FREEDOM OF EXPRESSION AND THE INFORMATION SOCIETY:
A LEGAL ANALYSIS TOWARD A LIBERTARIAN FRAMEWORK FOR LIBEL

DISSERTATION

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By

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Web blogs, as alternate sources of political opinion and analysis, have enabled new voices that can empower netizens and democratize information access. Their larger social contribution may be that they increase manifold the ideas available in the marketplace, in theory challenging any information hegemony of an increasingly consolidating corporate media. Bloggers, citizen journalists and others of the fifth estate have joined the social conversation by acting as watchdogs of not just government but also of the corporate media.

Libel law, as a determinant of freedom of expression, also defines the democratic values of individual self-fulfillment, marketplace of ideas, and empowerment. Libel lawsuits, however, impose a chilling effect, a chill which is exacerbated for the fifth estate by the challenge of multiple personal jurisdictions – a netizen can be hauled before a court whose location, laws and procedures are hard to predict.

The dissertation addresses that express challenge by proposing a separate common jurisdiction for libel cases that emanate in the information society. Specifically, it delineates a normative, inductive, theoretical framework for that common jurisdiction after analyzing the fundamental principles of freedom of expression characterizing jurisprudence. The framework comprises (1) a proposal to extend a reconsidered actual malice doctrine to the fifth estate, (2) a set of recommendations, situated in the libertarian scholarship of Thomas Emerson and John Milton, to define a norm of freedom of expression for the information
society, and (3) a model law to deliver the framework to a libel litigant of the fifth estate. The study does not describe the new jurisdiction’s executive powers, or the treaty terms from which it would draw its authority. That jurisdiction, asserted by an Internet Empowerment Agency born out of international treaty, would decide information society libel cases.

The study employs traditional legal analysis and inductive reasoning to take an early step toward making libel law predictable and reliable for the fifth estate – without regulating the content or technology of the Internet. It explores whether the fifth estate fundamentally restructures the freedom of expression, and develops refinements to the actual malice and public figure doctrines among other corollaries.
To

My parents Hemlata and Madhav Rao Moro

and

My paternal grandparents, the late Tarabai and Dr. S. Jagannath Rao Moro
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A lettered edifice such as a dissertation can scarcely emerge, or hold together, without foundational inspirations and critics.

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CHAPTER 1

INTRODUCTION

Libertarian philosophers of freedom of expression such as Thomas Emerson and John Milton argue that such freedom is essential for individual self-fulfillment and for a marketplace of ideas,\(^1\) dual values that are inextricably intertwined with the idea of democracy.\(^2\)

The freedom of expression is defined by limits placed upon it, among other laws, by libel.\(^3\) Historically, the laws of seditious libel were the key determinant of how free expression in any society was.\(^4\) But in the latter half of the twentieth century, when electronic media technologies made mediated communication popular, the laws governing private libel became just as important. In 1964, the United States Supreme Court seemed to formally

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collapse private libel into seditious libel to legitimize all libel law as a primary determinant of freedom of expression.\(^5\)

The common law\(^6\) of libel requires an alleged libel victim to successfully meet three legal challenges: Providing proof of defamation, identification and publication. In addition, in most cases since 1964, a libel plaintiff also must successfully prove a constitutional standard of fault that may range from negligence to actual malice.\(^7\)

In addition to those legal challenges, the literature documents that the Internet-mediated “information society”\(^8\) characterized by decentralized, ‘real time’ and worldwide communications has reinvented a crucial challenge of a technological or logistical nature – multiple personal jurisdictions\(^9\) – which makes it relatively easy for any court, across the

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\(^6\) Common law refers to judge-made, unwritten law developed through rules guided by a doctrine of *stare decisis* (“let the decision stand”) or precedent.


\(^8\) The dissertation employs the term “information society” as a metaphor for the varied informational, transactional and communicative opportunities enabled by Internet technologies such as the World Wide Web, multi-user domains, discussion boards and email. For a discussion of the information society’s predicates, see sections 2.2 and 2.4. For a discussion of the information society as a dominant social paradigm, see Armand Mattelart, *The Information Society: An Introduction* (London, U.K.: Sage, 2003), 1-3; 113-114; The dissertation uses the term as a toponym rather than as a historical period, in a sense comparable to Marshall McLuhan’s conceptualization of a “global village” effected by the early electronic mass media. *The Gutenberg Galaxy: The Making of Typographic Man* (London, U.K.: Routledge & Kegan Paul, 1962), 31; The “uniquely borderless” nature of the information society is discussed in section 2.4.

\(^9\) Personal jurisdiction, or jurisdiction *in personam*, refers to a court’s authority to make a decision about a litigant, as opposed to subject matter jurisdiction which refers to the court’s ability to hear the type of case in question. Jurisdiction, in general, is defined as a court’s authority to hear and decide a case. For a discussion of legal disputes emanating from the “surge of transnational contacts” via the information society, see Michael Traynor and Laura Pirri, “Personal Jurisdiction and the Internet: Emerging Trends and Future Directions,” *Sixth Annual Internet Law Institute* 2, no. 93 (2002): 95.
world literally, to assert jurisdiction over a defendant.\textsuperscript{10} That challenge does not affect the libel plaintiff exclusively – it impacts other plaintiffs as well.\textsuperscript{11} The writer chooses to limit the challenge to libel law, which predicates the subject of this work, freedom of expression.

The aim of the dissertation is to develop a theoretical framework to address the challenge of libel in the information society, especially as it affects nonmedia speakers of the fifth estate.\textsuperscript{12}

1.1. THE PROBLEM

Internet-mediated technologies such as the metadata protocol Really Simple Syndication (RSS), Wiki, and discussion boards have empowered netizens,\textsuperscript{13} including many bloggers\textsuperscript{14} and “citizen journalists,”\textsuperscript{15} to be socially active or even activist.\textsuperscript{16} Web blogs, as


\textsuperscript{11}Pamela Samuelson described in 1999 the new difficulty that had emerged: “How to coordinate with other nations in Internet law and policy making so that there is a consistent legal environment on a global basis.” “A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy,” 87 California Law Rev. 751 (1999).

\textsuperscript{12}“Fifth estate” refers to online citizen journalists such as Jeff Jarvis of buzzmachine.com or Dan Gillmor of bayosphere.com, activists such as the Egyptian pro-democracy convict Alaa Abdel-Fattah of manalaa.net, or political commentators such as Glenn Reynolds of instapundit.com. Traditionally, the four estates in Europe had referred to the noblemen, the clerics, the members of the middle class, and the press. See sec. 5.1; Also see generally Stephen D. Cooper, Watching the Watchdog: Bloggers as the Fifth Estate (New York, NY: Marquette, 2006).

\textsuperscript{13}The term “netizen,” a portmanteau of “Internet” and “citizen,” was coined by the American computer scientist Michael Hauben in his 1992 “netbook” titled “The Net and Netizens: The Impact the Net Has on People’s Lives.” A version of the “netbook” is available at http://www.columbia.edu/~rh120/ch106.x01 (accessed 20 July 2005).

\textsuperscript{14}The term “weblog” was first used in 1997 on robotwisdom.com, a site that published links to individually selected websites of interest. See David Bell, Brian D. Loader, Nicholas Pleace and Doubias Schuler,
alternate sources of political opinion and analysis, have enabled new voices that can empower netizens and democratize information access. Their larger social contribution may be that they increase manifold the ideas available in the marketplace, in theory challenging any information hegemony of an increasingly consolidating corporate media.

Libel has traditionally been the most common claim brought against media defendants, but in recent years these members of the fifth estate – nonmedia defendants

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15 Citizen journalism, also called participatory journalism, refers to an emergent phenomenon of citizens who are not professional reporters or members of the institutional media collecting, reporting, analyzing and disseminating news. See Shayne Bowman & Chris Willis, “We Media: How Audiences are Shaping the Future of News and Information.” The Media Center at the American Press Institute, www.hypergene.net/wemedia/weblog.php (accessed 15 June 2006); Also see Frank Pisani, Transforming the Gathering, Editing and Distribution of News, 59 (Cambridge, MA: Nieman Reports, fall 2005): 53.


17 A Pew Center survey published in July of 2006 found that eight per cent of Internet users, or 12 million Americans, keep a blog and that 39 per cent, or 57 million Americans, read blogs. Amanda Lenhart & Suzannah Fox, “Bloggers: A Portrait of the Internet’s New Storytellers,” Pew Internet & American Life Project (19 July 2006). www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf (accessed 10 August 2006); Also see, Cooper, Bloggers as the Fifth Estate.


19 In 2005, libel was the most frequently litigated claim against media entities, accounting for 87.6 per cent of trials. Media Law Research Center press release of March 2, 2006. www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2006_Bulletin_No_1.htm (accessed 10 August 2006); “Invasion of privacy claims were brought in a third of the complaints, with false light claims leading the pack. Contractual claims were made in 18.4 percent of complaints, followed by emotional distress claims in 16.6 percent of cases and intellectual property claims in 13.9 percent.” MLRC press release of 7 August, 2006.
such as bloggers – are increasingly the target of libel lawsuits, which potentially chills their freedom of expression.\textsuperscript{20} The Media Law Resource Center documents a large number of such lawsuits:\textsuperscript{21}

In October of 2005, the employment law firm Fisher & Phillips LLP based in Atlanta, Georgia, sued five “John Does,” claiming they published “false and malicious communications” about the firm on the Web.\textsuperscript{22} In November of 2005, Emanuel Welch, president of district 209 of the Proviso township high schools board, Illinois, and his brother Bill Welch filed a libel suit against blogger Carl Nyberg after Nyberg filed an ethics complaint against Emanuel Welch over his vote in August of 2005 to hire Bill Welch as a school custodian.\textsuperscript{23} In January of 2006, an Internet marketing company sued the owner of the blog seobook.com, which discusses search engine optimization, for libel.\textsuperscript{24} Earlier, in August of 2005, an appeals court reversed a trial court ruling dismissing former Cornwall, New York, supervisor Jim Sollami’s libel case against Tom Sheppard, who publishes cornball-
A couple of months later, another New York court dismissed a libel suit against a New Jersey blogger for his 45-page Web site detailing his gripes against his car insurer, holding that the comments on the site were protected free speech and not libelous. In July of 2005, a Wisconsin radio talk show host who posted and responded to a listener’s e-mail on his blog settled a lawsuit against him for $5,000. The plaintiffs in such cases range from small business owners to more powerful corporations or public figures – even, counter-intuitively, media organizations.


27 Miranda v. Sykes (Wis. Small Cl Ct., Milwaukee County settled July 28, 2005). WTMJ-AM talk show host Charlie Sykes removed the e-mail within a few hours of posting it in November 2004 post, after he learned that it contained factual errors. But the posting was still available via enterprising Internet search three months later. The result: a libel suit. The suit, filed by Spanish Journal Editor Robert Miranda, was settled in return for the station establishing a $5,000 scholarship for high school journalism students.

28 In a study of complaints against media entities in 2005, “corporations were the most common plaintiff, bringing 19.6 percent of the complaints against the media. Government officials – including elected officials, judicial officers, law enforcement personnel and candidates – were a close second, bringing 18.6 percent of the complaints. Among government officials, judges were the most frequent type of plaintiff to sue the media. The third most common plaintiff were criminal justice participants – lawyers and criminal defendants, bringing 15.1 percent of the complaints.” MLRC press release of 7 August, 2006. www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=4077 (accessed 10 August 2006); See sec. 2.4.1 for a discussion of the increasingly threat of corporations as libel plaintiffs.

29 With media-critical bloggers rampant, some media corporations see reason to take on a non-traditional role as libel plaintiffs in order to counter claims made in the blogosphere, which itself is a non-traditional social institution, emergent, self-organizing and self-regulating. Stephen D. Cooper, Watching the Watchdog: Bloggers as the Fifth Estate (New York, NY: Marquette, 2006); “The group of media-critic bloggers [Media Bloggers Association] . . . have hired Clifton, N.J.-based media lawyer Ronald Coleman as their general counsel. . . . The purpose of the MBA is to protect ‘the little guys from assertions of power by the big guys,’ Coleman says.” Wendy N. David, “Fear of Blogging,” American Bar Association Journal 91, 7 (July 2005): 16; Robert Cox of the Media Bloggers Association was sued in 2004 by the New York Times Co. for his parody of the Times’ correction policy on the blog thenationaldebate.com. See www.participate.net/user/robertcox (accessed 15 June 2006).
As a corollary, because of multiple personal jurisdictions, a libel defendant in say Franklin county, Ohio, can fear being summoned by a court in say Mumbai City district, India, where he or she would not enjoy the higher level of speech protection afforded by the American constitution. 30 Basically, a court may recognize personal jurisdiction by any of these locations – that of the (offending libel’s) location of composition, of publication, of host server, or of download, all of which can be different points on an atlas. 33 Even within a country, philosophical, doctrinal and procedural differences among different jurisdictions would cause a sense of uncertainty in information society defendants. The potentially unlimited jurisdictions posed by the transnational and ‘real time’ information society lead to uncertainties in the fault standard, in free speech protections, in statutes of limitations, in witness subpoenas and testimonies, and in other procedural rules. To add to the confusion, in relation to multiple jurisdictions, the litigant would also have to choose from multiple laws that might apply. 34

In April of 2003, the U.S. Supreme Court passed up an opportunity to

30 A case of this nature occurred in December of 2002 when the High Court of Australia ruled that Dow Jones could be sued in Australia after it published allegedly defamatory materials using Web servers located in New Jersey. See Dow Jones & Co. v. Gutnick, High Court of Australia case no. [2002]HCA56. The case spotlighted the irrelevance of territorial borders in the information society, showing American defendants smug in the protection of the First Amendment that they still might still be dragged to court in a distant land.

31 Pamela Jennings v. AC Hydraulic, case no. 03-2157 (U.S. Ct. App., Seventh Cir., September 2, 2004). The court of appeals held that a nonresident defendant’s maintenance of a passive website, by itself, did not supply minimum contacts necessary to permit exercise of specific personal jurisdiction.

32 Cadle Company v. Jan Schlichtmann, case no. 04-3145 (U.S. Ct. App., Sixth Cir., February 8, 2005). Affirming the judgment of the U.S. District Court for the Northern District of Ohio, the appellate court held that Ohio did not have personal jurisdiction over a Massachusetts-based Web site owner based on allegedly defamatory statements made on his site about a debt collector residing in Ohio, given that the website specifically referred to the debt collector’s activities in Massachusetts, and was not directed at Ohio readers.

33 American courts generally use traditional jurisdictional analysis on a case-by-case basis in domestic Internet cases, but the body of American law concerning assertions of jurisdiction over foreign Web sites is limited. See Alex Gigante, “Internet Defamation and Personal Jurisdiction,” in Elizabeth McNamara and Eric Rayman, Internet Publishing: The Legal and Business Issues as Traditional Publishing Moves to Electronic Media (New York, NY: Practising Law Institute, 2000), 314.
address that challenge when it declined to decide how to determine jurisdiction in Internet cases.  

Magnified by the esoteric problem of multiple personal jurisdictions, the threat of libel prosecution chills expression to potentially jeopardize the fifth estate’s empowerment. The theoretical framework developed in this dissertation addresses that threat by conceiving a separate jurisdiction for libels of the information society, the larger goal being to optimize the freedom of expression.

1.2. A PROPOSED RESOLUTION

It is clear from the literature that libel law, as a predicate of the freedom of expression, affects the libertarian or democratic values of individual self-fulfillment, marketplace of ideas, and empowerment. The writer’s overall goal is to develop a narrow libertarian way to ensure the predictability and reliability of libel prosecutions in the information society—especially those of bloggers, citizen journalists and others of the fifth estate who are vanguards of the Internet-enabled democratization. Inherent in that goal is a


35 Healthgrades.com, Inc. v. Northwest Health Care Alliance In., 02-1250. See Order List at http://www.supremecourtus.gov/orders/courtorders/042803pzor.pdf (accessed 28 February 2006). The denial of certiorari let stand a decision by the U.S. Court of Appeals for the Ninth Circuit that the U.S. District Court for the Western District of Washington state had personal jurisdiction over an out-of-state defendant based solely upon the publication of an allegedly libelous statement on a Web site. Many lower courts, as well as courts in other countries or sovereignties, have already issued hundreds of opinions in the past decade, many of which are inconsistent with one another, leaving significant uncertainty as to when a court has personal jurisdiction over a distant defendant whose Internet-based conduct is the sole basis for a defamation claim. The Supreme Court seemed to have passed up an excellent opportunity to bring clarity to the issue by denying certiorari in Healthgrades.com.

36 See sec. 2.1.

37 The U.S. Supreme Court recognized the Internet as a democratizing medium when it observed, “Any person
task of defining the limits of the freedom of expression, as well as another task of meeting the challenge of multiple personal jurisdictions. The dissertation attempts to accomplish those two tasks without calling for any regulation of the content or technology of the Internet.\textsuperscript{38}

In general, the dissertation proposes a separate common jurisdiction for libel cases that emanate in the information society.\textsuperscript{39} Specifically, it delineates a theoretical framework, based on an analysis of the fundamental principles of freedom of expression characterizing jurisprudence, for that common jurisdiction.

The dissertation is prosecuted by developing (1) a proposal to extend the actual malice doctrine to nonmedia defendants after critiquing the doctrine,\textsuperscript{40} (2) a set of normative recommendations to define freedom of expression in the information society,\textsuperscript{41} and (3) a model law to deliver the framework to a libel litigant.\textsuperscript{42}

The proposed new jurisdiction may be asserted solely by an Internet Empowerment Agency, which would draw its authority from an international treaty. That agency’s express mandate would be to resolve information society libel cases using a specific norm of freedom of expression which derives from the libertarian philosophical tradition. The agency’s establishment might be brokered by a self-help organization such as the California-based user with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer,” and that Internet publishers include “government agencies, educational institutions, commercial entities, advocacy groups, and individuals.” \textit{Reno v. American Civil Liberties Union}, 521 U.S. 844 (S.Ct. 626 1997), 853, 870.

\textsuperscript{38} The U.S. Supreme Court has already ruled that the Internet enjoys at least the same degree of First Amendment protection as do the print media. Ibid.

\textsuperscript{39} Libel in the information society is measured in the defamatory torts committed using Internet components such as blogs and other Web sites, discussion boards, multi-user domains, and email including spam.

\textsuperscript{40} See chs. 5 and 6.

\textsuperscript{41} See ch. 7.
nonprofit Internet Corporation of Assigned Names and Numbers,\textsuperscript{43} any arm of the United Nations,\textsuperscript{44} or perhaps the Inter-American Commission on Human Rights.\textsuperscript{45} The dissertation does not discuss that specific, as it does not the specifics regarding the agency’s geographical location, its executive powers or its administrative structure. Neither does it discuss the terms of the treaty that would help constitute the agency. The writer’s brief is limited to describing the agency’s theoretical framework and to developing a model procedure of action in the form of a legislative bill that the agency might adopt.

What should be the freedom of expression norm adopted in the proposed jurisdiction? What might be the nature of libel law that results from that norm? How should the law be implemented? The dissertation addresses these normative questions in varying degrees of detail.\textsuperscript{46}

To build the theoretical framework the writer employs traditional legal analysis as described by Jacobstein, Mersky and Dunn.\textsuperscript{47} The method uses the following procedural steps in order: The first is to analyze facts such as (1) the intersections of the libertarian tradition, and other philosophical traditions, with freedom of expression and with democracy, (2) the conditions of the American constitutional law of libel, and (3) the characteristics of the information society.

\begin{itemize}
\item \textsuperscript{42} For model law, see Appendix; for a discussion, see ch. 8.
\item \textsuperscript{43} See www.icann.org.
\item \textsuperscript{44} See www.un.org.
\item \textsuperscript{45} See www.cidh.org.
\item \textsuperscript{46} The research questions are listed in ch. 3.
\end{itemize}
The second step is to use those facts as well as other literature to derive the main problem as libel threat to the fifth estate and the corollary problem as possible multiple personal jurisdictions. The third step is to analyze the constitutional law of libel to address the stated problems, specifically by a critique of the actual malice doctrine (chapter 5) and by an argument to extend that doctrine to nonmedia defendants (chapter 6). The fourth and final step is to use the preceding analyses to propose a normative, inductive set of recommendations for freedom of expression in the Information Society, as well as to elucidate a legal procedure of its implementation (chapters 7 and 8). Steps three and four, thus, constitute much of the original contribution of the dissertation.

The primary sources comprise the population of 28 U.S. Supreme Court cases that have decided libel law, especially the historic case of *New York Times v. Sullivan* which extended First Amendment protection to much libel. The secondary sources include articles on libel in the law reviews, articles on freedom of expression and libel law in scholarly books as well as in academic journals, the text of the Restatement (Second) of Torts, and last but not the least, inputs from the dissertation committee.

1.3. SOCIAL SIGNIFICANCE

The dissertation benefits lawmakers by proposing a philosophical framework as well as a model procedure of legal action based on that framework. It benefits bloggers, citizen journalists and others of the fifth estate by confronting the chilling effect of libel suits, which jeopardizes their empowerment – it seeks to make libel litigation, for libels that emanate in

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48 See Tables 1 to 4.

49 Public officials must prove an “actual malice” standard of fault in order to prevail against the media in a suit for damages. 376 U.S. 254 (S.Ct. 39 1964).
the information society, predictable and reliable in a libertarian tradition that acknowledges
the democratic values of self-fulfillment and marketplace of ideas. The dissertation benefits
communication scholars by its analysis and critique of First Amendment theory and the
actual malice doctrine, which along with media regulation constitute a research area
recognized as important by the three top-tier communication conferences as well as by
nearly half of the communication doctoral programs in America.

1.4. SCHOLARLY SIGNIFICANCE

The dissertation makes an original contribution to freedom of expression scholarship
in a context of the jurisdictional challenge posed by the information society. It does so
through the theoretical framework developed in chapters 5, 6 and 7 as well as through the
procedural mechanism to implement that framework laid out in chapter 8.

The more traditional communication scholars may view as a limitation the practice of
traditional legal research to not routinely employ empirical data procured by popular social
science quantitative methods such as experiments or questionnaire surveys. Another
possible limitation is that while the writer’s major arguments are largely rooted in evidence in
the primary sources, some others may be based on material in the secondary.

50 See the law division Web pages of the three top-tier conferences: National Communication Association
http://www.natcom.org/nca/Template2.asp?bid=5067; Association for Education in Journalism and Mass
Communication http://www.unc.edu/~imfeld/; and International Communication Association

study found that 44.7 per cent of communication doctoral programs in America offered a specialization in law.

52 See sec. 3.2, as well as ch. 9, for discussions of the limitations.

53 Primary sources comprise the court decisions, statutes and legislative records which constitute a direct,
CHAPTER 2

LITERATURE REVIEW

2.1. LIBEL LAW AS A PREDICATE OF DEMOCRACY

This section establishes the significance of libel law to the freedom of expression and hence to democracy: The freedom to express beliefs or thoughts is so inextricably interlaced with the idea of democracy\textsuperscript{55} that a leading casebook of American constitutional law allocates nearly a third of its pages to discussing that freedom.\textsuperscript{56}

Historically, governmental authorities have handed down conflicting interpretations of the freedom of expression as they tried to define seditious libel. For example, early American colonists found almost no tolerance from public officials for ideas that were critical of the government.\textsuperscript{57} Even upon the First Amendment’s 1791 adoption (after which it

\textsuperscript{54} Secondary sources encompass the analyses, commentaries, summaries and compilations of various aspects of the law found in law reviews, books, restatements and other treatises.

\textsuperscript{55} Meiklejohn, \textit{Free Speech}; Dahl, \textit{On Democracy}.

\textsuperscript{56} Gerald Gunther, \textit{Constitutional Law}, 11\textsuperscript{th} ed. (Mineola, NY: Foundation Press, 1985), devotes 491 of 1633 pages to freedom of expression.

\textsuperscript{57} “The persistent image of colonial America as a society that cherished freedom of expression is a sentimental hallucination that ignores history.” Levy, \textit{Zenger to Jefferson}, xxix. There is little evidence that colonists would receive “advocates of obnoxious or detestable ideas.” Id. When opinions that did not conform were expressed, they were likely to be held in violation of the seditious libel laws. Id. at xxx. For example, see an account of the infamous trial of John Peter Zenger in New York in 1735 cited in \textit{Fitts v. Kolb}, 779 F.Supp. 1502, 1507 (D. S.C. 1991), and briefly described in sec. 2.3. Most early prosecutions were under criminal libel laws.
took 127 years for the United States Supreme Court to hear a free speech case) the high court continued to use Blackstone’s “bad tendency” doctrine to define seditious libel. Over the decades, the bad tendency doctrine was replaced by the more libertarian “clear and present danger” and “incitement” doctrines.

In a landmark interpretation in the 1964 case of *New York Times v. Sullivan*, the Supreme Court held that for a successful argument, public officials must prove an allegedly libelous “statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard for whether it was false or not.” Proof that the defendant harbored common law malice, defined as an intent to cause harm, or ill will, was no longer sufficient.

Until the *New York Times* judgment brought libel under the constitutional umbrella, the freedom to express had been limited by libel law designed to protect individuals’ reputations. In subsequent years, other judgments followed in which the Supreme Court

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58 The English jurist William Blackstone’s doctrine posited that freedom of speech existed when there was no prior restraint upon publishing, but such freedom could be curtailed after the publication if the message showed a tendency to disturb the public peace. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769), 151-152. The U.S. Supreme Court used the Blackstonian doctrine to decide the earliest First Amendment cases: *Schenck v. United States* (1919), *Abrams v. United States* (1919), *Gitlow v. New York* (1925) and *Whitney v. California* (1927).

59 See Justices Holmes and Brandeis’ dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (S.Ct. 1110 1919), at 624.

60 See the high court’s *per curiam* opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (S.Ct. 227 1969).

61 376 U.S. 254 (1964), at 279-80. The *New York Times* judgment was of civil libel, but in the subsequent case of *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court unanimously agreed that the “actual malice” rule applied to cases of criminal libel as well.


extended the actual malice rule to include more categories of plaintiffs.\textsuperscript{64} *New York Times* seemed to formally collapse private libel into seditious libel to legitimize all libel law as a primary determinant of freedom of expression.

A generally accepted view after *New York Times* is that if there is any “central meaning” of the First Amendment it “is that seditious libel cannot be made the subject of government sanction.”\textsuperscript{65}

The Supreme Court has recognized that some constitutional values, especially those guaranteed by the First Amendment, are so fundamental to a free society that they are entitled to more judicial protection than are others.\textsuperscript{66} Nevertheless, as the legal philosopher Thomas I. Emerson writes, “The outstanding fact about the First Amendment . . . is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.”\textsuperscript{67} The high court has addressed the First Amendment largely by itemizing all the possible freedoms and values that that Amendment is believed to protect.

Freedom, in general, has been declared as a “natural right”\textsuperscript{68} as well as an essential component of modern democracies,\textsuperscript{69} but most democracies constitutionally recognize the rights to expression as well as to reputation.\textsuperscript{70}

\textsuperscript{64} For a discussion of these cases, turn to chapter 2.3.1.


\textsuperscript{67} Emerson, *System*, 15.

\textsuperscript{68} E.g., Herbert Lionel Adolphus Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (1955), 175;
As the media sociologist Brian Winston writes, “Free expression can be proved to exist only when it is offensive, and should that paradox be forgotten then the right of free expression is seriously endangered.” But authors generally acknowledge that absolute freedom of expression seldom exists because of constraints enforced by public opinion, by culture, and by the limits dictated by market systems on individual voices.

The limits of a society’s system of freedom of expression have historically been a function of the laws of libel, including seditious libel and private libel, and, to a smaller extent, with the laws of obscenity, fighting words and threatening speech. The tort of libel, the subject of this dissertation, is pivotal to defining the limits of any system of freedom of

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69 For a discussion of the symbiotic nature of the relationship between various freedoms and the ideals of democracy, see Dahl, On Democracy; and Meiklejohn, Free Speech.


72 Julie L. Andsager, et al., Free Expression in 5 Democratic Publics (Cresskill, NJ: Hampton, 2004); Pnina Lahav, Press Law in Modern Democracies: A Comparative Study (New York, NY: Longman, 1985); Hart writes that citizens do not have any right that is “absolute,” “indefeasible,” or “impresscriptible.” “Are there Any Natural Rights?,” 175.

73 Emerson terms the aggregate of institutions, principles and values that support freedom of expression as a “system of freedom of expression.” See Emerson, System.

74 A tort is “a private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.” The civil wrong may be intentional or accidental. The word is Latin for “wrong.” Black’s Law Dictionary, 7th ed., Bryan A. Garner, ed. (St. Paul, MN: West Group, 1999): 1496-1497; A wider definition and discussion are available in Marshall S. Shapo, Principles of Tort Law, 2nd ed. (St. Paul, MN: West Group, 2003): 2-13.
expression, including that of the information society, because libel can lead to a prior restraint or a chilling effect on free expression.\textsuperscript{75} A society’s libel laws define the nature of its fundamental civil liberties.

Emerson describes a “system of freedom of expression” by its institutions, principles and values that support unfettered expression.\textsuperscript{76} The freedom of expression may be conceptualized as a set of conditions that encompasses all the indispensable requirements for realizing human potential,\textsuperscript{77} or as an idea that helps construct a widely accepted meaning of democracy.\textsuperscript{78} When the system’s limits are defined by a conflict between free speech and personal reputation, both those rights turn out to be constitutionally protected or granted in most democracies.\textsuperscript{79} That conflict, simply called defamation, may be a criminal offense, but is usually a civil wrong.\textsuperscript{80}

In the common law tradition, defamation encompasses the twin torts of libel, which is defamatory in a permanent form such as writing or scripted broadcast, and slander, which is


\textsuperscript{76} Emerson, \textit{System}.

\textsuperscript{77} Ibid.; Also see Justice Louis D. Brandeis’ concurring opinion in \textit{Whitney v. California}, 274 U.S. 357, 375 (S. Ct. 516 1927).

\textsuperscript{78} Political scientists seem unable to agree on a precise and comprehensive definition of democracy, although most of them agree on what democracy’s components are. For a discussion of democratic theory, see Robert A. Dahl, \textit{Democracy and its Critics} (New Haven, CT: Yale University Press, 1989).

\textsuperscript{79} Supra. n. 70; The United States is unique in that its constitution conceptualizes the freedom of expression as a given, and refrains from granting it to citizens. “Under our Constitution, free speech is not a right that is given . . . so . . . that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a [generous] government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says.” \textit{Tinker v. Des Moines School Dist.}, 393 U.S. 503 (S.Ct. 224 1969), 513.

defamation by spoken word. Defamation by writing is assumed to cause greater harm. This dissertation conceptualizes all defamations in the information society as libel; slander prosecutions, especially against the media, have become relatively unusual.

On the one hand, the freedom of expression has been discussed as a “logically necessary condition of democracy,” but also as a “natural right” that presupposes democracy. On the other, that freedom is also conceptualized as a “negative” right because it is measured by the limits that the political system sets on it. Those limits are defined by the parameters of seditious libel, by remedies available to a private defamation plaintiff, and by the protections available to a defamation defendant. The law professor, Alan Dershowitz, conceptualizes the freedom of expression as a “negative right” to highlight the constitution’s protection, as opposed to grant, of that freedom.

The political scientist, Robert Dahl, identifies seven component institutions of democracy, one of which he describes in this manner: “Citizens having an effectively enforced right to freedom of expression, particularly political expression, including criticism of the officials, the conduct of the government, the prevailing political, economic, and social

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83 Hart, “Are there Any Natural Rights?,” 175.


system, and the dominant ideology.”

Arguing that democracy is an ideal form of polyarchy, Dahl lists its four criteria as “free and fair elections, freedom of organizations, freedom of expression, and existence of alternative sources of information.” There is no doubt from reviewing the literature that freedom of critical expression is inherent in the conception of democracy but in addition, “Free expression means not just that you have a right to be heard. It also means that you have a right to hear what others have to say.”

The political philosopher, John Dewey, writes, “An obvious requirement [of democracy] is freedom of social inquiry and of distribution of its conclusions.” Justice Louis Brandeis of the U.S. Supreme Court, defending free speech as essential to republican government in a 1926 concurring opinion, goes somewhat further to declare, “Public discussion is a political duty.”

Some scholars highlight a distinction between practical democracy and freedom, in order to note the rise of “illiberal democracies” that routinely deprive their citizens of

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90 In Jo Ann Boydston (ed.), John Dewey: The Later Works, 1925-1953, vol. 2 (Carbondale, IL: Southern Illinois University Press, 1989), 367. Dewey continues on the same page, “The notion that men may be free in their thought even when they are not in its expression and dissemination has been sedulously propagated. It had its origin in the idea of a mind complete in itself, apart from action and from objects. Such a consciousness presents in fact the spectacle of mind deprived of its normal functioning, because it is baffled by the actualities in connection with which alone it is truly mind, and is driven back into secluded and impotent revery.”

property rights and the rights of speech and religion, but others applaud democracy as an experiment in exploring the potentials of citizens who are entrusted with freedom.

Citizens in a democracy require freedom of expression to effectively participate in deliberation, to acquire an understanding of governmental actions, and to influence the agenda of government decisions. Emerson conceptualizes the freedom of expression as a tool for self-fulfillment, a view echoed by law professor Edwin C. Baker: “To engage in a speech act is to engage in self-definition.” Another scholar defines that freedom as a public value that acts as a political anchor of society. Libel law, which can cause a chilling effect on speech, is consequently a particularly important political issue.

“True freedom,” the political scientist John Hallowell declares, “requires both knowledge of the good and the will to choose the good when known,” both of which requirements are reflected in the United States’ constitutional law of defamation established in the *New York Times v. Sullivan* case.

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94 Emerson, *System*, 3-7; Also see Jürgen Habermas’ keynote address to the International Communication Association, Dresden, June 19, 2006. [http://www.icaahdq.org/Speech_by_Habermas.pdf](http://www.icaahdq.org/Speech_by_Habermas.pdf) (accessed 1 August 2006): “The institutional design of modern democracies brings together three elements: first, the private autonomy of citizens, each of whom pursues a life of his/her own; second, democratic citizenship, i.e., the inclusion of free and equal citizens in the political community; and third the independence of a public sphere that operates as an intermediary system between state and society. These elements form the normative bedrock of liberal democracies.”


The origin of the freedom of expression is said to go back to the city state of Athens, Greece, of 800 to 400 B.C., whose aristocratic rulers permitted some citizens – not including women, resident aliens or juveniles – to express views without fear of prosecution. That privilege to commoners was gradually extended to reach a crest during the 443-429 B.C. reign of Pericles. One historian writes that the Athenian rulers had passed many laws restricting free speech and “if they did not [pass such laws] more often, that was because they did not choose to, or did not think to, and not because they acknowledged rights or a private sphere beyond the reach of the state.” From the ancient days when it was privileged for the Athenian citizens to the present day when it is protected as a natural right of Americans, the conceptualization of the freedom of expression has evolved significantly.

Keeping with this change, the law of libel has evolved too, from ancient Athenian law to the English common law to its current American constitutional avatar defined by the high court’s judgment of *New York Times Co. v. Sullivan*. In the ancient days, defamation that attracted most stricture was seditious libel (criticism of the ruling powers, such as the


king or the form of government or the laws) and, to a smaller extent, religious-moral heresy (criticism of the Church or use of bawdy expressions). In present day America, a seditious libel conviction requires the plaintiff to prove either “incitement”\textsuperscript{105} or “actual malice.”\textsuperscript{106} As the documented prosecutions suggest, the advent of the information society has caused private libel – online libel committed by a netizen or possibly a corporation and not about a topic of public concern – to emerge as a major issue in freedom of expression.

2.1.1. SPEECH, PRESS AND EXPRESSION

This section situates the freedom of expression in the First Amendment’s guarantees by discussing the coextensive nature of those guarantees.

The forty-five words of the First Amendment protect five expressive freedoms – those of religion, speech, the press, assembly and the freedom to petition the government for a redress of grievances. The Supreme Court has held those freedoms to be “inseparable. . .
cognate rights.”\textsuperscript{107}

Even so, Justice Potter Stewart of the U.S. Supreme Court has addressed the compartmentalization of the freedoms to argue, “That the First Amendment speaks separately

\textsuperscript{104} 376 U.S. 254 (S.Ct. 39 1964).

\textsuperscript{105} The “incitement standard” allows antigovernment speech to continue to the point that there is direct incitement to illegal conduct which is both imminent and likely to occur. It was established by the Supreme Court in the case \textit{Brandenburg v. Ohio}, 395 U.S. 444 (S.Ct. 69 1969).

\textsuperscript{106} For a successful argument, a public plaintiff must prove an allegedly libelous “statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard for whether it was false or not,” \textit{New York Times}, 376 U.S. at 279-80.

\textsuperscript{107} \textit{Thomas v. Collins}, 323 U.S. 516 (S.Ct. 18, 1945), 530. Justice Wiley Blount Rutledge wrote for the majority, “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty (sic) with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights.” In \textit{McDonald v. Smith}, 472 U.S. 479 (S.Ct. 619, 1985), the Supreme Court applied the same legal tests to a claim founded on the petition clause as are applied in cases of freedom of speech.
of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”

Justice Stewart has opined that the “actual malice” standard in libel was a privilege given exclusively to the press, and denied that the “constitutional theory of free speech gives an individual any immunity from liability for libel or slander.”

Chief Justice Warren E. Burger writes that the Supreme Court “has not yet squarely resolved whether the [p]ress [c]lause confers upon the ‘institutional press’ any freedom from government restraint not enjoyed by all others.” In several cases, the high court has decided that the press clause neither gives the press power to compel the government to reveal information, nor gives journalists access to information that the public generally does not have.

The political scientist, John Murry, points out that the freedoms of speech and press together supply the conditions under which democracy “can freely pursue its educational mission by precept and example,” and placing the debate in perspective is the legal philosopher Ronald Dworkin’s conceptualization of freedom of speech as a “prior right”

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109 See sec. 2.3 for an explication of actual malice.
110 Ibid., 633-35.
legalized by the Constitution, a fundamental right whose importance to human life even transcends the importance of democracy.\textsuperscript{114}

The political historian, C.W. Cassinelli, recognizes the “civil liberties of speech, the press, assembly, and association” as coextensive measures of contemporary democracies,\textsuperscript{115} while Emerson recognizes a speech-action dichotomy but includes freedoms of both in his “system of freedom of expression.”\textsuperscript{116} Baker proposes a liberty theory of freedom of expression on the premise that “the First Amendment protects a broad realm of non-violent, non-coercive, expressive activity.”\textsuperscript{117} Baker says this “expressive activity,” or nonverbal conduct, should also be viewed as speech and receive the same protection as speech, by which Baker’s theory protects the right of individuals to choose to create or receive, for example, sexual materials, but still does not protect commercial speech.

This writer accepts the conception that the five clauses of the First Amendment serve to formally expand the protection of free speech to various forms of expression, including publishing.

2.1.2. THEORIES OF FREEDOM OF EXPRESSION

The political philosopher, Karl Raimund Popper, writes, “Theories are nets cast to catch what we call ‘the world’: to rationalize, to explain, and to master it.”\textsuperscript{118} Hardly any

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\textsuperscript{116} For a discussion of the speech-action dichotomy see sec. 2.1.2.1.

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provision of the U.S. Constitution has spawned as many different theories about its underlying philosophical foundation, and a consequent interpretive framework, as has the guarantee of freedom of expression.

The following subsections briefly discuss three broad groupings of such theories, or traditions. Included in the discussion are the classical liberal philosophers such as John Milton, John Stuart Mill and Thomas Jefferson who argued that freedom of speech was a libertarian norm to be encouraged in all circumstances, a position significantly challenged by the eighteenth century English jurist William Blackstone who prescribed that speech which the government perceived as having a tendency to harm society may be punished, albeit only after publication.

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118 Karl Raimund Popper, *The Logic of Scientific Discovery* (Oxford, U.K.: Routledge, 2002), 37-38. First published as *Logic der Forschung* in Great Britain 1935; Popper describes “falsifiability” as the criterion to distinguish scientific theories from the non-scientific: “The criterion of demarcation inherent in inductive logic – that is, the positivistic dogma of meaning – is equivalent to the requirement that all the statements of empirical science (or all ‘meaningful’ statements) must be capable of being finally decided, with respect to their truth and falsity . . .” 40 (Emphasis retained from original); Also see Popper’s explanatory footnotes, *Ibid.*


122 Sir William Blackstone writes perhaps the most famous lines concerning the prior restraint doctrine: “The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman (sic) has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.” Blackstone, *Commentaries*, vol. 4, 151-52. First published 1769 in Great Britain.
More recently, the law professor, Alan Derschowitz, has posited that freedom of expression is a negative right – “the experiential case for freedom of speech is not nearly as convincing as the case against governmental censorship”¹²³ – to argue that the Bill of Rights does not give Americans any extensive right of free speech.

Also included in the discussion is an introduction to the views of utilitarians such as Alexander Meiklejohn, conservatives such as Walter Berns, critical-cultural scholars such as Katherine MacKinnon, and postmodernists such as Jacques Derrida.

The purpose of the discussion is to document the mutually irreconcilable philosophical strains that inform the freedom of expression.

2.1.2.1. LIBERTARIAN-LIBERAL

Classical liberals, or libertarians, conceive the individual as a condition of society, “something given, something already there,”¹²⁴ and expect social institutions to work primarily in the interests of the individual. The libertarian-liberal paradigm evolved in the writings of certain Western political philosophers of the seventeenth through twentieth centuries. In this paradigm freedom of expression is born in two interoperable and sometimes coextensive ways: (1) In a notional “marketplace of ideas” that permits the inevitable victory of better ideas over the worse, and (2) in a securing of the personal autonomy of individuals or netizens.

The marketplace idea seems to have been first described in the mid-seventeenth century by the philosopher poet John Milton, who urged ‘Truth’ and ‘Falsehood’ to “grapple;

¹²³ Dershowitz, Rights from Wrongs, 179.
¹²⁴ In Jo Ann Boydston (ed.), John Dewey: The Middle Works, 1899-1924, vol. 12 (Carbondale, IL: Southern
who ever knew Truth put to the worse, in a free and open encounter?”

Some two hundred years after Milton, the political economist John Stuart Mill eloquently described the importance of unpopular speech. Somewhat earlier, in the eighteenth century, the father of America’s Bill of Rights, James Madison, had already argued that a pronounced purpose of government was to protect free speech as a property right, a right to citizens’ property in their “opinions and the free communication of them.”

In the twentieth century, the marketplace idea appeared in several early dissenting opinions authored by Justice Oliver Wendell Holmes to criticize the U.S. Supreme Court’s prevailing free speech doctrine. In one such opinion Justice Holmes argued the “theory of our Constitution” to be that “the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” In another, he wrote that in his free speech rulebook ideas would be allowed to compete regardless of consequence. Echoing Holmes’ view, Justice Brandeis explained that if individual speech happened to cross an unacceptable line, “the remedy to be

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125 Milton, *Areopagitica*, para. 31; The constitutional scholar Vincent Blasi, however, qualifies *Areopagitica* by Milton’s commitment to the Reformation. Blasi writes, “Milton’s belief in the priority of truth seeking derived from his theology. . . . The argument of *Areopagitica* is for a purposive liberty: the Christian Liberty of the Puritan saint searching after God’s partially revealed truth. Milton was a Christian perfectionist.” Blasi, “Milton’s *Areopagitica*.” Blasi states it may be wrong to interpret Milton as fashioning a secular argument for the freedom of speech.


applied is more speech, not enforced silence.”

Holmes’ marketplace concept is reflected even more eloquently in the legal scholar Thomas Emerson’s comprehensive survey of First Amendment jurisprudence up to the 1960s, which identified the discovery of truth by free trade of ideas as one of the four values that support unfettered expression. Emerson wrote, “An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds,” implying that discovering any truth requires a free and uninhibited interchange of expression.

At least two other high court justices, William O. Douglas and Hugo Black, have advanced Holmes’ libertarian position to an absolute, by which they do not recognize any need to balance expressive rights with competing concerns such as reputation, national security, fair trial or privacy. In a 1960 article, Justice Black stated, “It is my belief that there are ‘absolutes’ in our Bill of Rights and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be ‘absolutes.’” Nonetheless, an absolutist interpretation of the First Amendment has never commanded the high court’s majority.

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132 Emerson, System, 6.
133 Justices Douglas and Black were absolutists who argued that that the First Amendment’s rule of “no law” prohibiting or punishing speech meant as much, even at the cost of unbridled antisocial expression such as hate speech. See Dennis v. United States, 341 U.S. 294, 590 (S.Ct. 57 1951) (Douglas, J., dissenting); and Smith v. California, 361 U.S. 147, 157 (S.Ct. 1214 1959) (Black, J., concurring).
Across the Atlantic, the European Convention on Human Rights of 1950 has displayed a similar rejection of any absolute freedom of expression. Section 1.10.1 of its charter, based on the United Nations’ 1948 Universal Declaration of Human Rights, guarantees to “everyone . . . freedom to hold opinions and to receive and impart information and ideas without interference by public authority.” But the very next subsection also specifically allows a state to require “the licensing of broadcasting, television or cinema entertainments,” which could mean allowing content controls. The contradiction has never been the subject of a court interpretation, but it may be attributed to the social conditions in the 1940s when radio, television and cinema as new media were yet to gain society’s trust even though the marketplace notion was appreciated. As Winston states, “It is not the old ideal of free expression (which Milton called “the liberty . . . above all liberties”) which [is] threatened by the changing circumstances of the media so much as current and proposed regulatory structures outside the general law.”

In addition to discovery of truth in a marketplace of ideas, Emerson identifies self-fulfillment as a second value of unfettered expression. Humans have a basic need to express themselves in order to self-actualize, and restricting that need would be “a negation of man’s

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essential nature.” Thus seeks in Internet speech a celebration of the individual’s autonomy by protecting it from regulatory excess for any purported social good.

Emerson is hardly the only libertarian to frame the freedom of expression by a speaker’s inherent autonomy. That idea actually goes back to a famous 1927 concurring opinion of Justice Louis Brandeis in which he stated: “Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty as both an end and as a means.” Sixteen years later, the personal autonomy was conceptualized as “intellectual individualism” by a high court that upheld a First Amendment right to not speak. The law professor, David A.J. Richards, clarifies that the freedom of expression is defined in relation to the self-respect that arises from that notional self-determination.

The above discussion suggests that the two arguments, of marketplace and of autonomy, are somewhat tied into each other in an interoperable manner; the first potentially results in an achievement of the second. That perceived interoperability, some historians

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140 Emerson’s two remaining values, nevertheless, extend beyond the libertarian ideal of protecting expression to consider larger social values – enabling participatory democracy and providing an important safety valve for an evolving society by “achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.” Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6-7. The individual is central to defining Emerson’s system of freedom of expression; Also see Edwin Baker, “Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech,” *University of Pennsylvania Law Review* 130, no. 646 (1982).


142 *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). In this case the high court nullified a state law that required school students to recite the pledge of allegiance.

have recorded, possibly emerged as a byproduct of the Protestant Reformation of England’s feudal society.144

The libertarians or classical liberals tend to see the protection of speech as an end in itself, and champion the communicative right as inalienable. In the late seventeenth century, the political philosopher, John Locke, argued that government should answer to the people, instead of the other way round. Locke conceptualized certain natural rights for the people, including life, liberty and property ownership. He wrote that the people’s grant of government made it a reciprocal duty of the government to safeguard those rights, for which exchange freedom of expression was essential.145

The libertarian credo secures the dignity of the netizen by allowing the netizen’s expressed influence on the information society. It also honors the individualized condition by recognizing the marketplace of ideas. Justice John Marshall Harlan wrote a full twenty years before the Internet became popular, “The constitutional right of free expression . . . puts the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.”146

A marketplace of ideas, such as a possible multi-user domain or discussion board, envisions a score of netizens deliberately and animatedly discussing or debating important political issues in front of a vast audience. Such discussion leads to a fulfillment of each

144 For a general discussion of the English heritage of freedom of speech, see Rosenberg, *Interpretive History*; Lewis, *Make No Law.*

participant’s individual autonomy. Considered in toto, the communication tends to blur the Emersonian dichotomy between speech and action by making it harder to differentiate between communicative intent and non-intent. That dichotomy has been a cornerstone of the U.S. Supreme Court’s interpretations of the First Amendment – speech may indeed include “action,” but the more the action the less that speech is protected.147

Because of a tendency of the information society to blur the difference between speech and action, libertarians tend to not recognize a right to punish harmful actions as much as they support the need to protect speech – even when the speech is hurtful or mean. An important libertarian premise is that speech is born out of thought or opinion. Despite the blurring tendency, the information society does record some actions whose intent is not to communicate ideas or thoughts but to make a decision specifically affecting the non-information society – for example the use of a mouse to conduct a banking transaction facilitated by the bank’s Web site. Such actions are examples of the non-violent, expressive or coercive activity that Baker’s liberty theory protects. However, the dissertation employs the Emersonian dichotomy and does not consider these actions as expression in order to preempt complications arising from the information society’s being coextensive with the ‘real’ society outside the Internet. The dissertation conceptualizes “expression” as purely those acts that have an intent to communicate, such as the ramblings on a blog, the postings on a Web site or discussion board, the content of an email, communication delivered by a


voice-over-internet protocol or by the use of speech-recognition software, even violent gaming actions in a virtual reality environment.

The libertarian theories are generally premised on two assumptions: That all citizens have an approximately equal access to the media, and that speech acts as an agent of self-fulfillment or personal autonomy. As the literature review will later discuss, both these assumptions hold good in the information society.

Because the libertarian-liberal theories have defined freedom of expression in many modern democracies, including the United States, those systems tend to offer relatively small remedies to defamation plaintiffs.\textsuperscript{148} In the United States, libel suits are frequently dismissed even before they go to trial, and when they do go to trial, the expensive litigation runs often into several years.\textsuperscript{149}

The U.S. Supreme Court has soundly rejected Blackstone’s bad tendency doctrine and instead prescribed a test of free speech that is at least as liberal as clear-and-present danger.\textsuperscript{150}

\textsuperscript{148} For example, in America, libel suits, usually targeting the press, are frequently dismissed before they go to trial. After they go to trial, libel suits often go on for years, resulting in high litigation costs. For a discussion of the odds in a libel suit as seen in actual cases, see Don R. Pember and Clay Calvert, \textit{Mass Media Law} (Boston, Mass.: McGraw Hill, 2005), 134-136.

\textsuperscript{149} Ibid.

\textsuperscript{150} William Blackstone’s bad tendency doctrine permits the government to stop speech before it has a chance to become effective. It was used by the Supreme Court in the decisions of \textit{Schenck v. United States}, 249 U.S. 47 (S.Ct. 33 1919); \textit{Abrams v. United States}, 250 U.S. 616 (S.Ct. 1110 1919); \textit{Gitlow v. New York}, 268 U.S. 652 (S.Ct. 68 1925); and \textit{Whitney v. California}, 274 U.S. 357 (S.Ct. 1213 1927). Beginning 1919, Justices Oliver W. Holmes and Louis D. Brandeis wrote a series of dissents that liberalized the acceptance of anti-government speech. The clear-and-present danger doctrine, which replaced Blackstone’s bad tendency doctrine, allows antigovernment expression to continue until a danger develops that is both obvious and immediate. It was argued by Justices Holmes and Brandeis in their dissent in \textit{Abrams v. United States} at pp. 624-31. In 1969, the Supreme Court, in a per curiam opinion, further eased the bar in the case of \textit{Brandenburg v. Ohio}, 395 U.S. 444 (S. Ct. 69 1969), when it established the current “incitement standard” that allows antigovernment speech to continue to the point that there is direct incitement to illegal conduct which is both imminent and likely to occur.
In balancing freedom of expression with other rights, however, the high court has upheld a few ad hoc forms of media regulation, such as judicial gag orders and controls on false advertising and broadcast indecency, in addition to the unbridled regulation of the four speech categories of public obscene expression, libel, true threats, and fighting words.\textsuperscript{151}

The Miltonian marketplace, free of government fetters, is predicated on the profound assumption that truth always wins over deceit, that libelous speech, obscene expression and hate speech would all be defeated by effective counter speech. The libertarian author, Nat Hentoff, high court Justice Louis Brandeis, and others of their ilk consistently recommend a near zero regulation system where counter speech is the only acceptable antidote for offensive or unpopular speech.\textsuperscript{152} Libertarians demonstrate a deep faith in the marketplace’s ability to catalyze self-fulfillment and to enable rational decisions. They advise netizens to oppose all governmental efforts to suppress, restrict, or curtail information.

Even though John Milton has no dearth of judicious and judicial admirers, and his libertarian tradition no dearth of influential proponents, a great historical irony is recorded in that Milton seemed to reject his own theory after being appointed to government. A mere seven years after he wrote \textit{Areopagitica} to advocate a marketplace of ideas, Milton, who was fast turning blind, accepted a position as censor in Oliver Cromwell’s administration to help enforce a strict puritanical rule over England, opposing any freedom of expression for Catholics and for others who advocated ideas that Cromwell’s Commonwealth considered subversive, impious or otherwise evil.\textsuperscript{153}

\textsuperscript{151} Dershowitz, \textit{Rights From Wrongs}.

To sum up, Emerson recognizes the legitimacy of the marketplace of ideas, but Baker criticizes the marketplace as implausible. Emerson recognizes a speech-action dichotomy, but Baker does not. Both agree on freedom of speech enabling individual self-fulfillment. Among the other libertarian theorists, Milton, Holmes, Brandeis and Harlan all acknowledge the utility of, or have no declared position on, the marketplace of ideas, speech-action dichotomy and self-fulfillment. In a nutshell, the libertarian theorists define the freedom of expression by an ability to discover the ‘truth.’

2.1.2.2. CONSERVATIVE-UTILITARIAN

Conservative and utilitarian scholars reject the two major premises of the Miltonian marketplace of ideas – that it leads to Emerson’s ideal of “individual self-fulfillment”\(^\text{154}\) and that it leads to rational decision-making. Instead, they argue that speech deserves protection to the extent that it advances either a social value or one that is necessary for democracy to flourish.

The legal philosopher, Alexander Meiklejohn, whose theory of free speech has been particularly influential with the Supreme Court,\(^\text{155}\) states that the First Amendment protects only “the public freedom which is required for the purposes of self-government,” not “the private freedom of this or that individual” as he or she plies his or her wares in the

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\(^{154}\) See Emerson, *System*, 3-7; Also see n. 23.

\(^{155}\) E.g., the Supreme Court ruled in *Valentine v. Chrestensen*, 316 U.S. 52 (S.Ct. 413 1942) that commercial speech was outside the protection of the First Amendment, a view reversed 33 years later in *Bigelow v. Virginia*, 421 U.S. 809 (S. Ct. 616 1975).
marketplace of ideas. Meiklejohn advocates absolute protection of political expression but a regulation of all other expression. The sociologist, James Davison Hunter, chides the extreme positions of libertarians as well as conservatives to write, “Collective life by definition ceases to exist without some agreed upon standards defining what the community or nation will embrace and what it will eschew and in both cases, why.”

The relationship between the First Amendment and self-government is developed from a somewhat different perspective by the law professor, Vincent Blasi, who argues that free speech is a means of developing the individual character needed for self-government. Justice William Brennan reflects on that relationship in 1957: “The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

The media critic, Walter Lippmann, frames the freedom of expression as a quest for the ‘truth’ but in a way different from the libertarians: “The right to speak freely is one of the necessary means to the attainment of the truth. That, and not the subjective pleasure of

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156 Meiklejohn, _Free Speech_, 88-89.

157 Meiklejohn, _Free Speech_, 88-89; Alexander Meiklejohn, _Political Freedom: The Constitutional Powers of the People_ (New York: Oxford University Press, 1965), 26. In general, Meiklejohn argues that political communication by all citizens should be extended the absolute privilege of the U.S. Constitution, art. I, sec. 6, which at present allows such a privilege only to members of Congress to debate in the House and Senate. Meiklejohn posits that the First Amendment only protects political speech, and it does so to an absolute extent that is beyond abridgment even by the clear-and-present danger rule argued by Justice Holmes and accepted by the constitutional scholar Zachariah Chafee, Jr.


160 _Roth v. United States_, 354 U.S. 476 (1957), 484. In this landmark decision, the Supreme Court defines obscenity as a form of expression that is worthless (“utterly without redeeming social importance”) as well as sexually lewd.
other legal scholars, such as Edwin Baker, use the very assumption of ‘truth’ to criticize the marketplace of ideas. Baker writes that there is no such thing as an objective, discoverable ‘truth’ – people are not always rational and they perceive the truth in different ways. In the marketplace, free speech seems to be more a listener’s right to hear than it is a speaker’s right to speak, which in the information society is evident in the concentration of Web traffic at a relatively small number of sites. 

The marketplace’s critics scoff at its theory as impractical or futile. They point out that inequities among the participants can create an unequal playing field that might amplify the voices of the rich while belittling those of the weak. For example, Baker makes an eloquent case that the marketplace “depends on implausible assumptions for its coherence.” He observes that the marketplace of the media has given rise to dominant oligopolies that perpetuate “lack of access for disfavored or impoverished groups, overwhelmingly pervasive participation by favored groups, techniques of behavior manipulation, irrational responses to propaganda, and the nonexistence of value-free, objective truth,” because of which “the marketplace of ideas fails to achieve optimal results.”


162 Baker, Human Liberty.

163 The Internet may accelerate both horizontal and vertical integration of corporations because of convergence as well as the low cost of distributing information. See Andrew Chadwick, “The Political Economy of Internet Media,” in Internet Politics: States, Citizens, and New Communication Technologies (New York, NY: Oxford University Press, 2006), 289-316.

164 Baker, Human Liberty, 3.
The legal scholar, Cass Sunstein, is even more mordant, arguing that because ideas are not like products the marketplace notion is socially suicidal. He writes that the information society’s fragmented discourse actually undermines democracy. Sunstein contends that the mass media have a tendency to exaggerate, that audiences are subject to making diverse interpretations of ideas, and that advertisers seek to purchase time, all of which contentions counter the marketplace’s absolutist claims. More recently, the journalism scholar Michael Bugeja has argued that Internet use has led to a decline in the sense of community.

Another scholar to advocate a conservative or utilitarian position is the constitutional expert, Robert Bork, who generally views the First Amendment as protecting nothing but political speech. Bork rues, “First Amendment jurisprudence has shifted from the protection of the exposition of ideas towards the protection of self-expression – however lewd, obscene, or profane.” Yet another utilitarian scholar, but outside the conservative Borkian mould, is possibly Thomas Emerson himself – he advocates a speech-action dichotomy. Emerson’s “individual self-fulfillment” idea, however, is classically libertarian.

The progressive and pragmatist scholar, John Dewey, criticizes the classical liberal conception of freedom by arguing that freedom is valuable not because of the negative

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165 Ibid., 4-5.
167 See generally, Michael Bugeja, Interpersonal Divide (Cambridge, MA: Oxford University Press, 2005).
absence of constraints but because of a positive “power to be an individualized self.”

Dewey makes a case for social institutions to exist not as a “means for obtaining something for individuals . . . [but as a] means for creating individuals.”

The libertarian theory tends to presuppose the conservative-utilitarian in some ways. For instance, John Stuart Mill, the libertarian, points out that community injury is preempted when every individual is able to express his or her opinions freely: “[T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”

Some thirty years before the Internet was conceptualized in a Rand Corporation laboratory in California, the First Amendment scholar, Zachariah Chafee, Jr., posited that expression was of two kinds – that which served an individual interest so that “life is to be worth living,” and that which served the social interest so that citizens may be well informed of the “truth” in public issues – and that the second type weighed heavier than the first.

Chafee argued that Congress and the courts “maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be

170 Emerson, System.
175 Zachariah Chafee, Jr., Free Speech in the United States (Cambridge, MA: Harvard University Press, 1941), 31-34.
slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war."  

The seventeenth century political philosopher, Thomas Hobbes, argued that for peace to rein in a society, it was essential for the government to repress subversive opinions. More recently, the constitutional scholar, Walter Berns, has argued against extending First Amendment protection to pornographers and members of communist parties – both of which groups happen to extensively use Internet expression – because their speech was not consistent with Berns' definition of "liberal democracy." A conservative or utilitarian position has greatly influenced America’s democracy, writes the law professor, John O. McGinnis: “The perfection of collective democratic processes was the most important rationale for the expansion of free speech during [the last several decades].”

The damage caused by libelous statements in an Internet forum depends on their access and acceptance by the “digital marketplace.” The United States government, since

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176 Ibid., 35.


178 For instance, Google Directory returned more than 26,000 hits in response to the search term “communist party” on 26 January 2005, and almost an infinite number of hits for sexually explicit terms associated with porn sites.


181 On 1 July 1997, President Bill Clinton said, “Government officials should respect the unique nature of the medium and recognize that widespread competition and increased consumer choice should be the defining features of the new digital marketplace.” For the full text of Mr. Clinton’s speech delivered while announcing his administration’s e-commerce policy, see http://clinton4.nara.gov/WH/New/Commerce/message.html (accessed 10 July 2005).
1997, has promoted the Internet as a marketplace of ideas to be overseen by any self-regulatory regime.\textsuperscript{182} However, an inherent flaw of any true marketplace is that it gives participants unequal opportunities of speaking and hearing,\textsuperscript{183} because of which the conservative and utilitarian writers support Internet freedom of expression only to the extent that it advances social values or democratic ideals of their own definition.

One of the main problems of the marketplace, in Baker’s observation, is its inability to ward off the dominance of a few powerful corporations. Baker writes that a disproportionate amount of power tends to flow to private corporations resulting in a diminished and “skewed marketplace.”\textsuperscript{184} In the last decade, it has been documented that private corporations – usually led by Microsoft and Time Warner – have emerged as the dominant user destinations of the Internet.\textsuperscript{185} This raises an important concern because, in the words of the constitutional scholar Alan Dershowitz, “Only the government may not restrict your right of free speech, others can. The Bill of Rights does not grant Americans any


\textsuperscript{183} Baker, Human Liberty.

\textsuperscript{184} Ibid., 250.

\textsuperscript{185} According to Nielsen/Netratings, the top ten U.S. Web sites by parent company in July of 2004 were Microsoft (unique audience of 106 million), Time Warner (94 million), Yahoo! (92 million), Google (61 million), eBay (48 million), U.S. government (44 million), InterActiveCorp (37 million), Amazon (35 million), RealNetworks (32 million) and Walt Disney Internet Group (32 million); The user ratings firm Jupiter Media Metrix reported in June 2001 that sites operated by just four corporations accounted for 50.4 percent of the time that American users of the Web were spending online. At the top of the heap were AOL Time Warner’s sites, with 32 per cent of all minutes spent online in the country, followed by Microsoft, 7.5 per cent, and Yahoo, 7.2 per cent. Overall, only 14 Web destinations controlled 60 per cent of overall browsing time, down from 110 sites in 1999. For details see <www.jupiterresearch.com> (accessed 10 July 2005); See generally, Web user surveys conducted by the Pew Internet & American Life Project, http://www.pewinternet.org/; To give another example, Microsoft announced on October 25, 2002, that it plans to spend $300 million on its advertising campaign on its latest Internet software MSN 8, three times more than the budget of its competitor AOL. In early 2003, MSN – a blend of Internet access, Web portal and specialized Web browser – has nine million subscribers in America compared to AOL’s more than 35 million worldwide.
general right of free speech [emphasis retained from original]." The threat of lawsuits by powerful private entities can act as a prior restraint and chill speech in online forums, especially when nonmedia speakers may be identified by their respective Internet Service Provider. An alleged libel can cause that prior restraint.

2.1.2.3. CRITICAL-CULTURAL AND POSTMODERN

In contrast to the libertarians as well as the conservatives, critical-cultural and postmodern theorists see freedom of expression as most valuable not for individual self-fulfillment or to social order, but for the empowerment of especially vulnerable citizens.

Critical-cultural scholars claim that America’s system of freedom of expression has deepened gender, racial, and ethnic divisions, silenced women and people of color, and effectively excluded those groups from the political process. Postmodernists go a step further to question the very legitimacy of free speech.

The critical media scholar, Robert McChesney, argues that a laissez-faire approach to regulating expression leads to a capture of government by the wealthy or powerful. Others have documented that the existing system of freedom of expression creates an apathetic, self-...

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186 Dershowitz, *Rights from Wrongs*, 179.


centered and cynical society that has neither the interest nor the will to fulfill any democratic mission of citizen sovereignty.\textsuperscript{190}

McChesney contends that the increasing concentration of media ownership is undermining the libertarian foundations of America’s democracy.\textsuperscript{191} The law professor, Monroe Price, cautions that the Internet’s diversity of voices leads to social balkanizations that may actually undermine the individual’s claim to unfettered expression in favor of a community’s need for supposedly beneficial information.\textsuperscript{192} Another law professor, Pnina Lahav, observes that many democratic governments already suffer a tense relationship with protecting freedom of expression for their citizens.\textsuperscript{193} The writings of the cultural critic, Howard Rheingold, tend to assuage the critics’ fears when they recognize a vigorous democratizing potential in the Internet.\textsuperscript{194}

Some legal scholars, such as Steven Shiffrin, express concern about the effects of the uncontrolled individual expression on traditional political values,\textsuperscript{195} while others, such as Stephen Carter\textsuperscript{196} and Cass Sunstein,\textsuperscript{197} view the quick evolution of information technology


\textsuperscript{191} McChesney, Our Unfree Press, 1-28; Also see generally, McChesney, Rich Media.


\textsuperscript{193} Pnina Lahav, Press Law.

\textsuperscript{194} Howard Rheingold, Smart Mobs: The Next Social Revolution (Cambridge, MA: Perseus, 2003).


as being responsible for accelerating the demise of democracy. Critical race theorists, such as Mari Matsuda, highlight the inequities suffered by ethnic minorities in a marketplace controlled by a dominating majority.¹⁹⁸

To the extent that speech is a precursor of action, critical-cultural scholars find Emerson’s speech-action dichotomy¹⁹⁹ to be weak. Historically, they have recognized that freedom of expression in individuals requires a translation into socially useful actions for it to have any meaning for democracy.²⁰⁰ They tend to show little faith in counter speech as recommended by Justice Brandeis or Hentoff. In their view, in a marketplace of ideas dominated by unidirectional media messages, counter speech is ineffective in responding to commercial speech that sexualizes children, hate speech that targets ethnic minorities, libelous speech that is directed at unpopular employers, or speech that glorifies substance addiction.

Critical-cultural authors tend to call for stringent laws to protect their perceived victims from the freedoms of the marketplace. The critical gender theorist, Catherine MacKinnon, supports the censoring of pornography because, in her view, porn is a form of language that culturally constructs individuals to adopt exploitative sexual rules.²⁰¹ Matsuda supports the censorship of hate speech that targets minorities.²⁰²

¹⁹⁷Sunstein, Republic.com.


¹⁹⁹Emerson, System.

²⁰⁰For example, see John Sparrow, Too Much of a Good Thing (Chicago, Il.: University of Chicago Press, 1977).


²⁰²Mari J. Matsuda, et al., Words that Wound (Boulder, CO: Westview, 1993). Matsuda argues “the violence of
The above discussion documents that critical-cultural scholars, regardless of persuasion, advance a distinct theory of the freedom of expression that allows narrow, civic republican, restrictions on Internet expressive rights in order to protect vulnerable groups.\textsuperscript{203}

The concern of critical-cultural writers is developed much further by the postmodern theorists. The postmodernists debunk the very notion of free speech as a myth, reject outright any suggestion of a speech-action dichotomy, and refuse to accept the legitimacy of the marketplace of ideas.\textsuperscript{204} The deconstruction guru, Jacques Derrida, declares, “Speech represents itself; it \textit{is} its representation. Even better, speech is \textit{the} representation of itself.”\textsuperscript{205} The cultural critic, Stanley Fish, explains that free speech “is just the name we give to verbal behavior that serves the substantive agendas we wish to advance.”\textsuperscript{206}

Like critical-cultural theory, postmodernism also sprang from literary criticism and not from the social sciences, as a scholarly movement around the middle of the twentieth century. Postmodernists tend to believe that on and off the Internet, speech always equals action even if it is not already a form of action. Speech is invariably in consonance with the speaker’s social and cognitive condition. One of the postmodernists’ central arguments is

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the word,” writing that “racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.” (p. 23). The book makes a case to outlaw racist speech, but the Supreme Court has generally disagreed.


\textsuperscript{204} See for example, Fish, \textit{There’s No Such Thing}.


\textsuperscript{206} Fish, \textit{There’s No Such Thing}, 102.
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that while empirical social scientists could prove null hypotheses false, they could never prove an unambiguous truth.

The political philosophers, Richard Rorty\footnote{Richard Rorty, \textit{Achieving Our Country: Leftist Thought in Twentieth-Century America} (Cambridge: Harvard University Press, 1999).} and Martha Nussbaum,\footnote{Martha C. Nussbaum, \textit{Upheavals of Thought: The Intelligence of Emotions} (Cambridge: Cambridge University Press, 2003).} argue that speech is not an individual cognitive act, but, rather, the reflection of a trait that is formed socially in an individual. The individual’s background, including his or her cultural and linguistic upbringing and component belief systems, governs what he or she does and even thinks. Postmodernists, like the critical-cultural theorists, view speech as a weapon in a conflict between groups that are unequal. Critics say that while postmodernists eagerly poke holes in existing paradigms, they offer no solutions. Instead, in order to equalize the power imbalance between what they perceive as unequal groups, they might support double standards. For example, while the postmodernists refuse to recognize the superiority of any standard over a competing standard, they tend to advocate a censorship of pornography and hate speech. To apply the words of the Frankfurt School sociologist Herbert Marcuse, “Liberating tolerance . . . mean[s] intolerance against movements from the Right, and toleration of movements from the Left.”\footnote{Herbert Marcuse, “Repressive Toleration.” \url{http://grace.evergreen.edu/~arunc/texts/frankfurt/marcuse/tolerance.pdf} 1965, 11 (accessed 6 June 2004).} The Internet is sometimes defined as a postmodern medium, because it tends not to recognize hierarchies in power or status among individual netizens.\footnote{Manuel Castells, \textit{The Internet Galaxy} (New York, NY: Oxford University Press, 2002).}
In conclusion, the critical-cultural and postmodernist scholars emphasize the need to regulate speech that disadvantages vulnerable groups or fails to empower underdogs. MacKinnon argues a theory that speech has the power to construct its users’ personalities, or, to quote Derrida, “We can no more imagine effective speech without there being self-representation than we can imagine a representation of speech without there being effective speech.”

The preceding discussion of theory shows that the freedom of expression plays a pivotal role in the success of individual and social rights, but there are irreconcilable differences among the various theoretical traditions. The theoretical diversity is reflected in the often conflicting publishing laws that regulate jurisdictions. Five years back, an author wrote in example, “The current state of Internet libel law remains far from ideal. Although some countries refuse to hold ISPs liable for defamatory statements, others do not. Thus, the current country-by-country approach to policing Internet libel leaves ISPs with no clear rules to follow. Consequently, ISPs are chilled from publishing newsworthy information.”

Chapter 7 develops a set of normative recommendations that would try to reconcile the above positions to ensure predictability in libel litigation across jurisdictions.

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211 Derrida, *Speech and Phenomena*, 57.

212 Scott Sterling, “International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution,” 21 Loyola of Los Angeles Entertainment Law Review (2001), 327; The situation has changed little since then, even though there have been non-ISP developments such Dow Jones & Co. v. Gutnick, High Court of Australia case no. [2002]HCA56. <http://www.4law.co.il/582.htm> (accessed 5 June 2004). Dow Jones squared with Mr. Gutnick in November of 2004, paying him $180,000 in
2.2. FREEDOM OF EXPRESSION, THE INTERNET AND INDIVIDUALIZATION

This section explores the Internet’s relationship with the freedom of expression documented in the previous section, discussing whether new technologies such as blogs fundamentally expand or reconstruct that freedom.

The Internet’s invention\(^{213}\) has advanced the notion of a cross-jurisdictional information society with which the Internet is considered to be coextensive.\(^{214}\) With the worldwide Internet population having crossed one billion,\(^{215}\) the technology is entering a stage of maturity\(^{216}\) in its popular applications as a source of information, a forum of expression, and a medium of instantaneous or ‘real time’ communication.

By taking away the “space and time” lags between a message’s source and its recipient, the Internet has operationalized McLuhan’s idea of a global village or “global embrace.”\(^{217}\) Irrespective of introducing an instantaneous communication highway with a burgeoning amount of Web-specific content, the Internet has fundamentally changed the

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\(^{214}\) Supra. n. 8.

\(^{215}\) The “worldwide Internet population” by end-2005 was estimated to be 1.08 billion, and projected to increase by 2010 to 1.8 billion, according to a study by Computer Industry Almanac, Inc. The results of this as well as other studies about the use of search engines, Internet bulletin boards and email, were accessed 15 June 2006 at http://www.clickz.com/showPage.html?page=151151.

\(^{216}\) A technology is said to enter a stage of maturity when it assumes “a life of its own,” says Ray Kurzwell, *The Age of Spiritual Machines* (New York, NY: Penguin, 2000), 19. Kurzwell classifies the seven stages in the life cycle of a technology as precursor, invention, development, maturity, pretender, obsolescence and antiquity.

\(^{217}\) “After more than a century of electric technology, we have extended our central nervous system in a global embrace, abolishing both space and time as far as our planet is concerned.” Herbert Marshall McLuhan, *Understanding Media* (New York, NY: Mentor, 1964), 3.
ways citizens communicate. It has caused a revaluation of some traditional effects of mass communication such as editorial control, agenda-setting and framing.

Every new publishing phenomenon has been catalyzed by a corresponding leap in the infrastructure of expression: The Chinese invention of paper galvanized writing for the record, Gutenberg’s invention of movable-type printing transformed the handbills into mass-circulation newspapers, Marconi’s founding of wireless telegraphy birthed radio; Vladimir Zworykin’s electron scanning tube developed into successful television; and Robert Maurer et al.’s optic-fiber cable enabled massive telecom networks. Similarly, the Internet spawned a multitude of decentralized media such as Web blogs.

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218 Michael Bugeja documents how some long-standing media theories may not hold in Internet communication. See Bugeja, *Interpersonal Divide*; Also see John V. Pavlik, *Journalism and New Media* (New York, NY: Columbia University Press, 2001), which discusses the evolution of online journalism from “shovelware” (newspapers placing their print content online) to token multimedia to non-linear storytelling and “story immersion.” Pavlik discusses the large increases in Web-specific content produced by the media organizations.

219 The “press as watchdog” idea goes back at least to the 18th century, when doubts were expressed over whether even elected parliaments could be trusted to serve the common good. For a discussion, see George Boyce, “The Fourth Estate: The Reappraisal of a Concept,” in *Newspaper History: From the 17th Century to the Present Day*, eds. George Boyce, James Curran, and Pauline Wingate (London, U.K.: Sage, 1978), 19-40.

220 This term was coined by Maxwell E. McCombs, and Donald L. Shaw, in “The Agenda Setting Function of the Press,” *Public Opinion Quarterly* 36 (1972): 176-87. Agenda setting theorists argue that the mass media tell the audience “what to think about” by setting the political agenda, and by defining the political problems, on a continuous, day-to-day basis, while political parties and politicians generally respond to a consensus view of what should be done. For an overview of agenda setting research, see “Symposium: Agenda Setting Revisited,” *Journal of Communication* 43, no.2 (1993): 58-127.

221 Framing, or frame analysis, a theory of media power related to “agenda setting,” describes the set of expectations that consumers of mass media use to make sense of each social situation through learned social cues.

Are Web blogs\textsuperscript{223} worthy of high legal protection? The question whether bloggers can produce journalism is moot – many bloggers successfully compete with mainstream media reporters in the quality of political coverage.\textsuperscript{224} Blogs have joined the social conversation by acting as watchdogs of not just government but also of the mainstream media,\textsuperscript{225} embellishing their criticism with iconoclastic testimony, personality and a keen if pompous eye.\textsuperscript{226} Still, blogs’ bigger social contribution may be that they increase manifold the ideas available in the marketplace, effectively challenging any information hegemony of an increasingly consolidating corporate media. If there are 53.5 million blogs,\textsuperscript{227} it is that many potential voices that were undocumented before 1999 when Pyra Labs launched the first popular Blogger software. If the information society is a bridge to the offline marketplace of ideas, blogs act as individual pillars of that bridge by decimating technical


\textsuperscript{225} The mainstream media have been observed to occasionally serve as “guard dogs” of the capitalist or ruling establishment rather than as watchdogs, their role as perceived in Thomas Carlyle’s conception of a fourth estate for the 19th century English and French political systems. “While media do serve a surveillance role, the question is, what \textit{kind} of surveillance? It may be suggested that the media serve not as watchdogs for the community as a whole, but as guard dogs for groups having the power and influence to create and command their own security systems.” Clarice N. Olien, George A. Donohue & Philip J. Tichenor, “Conflict, Consensus, and Public Opinion,” in Theodore L. Glasser & Charles T. Salmon, eds., \textit{Public Opinion and the Communication of Consent} (New York, NY: Guilford Press, 1995), 305.

\textsuperscript{226} “It was [the blogger Steve] Gillard who threw down the dueling glove at the mainstream press which, he said, holds people accountable but freaks all over the car lot when accountability is expected of them. ‘I think it would be a really, really good idea to track reporters word for word, broadcast for broadcast, and print the results online,’ Gilliard proposed.” James Wolcott, “The Laptop Brigade,” 207.

\textsuperscript{227} See www.technorati.com (accessed 20 August 2006).
requirements of Web publishing such as knowledge of HTML programming, registration
procedures or Web hosting. Blogs render access to the marketplace easy to the non-techie.

Blogs and other such Web forms enable a “logic of flows,” give individual netizens
an electronic soapbox and catalyze an individualized condition which manifests as a
feeling of empowerment – having the ability to instantly and simultaneously express views
and comments, meaningful or not, to diverse and vast audiences across the wired world.

Individualization is exemplified in the personal independence of the numerous virtual
identities a netizen may adopt. Paradoxically, it exists as a social or psychological condition
in the information society even though the Internet, as Negroponte wrote many years ago,
exemplifies a neo-Darwinian technology that is hard to rein in, a technology that seems to
negate notions of centrality, territoriality and materiality. The individualized condition, write
Ulrich Beck and Elisabeth Beck-Gernsheim, is quickly “becoming the social structure of the
second modern society.” As a cultural precept, individualization is experienced in the
rights and obligations by which netizens collectively create the predicates for the Internet-

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229 “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” Justice John Paul Stevens for the majority in *Reno v. ACLU*.

230 Examples of such empowerment have been discussed widely in the quickly emerging literature on effects of Internet use. For instance, see Yang Shaoguang, “An Information Discussion on Internet Matters,” *Chinese Education & Society* 39, 1 (January 2006): 65.


233 Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization* (London, U.K.: Sage, 2002), xxii. The authors differentiate the individualization of the “second” modernity from the egotistic individualism of 20th century America or post-Enlightenment Europe. They quote Scott Lash as saying that “if the first modernity comprises predominantly a logic of structures, then the second modernity . . . involves a logic of flows,” vii.
mediated society to hold together not with the help of established legal or moral traditions but by a collective of netizen-centric reciprocal online communications that, paradoxically, are often fragmented or open-ended or nonlinear.

Many blogs offer an undeniably poor quality of content but it may mirror that of the other media such as print, radio and television which all took several decades to become respectable – newer the medium, shorter has been its recalcitrant childhood. Because blogs are easy to access, as is the freedom to express (the American constitution recognizes the freedom of expression as a pre-existing or natural right), Thomas Paine’s words may explain the pervading crassness: “What we obtain too cheap, we esteem too lightly.”

History suggests that as the medium evolves, the cream of the blogs would set quality trends for the majority.

The ability to communicate instantaneously, as well as the existence of an individualized condition, are complemented by what Vin Crosbie delineates are the new medium’s fundamental traits: It enables digital (as opposed to physical) delivery of information, enables digital addressibility, is a quantum shift toward control by consumers, and is a marked triumph of open-anonymous systems over closed-proprietary systems.

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234 Bloggers can be gratuitous, take cheap shots, lie, display explicit confirmation bias, and display bad spelling and other cringeworthiness.


236 See, Vin Crosbie, The Four Fundamental Traits of the New Medium,
2.2.1. THE GLOBAL REACH OF A ‘REAL TIME’ MEDIUM

This section discusses how the Internet-mediated information society is characterized by decentralized communications, with a reach in ‘real time’ across the wired world – the primary reason for the challenge of multiple personal jurisdictions.

Because of the Internet’s advent, perceptions of individual identity and communicative efficiency may be rapidly evolving, and some scholars believe that by creating non-linear avenues of expression, the Internet has reinforced the public sphere.\textsuperscript{237} Even the critical scholar Jürgen Habermas\textsuperscript{238} states, “The Internet has certainly reactivated the grass-roots of an egalitarian public of writers and readers.”\textsuperscript{239} Counter-intuitively, because Internet-mediated communication does not show some characteristics of deliberation such as face-to-face interaction, media power and speaker-addressee reciprocity, it can fragment the public discourse and undermine democracy.\textsuperscript{240}


\textsuperscript{238} Habermas, of the Frankfurt School, is arguably best regarded for \textit{The Structural Transformation of the Public Sphere} (Cambridge, MA: MIT Press, 1989), a seminal work on liberal democracy, social evolution, civil society and public life initially published in German in 1962.


\textsuperscript{240} The law professor, Cass R. Sunstein, highlights the increasing volume of extremist voices on the Internet as users choose to read or listen to only those points of view they already share. Sunstein’s claim is that the Internet causes users to become more close-minded and extremist, as opposed to being exposed to a diversity of unexpected viewpoints. Sunstein, \textit{Republic.com}; Also see Bugeja, \textit{Interpersonal Divide}. “Computer-mediated communication in the Web can claim unequivocal democratic merits only for a special context: it can undermine the censorship of authoritarian regimes which try to control and repress public opinion. In the context of liberal regimes the rise of millions of fragmented chat-rooms across the world tend instead to lead to the fragmentation of large, but politically focused mass audiences into a huge number of isolated issue publics. Within established national public spheres, the online debates of web users only promote political communication, when news groups crystallize around the focal points of the quality press, e.g. national newspapers and political magazines.
Even as the Internet was in its early stages of development at the Rand Corporation’s laboratories in California in the late 1960s, the sociologist, Amitai Etzioni, introduced the notion of participatory democracy in sociological discussions about the emerging information society. 241 The Internet represents a post-industrial society that encourages mass-participation242 in ‘real time’ in numerous parts of the wired world.

The corporate media have described the Internet’s public discourse as in itself an interactive form of democracy243 mediated by computers, which encourages the mass media to act as interpersonal media, recognizes the presence of multi-nodal information channels, and recognizes a shift in editorial control of information from professional journalists to Internet users such as bloggers and webmasters. Even as the forces of commercialism have eroded the investigative drive in journalists, much in-depth reporting now occurs in the “blogosphere,” instead of in the corporate media.244 Still, as the syndicated columnist Thomas Friedman writes, the Internet seems to be a system where “everyone is connected but no one is in control.”245

(A nice indicator for the critical function of such a parasitical role of online communication is the bill for Euros 2088.00 which the anchor of Bildblog.de recently sent to the director of Bild.T-Online for “services”: the bloggers claimed they improved the work of the editorial staff of the Bildzeitung with useful criticisms and corrections; cf. Der Spiegel 18, 2006, p. 95).”

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242 Mattelart, *Information Society*, 44. The term post-industrial was coined in 1913 by “the English trained Indian scholar Ananda K. Coomaraswamy, a specialist in Far Eastern art and author of a seminal work on Buddhism and Hinduism. The notion carried with it the hopes of those who believed in the imminent collapse of industrial civilization and a return to decentralized society.”


244 Dan Gillmor, *We the Media* (Sebastopol, CA: O’Reilly, 2004).

The new media researchers, Merrill Morris and Christine Ogan, write that achieving a critical mass of adopters is essential for any medium to be considered a mass medium (and therefore economically viable to advertisers), and by this definition, the Internet is a mass medium. More than 70 per cent of Americans use the Internet at least once a month, and the average user is online for nearly 12 hours a week. The so-called digital divide seems to be closing: The fastest growing populations of U.S. users are Latinos and African-Americans, and only 4 per cent more American men than women use the Internet.

With the Internet’s potential to turn each of its users into a publisher, it is no wonder that incidents of online libel are common, fragmented and inadequately documented.

Some of the Internet’s unique characteristics are that not only is it both a mass and interpersonal medium, there is evidence that Internet users actually conceptualize, and describe, cyberspace as a place. Imagining the information society as a place rather than as a historical period has led to a number of cases and statutes that “enshrine the idea of property interests in cyberspace,” with judges, legislators, and legal scholars tending to apply physical assumptions about property to the Internet, and owners of Internet resources


trying to protect their respective cyberspaces from encroachments typical of the physical world.

In the same vein, the dissertation conceptualizes the Internet-mediated “information society” as a place rather than as a historical period. Continuously increasing bandwidth and computing capacity promise to make the Internet increasingly multisensory and engaging, and to indulge notions of an alternate “commons.”

Besides, some of the traditional rationales that regulate broadcast, cable and common carrier do not apply to the Internet, hypertext displays novel properties such as linkability and spatiotemporality – that is, it literally transcends space and time in access – as well as other idiosyncrasies are evident: For example, once a Web domain name is taken (unlike a newspaper masthead), none else can have that same address unless the universal resource locator (URL) is sold.

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250 See sec. 2.4.2 for an explication of “information society.”

251 “Bandwidth,” used in the context of computers, refers to the speed at which information can be transferred from one place to another.

252 Intel co-founder Gordon Moore’s famous observation in 1965 that computing capacity (transistor density) would double every two years, called Moore’s Law, complemented by the increase in bandwidth, means that cyberspace places will become even more multisensory and engaging, bringing back the 1990s’ fantasies of an alternate “commons.” For an exposition of Moore’s Law, see <http://download.intel.com/research/silicon/moorespaper.pdf> (accessed 4 June 2004).

253 The idea of a “commons” is described by Lawrence Lessig in his article “The Internet Under Siege” in the Foreign Policy issue of November-December 2001: “The Internet took off precisely because core resources were not ‘divided among private owners.’ Instead, the core resources of the Internet were left in a ‘commons.’ It was this commons that engendered the extraordinary innovation that the Internet has seen.”

254 Unlike in broadcast, the Internet does not suffer from interference or scarcity, the two predicates cited by the Supreme Court in the 1969 case of Red Lion Broadcasting Co. v. FCC. And unlike cable, the Internet scores high on competition, allowing its users the option of seeking content from a potentially infinite number of sources, thus negating the Supreme Court's rationale for regulating cable expressed in the 1997 case of Turner Broadcasting System v. FCC. For a discussion of Internet regulation, see Steve Mitra, “The Death of Media Regulation in the Age of the Internet,” New York University Journal of Legislation and Public Policy, 4, no. 2 (2001): 415-38.
The existing libel law has traditionally found its roots in the “print culture.” The emergent “net culture,” comprising computer networks, interactive machines, hypertext and new modes of visual communication, has been recognized as a testing ground for the law. A pertinent question is whether, having transformed politics in many democracies, the net culture also calls for a transformation of the libel law that defines the fundamental freedoms in those democracies.

2.3. AMERICA’S CONSTITUTIONAL LAW OF LIBEL

This section provides the facts and other material for the analyses of chapters 5 and 6. (Besides, this chapter also largely informs the research questions stated in chapter 3). Specifically, the section introduces common law defamation, describes the importance of reputation, introduces the “actual malice” rule established by the landmark Supreme Court case of New York Times v. Sullivan in 1964, and discusses some progeny of that case – all in the context of libel in the information society.

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255 Print culture comprises the prolific publication of books, newspapers and magazines issued by and for diverse or marginalized groups. For a discussion of this term, see generally James P. Danky and Wayne A. Weigand, eds. Print Culture in a Diverse America (Champaign, IL: University of Illinois Press, 1998).

256 The new media commentator, Howard Rheingold, uses “net” as “an informal term for the loosely interconnected computer networks that use CMC technology to link people around the world into public discussions.” See Howard Rheingold, “The Virtual Community,” in Reading Digital Culture, ed. David Trend (Malden, MA: Blackwell, 2001), 276.


The legal historian, Theodore Plucknett, documents that a primary justification of libel law is to define the system of freedom of expression. In addition, the semantics of libel terms determine the effectiveness or liability of a communication, and consequently they also define culture – even the “free culture” of the electronic commons and of the Internet public sphere.

The Restatement (Second) of Torts defines defamation as statements that tend to expose a person “to hatred, ridicule or contempt.” Generally, defamation reflects unfavorably on a person’s morality or integrity, or discredits him or her in his or her occupation, or restricts that person’s social contacts by alleging a mental illness or a communicable disease. In the Anglo-American common law tradition, such an attack against reputation may be of two kinds: Libel is defamation that is written or broadcast or in some other permanent form, and slander is defamation that is spoken by word of mouth. Defamation by writing is regarded to cause the greater harm.

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262 The metaphor of “electronic commons,” and its regulation, are discussed in Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York, NY: Basic Books, 1999). The term “public sphere” was conceptualized by the political philosopher, Jürgen Habermas, as “a discursive arena that is home to citizen debate, deliberation, agreement and action” (cited by Dana R. Villa in “Postmodernism and the Public Sphere,” *American Political Science Review*, 86, 3 [September 1992], 712.)

263 Restatement (Second) of Torts, Sec. 559. Restatements or treatises, published by the American Law Institute, are collations and analyses of the common law for use by judges and lawyers, and are considered almost as authoritative as the law itself.

264 Ibid.
As early as in 1604, William Shakespeare had recognized the importance of reputation: “He that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed.” In the two centuries following, libel law developed by precedent in the common law of England which in turn was adopted by the American states.

Perhaps the best documented legal dispute from colonial America is the remarkable 1735 libel trial of John Peter Zenger, publisher of the *New York Weekly-Journal*. Zenger was jailed by the maneuvering royal governor, William Cosby, after he had turned his journal into a voice for the governor’s opponents. Cosby charged him with “printing and publishing a false, scandalous and seditious libel, in which . . . the governor . . . is greatly and unjustly scandalized, as a person that has no regard to law nor justice.” Courts of the time had accepted the sedition maxim of “more the truth, more the libel,” so even though Zenger’s published criticisms were true he seemed to have no chance of winning. Zenger’s attorney, the well-heeled and well regarded Andrew Hamilton of Philadelphia, however pulled off a philosophical coup d’état. He ignored Cosby’s hand-picked judge to appeal directly to the jurors, persuading them to look beyond the sedition maxim and to find Zenger’s statements libelous only if they were untrue. Hamilton’s eloquence so touched the jurors that they returned a not-guilty verdict.

The Zenger case thus established truth as a defense, a common law tradition hailed by the American libel regime for the coming 229 years – until *New York Times* rendered

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266 *Othello*, Act III, Scene 3.

267 See generally Paul Finkleman (ed.), *A Brief Narrative of the Case and Trial of John Peter Zenger* (Naugatuck, CT: Brandywine, 1997).
truth relatively impotent, instead placing the burden of proof on the plaintiff to prove falsity (regardless of whether the plaintiff was public or private).^{269}

Falsity was to be proved by a standard of “convincing clarity” established for public plaintiffs by *New York Times v. Sullivan*, as opposed to a *prima facie* standard.^{270} *Prima facie* falsity would imply a claim of falsity that has enough integrity to be legally sufficient to establish the fact, whereas falsity by “convincing clarity” would indicate a much higher burden of proof lying somewhere between “preponderance of evidence” and “beyond reasonable doubt.”

2.3.1. *NEW YORK TIMES V. SULLIVAN AND ITS PROGENY*

In 1964, the Supreme Court decided a historic case^{271} in which it rewrote the fault standard to “actual malice” in cases involving libel plaintiffs who were public officials, that is those elected to a governmental position.^{272} The Supreme Court emphasized in its judgment that there was no constitutional value in false statements of fact,^{273} but such statements deserved limited protection in order to ensure a measure of breathing space around constitutionally valuable speech. The high court’s justification was that some amount

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of “erroneous statement is inevitable in free debate.” Justice William J. Brennan, Jr., wrote for the unanimous court that to require the critic of a public official to prove the truth of his or her statement might chill free speech by causing would-be critics to be overly cautious “because of doubt whether [the alleged libel] can be proved [true] in court or fear of the expense of having to do so.” Instead, the justices shifted the burden of proof, which they called “actual malice,” to the plaintiff.

In the decade following the *New York Times* decision, the high court decided a series of cases in which it explained that the actual malice standard includes criminal (“breach of peace”) libel, that public officials include those who are not only elected, but also appointed by the government to “have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs,” that the actual malice ruling covers “public figures” as well, and that it includes candidates for public office as well as applies to matters of an official’s private life that touch on his or her fitness for office. In 1970, the high court allowed a public plaintiff the process of “discovery,” by which he or she could attempt to delve into the subjective state of mind of a media defendant.

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274 Ibid., 271.
275 Ibid., 279.
276 The high court defined “actual malice” as a statement “made with knowledge of its falsity or with reckless disregard of whether it was true or false.” 376 U.S. at 280 (S. Ct. 39 1964).
280 In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), Alphonse Roy of New Hampshire, candidate for the U.S. Senate, was classified as a “public official” in a libel action.
in order to prove actual malice,\footnote{Herbert v. Lando, 441 U.S. 153 (S.Ct. 418 1979).} and in \textit{Gertz v. Welch}, 1974, it ruled that individuals who become temporarily active in some public cause were limited-purpose public figures and covered by the actual malice ruling.\footnote{Gertz v. Welch, 418 U.S. 323 (S.Ct. 625 1974).} These cases effectively brought the common law of seditious libel, or the criticisms of public officials and celebrities, under the First Amendment umbrella.

In other cases, too, the court clarified the law of libel. For example, in the 1986 case of \textit{Philadelphia Newspapers v. Hepps},\footnote{475 U.S. 767 (S.Ct. 421 1986).} the Supreme Court further extended its protection for media defendants by requiring libel plaintiffs to prove that the alleged defamation was, indeed, false. Earlier to \textit{Philadelphia}, by common law tradition, the burden of proof was on the media defendant to prove that its report was true. Nevertheless, in the 1990 case of \textit{Milkovich v. Lorain Journal Co.},\footnote{497 U.S. 1 (S.Ct. 621 1990).} the high court refused to grant the media constitutional protection against libel for statements of opinion. And in the 1991 case of \textit{Masson v. New Yorker Magazine Inc.},\footnote{485 U.S. 473 (S.Ct. 444 1988).} the high court ruled that deliberate alteration of quotations that change the meaning of an original statement can be defamatory.

Two of the progeny cases were especially relevant in defining the privilege introduced in \textit{New York Times – Gertz} and \textit{Milkovich}. In the former case, the Supreme Court ruled that private plaintiffs did not have to show actual malice but a fault standard at least equal to negligence. In the latter, the high court refused to extend constitutional privilege to defamatory opinion, ruling that “simply couching a statement – ‘Jones is a liar’ – in terms of
opinion – ‘In my opinion, Jones is a liar’ – does not dispel the factual implications contained in the statement.”

There seems to be little doubt that the Supreme Court, in New York Times and its progeny, envisaged a special status for the institutional media, as opposed to nonmedia including bloggers. In a 1975 law review article, Justice Potter Stewart wrote, “The publishing business is . . . the only organized private business that is given explicit constitutional protection.” Even though Justice Brennan has acknowledged, in a footnote of a dissenting opinion, that “there has been an increasing convergence of what might be labeled ‘media’ and ‘nonmedia,’” the high court has in at least two cases made special efforts to state that the issue of actual malice protection for nonmedia defendants remains unresolved. Consequently, even though the Electronic Frontier Foundation advises bloggers that “blogs have the same constitutional protections as mainstream media,” bloggers might do well to expect litigational consequences.

The First Amendment framework used by the high court for libel in New York Times and Gertz has changed little even though the definition of “media” has undergone a

288 Dun & Bradstreet, 472 U.S. 749 (S.Ct. 626 1985), at 782, n.7. In this case, at least six Justices appeared to reject the distinction between media and nonmedia: “. . . In the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.” Id., at 783-84 (Justice Brennan, dissenting).
289 More on this in sec. 2.3.4; See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986). “[W]e have no occasion to consider what standards would apply if the plaintiff sues a nonmedia defendant” (citation omitted); Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 n.5 (1990). “In Hepps the Court reserved judgment on cases involving nonmedia defendants (citation omitted) and accordingly we do the same.”
290 The EFF uses Justice Brennan’s dissenting opinion of Dun & Bradstreet cited in supra., n. 288.
metamorphosis thanks to the Internet. When the high court considered defamation as a cause of action inseparably tied to the act of publication, it also demonstrated its understanding of the means of mass communication. In 1964 and 1974, “the media” was relatively easily defined – print publishers and broadcasters. As a result, in Gertz the Supreme Court announced the public figure test with a relatively homogeneous class of defendants in mind. As one writer points out, “By looking only to the public or private status of the plaintiff in determining the appropriate degree of fault, the public figure doctrine assumes equality among media defendants.”

That did not deter the law professor David Logan, analyzing empirical data on libel and the media collected over the last two decades by the Libel Defense Resource Center, to conclude that the Supreme Court’s decisions in New York Times and Gertz “rank among the great civil liberties victories of the last half-century.” The New York Times decision superseded, in part, the libel laws of the fifty states. In part, it transformed common law of libel, which makes libel a strict liability offense, into a “fault” tort, and transferred the burden of proof from the defendant's having to show “truth” to the plaintiff's having to show “actual malice.”

2.3.2. FACTS AND LAW OF NEW YORK TIMES V. SULLIVAN

The case had a backdrop of the struggle for civil rights in southern America in the early 1960s. Commissioner L.B. Sullivan of Montgomery, Alabama, elected the official in


charge of that city’s police, sued the *New York Times* for publishing a March 29, 1960, full-page advertisement purchased by a group of civil rights activists. The ad did not name him when it said the “widespread nonviolent demonstration” of “Southern Negro” students was being met “by an unprecedented wave of terror,” but it made serious accusations against the police in general, including several false statements. Mr. Sullivan demanded that the *Times* publish a retraction, but the paper refused and instead asked why he believed the ad referred to him. Mr. Sullivan did not respond but joined three other Montgomery officials and the Alabama governor, John Patterson, to sue the *Times* for $3 million. At the trial, Mr. Sullivan argued that although he was not named in the ad, the charges of police abuse had defamed him because he supervised the police department. The court awarded him a sum of $500,000, the largest libel judgment in Alabama to that date, which the state supreme court affirmed.

But when the *New York Times* appealed, the U.S. Supreme Court overturned the Alabama decision. Writing for a unanimous high court, Justice William Brennan said Alabama’s libel law did not adequately safeguard freedom of speech and press as required by the First and Fourteenth Amendments. At issue was “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.” The justice said a civil suit brought by a public official such as Sullivan created the same kind of dangers to First Amendment freedoms as a

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seditious libel prosecution initiated by the government. Brennan argued that the *New York Times* ad was not purely commercial speech, but rather political speech that “communicated information, expressed opinion, recited grievances and sought financial support” on behalf of a cause “of the highest public interest.”

Justice Brennan defined an “actual malice” statement as made “with knowledge that it was false or with reckless disregard of whether it was false or not.” Proof that the defendant harbored common law malice, defined as an intent to do harm, or ill will, was not evidence of actual malice. The communication scholar, Wat Hopkins, has seen actual malice as a subjective determination of the publisher’s state of mind with regard to the falsity of his or her statement at the time of publication, and the Supreme Court has held that a plaintiff has a right to inquire into that state of mind.

The high court relied on at least two sources to make its argument in *New York Times*. One was the history of the Sedition Act of 1798, a federal law never tested in the Supreme Court but which Congress accepted was unconstitutional, that had made criminal the utterance of “any false, scandalous and malicious writing or writings against the

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295 Seditious libel refers to criticism of the government or the king. Freedom of expression is traditionally defined by the government’s theoretical tolerance of seditious libel. See generally Chafee, *Free Speech*.

296 Commissioner Sullivan had cited the Supreme Court’s 1942 decision in *Valentine v. Chrestensen*, in which the high court had denied constitutional protection to a handbill it had called “purely commercial advertising.”


government of the United States [or] Congress [or] the President.” The second was a privilege, recognized by several states, protecting from defamation laws those who act in good faith in criticizing government policies and officials.

Critics of the actual malice rule argue it is difficult, if not impossible, to prove the defendant’s state of mind at the time of the publication, because “reckless disregard” may not be a state of mind. Even negligence might be difficult to prove by the “discovery” process. Some legal scholars have decried the Supreme Court’s libel doctrine as “a failure” because they believe it refuses to accede the legitimate claims of some libel victims but chills speech by increasing litigation costs. The law professor, Randall Bezanson, declares that a change in the libel law is “imperative,” because “for those who placed faith in the privileges created by New York Times Co. v. Sullivan and its progeny, today’s libel tort must be discouraging, if not utterly devastating, for it falls substantially short of safeguarding press freedom and fails to safeguard individual reputation as well.” Still, the object of this dissertation is to examine libel law not so much by the status of press freedom as by that of the fifth estate’s freedom.

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303 376 U.S., at 280-82.
304 For critical comments see generally, John Soloski and Randall P. Bezanson, eds. Reforming Libel Law (New York, NY: Guilford Press, 1992); Wat Hopkins, Actual Malice; and Anthony Lewis, Make No Law.
2.3.3. STANDARDS OF FAULT

In the common law, a libel plaintiff acted under the doctrine of strict liability, or “liability without fault,” which meant that no matter if the defendant committed the libel out of a good motive, or by accident, or in ignorance, he or she was liable for damages. There was no requirement that fault be shown, as long as the act met the conditions of defamation, publication and identification.

However, the New York Times ruling made it mandatory for a successful libel plaintiff to have proved fault. The three standards of fault are as follows.

1. “Negligence” is the minimum burden of fault established for private plaintiffs in the 1974 case of Gertz v. Welch, where the Supreme Court said such plaintiffs do not have to prove actual malice even though the subject of the controversy is a public issue. In cases where the minimum burden is proved, damages are restricted to actual injury, with no presumed or punitive damages permitted. In common law of libel, an act of negligence is defined as doing something that reasonable or prudent persons in the normal course of affairs would not do, or not doing something that reasonable people would certainly do. In Internet libel, this means failure of a netizen to check the facts of his or her post or failure to contact the person who is allegedly defamed, or discrepancy in the post and source cited.

2. “Gross negligence” refers to a purposeful or deliberate failure to do what is prudent or reasonable.

308 For example, in the case of John H. Faulk v. Aware, Inc., et al., 14 N.Y.2d 899 (1964), the appellate court upheld an award of compensatory and punitive damages against Aware, Inc., for publishing articles alleging that the plaintiff, a New York television and radio artiste, was a Communist, which destroyed his career and removed him as an office-bearer of American Federation of Television and Radio Artists.

309 Tedford & Herbeck, Freedom of Speech, 97.
3. “Actual malice” refers to knowingly communicating a lie or doing so with a reckless disregard for the truth. In the *New York Times* case and its progeny, the high court set actual malice as the standard of fault to be proved by public-official and public-figure defendants. Actual malice is a high bar for liability in defamation lawsuits brought by public persons against the media.

2.3.4. ACTUAL MALICE AND NONMEDIA DEFENDANTS

In two prominent cases, the Supreme Court reserved its view on whether nonmedia defendants were protected by the actual malice doctrine.

In 1979, the *Philadelphia Inquirer* published a series that including an allegation that Thrifty stores and their parent franchiser had connections to organized crime which they used to get favors from the state administration. Maurice S. Hepps, Thrifty’s principal stockholder sued for libel. Pennsylvania followed the common law rule that the story was presumed to be false and the *Inquirer* had the burden of proving the truth, a rule that was upheld by Pennsylvania’s supreme court. On appeal, the U.S. Supreme Court reversed, ruling that a private plaintiff suing a media defendant must prove falsity of the allegation, thus turning the common law rule on its head. Thanks to the earlier case of *Gertz*, private plaintiffs also must prove a minimum degree of fault of negligence, so such plaintiffs need to prove both fault and falsity. In this case the majority opinion, authored by Justice Sandra Day O’Connor and joined by four other associate justices, specifically stated, “[We have no occasion] to consider what standards would apply if the plaintiff sues a nonmedia defendant.”

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310 Ibid.

In the case of *Milkovich v. Lorain Journal* four years later, the majority opinion, authored by Chief Justice William Rehnquist and joined by six associate justices, also stated without ado, “In *Hepps* the Court reserved judgment on cases involving nonmedia defendants and accordingly we do the same.”

However, Justice Brennan’s dissenting opinion, joined by Justice Marshall, is highly relevant to the theme of the dissertation: “The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. I continue to believe that ‘such a distinction is irreconcilable with the fundamental First Amendment principle that “[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual’.”

Justice Brennan’s view seems to be especially important in the information society for the reasons discussed in section 2.4.

### 2.3.4. PUBLIC FIGURES

Given the information society’s electronic commons and electronic soapboxes, an especially important *New York Times* progeny may be *Curtis Publishing Co. v. Butts*, in

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312 The *Milkovich* court grappled with a post World War II assumption of the common law that a statement of opinion, as opposed to a statement of fact, could not be proved true or false and was hence privileged and not defamatory. The high court refused to extend any special constitutional privilege to opinion, ruling that *News-Herald* columnist Ted Diadiun’s allegation that “Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth,” was not protected purely just it was an opinion.

313 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 n.5 (1990). (Citation omitted).

314 Ibid., at 23. (Citations omitted).

315 Lessig, *Code*. 
which case the high court extended the actual malice rule to “public figures.” The high court declared Wally Butts, the athletics director of the University of Georgia, and Edwin Walker, a retired army general who had voluntarily thrust himself into a public controversy, to be public figures. Again, in the 1970 case of Greenbelt v. Bresler, the high court ruled that the real estate developer, Charles S. Bresler, was a public figure in his community because he “was deeply involved in the future development of the city of Greenbelt.”

It may be relatively hard to determine whether a nongovernmental individual is a public figure, but the high court recognizes two categories of public figures: All-purpose and limited-purpose.

The former “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. [On the other hand, limited-purpose public figures are those who] . . . have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. [Both categories of public figures] invite attention and comment.”

All-purpose public figures include nationally syndicated columnists, television personalities, and well-known actors. A limited-purpose one may be an individual who temporarily or “voluntarily injects himself or is drawn into a particular public controversy

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319 Ibid., 8.

Limited-purpose public figures are harder to identify – a judge needs to decide the classification in court.

Some individuals involved in public issues are not classified as public figures. For example, a private attorney employed as counsel, or a prominent socialite who is being sued for divorce by her wealthy husband, or a research scientist who receives a federal grant. A convicted criminal does not retain his or her public-figure status after the trial has ended.

The public figure doctrine, however, seems to need some refinement for the information society, in which, as one author notes, “traditional media players must compete not only with each other, but also with citizens who once merely constituted their audience. This complex taxonomy of potential defamation defendants simply surpassed the Gertz court’s capacity for imagination.” In other words, that nonmedia actors have emerged as a major category of libel defendant has been overlooked by the public figure doctrine.

In general, the Supreme Court’s libel doctrine has evolved to systematically increase the First Amendment protections of libel defendants. The doctrine has a potential to provide a blanket protection to Internet publishers if only one could successfully argue that all

321 Ibid., 351.
322 Ibid.
327 See ch. 5 for an analysis of the public figure doctrine.
Internet plaintiffs are public figures. But that is a hard task to accomplish, so this writer would argue that which bloggers are public figures should be left to the Internet Empowerment Agency to decide on a case-by-case basis.

To sum up the section, the current First Amendment privilege in defamation cases is structured as follows: If the plaintiff is a “public official” or a “public figure” and the said libel is pertinent to plaintiff’s position, plaintiff must show evidence of convincing clarity that the publisher acted with actual malice. If the plaintiff, however, is a private person defamed in a discussion of an issue of public concern, plaintiff must show fault on part of the publisher – the fault may be some degree of negligence, or it may be actual malice. Only actual damages sustained, whether financial and emotional may be recovered if negligence is proved, but presumed and punitive damages can be recovered if actual malice is proved.

No matter what the status of the plaintiff, plaintiff has the burden of establishing falsity; defendant need not prove the truth. If the plaintiff is a private person defamed by comments not made in connection with discussing an issue of public concern, the First Amendment privilege does not apply.

Finally, the Supreme Court has bestowed First Amendment status on the common law requirement that a libel be “of and concerning” the plaintiff, as well as the common law exclusion of opinion from the reach of liability. The majority opinion of Milkovich v. Lorain Journal Co., authored by Chief Justice Rehnquist, chronologically reviews the

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329 “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these
extensions of First Amendment protection. The public figure doctrine’s evolution is presented below in a list of the defining Supreme Court cases.

<table>
<thead>
<tr>
<th>Case name and year decided</th>
<th>Salient ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. St. Amant v. Thompson (1968)</td>
<td>Actual malice requires that a public figure defendant entertained serious doubts about the truth of his or her publication.</td>
</tr>
<tr>
<td>6. Gertz v. Welch (1974)</td>
<td>A private attorney does not become a public figure as a result of being employed as counsel in a controversial case.</td>
</tr>
<tr>
<td>8. Time v. Firestone (1976)</td>
<td>A private individual does not become a public figure by seeking judicial vindication of his or her rights.</td>
</tr>
<tr>
<td>10. Hutchinson v. Proxmire (1979)</td>
<td>A research scientist who receives a federal grant of funds to assist in his investigations does not, as a result, become a public figure.</td>
</tr>
<tr>
<td>11. Wolston v. Reader’s Digest Assoc. (1979)</td>
<td>A convicted criminal does not retain his or her public figure status forever.</td>
</tr>
</tbody>
</table>

Table 1. U.S. Supreme Court libel cases that elucidated the public figure doctrine.

implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (S.Ct. 621 1990), 18-19.

2.4. LIBEL IN THE INFORMATION SOCIETY

The earlier sections have explored the relationships among freedom of expression theory, democracy, the Internet, common law libel and the constitutional law of libel. This one describes the relationship of libel law with the information society. It also describes the economic justifications of libel law in an era of multinational corporations.

The Internet, whose geographical reach, content variety and audience diversity are unmatched by the other media, is arguably the world’s largest repository of information. In June of 2006, the Internet contained millions of Web sites and more than a billion users.\(^{331}\) As discussed later in section 4.2, it is a ‘real time’ medium as well an electronic soapbox."\(^{332}\)

An important challenge faced by a democratic society is to provide recourse to those whose reputations suffer unfair attacks while simultaneously ensuring that the free flow of information is not chilled by any threat of legal action. With 227 million North American households owning the electronic equivalent of a printing press,\(^{333}\) libel is risked by millions of Internet users, some too young to understand what it is, or what the consequences of their actions may be. The law of libel needs to be applied in a manner that will enhance the information society’s benefits, rather than diminish them by introducing blanket censorships or jurisdictional uncertainties.

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\(^{332}\) Reno v. American Civil Liberties Union.

\(^{333}\) “North America Internet Users and Population Stats” for March 2006, http://www.internetworldstats.com/stats2.htm (accessed 6 July 2006). According to data released by the Leichtman Research Group in April 2003, America's leading cable and DSL providers had, by the end of 2002, accumulated a total of over 17.4 million high-speed Internet subscribers in the United States. Leichtman forecasted that the total number of broadband cable and DSL Internet subscribers in the US will surpass the number of narrowband subscribers in 2005 and will grow to nearly 49 million by the end of 2007. See details at
2.4.1. CORPORATIONS AND LIBEL LAW

The threat of libel law for the fifth estate turns especially serious when the plaintiff is tenacious, or has deep pockets, or faces no restriction by the First Amendment, or all of these. For example, a corporation, or an executive backed by a corporation.

Multinational corporations spawned by the information society have enjoyed phenomenal growth in the last few years,\textsuperscript{334} thanks to numerous high profile consolidations\textsuperscript{335} that have been recognized by Congress\textsuperscript{336} and reviled by critics.\textsuperscript{337} One such corporation, Exxon Mobil, based in Irving, Texas, announced a U.S.-record net profit of a whopping $36.13 billion for 2005.\textsuperscript{338} In the media industry, consolidation has caused six corporations together to own as much as 90 per cent of the electronic media holdings in the United States – Walt Disney Co., Viacom International Inc. (and its ward CBS Corp.), Time Warner Inc., Rupert Murdoch’s News Corp., Bertelsmann AG, and General Electric Co.\textsuperscript{339}

As Baker has documented a chief problem of any marketplace of ideas is that a disproportionate amount of power tends to flow to private corporations resulting in a

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\textsuperscript{334} See James Brock, “Merger Mania and its Discontents,” Multinational Monitor 26, no. 7/8 (2005): 10-14; Also see generally, McChesney, Rich Media; and Baker, Human Liberty.

\textsuperscript{335} Market consolidation, or concentration, indicates the competitiveness of a marketplace – higher the number of competing firms, higher is the market’s competitiveness. Low-competition markets are essentially oligopolies controlled by two or three dominant companies. The U.S. Justice Department uses the Herfindahl-Hirschman Index (HHI) to measure market consolidation. For a brief discussion of HHI see Chadwick, Internet Politics, 293.

\textsuperscript{336} Telecommunications Act of 1996, Pub L. No. 104-104, Sec. 202(b), 110. This section lays down detailed rules for ownership consolidations of radio stations.

\textsuperscript{337} See generally, McChesney, Rich Media.


\textsuperscript{339} “Concentration of Media Ownership,” Wikipedia: The Free Encyclopedia,
diminished and “skewed marketplace.” In the last decade private corporations have emerged as the dominant user destinations of the Internet, which raises an important concern given Dershowitz’s reminder that the First Amendment does not protect against non-governmental transgressions. The threat of lawsuits by powerful private entities can act as a prior restraint and chill speech in online forums, especially as a targeted blogger or citizen journalist may be identified by his or her Internet Service Provider.

In the mid-1980s, scholars identified a substantial increase in the frequency of corporations slapping retaliatory lawsuits against those who would question their economic interests. Such lawsuits typically alleged libel, and targeted individuals and groups involved in public protests, campaigns and lobbying. In 1988, they were given a name by the law professor George Pring and sociologist Penelope Canan: “Strategic lawsuits against public


340 Ibid., 250.
341 Supra n. 185.
342 Dershowitz, Rights from Wrongs, 179.
344 Examples include a land developer suing a citizens’ group for $40 million after the group successfully led a fight to impose a one-year moratorium on real estate development in Saratoga, California; A mall developer suing a local resident who publicly opposed a zoning approval; A school bus company suing parents who complained to the state that the school buses were unsafe; A coal company suing a blueberry farmer for complaining to the Environmental Protection Agency about the company’s polluting a river; and a Police Benevolent Association of Nassau County, New York, filing dozens of lawsuits against citizens who complained of police misconduct. The typical SLAPP is filed while “acting on economic or occupational interests,” and most cases involved actions brought by land developers, property owners, public utilities, alleged polluters, police officers, and local government officials. See George W. Pring and Penelope Canan, SLAPPs: Getting Sued for Speaking Out (Philadelphia, PA: Temple University Press, 1996). Media entities can be the target of a SLAPP lawsuit as well. In one case, an appellate court ruled that the San Francisco Chronicle, which had been sued by a private university following a series of stories about a zoning dispute between the school and the county, could seek to have the libel case dismissed under California’s sweeping anti-SLAPP law. In another case, a prominent political consultant suing the newsmagazine Mother Jones for reports his custody dispute with his wife lost at trial. The trial court accepted, and an appellate court later agreed with, the
participation.” In the next decade, the acronym SLAPP became popular with jurists and lawmakers.

A SLAPP’s purpose is not to win damages – rarely do the defendants have enough resources to compensate any harm even if plaintiff’s claim is well founded. Rarely are the defendants of any monetary worth relative to the affluence of the corporate plaintiff. A SLAPP’s purpose is not even to prove the claim’s merits. Rather, its purpose is to stop the defendant’s protests and to deter others from protesting.

One New York court was categorical in condemning SLAPPs: “Short of a gun to the head, a greater threat to [freedom of expression] can scarcely be imagined.”

SLAPPs are defined as lawsuits filed against individuals or groups who engage in activities such as “circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, peacefully demonstrating, or otherwise attempting to influence government action.” The issue at stake is whether a

magazine’s defense that the consultant’s libel suit violated California’s anti-SLAPP statute.

345 See Penelope Canan and George W. Pring, “Strategic Lawsuits Against Public Participation” Social Problems 35 (1988): 506. By the end of the 1990s the term was in common use among American lawyers, judges and legislators.

346 See for example, the judge discussing the use of the term in California cases, in Briggs v. Eden Council for Hope & Opportunity (1999) 969 P2d 564, 565 n 1.

347 Gordon v. Marrone (1992) 590 NYS2d 649, at 656. The court stated, “SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. . . [P]ersons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to [freedom of expression] can scarcely be imagined.”

corporation should restrict critical speech “on a substantive issue of some public interest or social significance.”

A SLAPP lawsuit typically alleges libel, and typically never goes to trial because it is withdrawn as soon as the intimidated defendant withdraws his or her campaign against the plaintiff, or otherwise settles with the plaintiff.

An example SLAPP occurred when U-Haul sued room-mates John Osborne and Glenda Woodrum in 1998 after they authored a Web site, “The U-Hell Website: Adventures in Moving,” inviting others to share unhappy experiences with the moving company. U-Haul, and the Better Business Bureau, had been unable to provide satisfaction to Osborne and Woodburn after they experienced multiple breakdowns of a rented U-Haul vehicle while moving from Florida to Georgia. In another case the following year, Dunkin Donuts sued a teacher, David Felton, for authoring a vent site www.dunkin-donuts.org after being unable to find satisfaction from a Dunkin Donuts restaurant in Stamford, Connecticut. In yet another case, an environmental assessment company sued a retired California professor who accused it of being incompetent. The trial court held that

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350 Fifty-three per cent of the cases analyzed by Pring & Canan were born of libel claims. Pring & Canan, 1996, at 217. The rest were born of other claims including conspiracy, antitrust violations, civil rights violations, contract violations and tortious interference with prospective economic advantage. The public interest issues implicated by the political activities of the targets of these suits usually involved zoning, land use, environmental protection and civil rights.


the professor’s comments were privileged regardless of his motives, because state law invited public comment on issues concerning the environment.  

American legislators have responded to this phenomenon with anti-SLAPP laws, none of which has been held unconstitutional. As of December of 2005, 25 of the states had anti-SLAPP laws, and at least ten others had discussed, or were discussing, anti-SLAPP bills. The various American jurisdictions seem to have recognized the primacy of freedom of expression over reputation in SLAPP lawsuits.

However, SLAPP is an international phenomenon, with multinational corporations based in America as well as outside targeting their critics in the courts of several countries. Libel cases are generally much easier to win in jurisdictions outside the United States. For example, the libel law in England and Wales – indeed, much of Commonwealth libel law – seems highly inviting to multinational corporations which wish to silence critics. One of the best documented “SLAPPs gone wrong” was filed in London by the American multinational, McDonalds Corporation, after protesters distributed anti-McDonalds literature outside some of its restaurants.


356 In this so-called McLibel case, McDonald’s filed a libel writ in London against two protestors outside its restaurants – former postal worker Helen Steel and gardener Dave Morris. But instead of ceasing their protests and apologizing, the protesters dedicated the next two years of their lives to fighting a protracted legal battle in which they represented themselves. The case attracted bad publicity for McDonalds, and even when the company obtained a partial victory on the merits of its claim, critics dubbed the victory as “pyrrhic.” See David Hooper, Reputations Under Fire: Winners and Losers in the Libel Business (New York, NY: Time Warner, 2001): 175-76.
SLAPP defendants often find themselves facing an exhausting legal process which not only distracts them in their campaign against the plaintiff, but is also lengthy and of uncertain outcome. They can incur enormous lawyer fees and court costs, expenses that under most American laws cannot be recovered from the plaintiff even if the claim fails. Many SLAPP defendants are, as happened in the McDonald’s case, forced to defend themselves.357 The financial and other costs for the plaintiff, however, are less serious as they are considered just another cost of doing business.

Of course, SLAPPs are not a unique problem in multiple jurisdiction situations – the problem really is being sued in a non-New York Times jurisdiction by anyone, not just someone acting in bad faith. But SLAPPs are an important example of how a multiple jurisdiction lawsuit can be especially hurtful to the defendant. For example, Microsoft could sue someone from China in Washington state, or vice versa.

Libel claims with no merit under the First Amendment can be viable and successful in many Commonwealth democracies where the suits have merit under lower proof standards. For example, critics of libel law in England and Wales contend it has an unacceptable chilling effect on freedom of expression, encouraging critics of multinational corporations to engage in self-censorship so they can avoid libel suits.

A libel plaintiff in Britain, whether individual or company, is supported by many presumptions that are unviable in America, and is required to prove little to establish a prima facie case. For example, the plaintiff is required to prove only that the defendant communicated to a third party a defamatory statement referring to the plaintiff.358 Unlike in

America, the British libel plaintiff is not required to prove that the defamatory statement is false, or that the defendant acted intentionally or in bad faith. Besides, in all cases of written defamation, or defamation in some other permanent form, damages are presumed.

On the other hand, libel defenses in Britain, in general, are complicated and relatively hard to establish. The defendant bears the burden of proving the truth of the statement, and there is no “public figure” defense established by the United States Supreme Court. In addition, British courts are known to award large damages.

As the above discussion shows, the economic justification of regulating libel, across national borders, is pretty strong in the information society. The more powerful multinational corporations have billions of dollars at stake in markets constituting varied libel jurisdictions, a fact which further reinforces the need to build a trans-jurisdictional standard of freedom of expression.

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358 P.F. Carter-Ruck and H.N.A. Starte, *Carter-Ruck on Libel and Slander* (1997, 5th edition) at 93. The plaintiff is not required to prove that the defamatory statement is false (Belt v. Lawes [1882] 51 LJQB 359 at 361), or that the defendant acted intentionally or in bad faith (Cassidy v. Daily Mirror Newspapers [1929] 2 KB 331, at 354). If a defamatory statement is made in some permanent form (a ‘libel’), damages are presumed (Ratcliffe v. Evans [1892] 2 QB 524, at 528-30 per Bowen LJ).

359 Belt v. Lawes [1882] 51 LJQB 359 at 361.


363 The purpose of such a defense is to provide high protection for political expression about people or institutions which have ready access to the media and which are capable of defending themselves against accusations without resorting to the courts.

2.4.2. PREDICATES AND PROPERTIES OF THE INFORMATION SOCIETY

Defamation is medium independent, but applying current libel laws in the information society is particularly difficult because of certain idiosyncrasies of the Internet. This section addresses how that society is distinct from a pre-information society by revisiting, in a context of the Internet, the components of a basic transmission model of communication such as the sender, receiver, medium, message, channel and noise.\textsuperscript{365} The section documents how the information society reconfigures that model, and provides a reconfigured framework to situate the research questions.

The idea of an information society is earliest documented in the 1960s in the works of American and Japanese authors.\textsuperscript{366} The Princeton economist Fritz Machlup introduced the concept implicitly in 1962 when he discussed “the knowledge industry,” referring to computers and other new technologies of communication as an “information machine industry.”\textsuperscript{367} In 1970 the American Association for Information Science met in Philadelphia, Pennsylvania, on the theme of the “Information-Conscious Society.”\textsuperscript{368} The term “information society” was coined in the Japanese as “Johoka Shakai” by Yujiro Hayashi in 1969,\textsuperscript{369} but first seems to appear in English in Daniel Bell’s book of 1973.\textsuperscript{370}

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\textsuperscript{366} For a history of the term, see Alistair Duff, \textit{Information Society Studies} (New York, NY: Routledge, 2001), 2-5.


\textsuperscript{368} See http://www.asis.org/Bulletin/Jan-00/garfield.html (accessed 1 April 2006).
The information society regards the creation, ownership and distribution of knowledge\textsuperscript{371} as a primary economic activity, and is commonly measured by the extent to which information industries contribute to a country’s gross national product. It is also measured by the proportion of “knowledge workers.”\textsuperscript{372} In a cultural sense, the information society regards the emergence of the individualization condition as a “second” modernity\textsuperscript{373} as discussed earlier in section 2.2. Some of the other features that characterize that society are discussed in the sections below.

The law professor James Boyle makes an economic argument that one of the defining features of the information society is an increasing proportion of product cost going to content creation rather than to distribution, and to message rather than medium.\textsuperscript{374} Another legal scholar, Jack Balkin, contends that the information society reduces innovation costs and permits new forms of content creation that would have been uneconomical in the past.\textsuperscript{375}


\textsuperscript{370} “I rejected the temptation to label these emergent features as the “service society” or the “information society” or the “knowledge society” . . . ” Daniel Bell, The Coming of Post-Industrial Society: A Venture in Social Forecasting (New York, NY: Basic Books), xxxvii. (First published in 1973).

\textsuperscript{371} “All information in the ordinary sense of the word is knowledge.” Machlus, Production, 15.

\textsuperscript{372} Daniel Bell has documented the growth in the number of white-collar workers and the decline of industrial labor as a harbinger of profound social and economic changes. Bell, Post-industrial Society; Robert Reich describes these workers as “symbolic analysts” who are highly educated, flexible and mobile, and who “solve, identify, and broker problems by manipulating symbols.” Robert Reich, The Work of Nations: Preparing Ourselves for 21st Century Capitalism (New York, NY: Vintage, 1992), 198.

\textsuperscript{373} Beck and Beck-Gernsheim, Individualization, vii.


Readers may note that similar to McLuhan’s conceptualization of a “global village,” the dissertation conceptualizes the information society not as a historical period but as a toponym.

2.4.2.1. JURISDICTION IS QUESTIONABLE

The legal columnist, Michael Overing, identifies the two issues at the center of many information society libel cases as personal “jurisdiction over the defendant and the choice of law that determines the outcomes of the dispute.” There exists a considerable body of literature that analyzes the difficulty of possible multiple jurisdictions in the information society. Partially because of the minimum contacts doctrine, an American libel

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379 Due process allows a state to exercise personal jurisdiction over a defendant if that person has had with it “certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” See International Shoe Co. v. Washington, 326 U.S. 310 (S. Ct. 123 1945); Minimum contacts is determined by “the relationship among the defendant, the forum, and the litigation.” See Shaffer v. Heitner, 433 U.S. 186, 204 (S. Ct. 624 1977); A plaintiff need not have minimum contacts with a forum state for that state to be able to assert personal jurisdiction over a defendant. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (S. Ct. 320 1984). The U.S. Supreme Court held that Hustler, an Ohio corporation with most of its business in California, could be sued in federal court in New Hampshire because it had a regular and continuously cultivated, albeit small, circulation in that state and had deliberately benefited from the New Hampshire market. Plaintiff Kathy Keeton, a resident of New York, needed no minimum contacts with New Hampshire (she sued there to take advantage of a six-year statute of limitation), only the defendant did; Also see Calder v. Jones, 465 U.S. 783 (S.Ct. 320 1984). The high court ruled in this case that an author and an editor, residents of Florida, who had allegedly libeled actor Shirley Jones, a resident of California, in a National Enquirer article must reasonably anticipate being hauled to court in California since they knew the magazine was sold in California and that the libel’s brunt would be felt in that state; Also see Robert O’Neil, The First Amendment and Civil Liability (Bloomington, IN: Indiana University Press, 2001), 40.
defendant in an Internet publishing case may find himself or herself sued in not only a different American state but in a foreign state as well, because the court may recognize personal jurisdiction by any of these locations – the (offending libel’s) location of composition, of publication, of host server, or of download, all of which can be different points on an atlas. The potentially unlimited jurisdictions lead to uncertainties for libel litigants in the fault standard, in free speech protections, in statutes of limitations, in witness subpoenas and testimonies, and in other procedural rules. In April of 2003, the U.S. Supreme Court declined to hear a case that asked it to decide how to determine jurisdiction in Internet cases.

Netizens are able to reach diverse audiences across the information society, but they may be liable to defend a libel suit in a jurisdiction where the libel laws may require

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380 American defendants smug in the protection of the First Amendment might still be dragged to court in a distant land as Dow Jones & Company, the publishing giant, discovered when in December of 2002 the High Court of Australia ruled that Dow Jones could be sued in Australia after it published allegedly defamatory materials using Web servers located in New Jersey. See Dow Jones & Co. v. Gutnick, High Court of Australia case no. [2002]HCA56. The case spotlighted the irrelevance of territorial borders in the information society.

381 Pamela Jennings v. AC Hydraulic, case no. 03-2157 (U.S. Ct. App., Seventh Cir., September 2, 2004). The court of appeals held that a nonresident defendant’s maintenance of a passive Web site, by itself, did not supply minimum contacts necessary to permit exercise of specific personal jurisdiction.

382 Cadle Company v. Jan Schlichtmann, case no. 04-3145 (U.S. Ct. App., Sixth Cir., February 8, 2005). Affirming the judgment of the U.S. District Court for the Northern District of Ohio, the appellate court held that Ohio did not have personal jurisdiction over a Massachusetts-based Web site owner based on allegedly defamatory statements made on his site about a debt collector residing in Ohio, given that the website specifically referred to the debt collector’s activities in Massachusetts, and was not directed at Ohio readers.

383 American courts generally use traditional jurisdictional analysis on a case-by-case basis in domestic Internet cases, but the body of American law concerning assertions of jurisdiction over foreign Web sites is limited. See Alex Gigante, “Internet Defamation and Personal Jurisdiction,” in Elizabeth McNamara and Eric Rayman, Internet Publishing: The Legal and Business Issues as Traditional Publishing Moves to Electronic Media (New York, NY: Practising Law Institute, 2000), 314.

different, usually easier than First Amendment, standards of fault.\(^{385}\) The jurisdiction problem is further exacerbated in international disputes. In December of 2002, the High Court of Australia ruled that Dow Jones, the American publishing giant, could be sued in Australia after it uploaded the allegedly defamatory materials on its Web server located in New Jersey.\(^{386}\) The case was about an article in an issue of *Barrons* magazine, whose paper edition sold 305,563 copies.\(^{387}\) The *Gutnick* decision was a legal recognition of the global village, making Australia the first country to allow a libel action against a foreign defendant based solely on an Internet download in that country. Dow Jones squared with Mr. Gutnick in November of 2004, paying him $180,000 in settlement and $400,000 in costs.\(^{388}\)

Addressing the need for libel law to evolve, at least one writer has expressed concern that the strict application of precedents created for offline publication to the information society may produce a chilling effect, reducing protection to a lowest common standard.\(^{389}\) American courts, on the other hand, have a reputation for not enforcing foreign libel

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\(^{385}\) See for example the University of Houston chart on libel law in other countries at <http://www.hfac.uh.edu/comm/medi_libel/libel/other.html> (accessed 21 May 2004); Also see supra n. 10.

\(^{386}\) Supra. n. 30. This case emerged from the publication of an article titled “Unholy gains” by William Alpert in *Barrons* on the magazine’s Web site on October 29, 2000. The article said Joseph Gutnick, a resident of Victoria in Australia, had colluded with an American money launderer and tax evader, Nachum Goldberg, to launder large amounts of money. The Dow Jones site on which the article was posted was a password-protected subscriber site with 550,000 subscribers worldwide, at least 1,700 of whom were paying from Australia. Gutnick sued Dow Jones in the Supreme Court of Victoria and confined his claims to damages incurred from the publication of the article in Victoria. Judge Hedigan of the Supreme Court of Victoria ruled, was later upheld by the Victoria Court of Appeal and eventually by the High Court of Australia as well.

\(^{387}\) Ibid.


judgments that are not consistent with the First Amendment. However, American defendants may be hauled to court in any foreign state as the Dow Jones case demonstrated. That foreign state may have only rudimentary protections for freedom of expression, or none at all. Even within America, there are philosophical and procedural differences in the various jurisdictions, which contributes to gross uncertainty, and a lack of reliability, in the process of litigation. Allowing the multiple personal jurisdictions to operate artificially slices up the contiguous information society, which is not just antithetical to the Internet’s ethos, structure and culture but also jeopardizes its expressive freedoms. Multiple jurisdictions also lead to large portions of Internet communications being subject to constraints or censorship imposed by the most restrictive regimes.

A common law test of jurisdiction is by the “minimum contacts” doctrine, which requires that a defendant has “purposefully availed” of contacts in a jurisdiction in order for a court to assert jurisdiction over the defendant. The U.S. Supreme Court has determined minimum contacts not by the plaintiff’s contacts with a forum state, but by “the relationship among the defendant, the forum, and the litigation.” The plaintiff need not have minimum contacts with a forum state for that state to be able to assert personal jurisdiction over a defendant. In Internet libel cases, the doctrine has been refined in a sliding scale, by which

390 Even as American defendants worry about facing libel suits under plaintiff-friendly jurisdictions abroad, such as in the United Kingdom or Australia, it is noteworthy that American courts, on their part, have consistently refused to enforce foreign libel judgments inconsistent with the U.S. Constitution. For example, see Matusевич v. Telnikoff, 877 F.Supp. (DDC 1995); Abdullah v. Sheridan Square Press, 1994 WL 419847 (SDNY May 4, 1994); and Bachchan v. India Abroad Publications Inc., 585 NYS 2d 661.


393 Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (S. Ct. 320 1984). The U.S. Supreme Court held that Hustler, an Ohio corporation with most of its business in California, could be sued in federal court in New Hampshire
a defendant who merely places a defamatory remark on a Web bulletin has much smaller chances of getting jurisdiction in the plaintiff’s preferred state than is, for example, the webmaster of a commercial Web site.\textsuperscript{394} It is not unusual for a judgment to be quashed on jurisdictional grounds, and besides, a plaintiff’s ability to identify the defendant is crucial to accurately estimating the defendant’s jurisdiction.\textsuperscript{395}

2.4.2.2. CHOICE OF LAW IS QUESTIONABLE

A corollary challenge is predicting which law applies in a given case, because the defendant is always in tenterhooks as to which jurisdiction, even if it is eventually within the United States, a plaintiff will sue.

The United Nations’ Universal Declaration of Human Rights pronounces that “everyone has the right to freedom of opinion and expression,”\textsuperscript{396} thus establishing a high threshold of protecting free expression in international law. Consequently, the New York Times decision of 1964, American law protects freedom of expression to a higher libertarian extent than the laws of most countries. Consequently, libel recoveries in America are much less common than in many other countries.\textsuperscript{397} Some international jurisdictions that have

\textsuperscript{394} As seen in Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (WD Pa. 1997), where the court considered both the quantity and quality of the contacts to determine if jurisdiction over the defendant was proper.


\textsuperscript{397} For instance, in continental Europe libel suits are less common, but result in much greater awards when they go to trial. Under the libel law of many foreign jurisdictions, the plaintiff has the right to “strike back,” called

An American libel defendant is at risk of having to defend a libel suit in a foreign jurisdiction where the law is likely to be friendlier to the plaintiff. In India and in Britain,\footnote{399}{“The solution preferred in one country may not be the best suited to another country.” Lord Nocholls of Birkenhead in \textit{Albert Reynolds v. Times Newspapers Limited}, 3 WRL 1010 (1999).} for example, a libel defendant must prove truth, unlike in America. Public libel plaintiffs, outside the United States, are not required to prove actual malice, with the English common law going as far as making libel a strict liability offence.

Besides, the expense of trying a libel suit, already high for litigants, may increase even further if the defendant has to travel to foreign location.\footnote{400}{Legal fees in excess of $100,000 are common when a libel case is appealed. Besides, according to the Libel Resource Defense Center, since 2000 the average trial award has been $3.4 million, up from $2.6 million in the 1990s. For a summary of the Center’s 2004 media libel report, visit the Libel Resource Defense Center website.}

### 2.4.2.3. SHORTENED INFORMATION CYCLE

In the information society, information can be published as fast as one can use a computer hooked to the Internet, and that information stays online until taken down by the author or the content provider. An “information cycle,” the gestation required for information to be processed before it is published – for example, about twelve hours for a daily right of reply, by which he or she can give as good as he or she got and not be liable for libel. Right of reply, a secondary defense, exists in the United States in a less advanced form. For a brief discussion of right of reply, see Don Pember and Clay Calvert, \textit{Mass Media Law} (Boston, MA: McGraw Hill, 2005), 233-34.
newspaper – can be much smaller, or even ‘real time,’ in that society. Netizens tend to publish or broadcast at their own pace, which is often relatively quick. Unlike a professional journalist, a netizen may seldom use an editor or any in-house legal counsel. A netizen also seldom has the resources of a media corporation to support what he or she writes.\(^{401}\) The short-circuited information cycle highlights the relevance of the right of reply clause\(^{402}\) that libel statutes in many jurisdictions permit, even though it may also be seen as a mitigating factor. Because Internet communication occurs in ‘real time,’ netizens, especially on discussion boards and multi-user domains, tend to place a premium on speed, which increases the chances of hyperbole and exaggeration. The emphasis on speed may compromise accuracy, not to mention grammar, spelling and punctuation.

The law professor, Lyrissa Lidsky, notes that in the information society, “venting,” or responding staccato, is as common as careful argumentation, if not more, which makes it “a frontier society free from the conventions and constraints of the real world.”\(^{403}\) Lidsky legitimizes the information society with her distinction of the Internet from “the real world” by which she, like many others,\(^{404}\) recognizes a reality of virtuality.

\(^{401}\) For a critical commentary of how netizens, especially bloggers, have transformed the news production process, see Dan Gillmor, *We the Media*.

\(^{402}\) Right of reply is a secondary defense in common law libel. It has not been commonly used in recent years. For a brief discussion, see Don Pember, *Mass Media Law* (Boston, Mass.: McGraw Hill, 2003), 218.

\(^{403}\) Lidsky, “Silencing John Doe,” 863.

\(^{404}\) E.g., Wu, “When Law;” Hunter, “Cyberspace.”
2.4.2.4. ANONYMITY AND PSEUDONIMITY

Other than multiple personal jurisdictions, another reinvented challenge that the Internet throws at law enforcement is the use of anonymous identities. This issue is discussed here not as an effect but as a predicate of the information society. Dershowitz frames the issue when he writes, “How can defamation . . . be regulated in a transnational medium that encourages anonymity and that has no responsible ‘publisher’?” Netizens possess a high ability to publish anonymously or by masking identity through an alias. This ability enables many of them to speak freely, but for the same reason also gives an incentive to those who seek to defame, being, as they are, less afraid of the consequences.

The history of anonymous speech in America is well documented. So is the constitutional law of anonymous speech: In the 1995 case of *McIntyre v. Ohio Elections Commission*, as well as in the 1999 case of *Buckley v. American Constitutional Law Foundation*, the U.S. Supreme Court recognized a First Amendment protection of anonymous speech. Both these cases involved political action by citizens – circulating pamphlets in one and engaging in initiative-petitioning in the other. The law professor,

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405 Dershowitz, Rights From Wrongs, 181.
406 Ibid.
407 E.g., Justice Clarence Thomas’ concurring opinion in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, at 358 (S. Ct. 419 1995). “The essays in the Federalist Papers, published under the pseudonym of ‘Publius,’ are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.”
408 514 U.S. 335 (S.Ct. 419 1995).
Lawrence Lessig, writes that anonymous expression is a primary “imperfection” of the information society in that it renders that society unamenable to most regulatory effort.\footnote{Lessig, Code, 28.}

Although the \textit{New York Times} case arguably clarified the libel tort, victims are still faced with the relatively hard task of identifying anonymous netizens. Libel plaintiffs often find it expensive and time-consuming to identify an anonymous publisher, and even harder to prove fault. The identification process usually begins with a plaintiff asking the Internet Service Provider (ISP) to provide the name and address of the anonymous libel suspect, so that the plaintiff can file a lawsuit against him or her. The ISP, which typically is in possession of routine personal information about its users, may readily disclose identifying information such as the libel suspect’s name or address, without a court ordering it to do so. If it refuses, the plaintiff may petition a court to subpoena the ISP. If the court grants a subpoena order, the ISP is not required by law to inform the libel suspect before it reveals his or her identity, even though many ISPs have a policy to do so.\footnote{376 U.S. 254 (S.Ct. 39 1964).} On receiving a subpoena, the ISP might inform the user that it is his or her responsibility to fight it by petitioning the courts for a protective order against discovery of identity.

What are the conditions under which a plaintiff can successfully persuade an ISP to reveal the identity of an alleged libel defendant? The question has been debated in at least two lower court cases – which have each produced a different legal doctrine. In one case, the Allegheny County Court of Pennsylvania used a three-part test – it asked the plaintiff to prove that the identity of the defendant was “(1) material, relevant, and necessary, (2) cannot

\footnote{For example, see the privacy policies of AOL and MSN available at http://www.aol.com/info/privacy.adp and}
be obtained by alternative means, and (3) is crucial to plaintiff’s case.” The Pennsylvania court’s balance-of-interests doctrine is sharply contrasted by the other case, in which the Contra Costa County Superior Court in California adopted a proof-before-subpoena approach. This court ruled that a plaintiff must prove that the statement is in fact libelous before the identity of the speaker can be revealed.

Libel plaintiffs, based on provisions in ISPs’ privacy policies, routinely demand and get identifying information about anonymous publishers, which has led some commentators to express concern about the impact that “John Doe” and “Jane Doe” lawsuits might have on anonymity and on freedom of expression. At the same time, it is technically not hard to figure out the identity of anonymous netizens.

A study published in July of 2006 found that 55 per cent of bloggers used a pseudonym.

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414 Ampex Corp., Edward J. Bramson v. J. Doe 1, aka “Exampex” on Yahoo!, et al., case no. C01-03627 (Contra Costa County, Ca., Superior Court, December 30, 2003). For another example of the proof-before-subpoena approach, see Arnold B. Bowker, et al. v. America Online, Inc., case no. 95L013509 (Circuit Court of Cook County, Ill., September 26, 1995), in which an Illinois court forced AOL to disclose a netizen’s identity after the petitioner, a scuba-diving resort, had proved that a defamatory post by what turned out to be a disgruntled employee, was false. In addition, see Dave Wilson, “Ruling Backs Anonymity of Net Messages,” Los Angeles Times, 11 December 2001, B7.


2.4.2.5. AMERICAN I.S.P. NOT LIABLE

Unlike a newspaper or a broadcast station, an ISP cannot be held liable for defamatory material it carries on its computer networks, because a provision of the Telecommunications Act of 1996 called the Communications Decency Act provides that “no 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.” 417 In addition, there are several cases, decided by federal as well as state courts, that clarify the liability, or lack of it, of ISPs.418 In addition, federal courts have defined ISPs broadly, as a result of which even businesses such as Kinko’s and Amazon.com “have used the CDA as a shield against defamation suits.”419

In an important case named Zeran v. America Online, a federal appeals court rejected a petitioner’s claim that AOL was subject to distributor liability after it had been notified of the first appearance of a libelous post but continued to host it.420 The court said Congress’ intention, in enacting the CDA, was “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal


419 Tedford & Herbeck, Freedom of Speech, 412.

420 Kenneth M. Zeran v. America Online, Inc., case no. 97-1523 (U.S. Ct. App., Fourth Cir., November 12, 1997). The court ruled that the term “publisher” in the Communications Decency Act encompasses distributors. Under the common law, every republication of a libel is a new libel. However, an exception to this rule is that bookstores, newspaper vendors and other distributors who actually distribute the printed product are not held responsible for republicating a libel unless the defendant can show they knew that the material contained a libel, or should have had reason to know. This concept is called “scienter,” or guilty knowledge. For a brief discussion of distributor liability, see Pember, Media Law (2003), 133-154.
or State regulation.” The court clarified that the anonymous publisher, not the ISP, was accountable for the libelous post.

By immunizing ISPs from liability, the CDA has emerged as the strongest federal protection for any media defendant, going beyond even the stringent standard of fault set by the *New York Times* actual malice rule.

2.4.2.6. “FIRST PUBLICATION” AND “SINGLE PUBLICATION” ARE QUESTIONABLE

The date of publication, in most jurisdictions, sets the statute of limitations. In the information society, it is hard to pinpoint when a message was posted. Some American courts have decided that the rule of first publication applies to Internet postings, and that the statute of limitations for libel in the information society begins on the first day that the posting is available to other users. In contrast, the High Court of Australia ruled in *Dow Jones & Co. v. Gutnick* that the rule of first publication was irrelevant to online messages and hence did not apply.

Similarly, the single publication rule, which provides that “any one edition of a book or newspaper, or any one radio or television broadcast, exhibition or a motion picture or similar aggregate communication is a single publication,” seems to apply in the information society but is yet to withstand judicial scrutiny.

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423 Supra. n. 30.

424 Restatement (Second) of Torts, § 557A (1977).
Because of the other issues with jurisdiction, choice of law and publication, single publication seems relatively hard to define. The difficulty is compounded by the fact that historically most libel suits have “involve[d] the mass media, usually newspapers,” but in the last decade or so, nonmedia defendants have got increasingly common.

It is evident from the preceding discussion that the information society’s predicates distinguish it from a pre-information society, presenting unique and formidable difficulties to libel law. The writer focuses on arguably the most formidable of those difficulties, personal jurisdiction, to frame the research questions in the next chapter.

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427 For an argument to extend the actual malice rule to nonmedia defendants, see ch. 5.

CHAPTER 3

RESEARCH QUESTIONS

The preceding literature review documented the sharp differences among the various theoretical traditions of freedom of expression, framed libel law as an important predicate of the democratic values of self-fulfillment, marketplace of ideas, and empowerment, and identified multiple personal jurisdictions among the special characteristics of the information society.

This chapter introduces the two research questions that emerge from that evidence, and briefly discusses how those questions are addressed.

**RQ1:** What should be the contours of a legal framework which will define libels committed in simultaneously transnational media that involve multiple personal jurisdictions?

**RQ2:** What possible form might a procedure of legal action take to operationalize the above legal framework?

The diversity in freedom of expression theory, as discussed in the literature review, is reflected in the irreconcilable publishing laws adopted by the various democracies, and even in the differing laws within individual democracies. In the information society, which extends across national and jurisdictional borders, there is no consensus of publishing law
which, as discussed earlier, is adversely impacting bloggers, citizen journalists and other members of the fifth estate. 429

Legal precedents in information society libel cases are relatively scarce, with case law developing only gradually and in a relatively fragmented manner. American constitutional law, as applied by the U.S. courts, often finds itself constrained by personal jurisdiction. American courts are in an overarching manner bound by the actual malice doctrine established by the Supreme Court in 1964, but many Commonwealth democracies, including Canada, 430 Britain, 431 Australia, South Africa, and India, seem to have, by and large, rejected that doctrine. 432 National or provincial laws applied by courts outside the United States are invalid without their respective jurisdictions.

Thus the inherently borderless information society is being subject to artificial national boundaries, which undermines its utility, creates uncertainty and is inconsistent with its very idea – problems that in aggregate present a considerable challenge to members of the fifth estate, as well as to others seeking to access the information society’s benefits.

The dissertation addresses the first research question by proposing a separate common jurisdiction for libel cases that involve bloggers, citizen journalists and other speakers and activists of the information society. 433 Specifically, it elucidates a theoretical

429 In Watching the Watchdog: Bloggers as the Fifth Estate (New York, NY: Marquette, 2006), Stephen D. Cooper documents the media-critical role, as well as other activist roles, played by bloggers.


431 “The solution preferred in one country may not be the bet suited to another country.” Lord Nocholls of Birkenhead in Albert Reynolds v. Times Newspapers Limited, 3 WRL 1010 (1999).


433 Libel in the information society is measured in the defamatory torts committed using Internet components
framework, based on an analysis of the fundamental principles of freedom of expression characterizing jurisprudence, for that common jurisdiction.

The dissertation develops the theoretical framework by (1) critiquing America’s constitutional law of libel and arguing for it to be extended to nonmedia defendants, the most common category of information society libel defendants, and (2) analyzing the prominent traditions of First Amendment theory to propose a set of normative recommendations for freedom of expression in the information society.

The proposed new jurisdiction might be asserted solely by an Internet Empowerment Agency, established by international treaty expressly for the purpose of resolving information society libel cases. Even though the dissertation describes the theoretical framework and delivery mechanism of that agency, it does not discuss the agency’s executive powers or administrative structure, or even the terms of the treaty from which it would draw its authority. Those might be tasks for a separate dissertation.

To address the second research question, the dissertation describes a model law to deliver the new framework. The model law, presented as a legislative bill that may be adopted by the suggested agency, uses a structure similar to the well known libel reform proposal authored by the law professor Marc A. Franklin.

such as blogs and other Web sites, discussion boards, multi-user domains, and email including spam.

434 See chs. 5 and 6.

435 See ch. 7.

The dissertation does not call for any regulation of the content or medium of the Internet.\footnote{437} The proposed framework is grounded in the existing theoretical categories in the tradition of normative theory-building, which enables a subjective, contextual or humanistic understanding of the phenomenon of the Internet, as opposed to scientific theory which focuses on an objective explanation or at least a causal effect.\footnote{438} Normative theory has often guided research in the social sciences.\footnote{439} The philosopher of scientific theory, Karl Popper, defines normative or subjective interpretation by the logical relationships between statements.\footnote{440} Scientific theory can be an extension of the normative theorizing process;\footnote{441} one of the principal criteria of good scientific theory, utility, is hard to define without calling upon normative or subjective values.

Normative theory has been described as “concerned with examining or prescribing how media \textit{ought} to operate if certain social values are to be observed or attained. Such theory usually stems from the broader social philosophy or ideology of a given society.”\footnote{442}

\footnotetext[437]{The U.S. Supreme Court has already ruled that the Internet enjoys at least the same degree of First Amendment protection as do the print media. \textit{Reno v. American Civil Liberties Union}.}


\footnotetext[439]{Habermas’ speech, supra n. 94. “Normative theory . . . serve[d] as a guide for research in certain fields of political science.”}

\footnotetext[440]{Popper, \textit{Logic of Scientific Discovery}, 148-49.}

\footnotetext[441]{Habermas’ speech, supra n. 94. “In Aristotle’s \textit{Politics}, normative theorizing and empirical research go hand in hand. Yet contemporary theories . . . express a demanding ‘Ought’ that faces the sobering ‘Is.’”}

\footnotetext[442]{Denis McQuail, \textit{McQuail’s Mass Communication Theory}, 4\textsuperscript{th} ed. (London, U.K.: Sage, 2000), 8. (Emphasis in original). “[Normative theory] is important because it plays a part in shaping and legitimating media institutions and has considerable influence on the expectations concerning the media that are held by other social agencies.”}
The normative recommendations developed in chapter 7 celebrate the libertarian democratic values of self-fulfillment and marketplace of ideas, which are described in the review, as well as address the analyses of chapters 5 and 6.

The new normative recommendations would be applicable to adjudicate all libel cases in the information society, whether they result from communication via email, Web sites and blogs, discussion boards, multi-user domains, or spam. The proposed framework would ensure a generalizability, consistency and reproducibility in defining Internet libel that will be useful to predict with certainty the legal consequences of libel in the information society.

In the concluding chapter 9, the dissertation briefly discusses the pluses and minuses of the suggested agency, as well as its values, composition and executive powers. The agency, which will have to be established by treaty in order to have legitimacy, may be located at the United Nations’ Working Group on Internet Governance or at the Internet Consortium for Assigned Names and Numbers, among several possible locations. That section will also very briefly discuss two other propositions – whether courts of individual jurisdictions (or countries) should decide cases with an appeal available with the proposed Internet Empowerment Agency, and whether an individual jurisdiction should implement the framework on its own.

Available public policy scholarship suggests that research in information society governance is progressing on three fronts: (1) Developing infrastructure in order to reform the digital divide, Internet protocol addressing, and the domain name system; (2) Fixing holes and by the media’s own audiences. A good deal of research into mass media has been the result of attempts to apply norms of social and cultural performance. A society’s normative theories concerning its own media are usually to be found in laws, regulations, media policies, codes of ethics and the substance of public debate.”
in data security and privacy; and (3) Addressing concerns in intellectual property protection. This dissertation may open a fourth front: (4) Developing a philosophical foundation of freedom of expression.

3.1. CONCEPTS AND OPERATIONAL DEFINITIONS

1. A “legal framework” is conceptualized as the combination of a set of theories or philosophies based on certain normative background assumptions about the relationship the law ought to establish between a regulator and an individual. The framework could transform into ideology if closed off from fresh interpretations of rights and principles.

In this dissertation, the framework is essentially a set of inter-related assumptions, theory, values, and practices that constitute a way of limiting libel within the framework of the speech and press clauses of the First Amendment.

2. “Jurisdiction” is conceptualized as the authority of a court to hear and decide a case. For any court to make a legally valid decision, it must have both (1) Subject matter jurisdiction, which refers to a power granted by a state legislature or by Congress or by treaty to hear the type of case in question; and (2) Personal jurisdiction, which refers to the authority to make a decision affecting the parties involved in the lawsuit. The dissertation operationalizes jurisdiction as personal jurisdiction only.

443 For a discussion of a related but more profound concept, legal paradigm, see Jürgen Habermas, William Rehg (trans.). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press), 388-446; Also see generally Kuhn, *Structure*.

444 Habermas, *Between Facts and Norms*, 221.

445 Supra. n. 9.
the challenge addressed by the dissertation, refers to the relative ease with which a court located anywhere in the world might hear and decide a dispute.

3. A “transnational medium” is a metaphor for an information society that is coordinated by Internet use. It is operationalized in the form of virtual arenas such as electronic discussion boards, multi-user domains, blogs and other Web sites.446

4. “Publisher” is defined as the author of a message of any size or content, conveyed via the transnational medium, and addressed to a specific audience or audiences. This concept is measured in the users of electronic discussion boards, Web sites, multi-user domains and other forums facilitated by the Internet.

5. “Libel” is the publication of a false statement, in the form of text, multimedia or graphic, that damages another’s reputation or exposes that person to hatred, ridicule or contempt.

6. “Corporation” is defined as a legal entity that is composed of a business floated by investors and entrepreneurs often, but not always, via a joint stock company. For example, Microsoft Corp. or New York Times Co.447 (The dissertation tweaks the traditional definition of the New York Times Co. and other media corporations as “media” in order to distinguish between journalist plaintiffs and corporate plaintiffs.)448

7. “Media” is defined as journalists or commentators affiliated to institutions of hierarchical employment that are in a business of producing and selling news for print or

446 Supra. n. 8.

447 As many as 17 of America’s 25 bestselling newspapers are owned by one of 10 publicly listed corporations. See http://abcas3.accessabc.com/ecirc/newsform.asp (accessed 15 December 2004).

448 Journalist or media plaintiffs get the same burden of proof requirements as nonmedia. See chs. 6 and 8.
broadcast, such as Paul Krugman of the New York Times, Anderson Cooper of CNN, or Bill O’Reilly of Fox News.

8. “Nonmedia” is conceptualized as the bloggers, citizen journalists, Web site operators and other netizens of the fifth estate who produce commentary, opinion or political reaction on specific Web addresses or in specific emails, such as Markos Zúniga of dailykos.com, Krishna Prasad of churumuri.wordpress.com or Juan Cole of juancole.com.

3.2. LIMITATIONS

Traditional legal research does not routinely employ empirical data procured by popular social science quantitative methods such as experiments or questionnaire surveys. Instead, it uses a four-step analysis described by Myron Jacobstein, Roy Mersky and Donald Dunn\textsuperscript{449} to scrutinize legal evidence through qualitative or critical arguments that may be informed by one or more ideological, legal or philosophical traditions. The legal method is typically used to analyze current law and theory, apply it to an emerging situation, and recommend possible updates to the law or theory or both. The success of a dissertation using the legal method should be evaluated by the validity of its evidence and the sophistication of its argument.

The dissertation sticks to primary sources of the evidence as much as possible,\textsuperscript{450} but does not shy away from useful evidence in many secondary sources.\textsuperscript{451} To the extent that

\textsuperscript{449} Jacobstein, et al., Legal Research.

\textsuperscript{450} Primary sources comprise the court decisions, statutes and legislative records which constitute a direct, original, and first-hand account of the law itself.

\textsuperscript{451} Secondary sources encompass the analyses, commentaries, summaries and compilations of various aspects of the law found in law reviews, books, restatements and other treatises.
secondary sources are inferior to primary sources because they are a step removed from the actual law, this presents a possible limitation to the dissertation.

The dissertation uses the Shepard’s citator not only to analyze the current validity of court cases but also to locate relevant law review articles and to find other cases on points of law that are enunciated in *New York Times*. To the extent that Shepard’s accuracy is challengeable, that factor may be considered a limitation.

An apparent criticism could be that even before the advent of the Internet, whenever published material went outside jurisdictional boundaries, the right to sue for libel traditionally existed only in the country of publication – so what is new? The writer rejects that simplistic solution because it does not address the structure, culture or ethos of the information society (discussed in section 2.4) by which expression can be accessed simultaneously and instantaneously in any corner of the wired world. Second, it does not change the *status quo*, which is not workable as documented.\(^\text{452}\) Third, even if such a solution were deemed workable, using it would reduce much Internet expression to whatever is permitted by the most tyrannical regimes, and continue the uncertainties of libel litigation. Fourth, even within the United States there are multiple jurisdictions. Fifth, the challenge of multiple jurisdictions for the information society is considered as a forceful reinvention. And sixth, the U.S. Supreme Court has already allowed long-distance libel prosecutions, as in the 1964 *New York Times* case.

\(^{\text{452}}\) For example, supra n. 29 (*Dow Jones & Co. v. Gutnick*).
Nine other important limitations are mentioned later in section 9.1 as topics for separate research.
CHAPTER 4

METHOD

Traditional legal scholars are of at least two types based on their methodological approach: Positivist or deductive scholars who apply a relatively simple process of finding the relevant legal rules and precedents, reading them, and then applying them to the issue or question at hand,\footnote{E.g., Thomas C. Grey, “Langdell’s Orthodoxy,” University of Pittsburgh Law Rev. 45, no. 1 (1983).} and realist or inductive scholars who see the law as fluid and responsive to new technologies and emergent cultures.\footnote{E.g., Karl Llewellyn, The Bramble Bush (Chicago, IL: Kazi, 1981).}

The inductive approach, which is employed in this dissertation, makes a relatively humanistic assumption that the law, as a product of human endeavor, is shaped by many factors beyond the law itself. Consequently, legal texts such as constitutions, statutes and regulations are not always a primary focus – in this approach, judges are seen to make the law rather than to discover it.

Irrespective of approach, much legal scholarship is doctrinal, interpretive or normative; it seeks to persuade as well as to inform.\footnote{Jack Goldsmith and Adrian Vermeule, “Empirical Methodology and Legal Scholarship,” The University of Chicago Law Rev. 69, no. 153 (Winter 2002): 1.} Legal scholarship tends to be profusely footnoted.\footnote{E.g., Karl Llewellyn, The Bramble Bush (Chicago, IL: Kazi, 1981).} Sometimes it borrows quantitative social science methods such as
surveys and content analyses to produce statistically reliable data that can be generalized to explain past legal outcomes and predict future ones. More often, as in this dissertation, it adopts critical, historical, rhetorical, feminist or other “qualitative methods . . . [which] provide deeper understanding, greater generalizability, higher external validity, and more adaptability . . . [and are] useful at the theory-building stages of research (exploration and description).” To the extent that it integrates into the discussion the ideas of individualization, marketplace of ideas, and empowerment, the study may be viewed as a libertarian explication of jurisdictional redress.

4.1. RESEARCH METHOD, PROCEDURE AND SOURCES

The dissertation uses a traditional four-step method of legal analysis described by Myron Jacobstein, Roy Mersky and Donald Dunn. The procedures in each step are stated below.

The first step is to identify the facts of the case New York Times v. Sullivan, as well as to identify the facts, properties or predicates of the information society. In the wake of New York Times, the Supreme Court has decided twenty-six other libel cases, whose facts and law also will be analyzed, albeit to relatively less import. All analyzed cases are listed as primary sources of the evidence a few paragraphs later, along with fleeting introductions. The cases were accessed in the United States Reports (Official Edition).

456. This dissertation has a footnote for every 57 words or five lines of text; the footnotes contain nearly 25,000 words, while the rest of the document comprises some 44,000 words.


The other evidence is gathered using the following secondary sources: (1) Law review articles were accessed via the database LexisNexis using variations of the terms “Internet” and “libel;” (2) Scholarly books about freedom of expression, democracy, and the Internet – and related topics – were accessed via the libraries of Ohio State University and the University System of Georgia; and (3) Peer-reviewed journals were accessed via the electronic databases OhioLINK and Galileo, using similar search terms as the law review articles. All libraries were accessed through the stack rooms open to the general public; a visitor’s pass may be required to enter some.

Having gathered the evidence, the second step is to use the evidence to formulate the legal issue, which is identified as multiple personal jurisdictions affecting libel litigation.

The third step is to analyze the constitutional law of libel to address the problem, including a critique of the *New York Times* actual malice doctrine (chapter 5), and an argument to extend that doctrine to nonmedia defendants (chapter 6).

The fourth and final step is to use the above analyses to propose a normative, inductive set of recommendations for freedom of expression in the information society, as well as to propose a legal procedure of its implementation (chapters 7 and 8). Steps three and four, thus, will constitute much of the original contribution of the dissertation.

The case citations in the dissertation are to be read in a traditional manner. A case cited as *Black v. White*, for example, indicates that someone named Black is suing someone named White. If White loses at trial and appeals, the case citation may become *White v. Black* in the appellate court even though the facts remain the same. Case names can cause

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459 E.g., in *New York Times v. Sullivan*, 376 U.S. 254 (S.Ct. 39 1964), the citation following the case name is to be read as follows: “U.S.” is the abbreviation for the court reporter, *United States Reports*, “376” is the volume number of the reporter, “254” is the page number on which the decision begins, “S.Ct.” is the name of the court,
confusion, because *Black v. White* may have nothing to do with the behavior of either Mr. Black or Mr. White – Mr. Black may be the guardian of a minor, Ms. Brown, the injured party; and Mr. White may be the trustee in bankruptcy of Mr. Green, the individual alleged to have cause Ms. Brown’s injury. Consequently, case names must be seen as identifying a dispute rather than describing its primary actors.

4.2. LIST OF SOURCES

Written below is a list of primary and secondary sources that were tracked down and analyzed as the evidence. In the early days of the study, the writer briefed each of these cases, but including the briefs as appendices would be unnecessary and distracting. Instead, a sentence or two about each case’s significance or relevance to freedom of expression theory is mentioned in the tables 2, 3 and 4. In addition to the mentioned cases, a few other Sheparded cases were read as well.

4.2.1. PRIMARY

The primary sources were accessed using the following official court reporters: *United States Reports (Official Edition)* for Supreme Court cases, West Publishing’s *Key Number Digests* for state cases and *West’s Federal Practice Digest, 4th* set, for federal cases. Cases not easily available at the Ohio State and the University System of Georgia libraries for any reason were accessed using the full-text electronic databases LexisNexis Academic and FindLaw. The following are the primary sources:

1. The population of twenty-eight libel cases decided by the U.S. Supreme Court. The salience of the cases is listed in the following tables 2, 3 and 4 which classify the cases and “39 1964” is the date on which the case was decided.
based on whether or not they dealt with a legal question of actual malice, and whether they
decided a question of jurisdiction respectively. The cases are *New York Times v. Sullivan*,
356 (1965); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Rosenblatt v. Baer*,
383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Beckley
Reader’s Digest Assoc.*, 443 U.S. 157 (1979); *Keeton v. Hustler magazine, Inc.*, 465 U.S.
770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Bose Corp. v. Consumers Union*, 466
U.S. 485 (1984); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985);
Three tabular presentations of these cases may be found below.

<table>
<thead>
<tr>
<th>Case name and year decided</th>
<th>Salient ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2. Garrison v. Louisiana (1964)</strong></td>
<td>A state may impose criminal sanctions for libel of public officials only in cases in which the plaintiff can prove actual malice.</td>
</tr>
<tr>
<td><strong>3. Henry v. Collins (1965)</strong></td>
<td>A public official must prove actual malice in order to recover damages for defamatory falsehood.</td>
</tr>
<tr>
<td><strong>4. Rosenblatt v. Baer (1966)</strong></td>
<td>A public official must prove that the allegedly libelous publication specifically referred to him and did so with actual malice.</td>
</tr>
<tr>
<td><strong>6. Beckley Newspapers Corp. v. Hanks (1967)</strong></td>
<td>Actual malice requires that the defendant had a high degree of certainty that his statement was false; A showing of ill will or spite is not sufficient to prove actual malice.</td>
</tr>
<tr>
<td><strong>7. St. Amant v. Thompson (1968)</strong></td>
<td>Actual malice requires that a public figure defendant entertained serious doubts about the truth of his or her publication.</td>
</tr>
<tr>
<td><strong>12. Gertz v. Welch (1974)</strong></td>
<td>Private persons do not have to meet the actual malice standard, and states may set their own standards of proof as long as there is a finding of fault of at least negligence.</td>
</tr>
</tbody>
</table>

*Table 2. U.S. Supreme Court libel cases involving a question of actual malice.*
Table 2. (Contd.)

<table>
<thead>
<tr>
<th>Case name and year decided</th>
<th>Salient ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>16. <em>Anderson v. Liberty Lobby</em> (1986)</td>
<td>A federal court must grant summary judgment in favor of media defendant in a case involving actual malice unless plaintiff shows that he or she will be able to offer jury clear and convincing evidence of actual malice.</td>
</tr>
</tbody>
</table>

Table 3. U.S. Supreme Court libel cases not involving a question of actual malice.
Table 3. (Contd.)

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name and Year Decided</th>
<th>Salient Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.</td>
<td><em>Hutchinson v. Proxmire (1979)</em></td>
<td>A private individual is not a public figure when, only because of the alleged libel, the individual is thrust into public attention and given access to the media.</td>
</tr>
<tr>
<td>6.</td>
<td><em>Wolston v. Reader’s Digest Assoc. (1979)</em></td>
<td>A convicted criminal does not retain his or her public figure status forever.</td>
</tr>
</tbody>
</table>

Table 4. U.S. Supreme Court libel cases deciding questions of jurisdiction.

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name and Year Decided</th>
<th>Salient Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td><em>Linn v. United Plant Guard Workers (1966)</em></td>
<td>A state court has jurisdiction to apply state remedies in a labor dispute if the plaintiff proves injury and actual malice.</td>
</tr>
<tr>
<td>2.</td>
<td><em>Keeton v. Hustler magazine (1984)</em></td>
<td>A libel plaintiff need not have minimum contacts with a state for that state to be able to assert personal jurisdiction over the defendant, only the defendant needs to.</td>
</tr>
<tr>
<td>3.</td>
<td><em>Calder v. Jones (1984)</em></td>
<td>A state may exercise jurisdiction over a libel plaintiff if the libel or the harm that occurred form that libel were directed at that state.</td>
</tr>
</tbody>
</table>

2. Cases decided by the lower American courts:


e. Ampex Corp., Edward J. Bramson v. J. Doe 1, aka “Exampex” on Yahoo!, et al., case no. C01-03627 (Contra Costa County, Ca., Superior Court, December 30, 2003).

f. Arnold B. Bowker, et al v. America Online, Inc, case no. 95L013509 (Circuit Court of Cook County, IL, September 26, 1995).

3. International cases:


4. First Amendment of the U.S. Constitution.

4.2.2. SECONDARY

1. Restatement (Second) of Torts.

4.2.3. CITATION STYLE

The documentation is based on chapters 16 and 17 of the Chicago Manual of Style, fifteenth edition, marginally improvised in keeping with the manual’s allowance that “the formats . . . may be modified as long as consistency is preserved within a work.” The improvisation is mostly in the citation of legal cases, as well as in that the state’s abbreviation follows all places of publication.


461 Ibid., 597; “In nonlegal works, the [citation] rules may be adjusted to the style of the surrounding documentation; providing adequate information to help readers find a source is more important than slavishly following prescribed forms of abbreviation and the like” (at 728-29).
CHAPTER 5

ACTUAL MALICE DOCTRINE AND NONMEDIA DEFENDANTS

This chapter onward, the writer addresses the research questions directly. In chapter 5, he argues for the actual malice doctrine to be able to protect nonmedia defendants, and in chapter 6 evaluates the doctrine for adoption in a new theoretical framework. In chapter 7 he uses the preceding two chapters to formulate a set of normative recommendations, and finally in chapter 8 he describes some details of a model procedure of legal action.

Consistent with the development of the information society, a few Western philosophers have documented the emergence of an “individualized condition” as a social effect of the Internet, by which many social realities emerge at the level of the netizen. Nonmedia communicators, including citizen journalists, represent that individualized condition by their widespread use of Internet technologies, and as a consequence, have turned out to be ubiquitous and persistent libel defendants.

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462 Beck and Beck-Gernsheim, Individualization, xxii; Also see generally, Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge (Minneapolis, MN: University of Minnesota Press, 1984).

463 See sec. 2.2 for a discussion of the term; For an introduction to this and other such emergences, see generally, Walter Truett Anderson (ed.), The Truth About the Truth: De-confusing and Re-constructing the Postmodern World (New York, NY: Penguin, 1995).
This chapter, part of the dissertation’s theoretical framework to address the challenge of multiple personal jurisdictions, argues existing constitutional law is inadequate to that reality because it seems to distinguish between media and nonmedia defendants. It calls for constitutional privileges enjoyed by the institutional media to be extended to nonmedia defendants.

5.1. NORM OF NONMEDIA DEFENDANTS

When Karl Marx and Friedrich Engles wrote of the bourgeoisie more than a century ago, “All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses his real conditions of life and his relations with his kind,” they could well have been describing the cultural and intellectual transformation wrought by the individualized condition. Communication and databasing technologies such as weblogs, RSS, Wikis, email newsletters, SMS and discussion boards, inescapable formative components of the information society, have operationalized that condition through individualistic bloggers and other netizens who are often socially active – or activist. About 29 per cent of American bloggers say that motivating other people to action is a

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464 Supra n. 20.
466 The term ‘weblog’ was first used in 1997 on robotwisdom.com, a site that published links to individually selected websites of interest. See David Bell, Brian D. Loader, Nicholas Pleace and Douglas Schuler, Cyberculture: The Key Concepts (New York, NY: Routledge, 2004), 10.
467 Thirty-four per cent of American bloggers consider their blog to be a form of journalism, according to a Pew Internet & American Life Project survey, which also estimated that eight per cent of Internet users, or 12 million Americans, keep a blog and that 39 per cent, or 57 million Americans, read blogs. More than half of American bloggers are under 30 years old, and only 60 per cent are Caucasian compared to 74 per cent of Internet users. Amanda Lenhart & Suzannah Fox, “Bloggers: A Portrait of the Internet’s New Storytellers,” Pew Internet & American Life Project (19 July 2006). www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%2006.pdf (accessed 10 August 2006).
primary reason they blog, while 61 per cent call it a major or minor reason. Another 27 per cent say influencing others’ thinking is their major motivation.468

One ecommerce consultant guesses that there are some 13.6 million bloggers in the world expressly trying to influence others, who if they “were their own country [would] be the 65th largest nation in the world. There is truly a Content Nation out there, a growing body of opinion-makers who are influencing individuals and institutions as never before on a wide variety of issues.”469

Many bloggers practice “citizen journalism”470 and are increasingly the target of libel lawsuits. Such targets represent a phenomenon that journalist Dan Gillmor frames as “We the Media,” a practice in which audiences participate in the production of public information.471 While the institutional media have, for the last ten decades, “treated the news as a lecture . . . Tomorrow’s news reporting and production will be more of a conversation, or a seminar.”472 That conversation, or seminar, would be mediated by a highly active and vigorous “fifth estate”473 different from the fourth estate represented by the traditional newspapers, newsmagazines, broadcast and cable.474 Citizen journalism has become so

468 Ibid.


470 Supra n. 16.

471 Dan Gillmor, We the Media.

472 Ibid., xiii.


474 The fourth estate is a relatively early Scottish notion of the institutionalized press’ role as a watchdog of the original three “estates of the realm” of the feudal Middle Ages – the Church (clergies), the Nobility (knights) and
pervasive that some mainstream news institutions have attempted to leverage the blogosphere to benefit their own newsgathering.475

The fifth estate comprises the ‘small guys’ – bloggers, citizen journalists, online activists or fund-raisers, and participants in the varied Internet forums. Not affiliated with the corporate media, these netizens represent the concept of nonmedia. Only a small audience may actually access most of a blogger’s musings – which can make the blogger akin to an unsuccessful offline speaker – but that is beside the point. Rather, a blogger is considered nonmedia because he or she is not affiliated with the corporate media even while enjoying a potentially large and diverse worldwide audience. The fifth estate reflects an information society seemingly unfettered by governmental or corporate control; libel prosecutions increasingly affecting its members should be a central theme in discussing the freedom of expression.

An institutional, or mass, medium may be defined as such when its circulation or consumption reach a critical point for a given advertiser – any further increase in the circulation or consumption will have only a negligible impact on the advertiser’s sales.476 In non-economic terms, a mass medium may also be defined as a delivery vehicle to transmit

the Peasantry (farmers and other working people). An early reference to the fourth estate appears in the writings of Thomas Carlyle: “[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important than they all.” Thomas Carlyle, On Heroes, Hero Worship and the Heroic in Society (Lincoln, NE: University of Nebraska Press, 1966), 178 (Original work published in Great Britain, 1841); More recently, the U.S. Supreme Court justice Potter Stewart welcomed the role of the press as a “Fourth Estate” – a “fourth institution outside the government to check the potential excesses of the other three branches.” Potter Stewart, “Or of the Press,” Hastings Law Journal 26 (1975): 636.

475 E.g., Scott Leith, “CNN starts Web site for viewers’ journalism,” Atlanta Journal-Constitution, August 1, 2006, C1. “‘We realize our viewers have a really valuable contributions to make,’ said Susan Bunda, senior vice president of news for CNN/U.S. . . . For years, news organizations like CNN have received help from everyday people in covering big events. Consider images taken by amateurs during the terrorist attacks of Sept. 11, 2001, or the Asian tsunami of late 2004 . . . With each passing month, however, more people have gained the ability to shoot pictures and videos, thanks largely to the proliferation of cellphones and cameras.”
messages from a relatively singular speaker to a vast audience, either with or without active feedback or exchanges.\textsuperscript{477} Courts have tended to define an institutionalized medium by its size, nature, circulation, and type of audience,\textsuperscript{478} by which implication bloggers and other “citizen journalists” should be considered common nonmedia denizens of the information society.

5.2. CONSTITUTIONAL PRIVILEGE: MEDIA AND NONMEDIA DEFENDANTS

As the American law stands, institutional media receive the complete protection of the constitutional privileges created in \textit{New York Times} and its progeny. The privileges, defined as standards of fault, apply to the mass media when the plaintiff is a public official or public figure, or when the dispute concerns a public issue. As a result of those privileges, relatively few media libel cases go to trial; the Media Law Resource Center, New York, has documented a strong downward trend in the number of media trials especially since 1980. In 2004, only 12 cases went to trial as opposed to an average of 26.3 cases in the 1980s, 17.9 cases in the 1990s, and 12.5 trials that far in the 2000s.\textsuperscript{479} A longitudinal study by the law professor, David Logan,\textsuperscript{480} of the Center’s data even a few years back had found “proof that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{476} Morris and Ogan, “The Internet as Mass Medium.”
\item \textsuperscript{477} For a discussion of communication models, see Denis McQuail, \textit{McQuail’s Mass Communication Theory}, 4\textsuperscript{th} ed. (London, U.K.: Sage, 2000), 52-59.
\item \textsuperscript{478} Arlen W. Langvardt, “Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law,” \textit{University of Pittsburgh Law Review} 49, no. 91 (1987): 122-23; The Supreme Court has never defined the Internet as a mass medium. The farthest the court has gone is to say, “The Internet is a unique and wholly new medium of worldwide human communication.” \textit{Reno v. ACLU}, 521 U.S. at 850.
\item \textsuperscript{480} David A. Logan, “Libel Law in the Trenches: Reflections on Current Data on Libel Litigation,” \textit{Virginia Law}
\end{itemize}
\end{footnotesize}
Justice Brennan and his brethren [had] accomplished the goal articulated in *New York Times*: the creation of an environment in which public ‘debate on public issues is uninhibited, robust and wide open.’481

On the other hand, the law does not appear to extend the constitutional privileges to nonmedia defendants as discussed earlier in section 2.3.4. Even though Justice Brennan writes, in a footnote of a dissenting opinion, that “there has been an increasing convergence of what might be labeled ‘media’ and ‘nonmedia,”482 the high court has in at least two cases made special efforts to state that the issue of actual malice protection for nonmedia defendants remains unresolved.483 Consequently, even though the Electronic Frontier Foundation advises bloggers that “blogs have the same constitutional protections as mainstream media,”484 bloggers might do well to expect legal consequences.485 The cases cited earlier suggest that citizen journalists, bloggers and others of their ilk can face a “serious risk of being sued for libel”486 when they engage in political commentary or activism.

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481 *New York Times*, 376 U.S. at 270.

482 *Dun & Bradstreet*, 472 U.S. at 782 n.7. In this case, at least six Justices appeared to reject the distinction between media and nonmedia: “. . . In the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.” *Id.*, at 783-84 (Justice Brennan, dissenting).


485 The EFF cites Justice Brennan’s dissenting opinion cited supra., n. 482.

The Supreme Court has failed to define any level of constitutional protection for nonmedia defendants, which many authors agree results in a chilling effect.\footnote{E.g., The First Amendment scholar Lyrissa Lidsky writes, “Defamation law . . . is so complex that it is almost impossible to state even the most basic proposition with certainty. Even for those relatively rare Internet users who have the resources to defend against a defamation action and who contemplate in advance whether their postings will subject them to liability, the inability to predict with any certainty what level of constitutional protection they will receive may itself have a chilling effect.” Lidsky, “Silencing John Doe,” 905-7.} When the high court had an opportunity to do so, it let it pass: In the case \textit{Dun & Bradstreet v. Greenmoss Builders},\footnote{472 U.S. 749 (S.Ct. 626 1985).} where the issue was whether a private plaintiff could recover presumed and punitive damages without showing actual malice as required by \textit{Gertz v. Welch}.\footnote{418 U.S. at 323.} By failing to announce explicit constitutional protection for nonmedia defendants, the high court effectively suggested that \textit{Gertz} applied only to matters of public concern. The high court’s reluctance was interpreted by some lower courts as \textit{Gertz}’s limits on such damages not applying to nonmedia defendants.

The law professor, Paul Horowitz, offers three arguments to extend legal protection to blogs: First, by contending that an “open press,” which blogs can represent, is equal to the “free press” that is referred to in the press clause of the First Amendment. Second, by using a functionalist definition of who does journalism, rather than who is traditionally labeled “the press,” and third, by requiring the courts to allow autonomy for nontraditional private institutions under the press clause. “To the extent the blogosphere resembles the press of the founding era, it may then be natural to suggest that our thoughts concerning the constitutional status of and protection for blogs should stem as much from the Press Clause as from the Speech Clause.”\footnote{Paul Horowitz, “Or of the Blog,” 11 \textit{Nexus Journal of Opinion} (2006): 50.}
Several states have adopted an “access argument” to offer higher protection to media defendants in public plaintiff lawsuits because such plaintiffs have higher access to the media. In the information society new technologies have phenomenally increased access to audiences by all manner of plaintiffs as well as defendants. However, because of a lack of “physical” or “real” facet, the cyberspace of the information society is a leveler between nonmedia defendants and the institutional media. Defendants and plaintiffs are in the same boat, the only factor that distinguishes them being the situation of the alleged defamatory falsehood.

The uncertainty of First Amendment privilege has resulted in a barrage of claims against nonmedia defendants, some of which are documented by the Media Law Resource Center. Here are some examples of tenacious public plaintiffs engaging nonmedia publishers: In July of 2005, two bloggers were jailed in Ohio for publishing allegedly critical comments against a judge, a case in which the charges included the bloggers’ use of their computer as a “criminal tool.” In a somewhat similar incident, also in July of 2005,

491 The access, or self-help, argument of Justice Powell is a frequently held justification for different standards for private and public plaintiffs. It makes a case that a plaintiff’s access to the media to rebut the alleged defamation is relevant to the plaintiff’s status as a public figure. See Gertz v. Welch, 418 U.S. 323, 344-45 (1974). The access argument is criticized in Justice Brennan’s majority opinion in Rosenbloom v. Metromedia, 403 U.S. 29 (1971), at 46-67: “Denials, retractions, and corrections are not “hot” news, and rarely receive the prominence of the original story . . . in the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media’s continuing interest in the story.”

492 A list of libel suits targeting bloggers and other netizens is available with the Media Law Resource Center’s site, http://www.medialaw.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3457; Also see the sites of the Electronic Frontier Foundation, a California libertarian activist group, at http://www.eff.org/bloggers/, and the Committee to Protect Bloggers, at http://committeeetoprotectbloggers.civiblog.org/blog/ThreatenedBloggers (all accessed 18 February 2006).

the U.S. Army demoted and fined an Arizona National Guardsman in apparent response to his criticizing the Iraq war on a blog set up by friends, following which the military began to require enlisted personnel to register their blogs with superiors. In another case in December of 2005, the chairman of the Philadelphia Turnpike Commission launched libel proceedings against a Middletown, Pennsylvania, blogger for critical comments on the blog. And in February of 2006, the founder of an activist group seeking to defeat Pennsylvania lawmakers sued a Web site that criticized his campaign as a “moneymaking scheme.”

And it is not only public officials going after nonmedia defendants. In the last decade, private corporations are documented to have emerged as the dominant user destinations of the Internet, which could reflect certain important issues concerning expressive freedom raised by the critical scholar, Robert W. McChesney. The relative ease of falsifying email return addresses allows bloggers to libel corporate actors anonymously.

letters that Baumgartner, a former attorney who was disbarred in 2003, sent to a school board member. That trial ended with a $175,000 verdict against Baumgartner.


497 Supra n. 185.

498 “Tragically the dominant notion of a ‘free press’ in the United States (and increasingly elsewhere) continues to regard the government as the only organized enemy of freedom. Imagine if the U.S. government had ordered that journalism staffs be cut in half, that scores of foreign bureaus be shut down and that the news be shaped to suit the interests of the U.S. government. It would doubtlessly constitute the gravest U.S. political crisis since the Civil War, making the red scares and Watergate look like a day at the beach. Yet when corporations pursue the exact same course, scarcely a murmur of dissent can be detected in the political culture.” Robert W. McChesney, “The Political Economy of Global Communication,” in Capitalism and the Information Age (Robert W. McChesney, Ellen Meiksins Wood and John Bellamy Foster, eds.) (New York, NY: Monthly Review, 1998), 18.
Some critics fear that the power of oligopolistic media goliaths has, in some ways, trumped the subversive capacity of the information society. Leading media content websites are mainly associated with the media giants, and coercive or intrusive advertising is ubiquitous. The First Amendment protects free speech from the state’s prior restraint and transgressions, but similar transgressions by corporations are outside the law’s purview.

Corporations are increasingly eyeing lawsuits, and possible punitive damages, as a way to silence critical consumers, disgruntled vendors, and former employees. Often the motivation is to squash the criticism and force the critic to withdraw, rather than to restore any reputation. And a corporation-netizen confrontation can be a rather unequal fight, even if the corporation’s claim is eventually found to have merit. In one case, a California jury found two ex-employees liable for invasion of privacy, libel, breach of contract, and conspiracy, and awarded their former company and two of its executives $425,000 in general damages and $350,000 in punitive damages. In May of 2005, a car insurance company sued a New Jersey man who had posted critical comments against the company on his 45-

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499 “The Internet has not spawned a new group of commercially viable media companies to compete with existing firms.” Robert W. McChesney, The Problem of the Media (New York, NY: Monthly Review, 2004), 221; Also see generally, McChesney, Rich Media, ch. 3.


501 “Only the government may not restrict your right of free speech, others can. . . . [Americans] lack a coherent positive theory of freedom of expression that is widely accepted.” Dershowitz, Rights from Wrongs, 179. (Emphasis in original).

502 Varian Medical Systems v. Delfino, 35 C.4th 180 (2005). In cases with media defendants, however, the award of punitive damages is on the decline. According to the Media Law Research Center, “There has been a dramatic shift from the 1980s to this decade in the ratio of compensatory and punitive damages in awards [in all cases, not just libel]. Of the total damages awarded in the 1980s, 39.0 percent was compensatory and 61.0 percent was punitive. In the 1990s, the ratio was 48.8 compensatory to 51.2 punitive. This decade, the ratio is 92.7 percent compensatory to only 7.3 percent punitive. In 2005, only 3.5 percent of the total damages awarded were punitive damages, an all time low for the [Complaint] Report.” Press release dated March 2, 2006. www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2006_Bulletin_No_1.htm (accessed 10 August 2006).
In August of 2005, a Nevada Internet marketing company sued a blogger who commented on search engine optimization for allegedly libelous comments and for publishing trade secrets. Edwin Baker documents that the disproportionate power wielded by private corporations had created a “skewed marketplace.” Another author writes, “It is becoming clear that [on the Internet] corporations are using punitive damages as a form of self-help.”

The threat of lawsuits by corporate executives and other private plaintiffs, in addition to the public plaintiffs, can act as a prior restraint to chill speech in the information society, especially when anonymous speakers run the risk of being identified by their respective Internet Service Provider. The threat to free speech in the information society comes perhaps not so much from government, as has been the traditional assumption in freedom of expression theory, but from powerful corporations and their executives. Policymakers for the information society would do well to pan the spotlight from seditious libel to private libel.

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503 Penn Warranty Corp. v. DiGiovanni, Index No. 600659/04 (N.Y. Sup. Ct., N.Y. County dismissed Oct. 24, 2005). The site was www.pennwarrantylitigation.com (now defunct). The suit was dismissed after the court held that the comments on the site were protected speech.


505 Baker, Human Liberty, 250.


507 For example, in September of 2005, Reporters Without Borders accused Yahoo!’s Hong Kong operation of supplying identifying information to the Chinese government that led to the imprisonment of a journalist, Shi Tao, of Hunan province. http://news.bbc.co.uk/1/hi/world/asia-pacific/4221538.stm (accessed 26 January 2006); See sec. 2.4.2.4 for a discussion of the identification process in America.

508 In 1996, the Clinton administration paved the way for a laissez-faire approach to the Internet when it announced the world’s first comprehensive regulatory policy for the information society. The policy even urged other governments to not attempt to regulate the Internet. See A Framework for Global Electronic Commerce,
5.3. A RETURN OF CRIMINAL LIBEL

This section discusses criminal libel as a possible issue for bloggers and citizen journalists. States file criminal libel suits usually against individuals who defame lawmakers, libel the dead or use racial epithets. In lawsuits outside the information society, criminal libel has been on its way out because of statutory vagueness, overbreadth, or because criminal libel laws did not require “actual malice” as mandated by the 1964 Supreme Court decision in Garrison v. Louisiana. In the last three decades of the twentieth century, at least a dozen states have jettisoned their criminal libel laws, either by legislative repeal or by judicial ruling. In a December of 2004 report, the Media Law Resource Center documented only 77 threatened or actual prosecutions for criminal defamation from 1965 to 2002, of which about a third ended in convictions.

Free speech advocates have successfully argued that any harms occurring from libel are better addressed in civil, rather than criminal, courts, and imprisoning speakers is “completely antithetical to current law and the public conscience.” Currently, seventeen states and two U.S. territories continue to have criminal libel laws.

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509 One American state defines criminal libel in the following manner: “A person is guilty of criminal defamation if he knowingly communicates to any person orally or in writing any information which he knows to be false and knows will tend to expose another living person to public hatred, contempt or ridicule…” Utah Code Ann. Sec. 76-9-404 (2000).


511 See http://www.medialaw.org/


514 Supra, n. 512.
With the advent of the information society, however, criminal libel seems to have made a comeback – the Internet apparently amplifies libels and creates unusual fears, pushing alleged victims to do unusual things.\textsuperscript{515} For instance, in Utah, a high school principal had a 16-year-old student, Ian Lake, jailed for a week under an antiquated 126-year-old criminal libel statute for indulging in boisterous curses that might not gone unnoticed if they’d been uttered at the watercooler instead of on a Web site (the student had babbled that the “drunk,” “dickhead” principal had been having an affair with the school secretary).\textsuperscript{516} In August of 2003, a Wisconsin man was convicted of criminal libel after posting his former boss’ name in an Internet advertisement soliciting sex partners.\textsuperscript{517} In December of 2003, Wesley Meixelsperger of Kansas was given a year’s probation after pleading guilty to posting false and disparaging remarks about his ex-wife on his Web site.\textsuperscript{518} In January of 2004, the American Civil Liberties Union filed a suit on behalf of college student Thomas Mink of Greeley, Colorado, whose computer police had seized after he used it to host a “Howling Pig” site that contained a doctored picture depicting a professor as a member of the rock group Kiss.\textsuperscript{519}

\textsuperscript{515} E.g., Katharine Biele, “When Students Get Hostile, Teachers Go to Court,” \textit{Christian Science Monitor}, Aug. 22, 2000, at 1. “The Web has added a new dimension to the issue of teacher defamation, taking what were once lunch-table conversations or clandestine notes, and making them available to everyone.”

\textsuperscript{516} In \textit{re I.M.L.}, 2002 UT 110, 61 P.3d 1038 (Utah 2002). The Utah Supreme Court threw out the case by striking the criminal libel statute as overbroad and not in conformity with “the requirements laid down by the United States Supreme Court” such as actual malice.

\textsuperscript{517} Lisa Sink, “Man Convicted of Posting Ex-Boss’ Name on Sex Site,” \textit{Milwaukee Journal-Sentinel}, August 11, 2000, at B1. In this case, as well as in the case of high school student, the charge was criminal libel.


\textsuperscript{519} See ACLU release, “ACLU Names Colorado Attorney General as Defendant in Challenge to Criminal Libel
These individuals were all prosecuted for alleged private libels but under criminal libel statutes. The Internet gives more individuals the ability to speak and therefore more opportunities to libel, but the comeback of criminal libel seems to be a curious trend.

So why do many plaintiffs see Internet statements as especially damaging, dangerous or lasting?\(^{520}\) David Porter writes, “In a medium of disembodied voices and decontextualized points of view, a medium, furthermore, beholden to the fetishization of speed, the experience of ambiguity and misreading is bound to be less an exception than the norm.”\(^{521}\) Because of this ambiguity or misreading – as well as because of the Internet’s potential reach, amplification or anonymity – corporations as well as private plaintiffs tend to react knee-jerk to defamatory materials posted on discussion boards and Web sites or in emails.\(^{522}\) Besides, there is an almost uncountable number of Web-based purveyors of information, including e-versions of traditional news outlets such as nytimes.com and political gossip forums such as drudgereport.com.\(^{523}\) They add up to an information society bristling with opportunities for

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\(^{520}\) John L. Hines, Jr., Michael H. Cramer & Peter T. Berk. “Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury,” The Sedona Conference Journal 4, no. 97 (Fall 2003). “Disparagement is a weapon commonly used by disgruntled employees or former employees to attack their corporate employers. The Internet has lowered the cost of using this weapon, made it more effective and decreased the likelihood that its employee-user will be detected. Corporate reputations are thus more at risk than ever.”

\(^{521}\) David Porter, Internet Culture (New York, NY: Routledge, 1997), xii.

\(^{522}\) Regardless of whether the corporate plaintiff brings suit for corporate defamation or for another corporate reputational tort, the plaintiff is required to prove four elements: (1) derogatory publication; (2) fault; (3) a provably false statement; and (4) pecuniary damages. See Dan B. Dobbs, The Law of Torts 407, at 1138 (2000). Even though these requirements are significantly more demanding than the common law libel rules, and are even more demanding than the Constitutional libel law developed since New York Times Co. v. Sullivan, that has not kept corporate plaintiffs from winning many, though not a majority, of punitive damage claims in Internet cases. See Michael L. Rustad, “Punitive Damages in Cyberspace: Where in the World is the Consumer?” 7 Chap. L. Rev. 39: 64. Spring 2004.

error, and thus liability for libel. An old dictum in advertising agencies’ offices used to be that when a customer had a good experience with a company he or she shared it with four others, but when the customer had a bad experience they shared it with a dozen. In the information society, the audience can easily increase to hundreds, thousands or even millions.

5.4. SPECIAL PROBLEMS OF NONMEDIA DEFENDANTS

Given that nonmedia defendants typically do not have liability insurance coverage, or any kind of corporate structure, they are highly vulnerable to libel claims. On the other hand, media defendants typically have a legal infrastructure and some form of liability insurance. It is a rather expensive legal irony that institutional media enjoy First Amendment privileges but nonmedia defendants may not – expensive to the information society because of its chilling effect on expression. The inequity seems even starker because corporate or public plaintiffs typically have access to an efficient legal support infrastructure when they claim libel.

In addition to legal illiteracy, nonmedia defendants tend to have relatively nonexistent support of unions or other forms of organization. They are randomly distributed, with no collective voice or lobby. They do not represent a constituency, which may be a cause for their not being able to make a case for First Amendment protection so


525 For example, the National Association of Broadcasters has in the past arranged two levels of insurance coverage for its members – one policy covering libel and invasion of privacy suits and the other covering other First Amendment problems. See Wayne Overbeck, Major Principles of Media Law (Belmont, CA: Thomson Wadsworth, 2006), 169.
far.\textsuperscript{526} On the other hand, media defendants represent a powerful constituency comprising insurers who have high stakes, as well as an organized bar.\textsuperscript{527} By their gatekeeper nature, institutional media tend to regulate the access to political news,\textsuperscript{528} sometimes, as some critics argue, going too far in their powerful agenda-setting effects.\textsuperscript{529} Going even further, activist critics such as Robert McChesney criticize the corporate media as having a disastrous effect on participatory democracy worldwide.\textsuperscript{530}

In such a scenario, to cloak media speech with First Amendment protection without extending that protection to nonmedia defendants frustrates the \textit{New York Times} court’s ideal of robust freedom of expression as a central intention of democracy.\textsuperscript{531} In addition, the institutional media tend to be relatively limited in circulation compared to the reach of transjurisdictional nonmedia such as bloggers and RSS posters. The double standard restrains independent writers and thinkers in the information society from expressing ideas for fear of a lawsuit, just the type of retribution that \textit{New York Times} ruled the First Amendment intends to preempt.\textsuperscript{532}

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  \item \textsuperscript{526} A rare example of such a constituency was the now-defunct Committee to Protect Bloggers. http://committeetoprotectbloggers.blogspot.com/
  \item \textsuperscript{527} “Libel law reform . . . has no political constituency unless the media and their allies support it. So far they have not done so.” Anderson, “Is Libel Law Worth Reforming?,” 39-40.
  \item \textsuperscript{529} For a discussion of anti-media sentiment in the United States see Bruce W. Sanford, \textit{Don’t Shoot the Messenger: How Our Growing Hatred for the Media Threatens Free Speech for All of Us} (New York, NY: Free Press, 1999), 11-25.
  \item \textsuperscript{530} McChesney, \textit{Rich Media}; Also see Douglas Rushkoff, \textit{Media Virus} (New York, NY: Ballantine, 1996), 206. Greg Ruggerio of the Immediast Underground, an electronic communication group that criticizes coercive messages and media monopolies, is quoted as saying, “Media is a corporate possession. It is not a democratic right that we can locate in the [C]onstitution . . . You cannot participate in the media.”
  \item \textsuperscript{531} See \textit{New York Times}, 376 U.S. at 269.
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5.5. EXTENDING THE CONSTITUTIONAL PRIVILEGE

One of the ramifications of the inequity for the information society is that the chill, or self-censorship, of nonmedia speech impedes the growth as well as economic and social benefits of that society. But the chill affects nonmedia speakers outside the information society as well. For example, it affects sources that are willing to let journalists publish their names, sources that have a primary importance in the institutional newsgathering process. This has a serious impact on the quality of the news and the credibility of the institutional media.

In addition to journalists’ sources, individuals who circulate petitions and write letters to the editor, databanks, credit reporting agencies, various information businesses, political and tenant groups, and publishers of handbills and local association newsletters, also are affected by the chill, resulting in the possibility of a vast amount of self-censoring.

One federal appellate court argued that scholars and prosecutors, as nonmedia defendants, may have a greater need for privilege than do broadcasters and newspapers. The inequitable treatment of media and nonmedia under current law tends to disrespect the Meiklejohnian idea of democratic self-rule that for many decades has dominated the

532 Anthony Lewis, Make No Law, 9-14.


Supreme Court’s interpretation of the First Amendment. It also seems to gut the libertarian ideal of a marketplace of ideas in the face of an increased need to protect such an ideal.

Given the expansion of the information society, libel litigation against nonmedia defendants will continue to rise, possibly resulting in a gradual compounding of the chilling effect, unless the Supreme Court explicitly recognizes a constitutional privilege as afforded to media defendants.

In deciding a 1994 lawsuit, the Seventh Circuit court of appeals observed that it made no sense to reserve constitutional protection only for the institutional media: “The private interest at stake is not greater when the defendant is a psychologist rather than a reporter.” Even though that court supported extending the actual malice rule to nonmedia defendants, only a year later it declined to rule on whether media sources were entitled to the constitutional privilege afforded by the actual malice doctrine. It found that the

538 In a relatively early case, the Wisconsin supreme court had declared that a computer bulletin board did not qualify as a periodical, because posting a message there was “analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals.” It’s in the Cards, Inc. v. Triple Play Collectibles (1995), 193 Wis. 2d 429, 436, 535 N.W.2d 11, 14. The case was so early that the court had to use a footnote to define the phenomenon of the Internet: “The on-line service [at issue in the case] is not the Internet, but is one network service. The Internet is a network of thousands of independent networks, containing millions of host computers that provide information services. Further, the Internet is not owned or controlled by a private company or the government,” 433 n.2, 535 N.W.2d at 13 n.2. The court ruled in this case that the Internet was not a medium that could trigger the state’s retraction statute, a position that was rendered generally obsolete by other judgments in later years.

539 Underwager v. Salter (1994), 22 F.3d 730, at 734-35. The lawsuit was filed by authors of books on child sexual abuse against a critic of their methodology. The plaintiffs’ books, not accepted by the scientific community, argued that most accusations of child sexual abuse arise from false memories implanted by faulty clinical techniques. Ibid., 731. Many scientists joined issue with the plaintiffs’ methodology. The defendant was a former prosecutor who had received a grant to critique the authority that the authors cited, and after 18 months of research she determined that the plaintiffs’ conclusions were ill-begotten. She wrote a monograph, which was not published, gave several speeches, and appeared in television interviews to discuss her research, following which the plaintiffs filed suit alleging libel. Ibid., 731-32.

540 Ibid., 734.

541 Harris, 48 F.3d at 253 (stating that “whether the New York Times standard would apply to [the defendant], who probably is best characterized as a media source, need not be decided here”).
Wisconsin supreme court had “limited the reach of New York Times."542 The legal dichotomy makes even less sense when the Supreme Court has refused to grant the media any special status in non-defamation situations.

Even though libel is defined independently of medium, the information society seems to have exacerbated the inequities of the law. The current law does not recognize that the information society has obliterated the distinctions between media and nonmedia defendants.543 In the face of the historian Arthur M. Schlesinger’s cautionary note, “Change is threatening. Innovation may seem an assault on the universe,”544 this writer proposes that constitutional privileges enjoyed by media defendants be extended to nonmedia defendants, especially to bloggers and others of the fifth estate. In a nutshell, why the law should evolve may be at least partially expressed by the categorical syllogism:


2. The line between media and nonmedia defendants has blurred.

3. The protection should extend to nonmedia defendants.

In chapter 7, the writer extends that argument into a normative set of recommendations for freedom of expression and in chapter 8, describes a legislative bill that would deliver the theoretical framework to the libel litigant.

542 Harris, 48 F.3d at 253.

543 The Electronic Frontier Foundation has urged the courts declare bloggers as journalists to protect them from revealing anonymous sources. See a discussion of the case *Apple v. Does* (2004) available at the EFF site www.eff.org/censorship/apple_v_does (accessed 19 February 2006). “The protections required by the First Amendment are necessary regardless of whether the journalist uses a third party for communications.”

Chapter 5 argued for the actual malice doctrine to be extended to nonmedia defendants, but how adaptable is the doctrine in the face of the special characteristics of the information society?\textsuperscript{545} The current chapter addresses that question by evaluating the doctrine’s colorful undertones\textsuperscript{546} as part of the theoretical framework of the separate jurisdiction proposed for members of the fifth estate.

Only a couple of years after America unveiled the world’s first Internet regulatory framework,\textsuperscript{547} policymakers recognized multiple personal jurisdictions as a key challenge to regulations framed in the information society. To use the words of the legal scholar Pamela Samuelson, “how to coordinate with other nations in Internet law and policy making so that there is a consistent legal environment on a global basis”\textsuperscript{548} had emerged as a significant difficulty. Since 1997, the American government’s laissez-faire ecommerce policy has

\textsuperscript{545} The dissertation defines “doctrine” as a conduit for arguments that a court uses to determine a result. The actual malice doctrine bars a public defendant “from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” See \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964), 279-80.


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purportedly served the libertarian interest, helping the information society blossom into a cultural construct informed by the individualization ethic.\textsuperscript{549} But as documented previously, America’s libertarian libel law seems to ignore the specific issue of nonmedia libel, in that it neither explicitly protects members of the fifth estate nor seems perfect to serve their libertarian needs. One court has recognized the need for a tweaking it: “Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.”\textsuperscript{550}

An effective way for a legislature to do so would be to duly modify the libel law prior to considering extending it to nonmedia defendants. This chapter argues that even when the actual malice doctrine’s complexities and imperfections are scrutinized\textsuperscript{551} it remains a “great civil liberties victor[y]”\textsuperscript{552} that celebrates the libertarian ideal. The doctrine being consistent with the individualization ethic\textsuperscript{553} and with the marketplace of ideas, it would logically form a component of any libertarian framework for information society libel. Extending a modified doctrine to protect the fifth estate would redeem the libel law’s perceived inadequacies for the information society.


\textsuperscript{550} E.g., \textit{It’s in the Cards, Inc. v. Triple Play Collectibles}, 193 Wis. 2d 429, at 437; The writer uses the court’s suggestion to develop, in chapter 8, a legislative mechanism to implement the new recommendations that the three earlier chapters outline.


The next few paragraphs try to sum up some common criticisms of the actual malice doctrine from the perspectives of plaintiff, defendant and the general public.

While the primary goal of a libel suit should be the restoration of a falsely injured reputation, the actual malice doctrine may be concerned not so much with the truth as it is with damages.\textsuperscript{554} Damages might mean little to a John Doe plaintiff who is aware of the relative poverty of a Jane Doe defendant living physically in a separate, maybe international, jurisdiction numerous miles away. John Doe is seeking only to restore his reputation with no intention to seek damages, to which he would find the obligation to prove actual malice an impediment or distraction.

For the media defendant the doctrine can create a prospect of expensive, intrusive and protracted litigation causing public criticism of the defendant. It can divert the focus to the plaintiff’s attacks on the integrity of the defendant, letting the plaintiff intrude into the defendant’s creative processes. It can impose large expense before and during trial and cause occasional large judgments that some argue continue to chill speech.\textsuperscript{555} Media defendants won less than forty per cent of the libel trials between 1980 and 2004; in the year 2004, media defendants had an average damage award of $3.4 million imposed on them.\textsuperscript{556}

For the general public the doctrine can seem confounding in that its purpose seemingly is to protect the dissemination of falsehoods, small though they might be. A critic

\textsuperscript{553} See sec. 2.2 for an explication of “individualization.”

\textsuperscript{554} See generally, Soloski & Bezanson, \textit{Reforming Libel Law}; Wat Hopkins, \textit{Actual Malice}; and Anthony Lewis, \textit{Make No Law}.

\textsuperscript{555} E.g., Anderson, “Is Libel Law.”

might conclude the truth seems to matter little to the doctrine, and because the doctrine’s purpose is to deny remedy to some plaintiffs whose reputation has been harmed by defamatory falsehoods it might actually undermine truth in public discourse. A consequence might be, to quote an admission of Justice White, that “the stream of information about public officials and public affairs is polluted and often remains polluted by false information.” In addition, the general public may see other possible social costs as even larger – such as a discouragement to participating in public life, adverse effects on the well being of the political process, or a dilution of the quality of public discourse.

In the light of the above difficulties, America’s libel law, the law professor Marc Franklin writes, “has developed into a high-stakes game that serves the purposes of neither the parties nor the public.”

In a fundamentally critical perspective, the law professor David Riesman writes, “[W]here tradition is capitalistic rather than feudalistic, reputation is only an asset, ‘good will,’ not an attribute to be sought after for its intrinsic value. And in the United States these business attributes have colored social relations. The law of libel is consequently unimportant.” Riesman’s argument would imply that the actual malice doctrine treats reputation as a pre-capitalist value informed by socially conservative or colonial offline societies rather than by any postindustrial individualization condition.

This writer, however, accepts neither Professor Franklin’s extreme conclusion of the libel law nor Professor Riesman’s devaluation of reputation. The following subsections

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557 The justice’s concurring opinion in Dun & Bradstreet, 472 U.S. at 769 (S.Ct. 626 1985).
559 David Riesman, Democracy and Defamation: Control of Group Libel, 42 Columbia Law Rev. 727, 730
critique the doctrinal component of the libel law to identify its specific chinks, but in a background of tweaking it to suit the special characteristics of the information society. The American libel law, the writer implies, is as close to recognizing the libertarian ethos as libel law is anywhere in the world.

This evaluation of the law will inform the normative recommendations for freedom of expression outlined later in chapter 7.

A system of freedom of expression is well served by laws that develop through a dialogic process involving, among others, courts and public representatives. That process needs to efficiently address the tensions inherent in balancing freedom with order; the dialogue should ideally develop in an iterative fashion. Normative research such as this dissertation and pragmatic regulations such as the American ecommerce policy would be catalysts or facilitators of that dialogue.

6.1. FALSE STATEMENTS PROTECTED

The actual malice doctrine seems to presume a centrality of damages rather than of truth or reputation – a normative libel framework should repair that lacuna by restoring the truth or at least vindicating the plaintiff’s reputation. Justice Brennan’s opinion for the unanimous court in *New York Times* frames the issue with an opening statement that records that “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action.” The justice explains the court’s dissatisfaction with the common law defense of truth: “Allowance of the defense of truth, (1942).

with the burden of proving it on the defendant, does not mean that only false speech will be
deterred. Even courts accepting this defense as an adequate safeguard have recognized the
difficulties of adducing legal proofs that the alleged libel was true in all its factual
particulars.\textsuperscript{562}

Even though later in 1986 the high court held that both public and private plaintiffs
bear the burden of proving falsity, it failed to specify whether the burden of proof must
shift from defendant to plaintiff in cases with nonmedia defendants, in cases not involving
matters of public concern, and in cases explicitly seeking a declaration of falsity rather than
any damages.\textsuperscript{563} In 1964 the high court had ruled that in cases of media defendants both
private and public plaintiffs had the burden of proving falsity, but not in cases of nonmedia
defendants. As one scholar points out, the original purpose of the doctrine may well have
been purely to prevent large money judgments from killing off press freedom,\textsuperscript{564} and the
law may not require proof of actual malice in a suit that seeks no money damages.\textsuperscript{565} But
specifically, the actual malice doctrine’s primary purpose can be interpreted as protecting
falsehoods. “Erroneous statement is inevitable in free debate, and . . . it must be protected if
the freedoms of expression are to have the “breathing space” that they need . . . to

\textsuperscript{561}New York Times, 376 U.S. at 256.

\textsuperscript{562}New York Times, 376 U.S. at 279.


\textsuperscript{564}E.g., see Pierre N. Leval, “The no-money, no-fault libel suit: Keeping Sullivan in its proper place,” 101
Harvard Law Rev. 1287 (1988), 213. “The ruling was not addressed to and has no logical bearing on whether a
court might declare a defamatory statement false. Nothing in it suggests that falsely maligned plaintiffs would
need to prove [actual] malice if they sought no money damages but only a judgment declaring falsity.”

survive.” A normative system would need to restore the primacy of truth in libel cases by dispelling any adduction that the doctrine is intended to protect falsehoods *per se*.

6.2. PUBLIC FIGURE DOCTRINE NEEDS REFORM

As section 2.3.5 documented the actual malice doctrine originally applied to a public official plaintiff, but in several years after 1964 the Supreme Court extended the logic to explicitly cover other categories of plaintiffs.

In 1967, the high court applied the doctrine to public figures, defined as plaintiffs who hold no official position but “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”

Four years on, the court applied the doctrine to candidates for public office and to appointed officials, including “at the very least . . . those among the hierarchy of

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568 *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967); concurring opinion by Chief Justice Earl Warren; Also see *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir. 1964) (Justice Friendly).

government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.\footnote{570}

The public figure doctrine would protect netizens – if only it, verily, acknowledged the existence of a fifth estate; it is outdated in that it fails to recognize that estate’s democratization of communication. The doctrine may possibly be reconsidered in two ways: By (1) abandoning it altogether so that all information society plaintiffs are considered as private plaintiffs, or by (2) allowing the Internet Empowerment Agency to define bloggers as public figures on a case-by-case basis, perhaps by the level of Internet access; in other words, access to or participation in the information society may be the agency’s criterion to define a public figure instead of official status, intimate involvement, or fame. In addition, the agency would be free to use its discretion to recognize other standards to call public figures among bloggers.

The writer would like to posit that the second is the better option as it is amenable to the libertarian ethos, and because the doctrine harms none. The suggested Internet Empowerment Agency should decide on a case-by-case basis which bloggers are public figures and which are not. That proposition is more amenable to the libertarian ethos, and would serve as an effective resolution of the doctrinal anachronism. The choice is justified in several judicial decisions, of the Supreme Court as well as the lower courts.

One of the frequently used rationalizations of the actual malice doctrine is ‘self-help by access,’ which makes a case that public plaintiffs are less vulnerable to reputational harm than private because they usually have more access to media and therefore more

\footnote{570 \textit{Rosenblatt v. Baer}, 383 U.S. 75, 85 (1966).}
opportunities to protect their reputation through self-help.\textsuperscript{571} It must be pointed out that Justice Brennan criticized that rationale when he wrote seven years after \textit{New York Times}, “In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media’s continuing interest in the story.”\textsuperscript{572}

Justice Brennan’s criticism, however, does not affect the access argument for the information society where the “media’s continuing interest in the story” vis-à-vis the nonmedia cannot have measurably diminished when it could hardly be measured in the first place. Besides, the very concept of media has undergone a transformation from democratization, decentralization and individualization as discussed in the literature review. The definition of a plaintiff as public by a high access to the Web or a high ability to counter an alleged libel with his or her own expression would reasonably be immune to Justice Brennan’s criticism.

In addition, the revised definition is consistent with the attempt of some lower courts to view the two public plaintiff categories as coextensive. For example, police officials are almost invariably classified as public plaintiffs no matter what their rank,\textsuperscript{573} and public figures have been deemed to include not only those who seek to influence public

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\textsuperscript{572} \textit{Rosenbloom v. Metromedia}, 403 U.S. 29 (1971), at 46-47. “Denials, retractions, and corrections are not ‘hot’ news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . the argument loses all of its force.”
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\textsuperscript{573} E.g., \textit{Roche v. Egan}, 433 A.2d 757, 762.
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affairs but also those who attract media attention by success in their career or avocation or by their relationships with celebrities. The courts have also ruled, already, that a public figure plaintiff’s fame or influence need not be widespread – notoriety within a particular circle is sufficient in claims of defamation within that circle. “Whistleblowers,” of which there is no shortage in the fifth estate, are already recognized as public figures for the public debates created by their disclosures.

To sum up, the definition of public figure should be left to the jurisdictional court – the suggested Internet Empowerment Agency – but may include plaintiffs who have an easy access to the Internet components or a high ability to respond to alleged libels in the information society, among other standards adopted at the discretion of the agency. The following three paragraphs further elaborate this proposition.

When Gertz or Curtis were decided, a defendant could be easily defined as “media,” specifically as either a print publishers or broadcaster. In the information society, however,

574 E.g., Associated Press v. Walker, 388 U.S. 130, 154 (1967). The court find that a politically prominent man who was involved in a college campus riot was a “public figure.”


578 E.g., Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1300 (D.C. Cir.) (innovator in grocery store business was public figure for limited purpose of comment on his own business), cert. denied, 449 U.S. 898 (1980); Williams v. Pasma, 656 P.2d 212, 216 (Mont. 1982) (former candidate for U.S. Senate who was well-known in state was public figure), cert. denied, 461 U.S. 945 (1983).

579 E.g., Grass v. News Group Publications, 570 F.Supp. 178, 183-84 (S.D.N.Y. 1983) (a private citizen, challenging a claim made by a gubernatorial candidate, was a public figure); Beard v. Baum, 796 P.2d 1344 (Alaska 1990) (a state employee reporting on public corruption was a public figure); Rodrigues-Erdmann v. Ravenswood Hosp., 545 N.E.2d 979 (Ill. App. 1989) (a doctor reporting malpractice at a hospital was a public figure); Einhorn v. Lachance, 823 S.W.2d 405 (Tex. App. 1992) (pilots reporting on airline safety infractions were public figures).
there is a vast diversity of defendants: The current public figure doctrine makes no distinction between a Leonard Witt (blogger of pjnet.org) and the New York Times Co. (a powerful media corporation), both of whom have a potentially comparable reach as mass communicators. The previous chapter has already argued that Witt needs to get the same legal protection that the New York Times gets (when sued by a public figure or a corporation). Footnote 581

On the other hand, the public figure doctrine recognizes diversity in plaintiffs. With media-critical bloggers rampant, media corporations have reason to take on a nontraditional role as libel plaintiffs in order to counter claims made in the blogosphere. Footnote 582 The threat of libel lawsuits from institutional media against bloggers seems serious enough for a group of media-critical bloggers to have hired a well-regarded media lawyer to ward it off. Footnote 583 This writer posits that such plaintiffs need to be recognized legally as corporations and have to prove a high standard of fault, actual malice, consistent with the libertarian requirement. So a New York Times Co. or CNN as plaintiff would be considered a corporation, but if an individual writer of that organization such as Maureen Dowd or Anderson Cooper sued a blogger on her or his own behalf, she or he would be considered a media plaintiff and would need to prove a lesser burden of fault, negligence.

Footnote 580: “As a result, the [Gertz] Court crafted the public figure test with a relatively homogeneous class of defendants in mind. By looking only to the public or private status of the plaintiff in determining the appropriate degree of fault, the public figure doctrine assumes equality among media defendants.” Aaron Perzanowski, “Relative Access to Corrective Speech: A New Test for Requiring Actual Malice,” 94 California Law Rev. 833 (2006): 834.

Footnote 581: When a corporation is sued by a media or nonmedia plaintiff, however, it should be protected by a lower fault standard of negligence. See Table 6 on p. 164.

Footnote 582: Stephen D. Cooper, Watching the Watchdog: Bloggers as the Fifth Estate (New York, NY: Marquette, 2006).

Footnote 583: “The group of media-critic bloggers [Media Bloggers Association]... [have] hired Clifton, N.J.-based media lawyer Ronald Coleman as their general counsel. ... The purpose of the MBA is to protect ‘the little guys from assertions of power by the big guys,’ Coleman says.” Wendy N. David, “Fear of Blogging,” American Bar
In gist, the jurisdictional court would use its discretion to decide if an Internet communicator is a public figure, perhaps by using a rationale that higher a plaintiff’s access to the Internet or frequency of online activity the harder that plaintiff has to work for legal relief. Such a rationale is justified in that such a plaintiff would have ample opportunity to counter the libel with a response of his or her own – all at the discretion of the jurisdictional court. The public figure doctrine thus refined would present a libertarian solution that encourages a multiplicity of voices, take some pressure off the regular courts, and encourage a dialogic, even debating, culture. It would be consistent with the self-policing idea promoted by user groups such as the Internet Corporation for Assigned Names and Numbers. In addition, it would lead to a collapse of the public figure category into public official (of course, this critique is not limited to a system in which no damages are awarded).

6.3. VORTEX PUBLIC FIGURES

Three years after New York Times, the Supreme Court created a category of limited-purpose or “vortex” public figure, a category that seems especially relevant to the information society given the relatively fragmented nature of much debate. This writer accepts the category as relevant to the information society, but as a corollary of the discussion in the previous section a “vortex” public figure would primarily have high access to the Internet or a high frequency of online activity in order to be considered a public figure in the first place. The high court has ruled that a libel plaintiff must prove that the defendant had engaged in “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting adhered to by responsible publishers.”584
In a 1967 case the Associated Press won on a ground that the plaintiff had failed to show actual malice as required by New York Times, but even though the justices disagreed on the appropriate standard of fault to be applied the majority justices were in agreement that the plaintiff was a public figure because of, partially, the access rationale: “Walker commanded a substantial amount of independent public interest at the time of the [publication. He achieved public figure status] by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, [and he] commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”

The reader may note that the high court in this view used the ‘self-help by access’ rationale to define Walker as a public figure, a rationale that this and the previous subsection develop as a definitional requirement in the information society.

6.4. DISTINCTIONS BETWEEN PLAINTIFFS

As discussed in 6.0.2, plaintiff categories need to include corporations including media corporations, requiring a burden of proof of actual malice. The difference between a corporate plaintiff and a media plaintiff would be that the latter is a reporter, columnist or other journalist suing on his or her own behalf, while the former is an organization.

In addition, the writer notes that the actual malice doctrine seems to make an unsupported distinction between a plaintiff who initiates a new public debate and one who

584 Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); The Supreme Court has defined a limited-purpose or vortex public figure as one who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” See Gertz v. Welch, 418 U.S. 323, 351 (S.Ct. 625 1974).

585 Curtis, 388 U.S. at 154-55.
participates in an ongoing debate. While there is no actual malice protection for the first type, the second type enjoys the status of a public figure in a traditional sense. To be equitable, the pioneer in a blog discussion, or in a multi-user domain or a discussion group for that matter, should have the same extent of protection as those who post later messages after the pioneer’s salvo has precipitated a netizen discussion. This writer posits that those discussions be considered in their entirety for the purpose of defining a public figure – with the corollary that a public figure’s primary defining characteristic remains that plaintiff’s access to the Internet and frequency of online activity.

6.5. PUBLIC CONTROVERSY

Many American courts have defined the notion of public controversy in relatively broad terms, such as “any topic upon which sizeable segments of society have different, strongly held views.” An active or animated discussion on a multi-user domain or in the comments section of a blog or an “electronic village,” might concern controversy that is “public” to the information society. In order to earn legitimacy, such a discussion should probably not be moderated, but be focused and coherent enough to enhance the understanding of the discussion topic. A federal appeals court has been forthcoming with a relatively specific definition: “[A] public controversy is not simply of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way” – one whose “ramifications will be felt by persons who are not direct

586 See generally, Soloski & Bazanso, Reforming Libel Law.
587 See Table 6 for the burdens of proof proposed for various plaintiff categories.
participants.” In addition, the judge must examine whether individuals were actually discussing some specific question – whether the press was covering the debate, reporting what people were saying, and uncovering facts and theories to help the public form some judgment. It is generally accepted that the courts “may not question the legitimacy of the public’s concern; such an approach would turn courts into censors of what information is relevant to self-government . . . A vital part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society’s agenda.”590 The definition would run an identical course in the information society.

After the controversy is defined, the court should analyze the plaintiff’s role in it. “Trivial or tangential participation is not enough . . . The plaintiff either must have been purposely trying to influence the outcome or could realistically have expected, because of his position in the controversy, to have an impact on its resolution.”591 And finally, “[T]he alleged defamation must have been germane to the plaintiff’s participation in the controversy. His talents, education, experience, and motives could have been relevant to the public’s decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive the New York Times protection.”592

6.6. SOME DOCTRINAL IDIOSYNCRASIES

A unique procedural tradition in actual malice doctrine is that even though public figures’ classification should be a finding of fact, the lower courts almost universally treat

589 E.g., the virtual communities of the Well at www.well.com.


591 627 F.2d at 1297.
the question as one of law, to be decided not by the jury but by the judge.\textsuperscript{593} This makes the actual malice doctrine consistent with libel claims in the information society, where it may be hard to get a jury of one’s “peers” given the possible jurisdictional diversity. Judge-only trials are a pragmatic and viable option.

Second, the doctrine significantly differs from other civil law by requiring actual malice to be proved not by “a preponderance of evidence” but by a much higher standard of “convincing clarity”\textsuperscript{594} or “clear and convincing proof.”\textsuperscript{595} Procedurally, this standard might put the torts of libel at par with crimes which typically require proof “beyond reasonable doubt.”\textsuperscript{596} The clear-and-convincing-proof standard applies not only at the trial stage but also during pretrial motions of summary judgment.\textsuperscript{597} The higher standard is useful to operationalize the individualization condition.

Third, the judge, whether trial or appellate, does not defer to the jury in the traditional sense – that of setting aside a jury verdict only if clearly erroneous.\textsuperscript{598} The libel

\textsuperscript{592} 627 F.2d at 1298.

\textsuperscript{593} \textit{Rosenblatt v. Baer}, 383 U.S. 75, 88 (1966). “As is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a ‘public official.’”


\textsuperscript{596} “Clear and convincing” proof is an intermediate standard which requires the plaintiff to persuade the trier of fact that the plaintiff’s claim is substantially more likely to be true than not. The standard lies somewhere between proof by “preponderance of the evidence” which requires merely that the claim be more likely true than not, and proof “beyond reasonable doubt” (used mostly in criminal law) which requires the trier of fact to be certain of the truth of a claim.


\textsuperscript{598} In \textit{Bose Corp. v. Consumer Union, Inc.}, 466 U.S. 485, 511 (1984), the Supreme Court explained, “The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”
judge is required to independently review a jury’s finding of actual malice in order to satisfy himself or herself of the evidence being constitutionally sufficient. This requirement helps judges overturn jury verdicts that under usual civil procedure would be accepted. This idiosyncrasy seems to fit with the judge also deciding the plaintiff’s classification.

6.7. GRAY AREAS

The Supreme Court has never clarified whether private plaintiffs who claim libel in speech “of purely private concern,” as in many conceivable information society situations, are relieved from meeting the minimum Gertz requirement of proving negligence when recovering for actual injury. But when the alleged speech involves topics of public concern, such plaintiffs need to prove at least a fault standard of negligence (not actual malice) in order to recover for actual injury. Actual injury is not limited to out of pocket costs; it also covers “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” An idiosyncrasy in libel law is that actual injury does not have to include any harm to reputation. When a state allows a defamation action for mental anguish alone, unaccompanied by any claim for harm to reputation, the actual injury requirement is not offended.

600 Dun & Bradstreet, 472 U.S. at 773-74 (1985). Justice White, in a concurring opinion, writes, “[I]t must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.”
602 Ibid., 350.
Private plaintiff netizens who seek more than compensation for actual injury, namely presumed damages or punitive damages, are required to prove actual malice as recommended by the *Gertz* court.\footnote{Gertz v. Welch, 418 U.S. 323, 349 (1974).} However, because “speech on matters of purely private concern is of less First Amendment concern,”\footnote{Dun & Bradstreet, 472 U.S. at 759 (1985).} netizens defamed in that kind of speech are allowed to recover presumed and punitive damages without showing actual malice.\footnote{Ibid., 761.} In the libertarian interest, however, punitive damages would have to be abolished as they raise the stakes too high to encourage any true marketplace of ideas.

6.8. HIGH STAKES

Damage awards to American plaintiffs are increasing. The median damages awarded between 2000 and 2004, $724,500, was more than twice the 1990s’ median of $350,000 and considerably more than the 1980s’ median of $200,000.\footnote{“Status of libel litigation against media,” Media Law Resource Center, press release dated 25 February 2005. Accessed 19 February 2006 at http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2749.} Defendants’ litigation costs are high as well, as are those of plaintiffs – often in excess of a million dollars.\footnote{David A. Anderson, “Is Libel Law,” 514.}

Libel plaintiffs may be forced to maximize damage claims just to assure a recovery sufficient to pay the lawyer – which of course is not special to libel. As an economist might argue, people usually make decisions to maximize profits. But common law courts, in an effort to redress the unjustified harm caused by libel, predicate libel actions and
compensatory awards on the harm allegedly inflicted. 609 Gertz restricted the award of general damages to plaintiffs who were able to prove actual malice, so such plaintiffs need not prove damages. All other plaintiffs could recover only actual damages. 610

Here, a note on damages would be in order. Monetary damages assessed by a jury may be of three types: 1. Specific or actual – those which can be calculated in a fairly precise manner such as the amount of salary that John Doe lost after being dismissed from his job because of a libel; 2. General – those which are more intuitive because they reflect the jury’s subjective opinion of the seriousness of the libel’s harm, such as an additional amount for John Doe beyond specific damages. General damages may be based upon proof such as the deposition of witnesses or they may be presumed by the jury; and 3. Punitive – those awarded as a form of punishment if the libel was particularly offensive or malicious.

Few suits proceed under the negligence standard because plaintiffs rarely sue for actual injury only. 611 Many plaintiffs are unable to prove actual injury and thus must seek presumed damages, rather than seek to punish the defendant with punitive damages. When defamation is not actionable per se at common law, the plaintiff has to prove actual damages in the nature of actual pecuniary loss. An award of special damages must be preceded by proof that the defendant’s fault caused the alleged pecuniary loss. 612 The libel


610 Actual damages are granted to the private plaintiff who establishes liability under a less demanding standard that that stated by New York Times, ignoring the private fines assessed to punish reprehensible conduct. See Gertz, 418 U.S. at 350 (1974).


612 Restatement (Second) of Torts, sec. 622A.
scholar David Anderson writes, “Even if [private libel plaintiffs] have a modest amount of provable actual injury and no desire to further punish the defendant, the economics of litigation are likely to steer them away from the negligence—actual-injury system and into the actual-malice scheme. Since the law provides no other method by which a plaintiff of modest means can finance the litigation, the plaintiff’s ability to pursue the claim depends on a lawyer’s willingness to take the case on a contingent-fee basis.” 613

This writer contends that punitive damages need to be abolished in the libertarian interest as they are antithetical to the concept of a marketplace of ideas.

6.9. TRUTH AS A DEFENSE

Some scholars have pointed out that a philosophical failing of the actual malice doctrine is that it seems to divert the inquiry away from truth. In England and some other Commonwealth societies, the jury may treat an unsuccessful defense of truth as an aggravation of damages. 614 Truth remains a complete defense – in a case that reminded observers that libel plaintiffs find it relatively easy to win in England, in February of 2006 the singer Elton John won an undisclosed libel settlement, including an apology, from two British newspapers after they admitted to publishing an untrue allegation about the singer’s conduct at a charity ball. 615

613 Anderson, “Is Libel Law,” cites the Iowa Libel Research Project to write that over 80 per cent of the plaintiffs engaged their lawyers on a contingent-fee basis.


In America, truth had high value in the common law tradition. The Zenger trial of 1735\textsuperscript{616} had established truth as an unassailable defense in the common law, until \textit{New York Times} came along to render truth relatively unimportant and instead, placed the burden of proof on the plaintiff to prove falsity regardless of whether the plaintiff was public or private.\textsuperscript{617} The change, in the libertarian interest, in the interest of a marketplace of ideas, and protective of freedom of expression beyond the common law, still took away the focus from the truth.

By all reckoning, a libel case is essentially about a plaintiff seeking to restore his or her reputation by having a court rule a false statement so. The actual malice doctrine seems to turn that logic over its head.

In \textit{New York Times}, the high court ruled, “Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . [Rather] 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.”\textsuperscript{618}

\textsuperscript{616} See sec. 2.3 for a brief description of the Zenger trial; Also see generally, Paul Finkleman, ed., \textit{A Brief Narrative of the Case and Trial of John Peter Zenger} (Naugatuck, CT: Brandywine, 1997).


\textsuperscript{618} \textit{New York Times}, 376 U.S. at 279.
6.10. PRIVATE, SEDITIOUS LIBELS COEXISTENT

Retrospectively, the information society, whose enthusiasts dub it the “last frontier of freedom,” has greatly benefited by the New York Times’ judgment, which seemed to collapse private libel into seditious libel. The personal lawsuit by L.B. Sullivan, Montgomery, Alabama’s commissioner of public affairs, was treated by the court as one of seditious libel. The Alabama jury had found that readers would infer that the criticism of police officers under commissioner Sullivan’s command defamed him implicitly, but the high court ruled that to base a verdict for the plaintiff on such an inference was tantamount to seditious libel, which “transmut[ed] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”

6.11. HEAVY BURDEN OF PROOF

The Supreme Court observed in Gertz that “the law of defamation is rooted in our experience that the truth rarely catches up with a lie,” indicating its acknowledgment of a high status of the individual defendant. Under the actual malice doctrine, writes Anderson, most libel plaintiffs have no chance of getting a remedy unless “in addition to proving publication of a defamatory statement, (1) they can produce before trial clear and convincing proof that the defendant seriously doubted the truth of the publication; (2) the trial judge, jury, and all reviewing courts independently agree that such proof was clear and

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619 E.g., Elon University/Pew Internet Project, Imagining the Internet, at http://www.elon.edu/predictions/john_perry_barlow.aspx. Quoting John Perry Barlow: “That's the thing about cyberspace. It's the last frontier and it will be a permanent frontier. It's infinite and it's continuously changing.”

convincing; (3) the accusation is not hyperbolic, rhetorical, satirical, or otherwise incapable of sufficiently precise factual content; (4) the plaintiff is able to prove its falsity, perhaps by the clear-and-convincing standard; and (5) the defendant is not neutrally repeating the defamatory accusation of a responsible organization about a matter of public concern.”

The American jury is not allowed to treat an unsuccessful defense of truth as a reason to aggravate the damages, so a defendant may continue to claim the truth of an allegation that the jury has found to be false. Consequently, “by choosing the fight on the ground of actual malice rather than falsity, the defendant gets the best of both worlds.”

A common law plaintiff is allowed to sue for nominal damages because of the legal recognition that there is a need to correct a false accusation. In comparison, the actual malice doctrine is so focused on damages that it does not give a plaintiff any relief in the form of a judgment of falsity. Leval argues, “When a plaintiff agrees to forego recovery of damages, he has given the defendant the very protection for which Sullivan was devised. The press and free debate do not need protection from a court judgment that does no more than find falsity.”

6.12. DEFENDANT IN FOCUS

One of the criticisms of the actual malice doctrine has been that it may focus the trial on the defendant’s conduct, making any constitutional protection dependant on the

623 Ibid., 22.
624 Restatement (Second) of Torts, Sec. 620.
625 Leval, “No-money, No-fault,” 214.
defendant’s state of mind – the operative question being whether “the defendant in fact entertained serious doubts as to the truth of this publication.”626 This, of course, turns on objective evidence, but addressing this question in court often leads to protracted litigation, sometimes for many years.627 At the end, if actual malice is found, the damages awarded are limited only by the “sound discretion of the jury.”628 Justice Powell writes about unregulated damage awards: “Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.”629 Damage awards after trial (before appeal) increased in the period between 2000 and 2004 to an average of $3.4 million, compared to the 1990s’ average of a little under $3 million (excluding the excessive $222.7 million initial award in MMAR Group, Inc. v. Dow Jones & Co., Inc., which was eventually vacated and the case dismissed), and compared to the 1980s’ average of $1.5 million.630 Information society defendants, as argued earlier, tend to not have corporate backing and unable to meet such possible awards, would tend to withdraw into a state of self-censorship or chill.

To infer the defendant’s state of mind involves an intrusive cross-examination, termed a “discovery process” by the plaintiff, to dig for the following types of circumstantial evidence:631 (1) Correspondence and conversations between a reporter and

an editor;\textsuperscript{632} (2) information that was not included in the article even though the defendant had it or had considered getting it;\textsuperscript{633} (3) the attitude that the defendant harbored toward plaintiff – proof that the defendant harbored common law malice, defined as an intent to do harm, or ill will, is not evidence of actual malice\textsuperscript{634} – toward the topic of the allegedly defamatory article, and toward the practice of journalism; (4) the newsroom pressures present during the preparation and publication of the defamatory material; (5) the adequacy of the defendant’s journalistic efforts, (6) the defendant’s conduct after publication; (7) the credibility of defendant’s informants, and (8) the nature of the defendant’s confidential sources.

6.13. SUMMARY JUDGMENT AND FALSITY

A summary judgment is a ruling issued by the judge upon a motion from the defense before the trial begins, that there is no reason to proceed further because of a lack of clear and convincing evidence that libel has occurred. In the face of the multiple jurisdictions challenge, which can render litigation particularly expensive for the defendant, summary judgment is an especially attractive outcome as it saves the costs of the trial.

Even though summary judgment is the best possible outcome for defendants, some courts have shown it is unlikely to result from merely contesting falsity, a classical fact issue. In one case, the high court has suggested that summary judgment should be the


\textsuperscript{632} *Herbert v. Lando*, 441 U.S. 153 (1979), at 174.


\textsuperscript{634} See *Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 10-11 (S. Ct 518 1970); also *Garrison v.*
exception rather than the rule in libel cases because the actual malice issue, involving the defendant’s state of mind, does not lend itself readily to summary disposition.  

Summary judgment, however, is crucial to ensuring the libertarian interest of netizens. *Prima facie* falsity – falsity that is legally sufficient to establish a fact unless disproved – would be required, instead of falsity proved by a more elaborate procedure of showing clear and convincing evidence, in a pretrial hearing in order for a summary judgment to not be granted in favor of the blogger defendant.

However, defending the accusation by contesting falsity may result in a failed motion for summary judgment – for a successful motion, the defendant would have to contest actual malice, which also is a fact issue but in most courts is taken away from the jury resulting in the plaintiff initiating the discovery process before trial, as well as, if there is a trial, during the trial.

6.14. FALLACY IN REASONING

A frequently used rationalization of the actual malice doctrine, waiver, is less persuasive outside the information society than inside. The waiver argument contends that “an individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . .” and hence must be left without remedy when the public scrutiny amounts to defamatory falsehoods. Again, given the ‘great leveler’ feature of the information society, this is a chink that is relatively irrelevant.

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6.15. ANALYSIS

This section analyses the preceding chapter discussion to draw some conclusions relevant to addressing the first research question.

The actual malice doctrine is clearly consistent with a libertarian ethic of the First Amendment, as well as with a Miltonian marketplace of ideas. It reflects the First Amendment’s paradox of enforced liberty (“no law” shall be made), is consistent with the individualization condition, and represents a major philosophical stride to protect libertarian eccentricities of public discourse. Consequently, bloggers would be much benefited by it.

The First Amendment’s forty-five words, of which fourteen delineate the free speech and press clauses, may be stirring, but they developed their current meaning only after World War I. That is when the Supreme Court, in deciding prosecutions under the Sedition Act of 1917 (and amendments of 1918), began to engage the question of how the Amendment would play out in specific political situations. Originally, the First Amendment only seemed to guarantee that Congress shall not “abridge[e] the freedom” of the people and the media, but in a series of libel rulings in the twentieth century, the high court interpreted it to overturn federal judicial decisions,637 state actions,638 decisions of other branches of the federal government,639 as well as to rule that it applied against incursions by the states.640

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636 Gertz v. Welch, 418 U.S. at 344-45.
639 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 143 (1951) (Justice Black concurring).
640 “. . . [N]or shall any State deprive any person of life, liberty or property, without due process of law.” U.S. Constitution, amend. 14; In Gitlow v. New York, 268 U.S. 652 (1925), the court ruled that the freedoms of speech and the press are “fundamental personal rights and liberties protected [against state actions] by the due process clause of the Fourteenth Amendment.”
With no reason to doubt that the longitudinal evolution of First Amendment philosophy would continue with the advent of the information society, the writer can draw from the preceding discussion fourteen emergent contours to inform the proposed theoretical framework for a new common jurisdiction:

(1) The actual malice doctrine would be sensitive to the libertarian interests of nonmedia defendants and consistent with a marketplace of ideas; (2) The doctrine would recognize the centrality of truth over damages; (3) Applying the doctrine might cause protracted and expensive litigation, and public criticism of the defendant; (4) The jurisdictional court would use its discretion to decide if an Internet communicator is a public figure on a case-by-case basis, perhaps by using a “self-help by access” rationale – a high level of access to the Internet and high frequency of online activities and any legal relief they get should be predicated on those facts; (5) The information society might obliterate the distinctions between public officials and public figure because netizen categories are expansive; (6) “Vortex” public figures would be a norm given the fragmented nature of much debate but they primarily need to meet the public figure definition of a high level of access to the Internet and a high frequency of online activity; (7) As getting a jury of one’s “peers” is relatively difficult given the jurisdictional diversity, judge-only trials would be a pragmatic option; (8) A “clear and convincing” standard of proof would operationalize the individualized condition better than “preponderance of evidence;” (9) Because “speech on matters of purely private concern is of less First Amendment concern,” netizens defamed in that kind of speech would be allowed to recover presumed and actual damages without showing actual malice; (10) The initiator of a public debate would have the same status as a

These contours are later accommodated in the theoretical explication of ch. 7.
later participant such that a pioneer in a multi-user domain or discussion group would have the same protection as those who post later messages after the pioneer’s salvo has precipitated a netizen discussion; (11) A public controversy would be defined in the context of variables specific to the information society, even though a broad understanding of the term remains unchanged; (12) Prohibitive litigation costs would need to be preempted; (13) The waiver rationalization of the actual malice doctrine would be relevant in the information society; (14) In the interest of the libertarian ethos and the marketplace of ideas, punitive damages would be abolished.

These proposed reforms are operationalized in the procedure for legal action discussed in chapter 8. Besides, the reforms, especially the ones concerning nonmedia defendants, logically inform chapter 7 which describes a set of normative recommendations for freedom of expression in the information society.

Table 5 below serves as a ready reckoner of the above discussion.

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<td>5.</td>
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<td>6.</td>
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Table 5. Rationales born in the actual malice doctrine for the proposed theoretical framework.
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CHAPTER 7

THE FREEDOM OF EXPRESSION NORM IN THE INFORMATION SOCIETY

Section 2.1.2.1 documented the interoperability of the libertarian creed in securing individual autonomy and a marketplace of ideas, while others discussed the idiosyncratic properties, including multiple personal jurisdictions, which render the information society as a tech-social ensemble of the Miltonian ideal. This chapter applies the libertarian philosophy as an antidote to the vexing jurisdictional challenge.

Pragmatic concerns such as legal predictability and procedural integrity call for predicking libel law on a single freedom of expression paradigm. Designing a separate jurisdiction, specifically its theoretical framework, has emerged to be a grail of legal and communication scholars.

The information society celebrates nonmedia publishers’ ability to express without inhibition, but as the literature review discussed, that ability is only as useful as an inclusive libel law to protect the integrity of communication. Classical liberal stalwarts such as John Milton, John Stewart Mill and Thomas Jefferson, not to mention the Justices Oliver Wendell Holmes and Louis Brandeis, have provided eloquent justifications for the protecting freedom of expression, even though the U.S. Supreme Court has never developed a comprehensive normative philosophy of that freedom. On the other hand, Justice Potter Stewart has
succinctly rationalized a need to protect reputation: “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.”  

Without an inclusive philosophy to balance freedom and order, the information society might fail as a “system of freedom of expression,” fragmenting into the kind of practical anarchy that was witnessed in the multi-user domain activities which forced Yahoo! to shut down its chat rooms in 2005, or in the “toothing” incidents that a year earlier caused European wireless providers to crack down on some users.

The literature documented the basic natures of the information society in addition to the various theoretical traditions of conceptualizing freedom of expression. Any proposal of a theory of expression for the information society would be informed by the literature.

A salient conclusion from the literature review is that in the information society, the “public official” may well be an ordinary nonmedia netizen – it is a call that is best made in a case-by-case basis by the adjudicating court. That conclusion also reflects the assumption of self-rule in Meiklejohn’s vision of participatory democracy, and is reflected in Justice

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643 Emerson, System.


645 “Toothing” was popular among young Japanese wireless subscribers in early 2004 as strangers on trains, buses, in bars and supermarkets hooked up for illicit sexual meetings using messages sent via Internet-enabled cellphones. See “Toothing latest hi-tech sex craze,” Reuters, at http://www.dudecheckthisout.com/Preview/PopOut.aspx?guid=49e3789f-f242-44a7-9fa6-1ad71163a0ec

646 See sec. 2.4.2.

647 Meiklejohn, Free Speech.
William Brennan’s words for the court in *New York Times* urging that a “citizen-critic of government” should have at least the same protections from defamation suits as government officials themselves enjoy.\(^{648}\)

The review suggested that the information society seems to have a potential to reconcile at least some of the major disagreements of the varied freedom of expression theorists. This chapter tries to operationalize that potential; it delineates a theoretical framework whose object is to vindicate the individualized condition through a Miltonian conceptualization of freedom of expression that advances five civil libertarian interests: “(1) Vindication of individual autonomy, (2) protection against abuses of government authority, (3) facilitation of the institutions of self-government . . . (4) ascertainment of truth,”\(^{649}\) and last but not the least, (5) a marketplace of ideas.

These libertarian interests, together, would represent a memetic individualization which reflects the emergent cultural precept of the information society.\(^{650}\)

The chapter offers a normative formula to describe how the theoretical justifications of freedom of expression should evolve given the changes in the social and individual conditions wrought by the information society. The previous two chapters and this one comprise the dissertation’s proposed theoretical framework for a separate jurisdiction to address information society libels.


\(^{650}\) Memetics is a theory of cultural evolution that tries to explain the development of distinct cultures by the transmission of cultural bits called “memes” which replicate themselves in individual minds. See Robert Auinger, ed., *Darwinizing Culture: The Status of Memetics as a Science* (New York, NY: Oxford University Press, 2000); Memetics has been used to explain concepts that define individualization, such as freedom. See Daniel C. Dennett, *Freedom Evolves* (New York, NY: Penguin, 2004), 179-81; The term “meme” was coined by the zoologist Richard Dawkins in *The Selfish Gene* (New York, NY: Oxford University Press, 1976), 190.
7.1. SOME NORMATIVE RECOMMENDATIONS

The media sociologist, Denis McQuail, describes normative theory as “concerned with examining or prescribing how media ought to operate if certain social values are to be observed or attained. Such theory usually stems from the broader social philosophy or ideology of a given society.” The set of normative recommendations developed in this chapter celebrates the libertarian democratic values of self-fulfillment and marketplace of ideas, which are described in the review, as well as addresses the analyses of the previous two chapters. Even though they may seem to shift from doctrinal recommendations to procedural ones, they comprise a systematic conceptualization of freedom of expression that flows from the preceding discussions.

The writer posits that freedom of expression in the information society ought to be conceptualized through a system that:

1. Protects all expression as political;

2. Requires a public or corporate plaintiff to prove actual malice in order to be successful, and a media or nonmedia plaintiff to prove at least negligence to be successful, both by the clear and convincing standard;

3. Grants a declaratory judgment, reply or retraction in lieu of trial; with the speaker, forum moderator or host, Web master, and Internet service provider being co-liable (in that order) to post the declaratory judgment or reply or retraction in the same forum as the libel.

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651 Denis McQuail, *McQuail’s Mass Communication Theory*, 4th ed. (London, U.K.: Sage, 2000), 8. (Emphasis in original). “[Normative theory] is important because it plays a part in shaping and legitimating media institutions and has considerable influence on the expectations concerning the media that are held by other social agencies and by the media’s own audiences. A good deal of research into mass media has been the result of attempts to apply norms of social and cultural performance. A society’s normative theories concerning its own media are usually to be found in laws, regulations, media policies, codes of ethics and the substance of public debate.”
4. Requires successful plaintiffs, if they seek compensatory damages, to support a claim of injury by clear and convincing evidence in an online context, such as in Internet traffic or ecommercial profits; Punitive damages shall not be allowed.

5. In cases of republication of the libel, recognizes the co-liability of the speaker, forum moderator or host, Web master, and Internet service provider (in that order) for (a) hyperlinking the republication to the declaratory judgment or the court judgment; or (2) deleting the republication.

6. Recognizes co-liability of the speaker, forum moderator or host, Web master, and Internet service provider (in that order) to post the final judgment in the same forum as the libel.

As a normative ensemble, the above six components might be developed into an inductive theory for freedom of expression in the information society, but the dissertation limits their discussion to a set of recommendations. The first recommendation comprises a partial support of Edwin Baker’s position, and reflects a partial challenge of Thomas Emerson’s position as well as a contextual support of Jacques Derrida’s. The second recommendation significantly modifies First Amendment law by requiring corporations to prove actual malice when they allege libel, but without affecting any existing product disparagement law. The third recommendation adopts the alternative libel adjudication

652 Baker, Human Liberty.

653 Emerson, System.

654 Derrida, Speech and Phenomena.

655 In addition to proving a loss of business, a plaintiff in a product disparagement case must establish that defamation was published with either common law malice, defined as intent to do harm, or actual malice, defined as a knowledge of falsity or reckless disregard of the truth. E.g., Rodney A. Smolla, The Law of Defamation sec. 11.02[2] [e] (1998), 11-33; Also see Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

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proposal advanced by Marc Franklin. The fourth recommendation addresses several criticisms of libel law to reform any award of damages. The fifth recommendation addresses the liability of libel republication. And the sixth addresses the liability of a losing defendant to publish the judgment. In addition, the set partially adapts to the information society three other libel reforms proposed in the years 1985 through 1993.

7.2. STATEMENT OF THE NORM OF FREEDOM OF EXPRESSION

In a single statement, the inductive, normative recommendations may be expressed thus:

Internet expression shall not be restrained, abridged or transgressed unless the plaintiff proves actual malice when the plaintiff is a corporation or a public plaintiff, or at least negligence when the plaintiff is a nonmedia or media plaintiff, both by a clear and convincing standard; A successful plaintiff, in order to claim compensatory damages (punitive damages are disallowed), shall prove online injury such as a decline in Internet traffic or ecommercial losses; If the plaintiff preempts trial by requesting a declaratory judgment or retraction or reply, such a judgment if procured shall be published in the original forum of publication of the libel as well as in the forums of any republications that have not been deleted, and not doing so will be a co-liability of the speaker, forum moderator or host, Web master and Internet service provider in that order.

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656 Franklin, “Good Names and Bad Law.”
657 See generally, Soloski & Bezanson, Reforming Libel Law.
658 Ibid.
659 “In induction one starts from observed data and develops a generalization which explains the relationships between the objects observed.” B.I.B. Beveridge, The Art of Scientific Investigation (New York: Vintage Books,
The recommendations, which together describe how libel ought to be conceptualized in the information society, not only uphold the ethos of individualization and of participatory democracy, but celebrate the libertarian ideal that such ethos represents. If adopted by the suggested separate jurisdiction – the Internet Empowerment Agency described briefly in section 1.2 – the recommendations would help adjudicate Internet libels no matter in which region or country a dispute arises.

In a pragmatic sense, in one stroke the recommendations would help resolve the jurisdiction issue, framed by Samuelson as “how to coordinate with other nations in Internet law and policy making so that there is a consistent legal environment on a global basis.”

The recommendations would allow the suggested agency to adjudicate nonmedia libel cases whether they result from communication via email, discussion boards, multi-user domains, spam, blogs or other Web sites. By enabling a common jurisdiction, the recommendations would ensure the generalizability, consistency and reproducibility of Internet libel, across the world as well as across information society within a country. They would enable litigants to predict specific procedural consequences.

7.3. AN EXPLICATION

The first recommendation, protecting all expression as political, flows from a contextual scrutiny of the Emersonian emphasis of speech-action dichotomy being employed as a method to document any “individual self-fulfillment” enabled by the freedom of

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1950), 113.

expression. In the information society, what a netizen says is not different from what the netizen types (does). While Emerson recognized that there is a difference between speech and action, communicative acts on the Internet may be best identified, in addition to expression-related actions, by the intent of a netizen’s actions. Netizen behaviors that don’t involve the intent to communicate or “speak” would not be included in this speech protection.

For instance, using the keyboard is more analogous to speaking than using the mouse – while the keyboard is used routinely and almost exclusively for typing and hence is analogous to speaking in the offline context, the mouse is clicked almost exclusively to make decisions and choices, the ‘pay’ of a bill, or the ‘open’ of a document. So keyboard activity may be more easily defined by the court as speech than mouse activity, except in instances when the mouse was used to ‘send’ an email, to click “yes” or “no” in an online questionnaire about the netizen’s political or social beliefs, or to draw pictures or letters in place of a keyboard. Of course, the distinction at stake is not between mice and keyboards, but about whether the action taken sends a message of communicative intent.

As discussed in section 2.1.2.1, the Emersonian distinction between speech and action is a cornerstone of the U.S. Supreme Court’s First Amendment theory: The more a speech is accompanied by action, the less it is deemed to be protected by the constitution.

The speech-action distinction has seemingly always been under attack – even before the modern computer’s invention, but although the line between speech and action may be rather thin, activities that amount to communicative acts have been ruled as protected by the

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661 See Emerson, System, 3-7; Also see n. 23.
First Amendment in a hierarchy defined by the doctrine of symbolic speech, which regulates expression such as picketing of officials and burning of flags and crosses.  

In the information society, the predicate of digitization – conversion and manipulation of all action and speech as binary code – acts as an equalizer to remove the difference between speech and action, and as a result, the concept of symbolic speech does not apply in a same or near sense. Typing and podcasting are akin to speaking, and any creation of hierarchical symbolic speech categories for the purpose of regulation is rather meaningless. It is as though action has collapsed into speech in a celebration of the Derridan assertion, “Speech represents itself; it is its representation. Even better, speech is the representation of itself.”  

The first recommendation accepts the corollary of this assertion – all action collapses into the category of speech except perhaps the unprotected mouse action named above.

The literature documented distinct disagreements over what categories of expression should not be protected, but scholars and courts generally agree that the First Amendment prohibits government from trying to control action by regulating speech – ideas cannot be legally regulated; bad taste, for better or for the worse, is neither a crime nor a tort.

Derrida, of course, deconstructs expression using the speaker’s notional linguistic and cultural backgrounds to conclude that speech is, to use the words of Fish, “just the name we give to verbal behavior that serves the substantive agendas we wish to advance.”  


Derrida, *Speech and Phenomena*, 57.

See section 2.1.
Internet’s propensity to convert direct action into pure speech (almost any action one performs with the physical keyboard gets converted into speech) manifests such postmodernist arguments that speech emerges from the heuristic background of the speaker rather than from any reflection of related actions. Derrida and Fish’s expositions on equal or synonymous speech and action, which present a decisive challenge to classical Emersonian theory, make sense as the philosophical framework underpinning expression in the information society. Derrida and Fish reject the possibilities of hierarchies in speech, and consequently any corresponding hierarchies in the regulation of speech.

While the norm would be to protect all Internet speech, the jurisdictional court may, at its discretion, exclude one category as being inconsistent with any libertarian interest – speech that commits or expresses child pornography. This exception would find grounding in the cultural diversity of the information society, albeit fragmented, which may be determined by, as an early theorist put it, a “gradual process of adaptation to the semiotic universe of free-floating electronic alibis.”\footnote{Fish, \textit{There's No Such Thing}, 102.} It would draw from a critical-cultural discussion of the specific speech categories that in America do not enjoy constitutional protection – critical scholars generally equate speech to action after concluding that too much speech is protected; if only speech were conduct, it could be regulated as though not entitled to extra protection.

Current U.S. Supreme Court freedom of expression theory offers insights as to appreciate why child pornography as a speech category may be interpreted as beyond protection. Other than for defamation with actual malice, the U.S. Supreme Court has historically allowed only three other categorical exceptions to First Amendment protection: “Fighting words,” defined narrowly since 1969 to include only speech that promotes
“imminent lawless action;”\textsuperscript{667} obscenity, currently judged by the three-part Miller test,\textsuperscript{668} and “true threats.”\textsuperscript{669} A dissection of these exceptions is presented in the next few paragraphs.

Defamation is central to the problematic realm that this dissertation addresses, and of the three other unprotected categories “true threats” has never been defined by the Supreme Court as a result of which lower courts have adopted a variety of tests to determine whether a speech constitutes a threat with any intention to harm.\textsuperscript{670} That category is irrelevant in the information society because of the conceptual limitation of accommodating any physical violence against another.

The category of “fighting words,” defined as epithets that provoke the average person to physical violence or which “by their very utterance inflict injury or tend to incite an immediate breach of the peace,”\textsuperscript{671} is similarly futile because it requires the speech to provoke an immediate physical violent reaction from an individual to whom the speech was directed. Fighting words, rendered moot by the lack of a direct confrontation,\textsuperscript{672} are no

\textsuperscript{666} David Porter, Internet Culture (New York: Routledge, 1997), xii.

\textsuperscript{667} This definition from Brandenburg v. Ohio, 395 U.S. 444 (S.Ct. 227 1969), supplanted Chaplinsky v New Hampshire, 315 U.S. 568 (1942), where fighting words were defined more broadly as words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

\textsuperscript{668} For a work to be legally obscene, it must be taken as a whole and, according to community standards, appeal to prurient interest; depict sex in a patently offensive way; and lack serious literary, artistic, political, or scientific value. Miller v California, 413 U.S. 15 (1973).


\textsuperscript{670} “Even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat.” As a result, the lower courts have adopted a variety of tests to determine whether speech constitutes a true threat. Jennifer E. Rothman, “Freedom of Speech and True Threats,” Harvard Journal of Law & Public Policy, 25, 283 (Fall 2001): 288.

\textsuperscript{671} Justice Murphy, writing for a unanimous court in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” (at 572).

\textsuperscript{672} In the 1972 case of Gooding v. Wilson, Justice Brennan, writing for the majority, clarified that the court’s fighting words doctrine did not concern all words that might be offensive to individuals in society but was limited to expression that had “a direct tendency to cause acts of violence by the person to whom, individually,
different from other forms of hate speech or, for that matter, any other speech.\textsuperscript{673} In 2003 even the Supreme Court somewhat relaxed its position by allowing regulation of hate speech whose intent was to intimidate.\textsuperscript{674} Digitization of fighting words takes away the venom of any latent violence, so the justification to flag them disappears. Fighting words in an offline context are not so in the information society.

The third prohibited speech category, obscenity, however seems relevant to the information society. Evidence that explicit sexual expression causes long term social harms may be fragmented and arguable, but the U.S. Supreme Court has ruled that obscenity, as a category of expression, may be subject to prior restraints.\textsuperscript{675} Obscene expression is somewhat inadequately defined\textsuperscript{676} but is clearly identified using the three-part Miller test: “(a) [W]hether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable

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\textsuperscript{674} \textit{Near v. Minnesota}, 283 U.S. 697, 716 (S. Ct. 16 1931). In this landmark case, the Supreme Court ruled that prior restraints were unconstitutional in all cases with rare exceptions being the government’s interests to safeguard national security, to protect a community from incitement to violence, and to enforce “the primary requirements of decency. . . against obscene publications.”

\textsuperscript{675} Compared to obscenity, the definition of indecency is broader – to be indecent, an expression does not have to appeal to prurient interest, but neither is there is any built-in protection for material that contains political or artistic value. The Federal Communications Commission has defined indecency as material that “describes or depicts, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of day when there is a reasonable risk that children may be in the audience.” Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975).
state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”677

Pornography is a distinct class of expression whose definition may be anybody’s guess but whose legal status is often a subject of controversy. All porn is not obscene speech in any jurisdiction, but child pornography as a distinct category has been regulated across all American jurisdictions for more than two decades by state and federal statutes.678 In two cases, New York v. Ferber679 and Osborne v. Ohio,680 the Supreme Court has ruled that the First Amendment protects neither the public dissemination nor the private possession of child pornography. To be identified so, child porn has to meet only a much diluted Miller standard laid out in 1982 by Justice Byron White who recognized the vulnerability of children in the libertarian paradigm. The justice established the following adjustment to the Miller standard while evaluating child pornography: “A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.”681 The agency might reject any protection for child pornography because of, as recognized by the Supreme Court, the measurably abominable, heinous and corrosive regard of such speech for libertarian values, as well as its inability to further any libertarian interests.


681 New York v. Ferber, 458 U.S. 747, 764 (S. Ct. 72 1982). The case involved a New York child pornography statute which prohibited any person from knowingly promoting a sexual performance by a child under the age of 16 by distributing material that photographically depicts such a performance.
The proposed set of normative recommendations protects all other speech categories and subcategories as political expression, including artistic expression, satire, and parody, even parody “calculated to injure.”

Cultural constructs tend to emerge from the semantics of the language used in a communication, language that also determines the effectiveness or liability of a libelous communication. Some of the cultural constructs of the information society are unique to it, such as the “free culture” or the “electronic commons” that the law professor, Lawrence Lessig, discusses as a postmodern rejuvenation of what is otherwise perceived as a crumbling public sphere. When speech is synonymous with action, it becomes a political activity that brings forth the speaker’s deepest beliefs and attitudes. Speech becomes a reflection of the speaker’s conscience and culture, the kind of uninhibited expression commonly found on Web discussion forums and blogs.

In relatively early days, the information society had a share of apologists for Internetphilia who might gush, “Just as intelligence and control are moving from gigantic


684 The law professor, Lawrence Lessig, who introduces the term “free culture,” uses it as a metaphor for the enhanced information-exchanging ability facilitated by Internet-based technologies. See Lawrence Lessig, *Free Culture*.

685 The metaphor of “electronic commons,” and its regulation, are discussed in Lessig, *Code*.

686 Some critical scholars argue that social capital is plummeting because of the influence of entertainment television. See Robert Putman, *Bowling Alone* (New York, NY: Simon and Schuster, 2000); The concept of “public sphere” is described by the political philosopher, Jürgen Habermas, as “a discursive arena that is home to citizen debate, deliberation, agreement and action” (cited by Dana R. Villa in “Postmodernism and the Public Sphere,” *American Political Science Review*, 86, 3 [September 1992], 712.)

mainframes to personal computers . . . so is economic power shifting from mass institutions to individuals.  

Much of such euphoric determinism was exposed as hype when the ecommerce bubble burst in a replay of Theodor Adorno and Max Horkheimer: “The promise which is actually all the spectacle consists of is illusory; all it actually confirms is that the real point will never be reached, that the diner must be satisfied with the menu.”

In other words, the information society’s most radical category of expression can be subversive to the libertarian ethic.

The second recommendation requires public and corporate plaintiffs to prove actual malice, and media and nonmedia plaintiffs to prove at least negligence, both by the clear and convincing standard. Some scholars have gone so far as to recommend that public officials and widely known public plaintiffs be prohibited from suing for libel. While rejecting that proposal, the set instead suggests strengthening of the actual malice regime by a modest modification of New York Times. It postulates that corporations be explicitly recognized for their influence in current societies as no less, and no different in their impact on a robust system of freedom of expression, than public figures. As documented in the earlier sections, scholars have discussed the vast and intense corporate influence over the information


689 For a description and history of how “the bubble burst” in 2000, see Motavalli, Bamboozled, 272-291.


691 E.g., Donald M. Gillmor, Power, Publicity and the Abuse of Libel Law (Cambridge, MA: Oxford University Press, 1992); Also see the concurring opinion of Justice Hugo Black in New York Times v. Sullivan (1964) and that of Justice William O. Douglas in Garrison v. Louisiana (1964); Justice Black, who say on the Supreme Court from 1937 to 1971, and Justice Douglas, who sat from 1939 to 1975, were among the longest serving associate justices of the twentieth century and well-known proponents of the absolutist position on the First Amendment.
noting by a preponderance of evidence that market capitalists hegemonizing the information society is more likely than the latter overriding the logic and power of economic capital. Consolidation of capital seems to be a clearly accelerating trend.

Earlier sections documented the rise of corporate power online, in that corporations have emerged as an important category of libel plaintiffs in lawsuits involving media and nonmedia defendants. In a sense, the corporations are playing a role that the state was purported to play before 1964 as chief enemy of libelous expression. This argument finds an explication in chapter 5 which made a case for nonmedia defendants to be protected by the actual malice doctrine by increasing the burden of plaintiff’s recovery.

At the same time, media and nonmedia plaintiffs need relief from the actual malice doctrine because their status is no different from that of nonmedia and private defendants. Clearly, the media do not act as corporate plaintiffs but when they do they should be considered as any corporation – that is, if, say, *New York Times* columnist Paul Krugman sued as himself, he would be a media plaintiff, but if the New York Times Co. sued on his behalf it would be a corporate plaintiff. When a media plaintiff is also a public figure, as Krugman is, the plaintiff’s status as “media” would override that of “public figure.” Thus,

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694 E.g., Ken Belson, “Huge Phone Deal Seeks to Thwart Smaller Rivals,” *The New York Times*, 6 March 2006. http://www.nytimes.com/2006/03/06/business/06phone.html?hp&ex=1141707600&en=eaee06a5683b023&ei=5094&partner=homepage (accessed 6 March 2006). On 5 March 2006, AT&T Corp., a leading telecom provider in the Midwest and Southeast, agreed to acquire a leading Southeastern provider BellSouth Corp. “The new company, with $120 billion in sales, about 317,000 workers and 71 million local phone customers in 22 states, would recreate a big chunk of the former AT&T monopoly that was broken up a generation ago. With the deal, only three Baby Bells would remain: AT&T, the former SBC Communications that provided service in the Southwest and elsewhere; Qwest and Verizon, the $90 billion company which is AT&T’s chief rival. The latter
Paul Krugman would not have to prove actual malice in a libel suit against a neoconservative blogger. Similarly, the talk show ideologues Bill O’Reilly, Al Franken and Neal Boortz would have to prove negligence in libel suits against critical bloggers – if they sued for themselves. If, however, they depended on their employers Fox News Channel, Air America Radio or Cox Radio, respectively, to sue on their behalf, then those employers would need to prove actual malice.

In other words, while the media may be miffed with a blogger, the category of plaintiff as “corporation” or “media” would depend on who files the suit – the company or an individual columnist.

This third recommendation indicates that the identity of the litigant is the sole criterion to decide the standard of fault, leaving out the subject matter of the dispute (that is, whether it is a matter of public concern). This marks another modification or strengthening of New York Times, which presumes for a public plaintiff (but not a private one) that the matter is necessarily about a matter of public concern.

The table below represents the burden of proof requirements:

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<th>Plaintiff</th>
<th>Public figure</th>
<th>Corporation</th>
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<tr>
<td>Media or nonmedia</td>
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<tr>
<td>Public figure</td>
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<tr>
<td>Corporation</td>
<td>Actual malice</td>
<td>Actual malice</td>
<td>Negligence</td>
</tr>
</tbody>
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Table 6. A permutational representation of proposed burden of proof.

The third recommendation, to grant declaratory judgments in lieu of trial; the speaker, forum moderator or host, Web master, and Internet service provider (in that order) two might now face renewed pressure to build themselves up.”

695 In Watching the Watchdog: Bloggers as the Fifth Estate (New York, NY: Marquette, 2006), Stephen D. Cooper documents the media-critical role, as well as other activist roles, played by bloggers.
will be co-liable to post the declaratory judgment in the same forum as the libel, is a shift from theoretical and substantive law to a procedural matter – it adapts to the information society four ideas of libel reform introduced by scholars, lawyers and reform groups over the years. The gist of those ideas is briefly described below.

A model state law proposed by the Washington Annenberg Program of Northwestern University focused on retractions and replies. It suggested aggrieved persons not sue for damages if the media retracted the libel or allowed the potential plaintiff to reply; if the parties were to refuse retractions and replies, a plaintiff could sue for compensatory but not punitive damages.

A drawback of the Annenberg proposal is that it requires, in effect, defendants to waive their constitutional protections – the libel plaintiff having to prove fault – if a plaintiff sued for a declaratory judgment of the truth. On the other hand, it also compels plaintiffs to abandon large damage awards. Besides, lawyers’ fees might be the largest awards in a lengthy litigation whose sole objective is to determine the truth.

A second reform, suggested by the Iowa Libel Research Project asked both parties in a libel dispute voluntarily submit to arbitration, after which the defendant would publish whether the story in question was found to be true or false.

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696 See generally, Soloski & Bezanson, Reforming Libel Law; and Donald M. Gillmor, Power, Publicity, and the Abuse of Libel Law.


A third reform, recommended by several scholars as well as by Representative Charles E. Schumer of New York, calls for a judicial declaration, called declaratory judgment, on the truth or falsity of disputed stories.

A fourth reform, supported by the American Society of Newspaper Editors, denies libel plaintiffs all damages except for economic loss, if the defendant publishes a “timely” and “sufficient” correction or clarification. It was proposed in 1993 by the National Conference of Commissioners on Uniform State Laws as the Uniform Correction or Clarification of Defamation Act (UCCDA), later endorsed by the American Bar Association, but to date adopted by only one state – North Dakota in 1995.

The set of recommendations is partially informed by all four reforms when it disallows punitive damages, requires a proof of fault by clear and convincing evidence for conviction, requires a contextual injury also by clear and convincing evidence, and offers the litigating parties an option among a declaratory judgment, retraction or reply. While the past reform proposals all call for state legislative intervention, the set postulates an intervention by


701 See H.R. 2846, 99th Cong., 1st Sess. 1985 (introduced by Representative Charles Schumer). The text of the bill, and a critique, are available in Franklin, “A Declaratory Judgment Alternative,” 832-835. The Schumer bill sought to establish a new cause of action allowing plaintiffs who are public official or public figures to sue for a declaratory judgment that the publication was false and defamatory. The bill provided that malice need not be shown, prohibited any award of damages, imposed a one year statute of limitations for all libel suits, prohibited punitive damages, and allowed reasonable attorneys’ fees to the prevailing party in most situations.


a trans-jurisdictional Internet Empowerment Agency in order to resolve the challenge of multiple jurisdictions that extend across international geographical borders.

The fourth recommendation, that plaintiffs must prove by clear and convincing evidence injury in an online context, such as a drop in Internet traffic or a fall in profits from ecommerce activities, extends the rationale of the information society described in earlier sections. Damages are defined as the sum of money that is awarded to the victorious plaintiff as the only civil legal remedy for the harm inflicted. Broadly classified, damages may be compensatory or punitive.\(^{704}\) Compensatory damages may be further subclassified into presumed damages, which are based on a jury’s assumption without further proof of what the harm is likely to be,\(^{705}\) and actual or specific or special damages, which are based strictly on evidenced harm.\(^{706}\) Punitive damages are traditionally awarded as punishment when the losing defendant’s conduct was shown to result from spite or other detestable motives.\(^{707}\)

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\(^{704}\) Of the $17.1 million total initial trial awards in 2004, 97.7 percent was compensatory damages, the largest share in the last two decades. See, “Status of libel litigation against media,” Media Law Resource Center, press release of 25 February 2005. [Link](http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2749) (accessed 19 February 2006).

\(^{705}\) Under the common law, a plaintiff who proves libel per se (that is, defamation charging criminality, incompetence in a job, a communicable disease, or sexual promiscuity) is presumed to deserve damages. The jury typically determines the dollar amount of presumed damages by making an intuitive estimate of what the amount should be.

\(^{706}\) Examples of actual damages are the amount of salary lost to John Doe who was dismissed from his job because of a defamatory falsehood, or the amount of income lost to a defamed retailer by using a comparison to previous sales, or the amount of property remaining unsold after publication of falsehoods about dangerous landfill in a subdivision.

\(^{707}\) Juries were much less likely to award punitive damages in the 2000s than they did in the two decades earlier. In trial awards from 2000 to 2004, of all the damage awards that plaintiffs won only 7.5 percent was punitive damages, compared to 61.7 percent of all dollars awarded in the 1980s, and 67 percent in the 1990s. See “Status of libel litigation against media,” Media Law Resource Center, press release of 25 February 2005. [Link](http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2749) (accessed 19 February 2006); An example of punitive damages is the case of Tatia Morsette, who was awarded $640,000 in compensatory damages and $700,000 in punitive damages when the Nation of Islam’s weekly newspaper, *The Final Call*, used her doctored picture showing her in prison uniform in a 1997 front-page story about women in prison. The punitive damages award was vacated by a sharply divided New
Extending the rationale of the information society, punitive damages, which are already out of favor with juries in traditional libel cases, are clearly out of place. So is any standard of evidence less than “clear and convincing proof,” which was introduced by the Supreme Court\textsuperscript{708} as an alternative to the preponderance of evidence standard.\textsuperscript{709} It involves a judge reviewing any finding by the jury to satisfy himself or herself that the evidence is constitutionally sufficient, and “that the finding is supported not merely by competent evidence or that a reasonable person could find actual malice, but that it is shown with convincing clarity.”\textsuperscript{710}

The fifth recommendation applies to republication, which ordinarily causes less damage than the original libel but is a relatively effortless task in the information society given the low entry barriers and easy replication of information as discussed in the literature review. In cases of republication of the libel, [the set] recognizes the co-liability of the speaker, forum moderator or host, Web master, and Internet service provider (in that order) for (a) hyperlinking the republication to the declaratory judgment or the court judgment; or (b) deleting the republication. This component establishes a chain of accountability. It makes a major departure from current American law, which immunizes Internet Service Providers from all liability.\textsuperscript{711} The intent is not to place liability on ISPs as much as it is to involve the cooperation of the ISP, if it comes to that, to hold the speaker, moderator and Web master (in that order of availability and liability) liable for updating the defamatory Web

\textsuperscript{708} New York Times, 376 U.S. at 285-86.


\textsuperscript{710} Anderson, “Is Libel Law,” 494.

\textsuperscript{711} Telecommunications Act of 1996, 106 Pub. L. 104, Sec. 230, (b) (2).
material by either deleting it or by hyperlinking it to the judgment. The Internet Service Provider is the last point of liability in the link. It is not the intent of the dissertation to place pressure on anyone in the communication chain other than the speaker – indeed, that would act as a chilling effect. Co-liability needs to be understood in the context that it does not intend to silence or threaten the moderator, Webmaster or other administrator, or the ISP – the court would have to take care that these individuals are treated merely as points of contact to get to the speaker in the event that the speaker does not cooperate.

There is no provision for punitive sanctions against the participants of this chain, but their co-liability may lead to the jurisdiction (the suggested Internet Empowerment Agency) holding one or more participants in contempt and fining them under equity law. Consequently, the set is consistent with the libertarian tradition but strikes a balance with the need to protect reputation.

The sixth recommendation uses the same logic of argument as the sixth. The set recognizes co-liability of the speaker, forum moderator or host, Web master, and Internet service provider (in that order) to post the final judgment in the same forum as the libel. The Internet Empowerment Agency would order those liable for the libel, in the order stated above, to post the judgment for a limited time period that is decided by consulting the plaintiff. In this manner, a victorious plaintiff gets a lasting vindication in an otherwise quick-changing scenario. The liability would be enforced, again, by resorting to a fine under an equity holding of contempt.

The Internet, like satellite rebound, is a technology that has prompted courts, legislatures and scholars to revisit the Supreme Court’s “scarcity,” “interference” and
“access” rationales for regulation of broadcast and cable. As the literature documented, many scholars have argued that these rationales do not apply to the Internet. Some early commentators argued that historically governments had used technological advances to exert new controls over the media, which needed to be resisted in the case of the Internet.

This chapter supports that view. As stated before, nothing in the dissertation calls for any regulation of the content or medium of the Internet. The dissertation argues for a reconsideration of the fundamental principles of freedom of expression characterizing jurisprudence, and a need to meet the information society’s jurisdictional challenge to libel law by formulating a separate common jurisdiction. By enabling a common jurisdiction, the proposed normative set of recommendations ensures the generalizability, consistency and reproducibility of Internet libel, across the world as well as across the information society within a country.

If adopted by a legitimate transnational body such as the Internet Empowerment Agency, it will enable litigants to predict specific procedural consequences, resolve an important issue in libel law, and enhance the well being of the information society.

The next chapter tries to enunciate a procedure for legal action using the recommendations elucidated in this one.

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712 See Red Lion Broadcasting Co. v. FCC (1969) for rationale of the FCC’s fairness doctrine (mostly abandoned since 1987), and Turner Broadcasting Co. v. FCC (1994) and (1997) for the rationales of the FCC’s cable regulations.

713 The U.S. Supreme Court has already ruled that the Internet enjoys at least the same degree of First Amendment protection as do the print media. Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).
CHAPTER 8

INFORMATION SOCIETY LIBEL: A MODEL LAW

This chapter activates the normative recommendations for freedom of expression made in chapter 7 by scoping out a possible model law for the information society.

The model law is introduced per se in the Appendix following chapter 9. It is written in the form of a legislative bill, using a structure similar to the well known Plaintiff’s Option Libel Reform Act proposed by the legal scholar Marc A. Franklin.714 The reader is invited to browse the Appendix upon concluding this chapter and before embarking on chapter 9.

The judiciary,715 the legislature,716 and the very marketplace of ideas all are potential sources to initiate any modification of libel law to address nonmedia defendants. The writer adopts a legislative mechanism given the well established status of statutory law in contemporary democracies and a consequently high acceptability of statutes.


715 “I conclude that only the Supreme Court can bring about the reform of libel law.” Anderson, “Is Libel Law,” 493.

716 See H.R. 2846, 99th Cong., 1st Sess. 1985 (bill introduced by Representative Charles Schumer); One court wrote many years back, “Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.” See It’s in the Cards, Inc. v. Triple Play Collectibles (1995), 193 Wis. 2d 429, 437, 535 N.W.2d at 14.
The model law would be adopted by the suggested Internet Empowerment Agency, an international judicial body established by a treaty to which various national governments are party. The treaty could be brokered by a user organization such as the Internet Corporation of Assigned Names and Numbers, or by the Inter-American Commission on Human Rights, among other cooperative or self-help bodies concerned with civil rights or liberties.

The fact that the new jurisdiction internationalizes a key precept of American constitutional law – the actual malice doctrine – should make a compelling argument for the United States government to support the treaty. The U.S. Supreme Court has already ruled in a 1981 case that it is constitutional for the federal government to seek intervention by an international adjudicatory tribunal. The treaty would also be attractive to other national governments seeking to benefit economically from a free Internet or seeking to encourage effective non-regulatory adjudication in the inevitable social changes wrought by the Internet.

The agency would be expected to accept a libel complaint if the expression involved meets three conditions:

First, the expression should have not only originated, but also have blossomed and developed, in an Internet medium such as a blog, discussion board, or email – this would include all initial arguments and counterarguments regarding the libel, if any. Internet expression that turns visibly controversial in an offline society would not be eligible for

\footnote{\textit{Dames & Moore v. Regan}, 453 U.S. 654, 656-657 (S.Ct. 72 1981). President Jimmy Carter had referred claims of U.S. nationals against Iran to an Iran-United States Claims Tribunal as part of an agreement with Iran for the release of hostages (who were eventually freed in January of 1981). The high court, using a pragmatic rather than literalist approach, found Carter’s order to be a constitutional exercise of the President’s Article II powers and also upheld the International Emergency Economic Powers Act. Chief Justice Rehnquist wrote for the court, “The United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Although those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate, and this practice continues at the present time.”}
adjudication by the Agency; such expression would continue to be subject to the regular jurisdictions that apply to publications in the various states. Thus, deciding whether a dispute involves Internet speech would be the agency’s first challenge before it asserts jurisdiction over a dispute.

Second, the expression should intend to communicate – this can be rather difficult to decide, but the Agency, at its discretion, may accept all expression to have a communicative intent which does not involve a bank or other financial transaction or an act of online gaming such as shooting aliens or busting spies. Most postings on blogs, discussion boards or multi-user domains, as well as in emails including spam, would qualify as expression. Expression in intranets, or in non-public discussion boards or multi-user domains, would qualify after the plaintiff meets, *prima facie*, the original legal challenges to a libel plaintiff – providing proof of defamation, identification and publication. Meeting those three challenges would be especially important to intranet or non-public libels. Thus, calling an expression as intending to communicate is the second challenge before the Agency asserts jurisdiction over a dispute.

Third, the expression in question should have originated in a nonmedia source, which section 3.1 conceptualized as a blogger, citizen journalist, Web site operator or other individual netizen who might produce commentary, opinion or political reaction on specific Web addresses or in emails. In other words, the defendant would usually be a ‘small guy’ without the resources of a public figure, a corporation, or a media organization. The institutional media are part of the information society, but are beyond the focus of the dissertation which is to protect the expression of the fifth estate. Organized media would use the regular libel litigation route via existing courts. The institutional media may qualify for adjudication by the Internet Empowerment Agency in rare instances where,
for instance, the expression involved was Internet-specific; that is, not also published in a traditional medium – but only at the agency’s discretion.

In addition, in order to decide the standard of fault, the agency would have to figure out the public figure status of the plaintiff using a standard of its choice. One such standard, as discussed in section 6.2 and elsewhere, might be the level of access to the Internet or a high frequency of online activities.

8.1. HIGHLIGHTS OF THE MODEL LAW

The model law, presented as “a procedure for judgment” in the Appendix, would address the actual malice doctrinal chinks documented in chapter 6. It would differ from Marc Franklin’s proposal in that while it allows an alternate remedy such as retraction, reply or declaratory judgment at the discretion of the plaintiff, it also allows for remedy by compensatory damages – which Franklin’s proposal does not. If plaintiff proves that the libel is false, the plaintiff has an opportunity until the start of trial to choose one of those alternate remedies. It also would differ from Franklin’s proposal is that it allows a brief pretrial hearing to ascertain prima facie falsity by a clear and convincing standard. The role of discovery is to ascertain prima facie the falsity of the alleged libel by a relatively quick and inexpensive showing of persuasive evidence, the burden to prove falsity being on the plaintiff.
Prima facie falsity would imply a claim of falsity that has enough integrity to be legally sufficient to establish the fact, relative to full falsity by “convincing clarity” which indicates a much higher burden of proof – lying somewhere between “preponderance of evidence” (a common law standard used in most civil cases other than libel cases) and “beyond reasonable doubt” (used in criminal cases).

Again, the burden of proving fault would be on the plaintiff, consistent with the First Amendment interpretation of New York Times. The burden would be actual malice for public or corporate plaintiffs, and negligence for media or nonmedia plaintiffs, as per the arguments presented in section 7.3.

If the plaintiff prevails on the prima facie falsity ruling, he or she may choose to demand a reply, retraction or declaratory judgment (or all of these alternatives), thus effectively ending the case with such a judgment in favor of plaintiff. No costs or fees would be awarded, but costs are likely to be a bare minimum up to this stage. Once prima facie falsity is proved by clear and convincing evidence, the defendant loses the ability to demand a full trial if the plaintiff is willing to settle for a reply, retraction or declaratory judgment – the defendant has no option but to accept the plaintiff’s proposed alternative.

If, however, the plaintiff chooses to not have a retraction, reply or declaratory judgment, then a trial date would be set – the burden of proof of actual malice, by clear and convincing standard, would be on plaintiff at trial. The model law thus creates incentive to preempt a trial once the court accepts the evidence of falsity.

Of course, if the plaintiff is unable to prove prima facie falsity by clear and convincing evidence, the court would end the case by granting a summary judgment in favor of the defendant, who has spent no money so far so would be economically unaffected by the libel allegation.
A highlight of the model law is that no costs or fees would be allowed if the plaintiff chose an alternate remedy such as retraction, reply or declaratory judgment. Since this would be an early stage of the litigation, such costs and fees are likely to be minimal, and in any case, as the literature documented, plaintiffs are likely more interested in restoring their reputation than in any monetary damages. The procedure thus would restore the primacy of truth in the libel litigation process.

The model law would minimize the stakes of the trial because of an inability to get punitive damages as well as the relatively high burden of proof required at trial. There is high incentive to accept an alternative remedy in order to preempt trial and its attendant costs in money and time.

The model law would require clear and convincing evidence to prove falsity during the pretrial hearing, to prove actual malice or negligence at trial, as well as to prove losses in Web traffic or ecommerce during any motion for compensatory damages. It accommodates the plaintiff when it would account for the information society’s idiosyncrasies such as easy republication and hyperlinking. It accommodates the defendant when it would not dilute the high protection for freedom of expression as well as when it would greatly reduce the advantages of a lengthy and costly trial.

The model law would encourage documentary evidence. When witness depositions are needed at any stage, it permits such testimonies by video conference or webcast after due verification by a presiding judge. The proposal does not describe this verification, leaving it to the situational satisfaction of the judge. Technology-mediated depositions would reduce the costs of the trial and prove especially attractive to bloggers and other nonmedia litigants.

The model law would fructify the extension of the actual malice doctrine to corporations argued in section 6.4 and earlier in section 2.4.1. All nonmedia defendants
would be protected by the actual malice standard when the plaintiff is a public figure or a
corporation – even a media corporation. Nonmedia defendants who are sued by other
nonmedia defendants, or by a media plaintiff such as a columnist, are protected by the
negligence standard.

While the model law would be adopted by the suggested Internet Empowerment
Agency, an international judicial organ legitimately created by international treaty, the
physical location of that agency, stipulated by the terms of the treaty, is beyond the scope of
this discussion.

In 2005, the European Union launched a stiff political challenge to the United States’
perceived control of the Internet through the Marina del Ray, California, based International
Corporation of Assigned Names and Numbers (ICANN).\textsuperscript{718} Several nations including Brazil,
China, Cuba and India expressed concern at the U.N. Working Group on Internet Governance
meeting in November of 2005 in Tunis over the United States’ allegedly disproportionate
control of Internet infrastructure.\textsuperscript{719} Given such a global political climate, the treaty might
well be set up as an organ of the United Nations (the American democracy may see a
‘victory’ even in that scenario, in that the treaty would internationalize a key precept of
American constitutional law, the actual malice doctrine). The agency might be based at the

\textsuperscript{718} ICANN is a nonprofit organization set up by the U.S. Department of Commerce in 1998 as a government
alternative to manage the Internet by allotting new suffixes for Web addresses (.com, .info, .tv), supervising
technological ‘mapping’ by which users can type URLs such as osu.edu instead of numeric IP addresses,
operating a directory of Web site owners, and facilitating new international Internet policy. See
http://www.icann.org/new.html (accessed 15 June 2006). The U.S. government, however, retains a power to
veto all ICANN decisions including the creation of new Web domains; For a brief discussion of the formation of
ICANN, see Chadwick, “The Rise of Internet Governance,” in \textit{Internet Politics}, 247-256.

\textsuperscript{719} Kenneth Neil Cukier, “Who Will Control the Internet? Washington Battles the World,” \textit{Foreign Affairs}
U.N. headquarters in New York City, or in a developing member country. Alternately, it may be set up at ICANN or at a similar other self-regulation agency in Europe.

While the writer has laid out the libertarian framework of the agency, others may seek to elaborate on the executive powers it may possibly draw from the treaty.
CHAPTER 9

CONCLUSION

Bloggers, citizen journalists and others of the fifth estate would benefit from a normative theoretical framework to ward off libel suits that chill their freedom of expression. The framework, and a model law to deliver it, would present a viable libertarian resolution of multiple personal jurisdictions – that, indeed, has been the grail of this dissertation.

In order to optimize the freedom of expression in the information society, the proposed framework recommends a new (corporate) category of plaintiff, revisits a key American constitutional libel doctrine, and reconsiders certain fundamental principles characterizing libel jurisprudence.

The framework updates current First Amendment jurisprudence by addressing the threat to freedom of expression from corporations. Scholars have recognized corporate consolidation to be an increasing trend. From the 1980s, there has been a significant spurt in the frequency of corporations slapping retaliatory libel lawsuits against individuals who would question their economic interests, especially those involved in public campaigns.720

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720 See sec. 2.4.1.
The proposed new jurisdiction, to be asserted by an Internet Empowerment Agency, would not affect of course any trends in corporate consolidation. But libel defendants, especially members of the fifth estate, who have emerged as ubiquitous if not all influential commentators in the information society\(^{721}\) could rest assured in the knowledge of a predictable and relatively inclusive libertarian level of protection. The new jurisdiction would simultaneously reassure information society libel plaintiffs by removing the legal and procedural uncertainties associated with multiple jurisdictions.

American constitutional libel law explicitly recognizes neither the coextensive nature of media and nonmedia defendants nor the emergence of a fifth estate. As documented, there is ample justification to extend the *New York Times* protection to nonmedia defendants, who have emerged as common defenders of the freedom of expression.

The proposed framework critiques the actual malice doctrine for the information society thus: (1) The doctrine would be sensitive to the libertarian interests of nonmedia defendants and consistent with a marketplace of ideas; (2) The doctrine would recognize the centrality of truth over damages; (3) Applying the doctrine might cause protracted and expensive litigation, and public criticism of the defendant; (4) The jurisdictional court would use its discretion to decide if an Internet communicator is a public figure on a case-by-case basis, perhaps by using a “self-help by access” rationale – a high level of access to the Internet and high frequency of online activities and any legal relief they get should be predicated on those facts; (5) The information society might obliterate the distinctions between public officials and public figure because netizen categories are expansive; (6) “Vortex” public figures would be a norm given the fragmented nature of much debate but

\(^{721}\) Supra nn. 8 and 12.
they primarily need to meet the public figure definition of a high level of access to the Internet and a high frequency of online activity; (7) As getting a jury of one’s “peers” is relatively difficult given the jurisdictional diversity, judge-only trials would be a pragmatic option; (8) A “clear and convincing” standard of proof would operationalize the individualized condition better than “preponderance of evidence;” (9) Because “speech on matters of purely private concern is of less First Amendment concern,” netizens defamed in that kind of speech would be allowed to recover presumed and actual damages without showing actual malice; (10) The initiator of a public debate would have the same status as a later participant such that a pioneer in a multi-user domain or discussion group would have the same protection as those who post later messages after the pioneer’s salvo has precipitated a netizen discussion; (11) A public controversy would be defined in the context of variables specific to the information society, even though a broad understanding of the term remains unchanged; (12) Prohibitive litigation costs would need to be preempted; (13) The waiver rationalization of the actual malice doctrine would be relevant in the information society; (14) In the interest of the libertarian ethos and the marketplace of ideas, punitive damages would be abolished.

With the distinctions between the institutional media and nonmedia diminished, the constitutional privileges enjoyed by media defendants from the *New York Times* judgment and its progeny would be explicitly extended to bloggers and others of the fifth estate. Media plaintiffs would be redefined as reporters or other journalists who sue as themselves – if their news organization sues on their behalf it would be considered a corporate plaintiff needing to prove actual malice. For journalists who may be public figures, their status as “media” would override their status as public figures. Thus a Paul Krugman or Thomas Friedman, both public figures, may sue a critical blogger without having to prove actual malice, but if
the New York Times Co. sued on their behalf it would, being a corporation, have to bear a burden of showing actual malice. This recommendation, consistent with the libertarian ethic, may well catalyze a reduction of corporate influence in deciding the limits of freedom of expression.

The identity of the litigant would be the sole criterion to decide the standard of fault, leaving out the subject matter of the dispute (that is, whether the expression involves a matter of public concern). This allowance would strengthen New York Times, which presumes for a public plaintiff, but not for a private one, that the matter is necessarily about a matter of public concern.

A central contribution is the dissertation’s conceptualization of the freedom of expression through an inductive set of recommendations, situated in the libertarian philosophy of John Milton and Thomas Emerson, to define libel in the information society. Those normative recommendations, which reflect an ethic of individualization and of participatory democracy, accept all Internet expression as political. They may be stated together as, “Internet expression shall not be restrained, abridged or transgressed unless the plaintiff proves actual malice when the plaintiff is a corporation or a public plaintiff, or at least negligence when the plaintiff is a nonmedia or media plaintiff, both by a clear and convincing standard; A successful plaintiff, in order to claim compensatory damages (punitive damages are disallowed), shall prove online injury such as a decline in Internet traffic or ecommercial losses; If the plaintiff preempts trial by requesting a declaratory judgment or retraction or reply, such a judgment if procured shall be published in the original forum of publication of the libel as well as in the forums of any republications that have not been deleted, and not doing so will be a co-liability of the speaker, forum moderator or host, Web master and Internet service provider in that order.” The jurisdictional court may use its
discretion to restrain an expression as non-political in only very rare situations – such as, for instance, if the expression involves the commission or dissemination of child pornography.

After the legal framework is delineated, the emerging challenge is to deliver it to litigants. That challenge would be met by a model law drawn up in the Appendix following this chapter. The model law, as a legislative bill, would be adopted by the suggested Internet Empowerment Agency. It would allow an alternate remedy such as retraction, reply or declaratory judgment at the discretion of the plaintiff, but also a remedy by compensatory damages. It would allow a brief pretrial hearing to ascertain *prima facie* falsity by a clear and convincing standard, and if plaintiff proves that the libel is false, the plaintiff would have an opportunity until the start of trial to choose one of the alternate remedies.

The model law differs procedurally from the common law in that it requires no motion from the defense for summary judgment – the pretrial hearing for falsity replaces any motion for summary judgment. The model law abolishes criminal libel but continues to recognize the distinction between libel *per se* and *per quod*. The legal conditions for libel – defamation, identification and publication – must be met at the trial stage along with the fault requirement.

The burden of showing fault – actual malice for public or corporate plaintiffs, negligence for media or nonmedia plaintiffs – must be borne by the plaintiff. All nonmedia defendants would be protected by actual malice when the plaintiff is a corporation or public figure. Nonmedia defendants who are sued by other nonmedia or media plaintiffs would be protected by the lower negligence standard.

Another highlight of the model law is that no costs or fees would be allowed if the plaintiff chose an alternate remedy such as retraction, reply or declaratory judgment. The bill provides high incentive to accept an alternative remedy in order to preempt trial and its
attendant costs in money and time. The model law requires clear and convincing evidence to prove falsity during the pretrial hearing, to prove actual malice or negligence at trial, as well as to prove losses in Web traffic or ecommerce during any motion for compensatory damages.

Yet another highlight is that the model law encourages documentary evidence, and when witness depositions are needed at any stage, it permits such testimonies by video conference or webcast after due verification by a presiding judge. The proposal does not describe this verification, leaving it to the situational satisfaction of the judge. Technology-mediated depositions would reduce trial costs and prove especially attractive to fifth estate litigants.

The fact that the new jurisdiction internationalizes a key precept of American constitutional law – the actual malice doctrine – should make a compelling argument for the United States government to support the treaty. The treaty would also be attractive to other national governments that seek to benefit economically from an unfettered or reliable information society, or that seek effective non-regulatory adjudication in the inevitable social changes wrought by the Internet, or both.

9.1. FURTHER RESEARCH

The following paragraphs cover some points bypassed by the dissertation that may be evaluated for research by other scholars.

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722 The U.S. Supreme Court has already ruled in a 1981 case that it is constitutional for the federal government to seek intervention by an international adjudicatory tribunal. See Dames & Moore v. Regan, 453 U.S. 654, 656-657 (S.Ct. 72 1981). President Jimmy Carter had referred claims of U.S. nationals against Iran to an Iran-United States Claims Tribunal as part of an agreement with Iran for the release of hostages (who were eventually freed in January of 1981). The high court, using a pragmatic rather than literalist approach, found Carter’s order to be a constitutional exercise of the President’s Article II powers and also upheld the International Emergency Economic Powers Act.
1. Since the model law is international, can it limit defenses to privileges that already exist in English or American law? What about the law of other jurisdictions? The dissertation does not address that issue.

2. The dissertation does not attempt to reinterpret federalism. One of the possible resolutions of the uncertainties of libel litigation in the information society could be in reinterpreting federalism, which the writer would recommend as topic for a separate study. Citizenship implies an acceptance or membership in a political entity such as a city state or a nation and carries with it certain duties, rights and privileges. The information society, with its implication of “netizenship,” might prompt an early research question such as, “If I’m a citizen of the Internet, but also a citizen of the state of Ohio, how do I face libelous expression (or child pornography) online?” This question could find resolution through a discussion and reinterpretation of federalism, at the end of which a researcher could possibly argue that the Internet be conceptualized as akin to a “center” or “federation,” while individual states or countries, or even smaller political entities, be considered akin to “states.”

The dissertation, however, chose to argue not a route of federalism but one of jurisdiction. It suggests an Internet Empowerment Agency to be established by international treaty to assert separate and exclusive personal jurisdiction over libel disputes of the information society.

3. The dissertation does not explore any corollary legal mechanisms that might have to be formulated for the suggested treaty to be able to divest states of jurisdiction over libels.

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723 Federalism is, or advocates, a division of power between a central authority and constituent political units.

724 City states were more common in the ancient days, but current examples would include Singapore, the Vatican, and the Principality of Monaco.

725 Supra. n. 13.
4. The dissertation does not explore the legal mechanisms by which the U.S. Congress might preempt some libel litigation but not all.

5. The dissertation does not describe the executive powers, location, or composition of the proposed Internet Empowerment Agency. There is some exploratory literature in this area, such as the 2004 paper for Syracuse University’s Internet Governance Project which discusses the composition of Internet governance regimes.\footnote{John Mathiason, Milton Mueller, Hans Klein, Marc Holitscher and Lee McKnight, “Internet Governance: the State of Play” (September 9, 2004). Internet Governance Project. Paper IGP04-001. Available at http://internetgovernance.org/pdf/ig-sop-final.pdf} As discussed toward the end of chapter 8, the agency may be located as an arm of a U.S.-based self-regulatory body such as the nonprofit Internet Corporation for Assigned Names and Numbers (ICANN) located in Marina del Ray, California. But given the current political climate – in 2005 many efforts were made in the European Union and at the United Nations to divest America of its controls of the Internet infrastructure\footnote{Mark A. Shiffrin and Avi Silberschatz, “Web of the Free,” The New York Times, 23 October 2005, D13.} – it may be politically expedient to locate the agency at the United Nations.

6. The dissertation does not call for any direct regulation of the content or medium of the Internet. In a sense, though, the study does create a framework for Internet governance.\footnote{“Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.” Report of the Working Group on Internet Governance, United Nations, 4. http://www.wgig.org/docs/WGIGREPORT.pdf (accessed 1 April 2006).} There is already some work in the area of direct governmental regulations of the Internet – for example, a U.N. Working Group on Internet Governance report in June of 2005 on the oversight by governments of the Internet observed, “There is a wide range of governance functions that could include audit, arbitration, co-ordination, policy setting, and regulation
amongst others but not including involvement in day-to-day operational management of the Internet that does not impact on public policy issues.”

7. The dissertation focuses on the established status of statutory law in contemporary democracies, so it does not develop possible alternate mechanisms to deliver the new framework. Such mechanisms might include, (a) allowing courts of individual jurisdictions to decide cases with an appeal available with the new agency, or (b) allowing each jurisdiction to interpret what freedom of expression means, and to develop its own laws to implement it – in the manner that ICANN set up its Uniform Dispute Resolution Policy as a deliberation mechanism to decide cybersquatting complaints. It is not obvious that any one of those delivery mechanisms would be more successful than the others.

8. Section IX(B)(a) of the model law, which requires pre-action negotiation and disclosure of evidence, is an important dimension of the statute but not discussed in the exposition because it did not require the writer’s attention given the dissertation’s theme.

9. The dissertation does not recommend any nuanced system of sanctions, but such a protocol may be developed from a user-decided “netizenship rating” akin to the reviewer ratings at amazon.com or the seller ratings at ebay.com.


APPENDIX

A PROCEDURE FOR JUDGMENT

(I). CAUSE OF ACTION: Any netizen who is the subject of libel may bring an action in the Internet Empowerment Agency either (a) for an Agency resolution by trial, or (b) for an alternative resolution including a declaratory judgment that the publication was false and defamatory or allowing a retraction or a reply.

(II). PROCEDURE OF ACTION 1: If the plaintiff is a corporation, a public figure or a public official, the Agency shall, in a pretrial hearing, conduct a brief process of discovery to ascertain \textit{prima facie} the falsity of the alleged libel, by clear and convincing evidence. The burden to prove falsity is on plaintiff.

(II)(A). If \textit{prima facie} falsity is not proved, the Agency shall award a summary judgment in favor of defendant. Costs and fees shall be awarded to defendant. Case ends.

(II)(B). If \textit{prima facie} falsity is proved, the Agency shall give plaintiff an option to choose from among a retraction, reply, or declaratory judgment.

(II)(B)(a). If plaintiff offers to accept retraction or a reply or a declaratory judgment, final judgment shall be pronounced comprising (i) the finding of the Agency, (ii) the statement of retraction, reply or declaration, and (iii) an order to defendant to post the finding of the Agency, and the statement of retraction, reply or declaration, in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web
master and ISP (in that order), and (iv) award of costs and fees to plaintiff. Case ends.

(II)(B)(b). If plaintiff chooses to not accept retraction, reply or declaratory judgment, trial shall begin. Burden of proof shall be on plaintiff to prove actual malice\textsuperscript{731} by a clear and convincing standard.

(II)(B)(b)(i). Preliminary judgment shall be pronounced.

(II)(B)(b)(i)(1). If defendant prevails in the preliminary judgment, costs and fees shall be awarded to the defendant for the procedure following Step (II)(B)(b). Case ends.

(II)(B)(b)(i)(2). If plaintiff prevails:

(II)(B)(b)(i)(2)(i). Plaintiff may choose not to move a motion for compensatory damages. In this scenario, the preliminary judgment shall be declared as the final judgment, and shall comprise (i) the finding of the Agency, (ii) costs and fees to plaintiff, and (iii) an order to defendant to post the final judgment in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order). Case ends.

(II)(B)(b)(i)(2)(ii). Plaintiff may choose to move a motion for compensatory damages. Burden of proof by clear and convincing standard: A loss of income in ecommerce or a remarkable fall in netizen traffic.

(II)(B)(b)(i)(2)(ii)(x). If plaintiff prevails in that motion, compensatory damages shall be awarded. Final judgment shall be pronounced. The final judgment shall comprise (i) the finding of the Agency, (ii) an award of compensatory damages but no punitive damages, (iii) costs and fees, and (iv) an order to

\textsuperscript{731} In \textit{New York Times}, the Supreme Court defined actual malice as a statement “made with knowledge of its falsity or with reckless disregard of whether it was true or false.” 376 U.S. at 280 (S. Ct. 39 1964).
(II)(B)(b)(i)(2)(ii)(y). If defendant prevails in that motion, costs and fees shall be awarded to the defendant for the procedure following Step (II)(B)(b). Preliminary judgment is changed into the final judgment in favor of plaintiff, comprising (i) the finding of the Agency, and (ii) costs and fees upto Step (II)(B)(b), and (iii) an order to defendant to post the final judgment in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order). Case ends.

(III). PROCEDURE OF ACTION 2: If the defendant is media or nonmedia, the Agency shall, in a pretrial hearing, conduct a brief process of discovery to ascertain *prima facie* the falsity of the alleged libel, by clear and convincing evidence. The burden to prove falsity is on plaintiff.

(III)(A). If *prima facie* falsity is not proved, the Agency shall award a summary judgment in favor of defendant. Costs and fees shall be awarded to defendant. Case ends.

(III)(B). If *prima facie* falsity is proved, the Agency shall give plaintiff an option to choose from among a retraction, a reply, or a declaratory judgment.

(III)(B)(a). If plaintiff offers to accept retraction or a reply or a declaratory judgment, final judgment shall be pronounced comprising (i) the finding of the Agency, (ii) the statement of retraction, reply or declaration, and (iii) an order to defendant to post the finding of the Agency, and the statement of retraction, reply or declaration, in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order), and (iv) award of costs and fees to plaintiff. Case ends.
(III)(B)(b). If plaintiff chooses to not accept retraction, reply or declaratory judgment, the trial shall begin. Burden of proof shall be on plaintiff to prove negligence\textsuperscript{732} by a clear and convincing standard.

(III)(B)(b)(i). Preliminary judgment shall be pronounced.


(III)(B)(b)(i)(2). If plaintiff prevails:

(III)(B)(b)(i)(2)(i). Plaintiff may choose not to move a motion for compensatory damages. In this scenario, the preliminary judgment shall be declared as the final judgment, and shall comprise (i) the finding of the Agency, (ii) costs and fees, and (iii) an order to defendant to post the final judgment in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order). Case ends.

(III)(B)(b)(i)(2)(ii). Plaintiff may choose to move a motion for compensatory damages. Burden of proof by clear and convincing standard: A loss of income in ecommerce or a remarkable fall in netizen traffic.

(III)(B)(b)(i)(2)(ii)(x). If plaintiff prevails in that motion, compensatory damages shall be awarded but no costs and fees shall be awarded. Final judgment shall be pronounced. The final judgment shall comprise (i) the finding of the Agency, (ii) an award of compensatory damages but no

\textsuperscript{732} Negligence is evident when the defendant failed to do something that prudence or professionalism demands, or doing something that a prudent individual or a professional would not do. Examples include failure to check the facts or accuracy of copy, failure to contact multiple sources to check on libelous statements, or failure to use reliable sources. As a matter of interest, it should be noted that beyond negligence, but before “actual malice,”
punitive damages, (iii) costs and fees, and (iv) an order to defendant to post the final judgment in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order). Case ends.

(II)(B)(b)(i)(2)(ii)(y). If defendant prevails in that motion, costs and fees shall be awarded to the defendant for the procedure following (III)(B)(b). Preliminary judgment is changed into the final judgment in favor of plaintiff, comprising (i) the finding of the Agency, and (ii) costs and fees up to Step (III)(B)(b), and (iii) an order to defendant to post the final judgment in the same forum as the libel with co-liability for not doing so on the speaker, forum moderator or host, Web master and ISP (in that order). Case ends.

(IV). BURDEN OF PROOF: Described in (II)(A), (II)(B)(b), (III)(A) and (III)(B)(b). In each case, the plaintiff shall bear the burden of proving by clear and convincing evidence each element of the cause of action. A report of a statement made by an identified source not associated with the defendant shall not be deemed false if it is accurately reported.

(V). DEFENSES: Privileges that already exist in English common law or by American statute, including but not limited to the privilege of fair and accurate report, shall apply to actions.

(VI). BAR ON CERTAIN CLAIMS. A plaintiff who brings an action for a retraction, reply or declaratory judgment under subsection (II)(B)(a) or (III)(b)(a) shall be forever barred from asserting any other claim or cause of action arising out of a publication which is the subject of such action.

there is another category of fault known as “gross negligence,” which indicates an intentional failure to do what was due.
(VII). LIMITATION ON ACTION:

(VII)(A). Any action arising out of a publication which is alleged to be false and defamatory must be commenced not later than one year after the first date of such publication or broadcast.

(VII)(B). It shall be a complete defense to an action brought under section (I) that the defendant published or broadcast an appropriate retraction before the action was brought under (I). Any republications in this scenario will be considered incidental or collateral injury.

(VIII). PROOF AND RECOVERY IN DAMAGE ACTIONS

(VIII)(A). No trial shall happen until falsity of alleged libel is proved by a clear and convincing standard. See (II)(A) and (III)(A). Documentary evidence is encouraged. Depositions during any stage of the action may be made via video conference or Webcast after the Agency’s due verification.

(VIII)(B). Punitive damages may not be awarded in any action.

(VIII)(C). A plaintiff who brings an action for damages shall be forever barred from asserting any other claim or cause of action arising out of the same publication.

(IX). FEES AND COSTS

(IX)(B). Exceptions:

(IX)(B)(a). In an action brought under Section (I), a prevailing plaintiff shall not be awarded costs and fees if the plaintiff has prevailed on the basis of evidence that the plaintiff did not present, or formally try to present, to the defendant before the action was filed.

(IX)(B)(b). In any action brought under Section (I) in which the defendant has made an appropriate retraction after the filing of suit, the plaintiff shall be treated as the prevailing party up to that point and the defendant shall be treated as the prevailing party after that point.

(X). REPUBLICATION: All judgments for the plaintiff shall be accompanied by an order addressed to non-identified “To Whom Concerned” netizens mentioned in the following order – speaker, forum moderator or host, Web master, and Internet service provider – who may have linked to the defamatory falsehood, informing them of their co-liability, in that order, for not (a) hyperlinking the republication to the declaratory judgment or the court judgment; or (2) deleting the republication. The liability would be contempt of court and equity fines. The burden of showing every incident of noncompliance with (IX) shall be a separate cause of action by the plaintiff.

(XI). EFFECTIVE DATE: This proposed Procedure for Action shall apply to any cause of action that arises on or after the date of the acceptance of this Action by the Internet Empowerment Agency.

The following flowchart depicts the procedure detailed above from the perspective of a public or corporate plaintiff. It would be identical for a media or nonmedia or media plaintiff except that negligence would be required at stage (II)(B)(b).
Table 7. Proposed libel litigation procedure from a public or corporate plaintiff's perspective.

* A media plaintiff is defined as an individual columnist or reporter, not a corporation that may represent that individual.
SELECTED BIBLIOGRAPHY


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