed by traditional media organizations has been diminished, if not eliminated, by the digital publishing tools available to anyone who has access to a computer. A man with a gripe in Los Angeles can now be heard in New York. A newspaper in Sydney can be read in Chicago. And a defamatory video made in St. Petersburg, Russia can be viewed in St. Petersburg, Florida. It may very well be that in our increasingly networked world, defamatory speech is simply beyond the power of a court to effectively enjoin.³⁵⁹

Moreover, there is reason to be skeptical that even when judicial power can reach the speech in question, an injunction will have sufficient practical effect to be worthwhile. All speech now has digital echoes.³⁶⁰ As a result, in order to be effective an injunction must restrain speech in multiple communication mediums.³⁶¹ This requires that the plaintiff is able to identify where the defamatory speech is occurring and that the court is 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 section 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.³⁶²

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 actually conceded that they would continue to defame the plaintiff absent a court order enjoining their behavior.³⁶³ 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 defamatory statements the court has found are defamatory, rather than to preventing all defamation in the future.³⁶⁴

³⁵⁸ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 32 (2006) (observing that, in part because of the Internet, “[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one’s meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe”).

³⁵⁹ See Ardia, *Reputation in a Networked World*, supra note __ at 313-16.

³⁶⁰ See supra notes __ - __ and accompanying text.

³⁶¹ Cf. *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).

³⁶² See supra notes __ - __ and accompanying text.

³⁶³ See, e.g., *Tory v. Cochran*, 544 U.S. 734 (2005); *Balboa Island Vill. Inn v. Lemen*, 40 Cal. 4th 1141 (2007).

³⁶⁴ See supra notes __ - __ and accompanying text.

An injunction may also be a useful and appropriate remedy if the defamatory material is circulating only 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.

Accordingly, 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 defamatory 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. While 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 previously published speech that a court has found is defamatory.

This fertile ground has not gone uncolonized. As this article showed, a more permissive attitude toward injunctions in defamation cases is emerging across the country. While not all courts are following this approach – and many remain confused about the constitutional and equitable limits on injunctive relief in defamation cases – it is clear that the adage that equity will not enjoin a libel is no longer a correct statement of the law today. It is not at all 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. 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

FREEDOM OF SPEECH, DEFAMATION, AND INJUNCTIONS

elements of defamation; (3) the injunction be narrowly tailored so that it targets only 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 an injunction will actually be effective in reducing her harm.