

WHAT CHEAP SPEECH HAS DONE: THE TRANSFORMATION OF LIBEL AND PRIVACY LAW

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[This is a very early draft; a few sections are not completed, and many footnotes are yet to be filled, in particular with citations to various articles and books that touch on the subjects I discuss.]

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Disclosure: I have participated as a lawyer in about a dozen of the cases mentioned in this article (mostly pro bono, though as a paid consultant in *Publius v. Boyer-Vine*). In particular, I have argued on behalf of a party or an amicus in *Obsidian Finance LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014) (libel, opinion, and the media/nonmedia defendant distinction); *Ellis v. Chan*, [add cites throughout] (Ga. 2015) (injunction barring speech about a person); *State v. Turner* (Minn. Ct. App. 2015) (criminal libel); *Levitt v. Felton* (Mich. Ct. App. 2016) (libel, parody impersonation). And I have filed amicus briefs in *Van Valkenburg v. Gjoni* (Mass. Ct. App. 2016) (injunction barring speech about a person); *State v. Burkert* (N.J. Super. Ct. App. Div. 2016) (criminal harassment); *State v. Kaleb K.* (Wisc. 2015) (criminal harassment); *State v. Bishop* (N.C. 2016) (criminal harassment, invasion of privacy, speech about minors); *Walker v. State* (Md. Ct. App. 2016) (criminal harassment, speech about minors); *SEIU v. Professional Janitorial Service* (Tex. 2015) (the media/nonmedia defendant distinction); *State v. Johnson* (Mass. 2015) (impersonation); *Hassell v. Bird* (Cal. Ct. App. 2016 & to be filed, Cal. Sup. Ct. 2017) (injunctions binding service providers as well as speakers); *Publius v. Boyer-Vine* (C.D. Cal. 2016) (statute requiring takedown of legislators' home addresses) (in progress).

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INTRODUCTION

What cases do we think about when we think “libel law”? *New York Times v. Sullivan*. *Gertz v. Robert Welch, Inc.* Probably *Dun & Bradstreet v. Greenmoss Builders*—the leading cases from the textbooks.¹ How about privacy, in the sense of disclosure of private facts? Maybe *Florida Star v. B.J.F.*; *Bartnicki v. Vopper*; *Cox Broadcasting v. Cohn*.² If we think about modern cases, it would probably be the *Rolling Stone* lawsuits and the Hulk Hogan sex tape video lawsuit against Gawker.³

That’s so 1993. The model those cases represent—lawsuits over damages against media organizations—is now just a small part of where the action is these days, when it comes to libel and privacy law. The remaining part, being developed far outside the Supreme Court and far from the sight of leading newspapers, is much stranger, less authoritative, and less consistent. Yet for all its flaws, and there are many, it tries to confront the real problems of the Internet age.

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

² *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Cox Broadcasting Co. v. Cohn*, [cite].

³ [Cite.]

The “cheap speech” made possible by the Internet has famously democratized mass media communications.⁴ It used to be that, in A.J. Liebling’s words, “Freedom of the press is guaranteed only to those who own one.”⁵ Yet while this system was rightly criticized as undemocratic, the flip side was that the owners of the press had assets that were vulnerable to civil lawsuits, and those owners were thus disciplined by the risk of liability, as well as by market forces.

Say what you will about the old mainstream media, but it didn’t offer much of a voice to people obsessed with private grievances, or to outright kooks. In 1993, someone who wanted to educate the world about an ex-lover’s transgressions would have found it hard to get these accusations published, unless the ex-lover was famous. The media acted as gatekeeper. And while the gates shut out much good material, they shut out much bad as well.

Today, though, the relatively poor and the anonymous (literally and figuratively) can speak to the world, and can often find an audience, in Google search results even if not in daily visitors to a site.⁶ And while this democratization has many virtues, it has the vices of those virtues. Anyone can say anything about anyone—and they do. They can easily publish complaints, including lies, about acquaintances, ex-lovers, and local businesses. They can publish photographs of their ex-lovers naked. And while the typical “Jane Schmeckelburg done me wrong” site won’t have many readers, it might easily come up as the top result in a Google search for “Jane Schmeckelburg.”

Moreover, many people can do all this without being much deterred by the risk of liability for libel or disclosure of private facts: Because the speakers have very little money, they have little to lose from a lawsuit, and potential plaintiffs (and contingency fee lawyers) have little to gain.

⁴ See generally *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005); DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2006); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 *Duke L.J.* 855, 895–97 (2000); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).

⁵ A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed. 1975); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 58 (1993) (“Broadcasting access is the practical equivalent of the right to speak, and it is allocated very much on the basis of private willingness to pay.”); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641, 1643 (1967) (“[A] comparatively few private hands are in a position to determine not only the content of information but its very availability.”); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1413 (1986) (“[An unregulated marketplace of ideas will include] only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.”).

⁶ Of course, getting noticed is still easier if you have the money to advertise, or the ear of an existing media outlet that will pass along your speech to its readers. But the phenomena that I describe don’t require that poor speakers have as broad an audience as rich ones—only that they can have an audience of considerable, and damaging, breadth.

There are mean and irresponsible rich people as well as poor people; and there are mean and irresponsible publishers at media organizations, despite the market constraints under which the organizations operate. But those with assets can at least be sued for damages. Damages lawsuits against those without assets are largely quixotic.⁷

It should therefore be no surprise that the legal system has been changing in response to these changes; but many of the changes are happening under the radar of the academy and of the Supreme Court—indeed, mostly outside any appellate court. Indeed, perhaps they don't reflect the “law” in the sense of binding appellate precedent; but they are the “law” in the sense of what judges and other actors in the legal system actually do.

1. Criminal libel law, long thought to have fallen into disuse, remains enforced in many states, with likely about 200 prosecutions nationwide in the last decade. The California courts are reinventing criminal libel law, even though the California Legislature has repealed it. Narrower criminal-libel-like statutes, such as bans on impersonation, are being enacted.

2. Injunctions against libel had long been seen as unconstitutional. In 2004, the Supreme Court almost decided whether this is indeed a First Amendment requirement.⁸ (The case was dismissed because the plaintiff, the famed trial lawyer Johnnie Cochran, died while the case was pending.) Even those state courts that allowed some such injunctions were careful to stress that statements could be enjoined only after a trial at which those particular statements were found to be false and defamatory.⁹

But today, such injunctions are commonplace in state trial courts. Some are shockingly broad, banning *all* speech by the defendant about the plaintiff.¹⁰ Some ban all libelous speech about the plaintiff (thus

⁷ In principle, people with a lot of money may also be hard to deter, especially if damages awards are set too low. There is the story of Lucius Veratius, an ancient Roman aristocrat who took advantage of the ancient rule of the Twelve Tables, “If one commits an outrage against another the penalty shall be twenty-five *ases*,” the *as* being a copper coin. Twelve Tables, table VIII, ¶ 4. Twenty-five *ases* being nothing to him, he would walk down the street slapping people in the face; his slave would then hand the victim the money, and Veratius would go on to the next man. AULUS GELLIUS, *ATTIC NIGHTS*, <http://www.perseus.tufts.edu/hopper/text?doc=Gel.20.1>.

But in practice, this doesn't seem to happen much, precisely because damages awards—including punitive damages for particularly egregious behavior—can be quite substantial. (Consider the \$140 million awarded to Hulk Hogan in the Gawker litigation, [cite], though that seems very likely to be cut back on appeal.) And while some rich defendants may expect that their expensive top-notch lawyers will avoid such liability, the prospect of liability can draw top-notch plaintiffs' lawyers (even absent an ideological funder for the litigation, as in the Gawker matter.)

⁸ *Tory v. Cochran*, 544 U.S. 734 (2005).

⁹ *See infra* __.

¹⁰ *See infra* __.

creating what is tantamount to a criminal libel law focused on this particular defendant's speech about this particular plaintiff).¹¹

Some, though, ban only statements specifically found to be defamatory, or order the removal of such statements. (I call the latter "takedown injunctions.") Several state supreme courts have upheld such injunctions.¹²

3. Moreover, the action in enforcing takedown injunctions isn't in court—it's with web site operators, such as Yelp, and search engines (I'll use Google as a shorthand stand-in for all these).¹³ Those companies generally have no obligation to take down libelous material, but they have chosen to take down material that a court has found to be libelous. (This decision may have come from of a sense of civic or ethical duty, a desire to avoid public criticism, a desire to prevent changes in the law that would allow direct injunctions against them, or a mix of these motives.)

But because of this, some of the takedowns stem from default judgments against defendants who lack the money to litigate a case, or against pseudonymous commenters who cannot be found. As a result, material can be taken down based on a default judgment, with no meaningful factfinding about whether the statements are indeed false.

What's more, some of the takedown orders appear to be the result of organized frauds. Sometimes plaintiffs sue nonexistent defendants, get this ostensible defendant's ostensible consent for an injunction, and then send the ill-gotten injunction to a search engine. Sometimes they sue real people, but ones who seem to have nothing to do with the post. Sometimes they don't sue at all, but just forge an order and send it to Google. I have so far identified about 60 cases in which I suspect some such shenanigans, but I think there are likely more.¹⁴

4. Lower courts and legislatures are likewise adapting privacy law to the new world of cheap speech and judgment-proof speakers, sometimes soundly and sometimes not. (I focus here on cases aimed at restricting the distribution of speech about people, rather than cases having to do with governmental or private surveillance.)

Some jurisdictions have essentially criminalized the disclosure of privacy tort, something that had been unheard of until recently,¹⁵ but that turns out to be an echo of the 19th-century formulation of criminal libel law.¹⁶ Some have authorized broad injunctions against the display

¹¹ See *infra* __.

¹² See *infra* __.

¹³ See *infra* Part III.B.

¹⁴ See *infra* Part III.B.2–III.B.4.

¹⁵ See *infra* Part IV.C.

¹⁶ See *infra* Part IV.B.

of private information. Some have enacted specific statutes forbidding the distribution of specific information about people, such as nude photographs,¹⁷ home addresses,¹⁸ financial information, and the like.

5. Finally, some courts are issuing broad injunctions against “harassment” or “stalking,” often barring defendants from posting anything at all about plaintiffs.¹⁹ And these orders are often just responses to defendants’ repeatedly criticizing plaintiffs, even in the absence of defamation or true threats. This, too, I think, is a response to the democratization of mass communications: Courts are accustomed to the need to tolerate sharp criticism by the media and by political organizations, perhaps because some established organizations are standing behind it, which signals to courts that the speech is valuable. But similar sharp criticisms by individuals can seem like pointless or menacing obsession, precisely because it comes from one uncredentialed individual.

There are also many more things that can be said about similar questions related to threats of violence, advocacy of violence, and terrorist propaganda and recruiting, as well as child pornography; but that is a story for another day.²⁰ And I’m sure there are similar articles to be written about the experience in foreign countries, and about how the laws in one country end up affecting what is available in others. But that is a story for another author—as you will see, I think that understanding such matters requires deep knowledge of how law operates on the ground; that knowledge is hard enough to obtain for one’s own country, and I cannot efficiently obtain it for others.

* * *

All this is a story that strikes me as interesting itself. Most of it is not well-known. Much is almost entirely unknown.

Some of it surprised me, even shocked me, when I first learned about it. Much of it I had the good fortune to learn through some of the cases that my students and I worked on for the Scott & Cyan Banister First Amendment Clinic that I founded at UCLA in 2013, and through some other pro bono cases that I had handled before and since. Much came to me, directly or indirectly, through my blogging; readers often point me to trial court cases that might never make their way into the appellate reports. All this gave me a rare glimpse at what, earlier in my career, I would never have seen.

The story also offers one illustration of how the legal system adapts to changing realities, especially when changing technology produces

¹⁷ See *infra* Part IV.D.

¹⁸ See *infra* Part IV.E.

¹⁹ See *infra* Part V.

²⁰ For more on how these questions relate to transnational regulation, and to jurisdiction and choice of law, see Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. PA. L. REV. 1975 (2005); Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT’L LAW. 991 (1998).

changing economic circumstances and changing social behavior. The change here happened without any top-down decisionmaking, whether from the Supreme Court, Congress, or federal agencies. Instead, throughout the country judges, prosecutors, private litigants, and legislators have stumbled in different directions, trying to accommodate themselves to the new profile of potential libelers and privacy invaders. Students of legal change should find much that interests them here, though it may be too early to tell whether the changes have on balance been good or bad.

In this Article, then, I aim mostly to be a tour guide. I'll try to avoid the familiar parts of town, where the rich and famous live. Instead, I'll try to show what new things—good and bad—are being done in the places where ordinary people live and do business, and what supposedly long-gone things are coming back.

But in the process, I'll speculate a bit on why some of these things are happening; and I'll occasionally offer some thoughts on whether these new (or resurgent) habits are worth officially adapting. Some of them, I think, need to be resisted: They are generally inconsistent with First Amendment principles that remain sound in the era of cheap speech, just as they were before. I hope that publicizing these developments will help promote such resistance.

But other developments, I think, have more to recommend them, though they also pose risks of their own. If we are to have any realistic protection against libel and invasion of privacy by individuals, including anonymous and uncatchable individuals, rather than by large media organizations, we have to go beyond civil damages liability. Thus, suitably narrow criminal libel laws, for all their dangers, may be the only way to viably deter genuinely damaging and valueless speech—though perhaps criminal prohibitions should be limited to those that are especially unlikely to yield a chilling effect, such as bans on impersonation.

Likewise, whatever the history of the prohibition on injunctions against libel might be, today some such injunctions—which, like criminal libel law, deploy the threat of criminal punishment—are probably necessary. At the same time, the very thing that makes such injunctions necessary (that the defendants might lack money, might not show up, might be overseas, or might not be identifiable) also makes any legal process aimed at getting the injunctions unreliable: The plaintiff will likely be represented by a libel lawyer, but the defendant will be either pro se or entirely absent. It's worth thinking about whether there are some alternative mechanisms that can partly solve both these problems, though I'm not optimistic.

Truthful speech about people (and the expression of opinions about them) should generally remain protected, even when its targets view it as distressing and intrusive. But, again, narrow criminal prohibitions

on speech that is especially harmful and valueless, such as revenge porn, is justifiable.

Finally, if I'm right that this is an interesting story, it is a story about documents that aren't in the usual caselaw databases. It is about docket sheets, on Bloomberg Law and in Lexis's and Westlaw's specialized Dockets files. It is about trial court filings, on Bloomberg Law and on Westlaw.

It is about records that aren't on any centralized service, but can be gotten with varying degrees of difficulty from courthouses throughout the country. It is about lists of cases provided by administrative offices of courts, or statistics gathered by state Justice Departments. It is about court orders, and purported orders, in the Lumen Database (<http://lumendatabase.org>), which is where Google and other companies put takedown orders that they receive. It is about law bubbling up from the ground floor.

I. THE DEMOCRATIZING OF MASS COMMUNICATION

Before I get to how the legal system is reacting to democratization of mass communications, let me say a few words about the democratization itself. It stems, in the U.S., from three things: First, from the technological change created by the Internet. Second, from the legal system's decision that nonprofessional speakers (whether online or offline) get full First Amendment protection, no less than do traditional newspapers, magazines, or book publishers. Third, from 47 U.S.C. § 230, the statute that immunizes intermediaries—who usually do have assets—from liability for what their users say.

A. *Technology: Cheap Speech*

Little needs to be said about how the Internet has democratized mass communications. [Brief and familiar discussion, with the usual caveats, omitted for this draft.]

B. *Law: Full Protection for Nonprofessional Media*

People are thus technologically able to speak to the world at large, even when they lack access to an established media organization. And they are legally entitled to the same First Amendment protections that the established media organizations get.

This has been the view of the courts since the early Republic: The freedom of the press was seen as belonging equally to all who use the press as a technology—the printing press and its technological heirs—regardless of whether they belonged to “the press” in the sense of the

media industry. The view was nearly unchallenged in court decisions until about 1970.²¹

After 1970, about a dozen lower court cases took the view that First Amendment protections (such as the protections against libel liability) apply more to the institutional media than they do to nonprofessional publishers.²² And five Supreme Court cases from 1979 to 1990 expressly left the question open.²³

But *Citizens United v. FEC* expressly held that the First Amendment applies equally to the professional media and to other speakers; and all the federal circuit courts that have considered the issue have agreed.²⁴ The most recent such decision, *Obsidian Finance Group LLC v. Cox*, reached this result in an Internet speech case, though the court's logic applies more broadly.²⁵

Indeed, the emergence of the Internet has been a recurring argument in favor of such equal treatment.²⁶ When so much important mass communication comes from speakers who aren't professional media, drawing the line between "the press" and non-"press" speakers seems both difficult and illegitimate.²⁷

This means that courts can't compensate for the possible costs of cheap speech by treating the newcomers (individual speakers) as less protected than the established media speakers. A judge who thinks that an individual speaker is irresponsible or just wacky, and lacks the internal checks and balances that media organizations often provide, can't use that as a basis for denying that speaker full protection.²⁸ As we'll

²¹ See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?—From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

²² See *id.* at __.

²³ See *id.* at __.

²⁴ 558 U.S. 310, __ (2010); See, e.g., *Flamm v. American Ass'n of University Women*, 201 F.3d 144, 149 (2d Cir. 2000); *Avins v. White*, 627 F.2d 637, 649 (3rd Cir. 1980); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); *In re IBP Confidential Business Docs. Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014); *Garcia v. Board of Ed. of Socorro Consol. School Dist.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Davis v. Schuchat*, 510 F.2d 731, 734 (D.C. Cir. 1975)

²⁵ 740 F.3d at __.

²⁶ See, e.g., *Citizens United*, 558 U.S. at 352; *Obsidian Finance Group*, 740 F.3d at 1291.

²⁷ Some state statutes expressly give institutional media—or often only certain types of institutional media, such as newspapers and magazines not books—additional protection beyond what the First Amendment offers. Common examples are statutory journalist's privileges, libel retraction statutes, and exemptions from campaign finance laws. [Cite.] But the baseline of First Amendment protection applies equally to all speakers.

²⁸ Thus, for instance, in *Obsidian Finance Group* the Ninth Circuit reversed a district court decision that denied defendant full First Amendment libel protection. That district court decision rested in part on the view that defendant lacked "any education in journal-

see in Part V, in practice courts might still be treating individual speakers less favorably, at least when it comes to anti-“harassment” orders. But in theory, courts must treat them the same.

C. Law: 47 U.S.C. § 230

Of course, Internet speech, even from judgment-proof speakers, comes through platforms owned by businesses that have ample assets. People’s blogs are hosted on some company’s computer systems. Consumer reviews are posted on some company’s site, such as Yelp or RipoffReport. Revenge porn is often posted on sites devoted to such material, or at least to pornography generally. And this material is usually found by users using search engines, chiefly Google, Bing, and Yahoo.

But all those non-judgment-proof intermediaries are, with few exceptions, not liable for what users post, and generally aren’t even subject to injunctions based on such user posts.²⁹ Title 47 U.S.C. § 230, enacted in 1996, expressly provides that such Internet content and service providers can’t be treated as publishers or speakers of material posted by others.³⁰ Courts have read this immunity broadly, to bar nearly every theory of civil liability that plaintiffs have tried to impose on such companies.³¹

And the immunity applies whether or not service providers decide to control what is posted on their sites.³² Service providers are thus free to choose whether to take down some material that they conclude is defamatory or otherwise offensive, or whether to keep it. In either case, they are immune from liability (except as to material that infringes federal copyright or trademark law, a subject that I’ll leave for another paper).

Thus, for much online material, there is no potential institutional defendant who might be held accountable for it. Plaintiffs can sue the individual authors—but if such a lawsuit doesn’t give the plaintiffs the relief they seek, no other defendants are available.

ism,” “any credentials or proof of any affiliation with any recognized news entity,” or “proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest.” *Obsidian Finance Group, LLC v. Cox*, ___ F. Supp. 2d ___, __ (D. Ore. 2011). Not so, said the Ninth Circuit: “The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story.” *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014).

²⁹ *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000); *Kathleen R. v. City of Liverpool*, 87 Cal. App. 4th 684 (2001); *Giordano v. Romeo*, 76 So. 3d 1100 (Fla. Ct. App. 2011); *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010). *But see* *Hassell v. Bird*, ___ (Cal. Ct. App. 2016) (holding that such providers could be subject to injunctions), *review granted*, ___.

³⁰ 47 U.S.C. § 230(f).

³¹ [Cite.]

³² 47 U.S.C. § 230; [cite cases].

Some of the problems discussed in this Article could be ameliorated by repealing or limiting § 230, and thus by giving organizations that are vulnerable to civil liability an incentive to police speech. Of course, this would exacerbate other problems, chiefly by giving the organizations too much of an incentive to police even protected speech.³³ For our purposes, I will assume that § 230 endures, though the problems raised in this article may lead some readers to reflect on whether § 230 ought to be modified—say, by institute a limited notice-and-takedown provision, such as the one provided for copyright infringement under the Digital Millennium Copyright Act³⁴—or whether such calls should be resisted.³⁵

II. LIBEL AND SOME OTHER FALSEHOODS: RECRIMINALIZATION

A. *The Traditional Civil Damages Model*

For decades, protecting people's reputation from defamatory falsehood has been left to libel damages liability. Damages liability is supposed to compensate the injured target of the speech. It is supposed to deter libelers. And it is supposed to encourage libelers to promptly retract their false charges once threatened with a lawsuit.³⁶

This mechanism worked to some degree, however imperfectly, for the pre-Internet mass media. Because such media had money, they tended to worry about libel liability. And because they had money, plaintiffs (or plaintiffs' lawyers) had some prospect of recovering their fees, if they had very strong libel claims. Libel law also worked to some degree for libel lawsuits against employers, business rivals, and similar commercial actors.³⁷

This is, of course, an oversimplification. Libel cases were often hard to win, as a result of the Supreme Court's decisions reining in libel law.³⁸ The availability of libel insurance also likely made the deterrent effect of libel law more complex.³⁹ Still, on balance, tort law tended to serve its compensatory and deterrent function here, at least to some extent.⁴⁰

³³ [Cite articles arguing both ways.]

³⁴ 17 U.S.C. § 512.

³⁵ [Cite criticisms of the DMCA even as to copyright.]

³⁶ [Cite re: pressure to retract.]

³⁷ [Cite examples.]

³⁸ [Cite article on effects of the *Sullivan* etc. revolution.]

³⁹ See Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 18–22 (1983); see also Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 926 n.98 (1983).

⁴⁰ For data from the late 1980s and 1990s on how libel litigation, including against the mass media, actually worked out, see David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001).

But the risk of civil liability doesn't much affect speakers who have no money. Suing such a speaker is a guaranteed money pit: You have to pay your lawyer, and you know you'll never recover any of that expense, much less get compensated for your damaged reputation.

Knowing this, judgment-proof speakers aren't much deterred by the risk of a libel lawsuit up front, before they make their statements. And even if they get a letter demanding that they take down the statements (from, say, a blog or some other home-built web page), they can feel relatively safe playing chicken. True, even poor speakers can have some assets that could be seized, so they risk some pain from a libel lawsuit. But such speakers can usually be fairly confident that their target won't invest the money in getting and enforcing a judgment.⁴¹

B. Criminal Libel: Survival and Revival

The threat of punishment for criminal libel, on the other hand, can influence poor speakers. Even if we're judgment-proof, we aren't jail-proof (unless we're safely anonymous or outside the jurisdiction—more on that shortly). Even if criminal libel prosecutions are rare enough that such deterrence won't be effective up front, they seem likely to yield a prompt takedown of the allegedly libelous speech, and a prompt suspension of such speech during the prosecution. Once an indictment is filed, only a rare speaker would boldly continue with the same behavior that got him in trouble.⁴²

And criminal libel prosecution can also benefit poor victims of libel, because the legal costs are borne by the state. The victims may get little financial compensation: Restitution appears not to be a common remedy in criminal libel cases; and even if restitution were made available, and were easier to get through the criminal process than through the civil process,⁴³ you can't get blood from a stone through criminal prosecution any more than through a civil suit. But they can get some sense of vindication, and likely removal of the reputation-damaging material.

Criminal libel law is often described as essentially dead.⁴⁴ Indeed, I've heard some people suggest that it's unconstitutional.⁴⁵ But I think it is neither.

First, constitutionality. In *Herbert v. Lando* (1979), the Court said that "Civil and criminal libel cases 'are subject to the same constitution-

⁴¹ Occasionally, plaintiffs will litigate such cases, if they think they have a great deal at stake, and they think that they can persuade even judgment-proof defendant that having a judgment against them is such a hassle that it's better to agree to take down and stop the libels. *See, e.g.*, *Obsidian Finance Group, LLC v. Cox*, [cite all the trial-level decisions and the appellate decision, as well as some of the post-appeal papers].

⁴² [Cite articles on effect of indictment generally.]

⁴³ [Cite article on advantages of criminal restitution.]

⁴⁴ [Cite examples.]

⁴⁵ [Cite.]

al limitations”;⁴⁶ they are both limited by precedents such as *New York Times Co. v. Sullivan*, but they are both allowed if they are consistent with those precedents. In the Court’s leading modern criminal libel case, *Garrison v. Louisiana* (1964), the Court held that the Louisiana criminal libel statute was unconstitutional as to the “official conduct of public officials,” but only because it failed to incorporate the *New York Times v. Sullivan* “actual malice” standard.⁴⁷

Indeed, the *Garrison* majority said that knowing and reckless falsehoods “do not enjoy constitutional protection”⁴⁸—again, in the context of discussing criminal libel, not civil liability. And in the Court’s other modern criminal libel case, *Ashton v. Kentucky*, the Court likewise set aside a conviction on the grounds that the state law was too broad, not that criminal libel laws are per se constitutional.⁴⁹ Lower court cases likewise conclude that suitably narrow criminal libel laws are constitutional.⁵⁰

Now criminal libel statutes have not survived the Court’s libel revolution as well as civil liability has, partly because statutes are less supple than common-law tort rules. Because libel was a common-law tort, state courts could easily preserve a constitutionally narrowed form of civil libel action just by adapting state tort law rules to fit the Court’s emerging libel caselaw, and doing so with each new Court decision.⁵¹ But by 1964, criminal libel law had been codified in most states.⁵² The Supreme Court’s cases rendered those statutes unconstitutionally overbroad.

And when the statutes were challenged, courts were often inclined to just strike them down rather than to narrow them by essentially adding new limiting language to them. Since 1964, courts in several states

⁴⁶ 441 U.S. 153, 157 & n.1 (1979).

⁴⁷ 379 U.S. 64, 75, 77 (1964).

⁴⁸ 379 U.S. at 75.

⁴⁹ 384 U.S. 195 (1966).

⁵⁰ See, e.g., *Mink v. Knox*, 613 F.3d 995, 1005 n.7 (10th Cir.2010); *In re Gronowicz*, 764 F.2d 983, 988 & n. 4 (3d Cir.1985) (en banc) (holding that there is “[n]o distinction having any first amendment significance” between criminal libel and civil libel or criminal fraud and civil fraud, for libelous or fraudulent speech both have no First Amendment protection in either the civil or criminal context”).

⁵¹ Some states had codified their common law of libel, but generally in broad terms, which state courts could easily interpret in ways consistent with the Supreme Court’s precedents. See, e.g., CAL. CIV. CODE § 45 (“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”); [case applying *Sullivan* to this].

⁵² [Cite.] *But see Ashton v. Kentucky*, 384 U.S. 195 (1966) (setting aside a conviction under Kentucky’s common law of criminal libel).

have struck down the old statutes,⁵³ and in most of those states the legislatures did not reenact narrower, constitutionally valid version.⁵⁴ Indeed, in many more states, legislatures just repealed the criminal libel statutes altogether.⁵⁵ Criminal libel laws are thus indeed less popular now with legislatures than in the past.

But in about a dozen states, the laws remain on the books.⁵⁶ And recent years have begun to see something of a revival in criminal libel enforcement, at least in some states.

I tried to gather data on such prosecutions throughout the country, by calling statistics departments at courts and law enforcement agencies in those states that still have criminal libel statutes. I have also tried to gather the underlying court files for those states that gave me the individual case information. [This information gathering is still in process as of this draft.] The results were necessarily incomplete, but they suggest that, over the last decade, there were about 20 criminal libel prosecutions per year throughout the country, though published court decisions mention criminal libel prosecutions only at a rate of about 0.2 per year.⁵⁷

Twenty cases a year are not a vast amount. (Libel injunctions, which I'll discuss below, are a more important phenomenon.) But it

⁵³ See *State v. Turner*, __ (Minn. Ct. App. 2015); *Parmelee v. O'Neel*, 186 P.3d 1094 (Wash. Ct. App. 2008); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003) (Puerto Rico statute); *In re I.M.L.*, 2002 UT 110, 61 P.3d 1038, 1038 (Utah 2002) (but only as to one of the two Utah statutes; the other remains enforced); *Ivey v. State*, 821 So. 2d 937, 946 (Ala. 2001); *State v. Shank*, 795 So.2d 1067 (Fla. Ct. App. 2001); *Nevada Press Ass'n v. Del Papa*, CV-S-98-00991 (D. Nev. 1998); *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996); *State v. Powell*, 839 P.2d 139 (N.M. Ct. App. 1992) (only as to speech on matters of public concern); *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (only as to speech about public figures or public officials on matters of public concern); *Fitts v. Kolb*, 779 F. Supp. 1502, 1502 (D.S.C. 1991); Louisiana decisions (only as to speech on matters of public concern); *Williamson v. State*, 295 S.E.2d 305 (Ga. 1982); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976); *Weston v. State*, 528 S.W.2d 412 (Ark. 1975); *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972); *Boydston v. State*, 249 So. 2d 411 (Miss. 1971). In a few states, though, courts have narrowed or reinterpreted the statutes to make them constitutional. See *Phelps v. Hamilton*, 59 F.3d 1058, 1072 (10th Cir. 1995) (Kansas law); *Thomas v. City of Baxter Springs*, 369 F. Supp. 2d 1291, 1298 (D. Kan. 2005); *People v. Ryan*, __ (Colo. 1991) (the Legislature has since repealed the statute); *Pegg v. State*, 659 P.2d 370 (Okla. Ct. Crim. App. 1983).

⁵⁴ Minnesota and Montana did reenact narrower statutes. Minn. Stat. Ann. § 609.765; Mont. [cite].

⁵⁵ [Cite.]

⁵⁶ IDAHO CODE § 18-4801 to 18-4809; KAN. STAT. ANN. § 21-6103; LA. REV. STAT. ANN. § 14:47; MICH. COMP. LAWS § 750.370; MINN. STAT. § 609.765; MONT. CODE ANN. § 45-8-212; N.H. REV. STAT. ANN. § 644:11; N.M. STAT. ANN. § 30-11-1; N.D. CENT. CODE § 12.1-15-01; OKLA. STAT. tit. 21 §§ 771-781; UTAH CODE ANN. § 76-9-404; VA. CODE ANN. § 18.2-417; 14 V.I. CODE § 1174; WIS. STAT. § 942.01.

⁵⁷ *State v. Horsley*, 714 S.E.2d 1 (Ga. Ct. App. 2011) (noting that the prosecutors dropped the criminal defamation count); *State v. Ramirez*, 2014 WL 2225137 (Kan. Ct. App.) (affirming conviction).

shows that some prosecutors do see criminal libel as a valuable tool; and what some prosecutors do now, others can do in the future. Indeed, there is some evidence from Wisconsin that criminal libel prosecutions rose from 1991–99 to 2000–07, the era during which Internet use surged.⁵⁸

And many of the prosecutions involve ordinary people lying about each other online—impersonating each other in reputation-damaging ways,⁵⁹ accusing each other of child molestation,⁶⁰ accusing each other of terrorism,⁶¹ and more. [Add more examples when all the cases are in.] Even the occasional cases involve political controversies tend to involve situations where the statements seem to pretty clearly be lies.⁶²

Sometimes, the prosecutions or threatened prosecutions do appear to be political abuses: Consider, for instance, the case of the Louisiana sheriff who went after an anonymous online critic who had claimed that the sheriff had improperly given a local businessman a contract. The sheriff got a search warrant based on the theory that the criticism was criminal libel of the businessman, and managed to identify the critic as a result.⁶³ But the businessman was himself a local official, and Louisiana courts had already held the state criminal libel statute unconstitutional as to public officials, or for that matter as to anyone involved in a matter of public concern.⁶⁴ The Louisiana Court of Appeals therefore set aside the warrant as “lack[ing] probable cause because the conduct complained of is not a criminally actionable offense”⁶⁵—but only after the critic was identified as a police officer in a neighboring jurisdiction.⁶⁶

⁵⁸ [Cite David Pritchard’s excellent article.]

⁵⁹ *E.g.*, <http://www.wrdw.com/home/headlines/100284224.html> (Bonsant) (teenager impersonating teacher); *State v. Birnbaum* (Minn. Ct. App.) (ex-boyfriend impersonating ex-girlfriend and placing sexually explicit posts as well as posts soliciting sex).

⁶⁰ *E.g.*, *Cedar City v. Hancock* (Utah) (accusing ex-wife’s brother of molesting the brother’s children); *State v. Moen* (Minn. Ct. App.) (allegedly retaliating against victim for having made accusations against defendant’s husband).

⁶¹ <http://www.rawstory.com/2016/04/right-wing-militant-to-shred-quran-and-pictures-of-hillary-at-rifle-toting-georgia-capitol-rally/> (Stachowiak).

⁶² [Cite.]

⁶³ <https://theintercept.com/2016/08/04/sheriff-raids-house-to-find-anonymous-blogger-who-called-him-corrupt/>; <https://theintercept.com/2016/08/26/sheriffs-raid-to-find-blogger-who-criticized-him-was-unconstitutional-court-rules/>

⁶⁴ [Cite.]

⁶⁵ *Terrebonne Parish Sheriff’s Office v. Anderson*, <http://www.la-fcca.org/opiniongrid/opinionpdf/2016%20KW%201093%20Decision%20Writ.pdf>.

⁶⁶ The police officer was suspended with pay, but has since been reinstated. <http://www.wlvtv.com/news/local/lafourche-terrebonne/houma-pd-reinstates-officer-raided-over-blog-posts/297429131>. He has filed a federal lawsuit over the search, [http://www.houmatoday.com/news/20160811/new-federal-court-filing-claims-terrebonnes-heri; Anderson v. Larpenrter, 2017 WL 3064805 \(E.D. La. July 19\), appeal pending](http://www.houmatoday.com/news/20160811/new-federal-court-filing-claims-terrebonnes-heri; Anderson v. Larpenrter, 2017 WL 3064805 (E.D. La. July 19), appeal pending).

[Also discuss the prosecution in *Simmons v. City of Mamou*, 2012 WL 912858 (W.D. La.); *In re Matter Under Investigation*, 2015 WL 6736200 (La. Ct. App.); *Mata v. Anderson*, 760 F. Supp. 2d 1068, 1076–77 (D.N.M. 2009).]

It’s possible, then, that criminal libel law is unduly chilling, and subject to potential political abuse. Maybe it should be categorically barred as to speech on matters of public concern: Punitive damages are barred in public-concern cases, unless “actual malice” is shown⁶⁷—perhaps criminal libel law should be even more severely limited. Or perhaps it should be barred altogether, for instance because the line between speech on matters of public concern and private concern is too hard to draw,⁶⁸ or because we think the legal system already criminalizes too much, and adding even misdemeanor punishments will only exacerbate the problem.⁶⁹ But if we do set criminal libel law aside, we have to acknowledge that we’re setting aside what might often be the only effective tool for punishing and deterring intentional libels.

[Discuss Georgia prosecutions after invalidation, Florida prosecutions for anonymous libel after invalidation. <http://www.fox5atlanta.com/news/i-team/mom-winds-up-in-jail-after-posting-about-ex-husband-on-facebook>; *Smith v. Houston County Sheriff’s Office*, 2013 WL 5937433 (M.D. Ga. Nov. 4).]

C. Criminal Libel by Another Name

Indeed, one state—my own California—appears to be reinventing criminal libel law after a decades-long break. In 1976, a California appellate court struck down the California criminal libel statute, in a case involving a publication about the famous actress Angie Dickinson.⁷⁰ Ten years later, the California Legislature repealed the statute.⁷¹

But two recent California Court of Appeal decisions have read an identity theft statute as essentially recriminalizing libel (though with no evidence that the Legislature so intended). The statute provides that it is a crime to “willfully obtain[] personal identifying information . . . of another person” and use it “for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medi-

ffs-search-unconditional; [cite case].

⁶⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁶⁸ See, e.g., Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37 (1990); Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000); Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011); [Clay Calvert article].

⁶⁹ [Cite.]

⁷⁰ [Cite.]

⁷¹ [Cite.]

cal information without the consent of that person.”⁷² “Personal identifying information” means “any name, address, telephone number” or one of many other identifying items (such as Social Security number, bank account number, and the like).⁷³

Though the statute is colloquially called the “identity theft statute,” California courts have held that the statute isn’t limited to behavior generally viewed as “identity theft,” such as impersonation, or financial fraud: The statute, they have held, “contains no requirement that the defendant hold himself out as someone else,” nor does it “require an intent to defraud or to cause harm or loss to another.”⁷⁴ And courts have held that the “unlawful purpose” could be a purpose to commit a merely civil actionable tort, such as libel.⁷⁵ Since nearly all libels would involve the use of at least one piece of “personal identifying information”—the subject’s name—nearly all knowing libels are thus criminal under this interpretation.

And two California appellate decisions have expressly upheld criminal convictions for posting libels. In *In re Rolando S.*,⁷⁶ Rolando S. “was one of several recipients of an unsolicited text message providing the password to the victim’s e-mail account.”⁷⁷ He then used this password to get access to the victim’s Facebook account, and “wrote sexually explicit and vulgar comments on the victim[s] friends’ walls, . . . purportedly as her.”⁷⁸ This, the court concluded, was libel, therefore “unlawful,” and thus a crime.⁷⁹ And the decision can’t be limited on the grounds that Rolando S. accessed an e-mail account without permission; such unauthorized computer access isn’t an element of § 530.5(a) (as opposed to other crimes, such as unauthorized use of computers).

⁷² CAL. PENAL CODE § 530.5(a).

⁷³ *Id.* § 530.55.

⁷⁴ *People v. Lee*, 11 Cal. App. 5th 344, 357 n.8 (Cal. Ct. App. 2017). “[T]he statute itself does not use [the] phrase [‘identity theft’], nor does it require that a defendant portray himself as someone else.... [T]he statute does not, in fact, require that a defendant have personated another in using another individual’s personal identifying information in order to be convicted under its terms.” *People v. Barba*, 211 Cal. App. 4th 214 (2012). “[Section 530.5(a)] clearly and unambiguously does not require an intent to defraud.” *People v. Hagedorn*, 127 Cal. App. 4th 734 (2005).

⁷⁵ *People v. Bollaert* (Cal. Ct. App. 2016); *In re Rolando S.* (Cal. Ct. App. 2011); *People v. Casco* (Cal. Ct. App. 2015) (nonprecedential). A nonprecedential case, *Clear v. Superior Court* (Cal. Ct. App. 2010), concluded in 2010 that “There is no authority that the commission of civil tort, such as defamation, constitutes an unlawful purpose.” But there is such authority now, and in precedential opinions (*In re Rolando S.* and *Bollaert*).

⁷⁶ 197 Cal. App. 4th 936 (2011).

⁷⁷ *Id.* at 939.

⁷⁸ *Id.* at 947.

⁷⁹ *Id.* at __.

Indeed, in *People v. Casco*,⁸⁰ the court upheld a conviction without any unauthorized access to a computer account. Casco “creat[ed] a false MySpace profile and fraudulent web site advertisements suggesting the victims were soliciting prostitution.”⁸¹ This, the court held, was actionable libel, thus “unlawful,” and again thus a crime.⁸² The “personal identifying information” here was the victims’ names, addresses, and phone numbers, but nothing in the analysis turned on the inclusion of the addresses and phone numbers—the use of the names alone, coupled with the libel, would have sufficed.

I think the California Court of Appeal erred in reading the statute so broadly. A step as significant as recriminalizing libel, following express legislative repeal, ought not be lightly taken, especially since such a reading may well not be what the Legislature intended—the requirement of “unlawful purpose” in the criminal statute may easily have been intended to refer to criminal purpose.⁸³

What’s more, the courts’ rationale makes it a crime to engage in any intentional tort that uses a person’s or company’s name—the statute covers the “personal identifying information” of businesses as well as of individuals.⁸⁴ For the first time in California, disclosure of private facts is now a crime. Tortious interference with contract is now a crime. Bad-faith denial of insurance coverage is now a crime. That can’t be right, I think.

Nonetheless, the impulse behind these decisions—the impulse of prosecutors who argued for this theory, and the judges who adopted it—shows the appeal of criminal libel prosecutions, even when a statute has to be stretched for that purpose. The law ought to do something about knowing lies about people, the impulse suggests, and the civil law of libel alone does virtually nothing when the libelers are judgment-proof. That is part of the reaction that I’m aiming to describe.

D. Harassment/Cyberstalking

Modern “criminal harassment” and “cyberstalking” laws are also being adapted to revive aspects of criminal libel law. Traditionally, such laws have banned unwanted speech *to* a person (such as telephone harassment or in-person approaches). But increasingly they also ban unwanted speech *about* a person, if it’s intended to “harass,” “annoy,” “alarm,” or “embarrass”; and much libelous speech can be said to qualify.

⁸⁰ 2015 WL __ (Cal. Ct. App.).

⁸¹ *Id.* at __.

⁸² *Id.* at __.

⁸³ *See, e.g., People v. Cox*, 2 P.3d 1189, 1193 (Cal. 2000) (interpreting the requiring of an “unlawful act, not amounting to a felony” in a criminal manslaughter statute as referring to

⁸⁴ CAL. PENAL CODE § 530.55(a).

Thus, for instance, the Pennsylvania criminal harassment law provides:

- (a) A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: . . .
- (3) engages in a course of conduct [defined as more than one act] or repeatedly commits acts which serve no legitimate purpose;
- (4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;
- (5) communicates repeatedly in an anonymous manner;
- (6) communicates repeatedly at extremely inconvenient hours; or
- (7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6). . . .
- (e) This section shall not apply to constitutionally protected activity.⁸⁵

One Pennsylvania decision upheld a harassment conviction for a post that falsely accused a 15-year-old girl of having a sexually transmitted disease.⁸⁶ That decision is limited to sexually themed references, because the defendant prosecuted under subsection (4), on the theory that such sexual allegations are “lewd,” but a similar prosecution under subsections (3) or (7) could punish even nonsexual libels. Indeed, in another case, a woman was convicted under subsection (3) for libelously accusing someone of fraud.⁸⁷

Likewise, a federal court upheld a Florida statute that banned “willfully, maliciously, and repeatedly” “engag[ing] in a course of conduct” “directed at a specific person” when the conduct “causes substantial emotional distress to that person and serves no legitimate purpose.”⁸⁸ The law, the court held, would indeed criminalize distributing flyers (the speech that the plaintiff had engaged in in the past) if they contained “false” “information” and thus “constitute[d] defamation”; but such a criminal prohibition, the court concluded, was constitutional because defamation was “unprotected under the First Amendment.”⁸⁹

Indeed, there may be a federal law of criminal libel emerging under 18 U.S.C. § 2261A(2), the federal cyberstalking statute. Under that law, it is a crime to (among other things) “with the intent to . . . harass” a person, use “any . . . electronic communication service” “to engage in a

⁸⁵ 18 PA. CONS. STAT. § 2709.

⁸⁶ *Commonwealth v. Cox*, 72 A.3d 719 (Pa. Super. Ct. 2013). The court also said that even true statements about sexually transmitted diseases, especially as to 15-year-olds, would be “lewd,” but presumably a true statement might be considered “constitutionally protected activity”—a false statement (especially a knowingly false one) would not be.

⁸⁷ *Commonwealth v. Abrams*, No. MJ-3810+NT-0000217-2014 (Pa. Mag. Ct. Sept. 15, 2014).

⁸⁸ *Burroughs v. Corey*, 92 F. Supp. 3d 1201 (M.D. Fla. 2015) (upholding FLA. STAT. ANN. § 784.048).

⁸⁹ *Id.* at 1209.

course of conduct that” “would be reasonably expected to cause substantial emotional distress” to that person. Repeated libelous statements can certainly “cause substantial emotional distress,” and can be found to have been intended to “harass” (which here seems likely just to mean “disturb or irritate persistently”⁹⁰). At least three court decisions have indeed treated libelous material—in both, false accusations of child molestation—as potentially criminalized by § 2261A.⁹¹

E. Impersonation

Criminal libel law, of course, carries obvious dangers. Lies, truths, and honest mistakes are often hard to distinguish; and even a speaker who sincerely believes what he is saying might worry that a judge or jury might wrongly conclude both that the statement is false and that the speaker knew it was false.

Criminal libel law might thus deter true statements as well as false statements. And while criminal libel law might deter false statements (which are supposed to be deterred) more than civil libel law does, it is also likely to deter true statements more than civil libel law does. For instance, speakers who have assets that are vulnerable to a civil lawsuit may also often have libel insurance: Many regular homeowners’ insurance policies cover libel lawsuits, but a homeowner faced with a criminal prosecution will have to hire a criminal lawyer out of his own funds.⁹²

What’s more, even if someone accused of criminal libel is acquitted at trial, or succeeds in having the case dismissed or the charges

⁹⁰ See, e.g., *Wollschlaeger v. Governor*, 760 F.3d 1195, 1229 (11th Cir. 2014), *vacated on other grounds*, 797 F.3d 859 (11th Cir. 2015), *rev’d en banc on other grounds*, __.

⁹¹ *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 371–72 (D. Del. 2015) (“Turning to the indictment here, I have no trouble finding that much of the speech alleged in this case could be defamation, and therefore is not protected by the First Amendment.”); *United States v. Sergeantakis*, 2015 WL 3763988, *7–*8 (S.D.N.Y. June 15); *United States v. Sayer*, 2012 WL 1714746, *3 (D. Me. May 15). [cite Juan Thompson prosecution.]

⁹² See, e.g., <https://www.allstate.com/tools-and-resources/personal-umbrella-policy/libel-slander-liability.aspx> (umbrella insurance policy); __ (homeowner’s insurance policy). In at least one case in which I was involved, *Levitt v. Felton*, __, the defense was paid for by the homeowner’s insurance policy. [Cite.] Insurance policies generally don’t cover intentional misconduct; but since negligent and reckless statements can be libelous, the insurance company will have a duty to defend libel lawsuits, at least until the statement is found to have been knowingly false. [Cite.] In practice, then, the defense will be funded by the insurance company through trial and appeal, and often the insurance company will put up the money for a settlement.

Small businesses’ general liability insurance policies may also cover libel damages, and libel defense. This may be relevant for libel disputes arising out of consumer complaints by small business owners. See, e.g., https://www.lumendatabase.org/file_uploads/files/4137865/004/137/865/original/Scan0044.pdf?1481753613 (showing a libel settlement paid for by an insurance company, whether an insurance company for the individual defendant or for the small business defendant).

dropped, “the process is the punishment.”⁹³ Being arrested; facing criminal charges; having to post bail; perhaps having to spend time in jail while waiting to get bail; having to hire a lawyer—few people would look back on this with equanimity, even if they are ultimately vindicated. Someone who has gone through this process may well hesitate before speaking in the future, even speaking truthfully, especially about someone who he knows will have the prosecutor’s ear. Even someone who hears about others going through such a process may feel intimidated.

Perhaps because of this, some states have tried experimenting with narrower prohibitions on knowingly false statements, which seem likely to carry a lesser risk of a chilling effect. The clearest example of this is impersonation bans,⁹⁴ such as the New York law that forbids “[i]mpersonat[ing] another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another.”⁹⁵

Impersonation seems especially likely to injure the targets’ reputations: what looks like a person’s own admission is more likely to be believed than a criticism from a third party. Indeed, several recent prosecutions under broader criminal libel laws have actually involved impersonation,⁹⁶ as have some other prosecutions under “harassment” or stalking statutes⁹⁷ or “identity theft” statutes.⁹⁸ One common scenario is someone posting online ads claiming to be from an ex-girlfriend, offering casual sex (free or paid).⁹⁹ Another involves people posting other embarrassing things in people’s names,¹⁰⁰ sometimes after having uncovered those people’s computer passwords.¹⁰¹

⁹³ MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

⁹⁴ [Cite.]

⁹⁵ N.Y. PENAL LAW § 190.25; *see also* CAL. PENAL CODE § 529(a)(3) (prohibition limited to impersonation that includes any “act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person”); TEX. PENAL CODE § 33.07(a).

⁹⁶ <http://www.wrdw.com/home/headlines/100284224.html> (Bonsant) (teenager impersonating teacher); *State v. Birnbaum* (Minn. Ct. App.) (ex-boyfriend impersonating ex-girlfriend and placing sexually explicit posts as well as posts soliciting sex).

⁹⁷ [Cite.]

⁹⁸ [Cite Rolando S.; Casco.]

⁹⁹ *See, e.g., State v. Turner*, 864 N.W.2d 204 (Minn. Ct. App. 2015) (criminal libel); *United States v. Sayer*, __ (cyber-stalking). The *Turner* court rejected the criminal libel prosecution because the Minnesota statute, which applied even to true statements, was unconstitutionally overbroad; but Minnesota has since reenacted the statute, limited to knowingly false statements. MINN. STATS. § 609.765 (2016).

¹⁰⁰ *See State v. Baron*, 769 N.W.2d 34 (Wisc. 2009) (defendant pretended to be a person—in that case, a high-level city employee—while sending out messages apparently revealing that the person was having an affair); *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014)

Such impersonation will often be civilly actionable libel: Just as saying “Jane Schmane said, ‘I love to cheat on my husband with strangers’” can be libelous if Jane Schmane didn’t actually say it, so writing “I love to cheat on my husband with strangers” and signing it “Jane Schmane” can be libelous, too.¹⁰² Impersonation statutes make such actions criminal as well.

But because impersonation statutes don’t require harm to reputation, they can be used when impersonation causes other dangers. *People v. Golb* offers an example.¹⁰³ Raphael Golb was the son of Norman Golb, a Dead Sea Scrolls scholar who was involved in longstanding academic debates with other such scholars. The younger Golb decided to promote his father’s theories by impersonating his father’s rivals, and sending various e-mails in their names. Some of those e-mails reflected badly on the ostensible sender, for instance when Raphael Golb impersonated Lawrence Schiffman, and sent an e-mail in Schiffman’s name that purported to admit to plagiarism.¹⁰⁴

But other e-mails simply impersonated scholars in the process of criticizing third parties.¹⁰⁵ This might not be libel of the impersonated party, for instance if the e-mail just expresses an unflattering opinion of the third party: Such a message might not reflect sufficiently badly on the ostensible sender to expose the sender to “hatred, contempt, ridicule, or obloquy.”¹⁰⁶ Nonetheless, the impersonation could easily undermine the impersonated party’s friendships and professional relationships, and force the impersonated party to spend time and effort undoing those harms.¹⁰⁷

Or consider *Commonwealth v. Johnson*, a case that was prosecuted under a Massachusetts criminal harassment statute, but that I think would have fit better within a specialized impersonation statute. In *Johnson*, the defendants decided to annoy their former neighbors, the Lyonses, by posting Craigslist ads pretending to be the Lyonses, listing the Lyonses’ home address and phone number, and saying they were giving away free gold carts.¹⁰⁸

(defendant pretended to be a professor and sent out a message falsely confessing to academic misconduct).

¹⁰¹ See, e.g., *Baron*.

¹⁰² See, e.g., *Rall v. Hellman*, 284 A.2d 113 (2001) (concluding that “disseminat[ing] a fabricated e-mail in plaintiff’s name that did not reflect plaintiff’s views” may be libelous, if the statements reflect badly enough on the plaintiff); cf. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510–11 (1991) (holding that misquoting someone may be libelous).

¹⁰³ [Cite.]

¹⁰⁴ *Id.* at __.

¹⁰⁵ *Id.* at __.

¹⁰⁶ [Cite.]

¹⁰⁷ Such impersonation might well be civilly actionable under the false light tort. [Cite.]

¹⁰⁸ [Cite.]

Portraying people as offering free sex to strangers might be defamatory, but portraying them as offering free golf carts is not. Nonetheless, the result of these ads was understandably disturbing. When strangers—over thirty of them, in this case¹⁰⁹—drive to your home, expecting free golf carts, they may well get angry when they learn that their time has been wasted, and you may well be scared by their anger (or may just find yourself constantly distracted by the parade of visitors whom you need to turn away).

Impersonation statutes offer the prospect of dealing with these harms. And they do so with a minimum risk of chilling effects: You may not be sure of what you're alleging, but you know who you are. An impersonation ban shouldn't deter you from making whatever claims you want to make; it just forbids you from pretending to be someone else. And though the potential harm here is not to reputation, the harm is sufficiently significant and personally targeted that, even under *United States v. Alvarez*, it should suffice to make the speech criminalizable.¹¹⁰

The one possible chilling effect is on parody. Impersonation bans are largely consistent with protection for parody, because an obvious parody would generally not count as impersonation, properly defined. Fiction is not a lie, for impersonation as for libel.¹¹¹ Punishable impersonation must consist of what reasonable readers would perceive as a factual assertion: "this statement is being made by Vic Victim." If it's clear that the statement is instead someone joking about being Vic Victim, there is no such false factual assertion.¹¹²

"[T]he First Amendment protects statements that cannot be interpreted as stating actual facts about an individual from serving as the basis for a defamation action or similar claim under state law."¹¹³ Indeed, the libel mens rea rules might protect speakers who sincerely be-

¹⁰⁹ *Id.* at __.

¹¹⁰ [Note the application of intermediate scrutiny by the Breyer/Kagan controlling concurrence, and the statement that sufficiently personalized harm may suffice for liability]. See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (concluding that even nondefamatory knowing falsehoods about people can be published, if they sufficiently intrude on privacy); *Cantrell v. Forrest City Publishing Co.*, 419 U.S. 245 (1974). These two "false light" tort cases offer an unusually high density of subtle celebrity presence: In *Cantrell*, the false statements were written by then-journalist but later famous screenwriter Joe Eszterhas, who went on to write *Flashdance* and *Basic Instinct*. And in *Time*, the argument for the Hills was delivered by soon-to-be-President Richard Nixon.

¹¹¹ [Cite.]

¹¹² [Note possible complexity if reasonable readers would recognize parody, but a substantial number of unreasonable ones wouldn't.]

¹¹³ *Lakeshore Hospital v. Perry* (Mich. Ct. App. 2014)

lieve that their speech about public figures will be perceived as parody, even if they turn out to be mistaken.¹¹⁴

Nonetheless, there may be borderline cases, where a parodist is worried that a jury might think that a reasonable reader would take the joke seriously. Indeed, much parody tries to find humor in subtlety, starting with a serious-looking story and then slowly adding ridiculous elements. (Jonathan Swift’s classic *Modest Proposal*, for instance, begins with seemingly serious arguments aimed at echoing then-common complaints about the poor, and only turns to eating children in the ninth paragraph.) A parodist might worry that a prosecutor, judge, or jury will miss the joke, and will conclude that reasonable readers will likewise take the statement seriously.

Indeed, the anonymous defender of Raphael Golb at <http://raphaelgolbtrial.wordpress.com> (and in repetitive comments on many blogs, including my own) argues that Golb’s impersonation of Dead Sea Scrolls scholars was just “satirical” “deadpan imitative mockery.”¹¹⁵ And, by definition, as humor gets more and more deadpan, at some point it risks coming across as not humor at all.

So there is risk of a chilling effect even in impersonation statutes. But much impersonation really is harmful and constitutionally valueless knowing false statement of fact—and the risk of chilling valuable speech through impersonation statutes is modest. Even if resurgence of criminal libel law writ large is too likely to deter too much valuable speech, narrower impersonation bans should, I think, be acceptable.

Finally, note that impersonation laws are likely to be constitutional even though they draw content-based distinctions within the category of knowing falsehoods about particular people, and are thus subject to scrutiny under *R.A.V. v. City of St. Paul*.¹¹⁶ Impersonation, for reasons I mentioned above,¹¹⁷ is likely to be an especially damaging form of falsehood. The Court has said that the government may focus on forbidding especially prurient obscenity,¹¹⁸ or especially threatening or disruptive threats.¹¹⁹ Likewise, it can forbid knowing falsehoods that are especially likely to damage reputation or produce potentially dangerous confrontations.

¹¹⁴ See *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 163 (Tex. 2004) (articulating test as, “did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?”).

¹¹⁵ See, e.g., [http://raphaelgolbtrial.wordpress.com/\[post\]; my.org/2016/08/23/resolve-to-be-a-heterodox-university/](http://raphaelgolbtrial.wordpress.com/[post]; my.org/2016/08/23/resolve-to-be-a-heterodox-university/); [cite comments to posts at Volokh Conspiracy].

¹¹⁶ 505 U.S. 377 (1992).

¹¹⁷ [Cite.]

¹¹⁸ *R.A.V.*, 505 U.S. at __.

¹¹⁹ *Id.* at __; *Virginia v. Black*, 538 U.S. 343, __ (2003).

And even if I'm wrong in thinking that impersonation is especially dangerous, "the nature of the content discrimination" between falsehoods that impersonate and other falsehoods "is such that there is no realistic possibility that official suppression of ideas is afoot."¹²⁰ There is thus no reason to think "that the selectivity of the restriction is 'even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say,'"¹²¹ and there is therefore no *R.A.V.* problem.

III. LIBEL: INJUNCTIONS AGAINST DEFAMATION

A. *Injunctions as Enforced by Courts*

1. Injunctions going beyond libelous statements

We shift now from criminal law to civil injunctions. But the shift is only slight, because ultimately injunctions are backed by criminal law: violating an injunction can be punished as criminal contempt of court.

One thing that surprised me was how many recent anti-libel injunctions cover much more than nonlibelous speech. "Defendant . . . shall not post any Content, defamatory *or negative* material or information about any Plaintiff or Plaintiffs . . . employees, customers, [or] vendors . . . on any Forum."¹²² "[Defendant may not] directly or indirectly post[] negative reviews about [plaintiff], online."¹²³ Yet "negative" but not defamatory material is generally fully protected by the First Amendment. Even if defendant had libeled plaintiff in the past, that offers no basis for banning such fully protected speech in the future.

Or consider the injunction banning plaintiff's disgruntled ex-tenant from "directly or indirectly interfering . . . via any . . . material posted on the internet or in any media with Plaintiffs' advantageous or contractual business relationships."¹²⁴ But speech that interferes with business relationships, for instance by urging someone not to deal with a company, is generally fully protected, unless it's defamatory. (The provision I just quoted came from an injunction that deliberately went beyond def-

¹²⁰ *R.A.V.*, 505 U.S. at __.

¹²¹ *Id.* at __ (internal quotation marks and citation omitted).

¹²² *Meisenbach v. Castillo*, No. CV2014-001528 (Ariz. Super. Ct. Maricopa Cnty. Mar. 1, 2016) (emphasis added); *see also* *Profinity LLC v. Shipley*, No. CV2012-013904 (Ariz. Super. Ct. Maricopa Cnty. Feb. 14, 2014) (same language in a default judgment order submitted by the same plaintiff's lawyer); *Wang v. Lee*, No. BC573818 (Cal. Super. Ct. L.A. Cnty. July 15, 2016) ("defamatory or derogatory statements").

¹²³ *Walter Arnstein, Inc. v. Transpacific Software PVT Ltd.*, No. 11-CV-5079 (S.D.N.Y. Feb. 15, 2016).

¹²⁴ *Chevaldina v. RK/FL Management, Inc.*, 133 So. 3d 1086, 1090–91 (Fla. Ct. App. 2014) (overturning this injunction on the grounds that it is unconstitutionally overbroad).

amation; indeed, a separate provision of the injunction already banned speech “calculated to defame.”¹²⁵)

And some injunctions categorically ban defendant from speaking about plaintiff (or at least from doing so online or on some particular site): “[Defendant may not] publish[] or caus[e] to be published any posts or commentary concerning Plaintiff or his family on . . . or any . . . internet location or website.”¹²⁶ “[Defendant] is permanently enjoined from publishing . . . any statements whatsoever with regard to the plaintiff.”¹²⁷ “Defendant is not to make, post or distribute comments, letters, faxes, flyers or emails regarding Plaintiff to the public . . . without agreement of the parties or permission of the court.”¹²⁸ “Complaints-board.com is ORDERED to block further posts by [the Internet Protocol address corresponding to username ‘I GOT SCREWEDTOO’] concerning Todd Stockton.”¹²⁹

Defendant may not “post anything related to The Hamptons [condo complex],” including on a friend’s social media account.¹³⁰ “Pending resolution of this litigation, the Defendants shall not publish or distribute information about Wendle Motors, Inc.”¹³¹ “The Plaintiff and all persons in active concert and participation with it are restrained from disseminating additional information about the Defendants over the Internet, whether in the form of postings, emails, or private messages.”¹³²

¹²⁵ *Id.* at 1091.

¹²⁶ *Jia v. Gu*, <http://reason.com/volokh/2017/12/26/how-controversial-chinese-billionaire-fo>.

¹²⁷ *Saadian v. Avenger213*, No. BC 502285 (Cal. L.A. Cnty. Super. Ct. July 28, 2014); *see also Fantozzi v. Bigler*, No. FD-16-1725-05 (N.J. Passaic Cnty. Super. Ct. July 25, 2008); *Baldinger v. Patisso*, No. 3:10-cv-03122-PGS-DEA (D.N.J. July 10, 2012); *Flushcash, Inc. v. Bladis*, No. 12-03718 CA 40 (Fla. Miami Dade Cnty. Cir. Ct. Apr. 17, 2012); *Oprisiu v. Leblanc* (Mich. Cir. Ct. Mar. 7, 2012); *Wannebo v. Ewing*, No. 37-2016-00026279-CU-HR-CTL (Cal. San Diego Cty. Super. Ct. Oct. 25, 2016); *Ulmer v. Scoville*, No. 602,785 (La. East Baton Rouge Parish Aug. 31, 2012); *Blom v. Callan*, No. CV-OC-2011-16232 (Idaho Dist. Ct. 4th Dist. Apr. 9, 2012); *Robiner v. Cooper*, No. 13-133770-C2 (Mich. Cir. Ct. Oakland Cnty. Feb. 27, 2014); *Thermolife Int’l, LLC v. Connors*, No. C-266-15 (N.J. Super. Ct. Ch. Div. Bergen Cnty. Apr. 11, 2016); *Net Element, Inc. v. Zell*, No. 14-15763 CA 21 (Fla. Cir. Ct. Miami-Dade Cnty. Oct. 22, 2014); *Boles v. Kallenborg*, No. 14 MR 2354 (Ill. Cir. Ct. Will Cnty. Aug. 25, 2015); *Harper v. Redacted*, No. 16S-35 (Monongalia Cnty. Mag. Ct. May 5, 2016); *Kiffmeyer v. Boyer*, No. CV2017-090072 (Ariz. Maricopa Cnty. Jan. 31, 2017); *Yanik v. Simple*, No. 16 CV 11482 (N.C. Dist. Ct. Wake Cnty. Dec. 2, 2016); *Khayyan LLC v. Santamaria*, No. 15-cv-1910 (S.D.N.Y. July 2, 2015); *Kathryn S. Peterson v. Heidi M. Tease*, No. 2012CV000569 (Manitowoc, Wisc. Cir. Ct. Oct. 1, 2012).

¹²⁸ *Streeter v. Visor*, no. CV2014093311 (Ariz. Super. Ct. Maricopa Cnty. May 9, 2014), *rev’d*, 2015 WL 7736866 (Ariz. Ct. App. Dec. 1, 2015).

¹²⁹ *Stockton v. Smith*, No. 12C162 (Colo. Douglas Cnty. Cir. Ct. Oct. 14, 2014).

¹³⁰ *Hamptons transcript*, p. 88.

¹³¹ *Wendle Motors Inc v. Honkala et al*, Docket No. 2:06-cv-00334 (E.D. Wash. Nov. 22, 2006).

¹³² *Wendle, TRO* (Dec. 11).

I think I grasp the judges' likely rationale in some such cases: When a judge sees the defendant's speech as a campaign of defamation—and indeed thinks that the defendant is obsessed with criticizing plaintiff, perhaps to the point of irrationality—trying to forbid just defamatory statements may seem futile. The judge may suspect that any future criticism by the defendant of the plaintiff, or perhaps any speech at all about the plaintiff, would just degenerate into further defamation, and a prophylactic prohibition is needed to keep that from happening.

Indeed, remedies law sometimes allows injunctions that go further than the initial violation, and even that forbid behavior that, absent the initial misdeed, would not be tortious.¹³³ But First Amendment law does not allow such preventative measures when they ban otherwise protected speech (as opposed to narrow content-neutral time, place, and manner restrictions).¹³⁴

Likewise, preliminary injunctions forbidding allegedly libelous speech, based on a mere showing of likelihood of success on the merits,¹³⁵ ought not be constitutional. Indeed, the leading state supreme court cases that endorse some anti-libel injunctions make clear that such injunctions are permissible only after a finding on the merits that the speech is unprotected, not just based on a finding of probable cause or likely success on the merits.¹³⁶ The Supreme Court held in *Vance v. Universal Amusements, Inc.*¹³⁷ that alleged obscenity cannot be enjoined simply based on such a reduced showing—at least absent the procedural protections offered by *Freedman v. Maryland*¹³⁸—even though it could

¹³³ [Cite.]

¹³⁴ [Many citations here]; *McCarthy v. Fuller*, __ (7th Cir. 2016); *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007); *Gillespie v. Council* (Nev. Ct. App. 2016); *Tory v. Cochran*, 544 U.S. 734 (2005).

¹³⁵ *See, e.g.* *Escalera v. Fagin*, No. 16 CvD 141 (N.C. Watauga Cnty. Gen. Ct. Just. Mar. 24, 2016) (TRO ordering the removal of consumer complaints); *T.S. v. Reyes*, No. D-1-GN-12-003616 (Tex. Travis Cnty. Dist. Ct. Nov. 15, 2012) (TRO ordering the removal of blog that allegedly impersonates plaintiffs).

¹³⁶ *See infra* note __.

¹³⁷ 445 U.S. 308 (1980); *see also* *Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (holding that a determination by a judge of “probable cause” that speech is obscene is insufficient to justify a restriction); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 240 (1990) (reaffirming this principle as to “prior restraint[s] in advance of a final judicial determination on the merits”); *State v. Book-Cellar, Inc.*, 679 P.2d 548, 553-55 (Ariz. Ct. App. 1984) (upholding a statute that authorized preliminary injunctions against the distribution of obscenity by requiring “that a final judicial determination [be] made by the end of 60 days from the issuance of a preliminary injunction,” a safeguard compelled by *Freedman v. Maryland*, 380 U.S. 51 (1965)); *City of Cadillac v. Cadillac News & Video, Inc.*, 562 N.W.2d 267, 270 (Mich. Ct. App. 1996) (overturning down a preliminary injunction of obscenity on the grounds that the injunction would permit “removal of allegedly obscene materials from circulation before a judicial determination whether the material is obscene, with none of the safeguards” established in *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)).

¹³⁸ 380 U.S. at 59.

be enjoined after a finding of obscenity on the merits.¹³⁹ Likewise, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* (1973), the Court upheld an injunction against an illegal advertisement only “because no interim relief was granted,” so that “the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected.”¹⁴⁰ Injunctions against libel should be similarly impermissible until a final determination that the speech is libelous.¹⁴¹

2. The categorical no-injunction rule, and reasons for the shift away

But what about injunctions entered following a decision on the merits, and limited to defamatory statements? For much of American history, the black-letter rule was that defamation generally could not be enjoined, however narrow the injunction might be.¹⁴²

This partly stemmed from the tradition that equity had a limited jurisdiction aimed primarily at protecting property rights¹⁴³—a principle often articulated as equity refusing to enjoin crimes, including libel.¹⁴⁴

¹³⁹ *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

¹⁴⁰ 413 U.S. 376, 390 (1973).

¹⁴¹ [Cite the more recent batch of cases]; *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302 (Ky. 2000); *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 519 (Cal. Ct. App. 1991) (refusing to enter a preliminary injunction against libel because “A preliminary injunction is a prior restraint.”); *Cohen v. Advanced Med. Group*, 496 S.E.2d 710, 710-11 (Ga. 1998) (overturning a preliminary injunction against libel on the grounds that the injunction was not “entered subsequent to a verdict in which a jury found that statements made by [defendant] were false and defamatory” (quoting *High Country Fashions, Inc. v. Marlenne Fashions, Inc.*, 357 S.E.2d 576, 577 (Ga. 1987))); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (stressing that an injunction of charitable solicitation was permitted only “after a final adjudication on the merits that the speech is unprotected”); *St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho*, 663 N.E.2d 1220, 1223-24 (Ind. Ct. App. 1996) (holding that a preliminary injunction of an alleged libel was an unconstitutional prior restraint); *Gilbert v. National Enquirer, Inc.*, 51 Cal. Rptr. 2d 91, 96-99 (Cal. Ct. App. 1996) (same); *Pirmantgen v. Feminelli*, 745 S.W.2d 576, 577-78 (Tex. Ct. App. 1988) (same). *But see* *Gillespie v. Council* (Nev. Ct. App. 2016) (allowing preliminary injunction in libel case, because a 1974 Nevada Supreme Court had allowed such injunctions); *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233-39 (concluding that a preliminary injunction in a labor union libel case was not a prior restraint because the statements were so misleading as to be fraudulent, and “[t]he First Amendment does not protect fraud”); *Bingham v. Struve*, 591 N.Y.S.2d 156, 158-59 (Sup. Ct. App. Div. 1992) (ordering a preliminary injunction against a libel on a matter of private concern, concluding that the libel was constitutionally unprotected but not considering the prior restraint problem).

¹⁴² The view dates, at least in part, back to English law. *See, e.g.*, *St. James’s Evening Post Case*, 26 Eng. Rep. 683, 683 (1742) (“[W]hether [a publication] is a libel against the public or private persons, the only method is to proceed at law.”); *see generally* Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655 (2008); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYR. L. REV. 157, 167 (2007).

¹⁴³ [Cite Ardia article, throughout.]

¹⁴⁴ [Cite.]

But in fact equity would enjoin trespass, even if the trespass was criminal as well as civilly actionable.¹⁴⁵ The real underlying principle was that protection of personal non-property rights was largely left to law rather than equity.¹⁴⁶

The no-injunction rule was also often justified with the statement that plaintiffs had an adequate remedy at law, in the form of a damages lawsuit.¹⁴⁷ But that was a legal conclusion rather than a factual assertion—“adequate remedy at law” merely meant that the legal remedy was the one that plaintiffs had to content themselves with.¹⁴⁸ And this too relied on equity being generally focused on protecting property rights. Injunctions to prevent interference with property were routinely granted, because compensation for interference with property wasn’t seen as an adequate substitute for prevention of such interference.¹⁴⁹ Yet injunctions to prevent interference with reputation were denied, even though practically damages often couldn’t adequately undo the harm that the defamation actually caused.

Finally, the no-injunction rule partly stemmed from the view that such injunctions violate the freedom of expression, even if criminal punishment or civil liability for libel does not. As far back as *Brandreth v. Lance* (1839), the New York Court of Chancery held that such injunctions would “infring[e] upon the liberty of the press,” by “attempting to exercise a power of preventive justice which, . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.”¹⁵⁰ And this was so even though the speech in *Brandreth* was quite unappealing: Lance had been dismissed by his employer Brandreth, and allegedly sought revenge by having someone write and publish a purported autobiography of Brandreth; indeed, one of Lance’s codefendants, the actual author whom Lance had hired, offered to Brandreth to abandon this project for a payoff of \$50.¹⁵¹ Yet despite the alleged blackmail, and the material being far removed from any political matters, the court refused to issue the injunction.

¹⁴⁵ [Cite.]

¹⁴⁶ Cf. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 948.a, at 263 (3rd ed. Boston, 1843) (noting that publications may only be enjoined when they violate property rights—such as copyright—in the work being published); EDMUND ROBERT DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 1865–66 (1st Am. ed. Boston, 1846)

¹⁴⁷ [Cite.]

¹⁴⁸ See, e.g., *Willing v. Mazzocone*, 393 A.2d 1155, __ (Pa. 1978) (“In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor.”).

¹⁴⁹ [Cite.]

¹⁵⁰ 8 Paige Ch. 24 (N.Y. 1839).

¹⁵¹ *Id.* at __.

Other 1800s state cases likewise held that injunctions against libel were generally unconstitutional.¹⁵² Indeed, in the 1800s, the prohibition of injunctions against libel was the main judicial protection offered by constitutional free expression guarantees: Protection against criminal laws restricting speech and civil liability for speech was scanty,¹⁵³ but protection against injunctions was quite strong. And this tradition persists to this day in some states, such as Pennsylvania and Texas.¹⁵⁴

The recent trend, though, is in favor of allowing at least some injunctions against libel.¹⁵⁵ And this trend seems to have accelerated as the Internet has democratized access to the media.

As Judge Posner noted in one recent Internet libel case, the traditional ban on libel injunctions “would make an impecunious defamer undeterrable. He would continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment.”¹⁵⁶ In traditional equity terms, the assumption that libel plaintiffs have an “adequate remedy at law” in the form of a damages claim is especially inapt when it comes to the judgment-proof defendant. And the Internet makes it easier than ever for judgment-proof speakers to cause damage that is substantial, yet financially irremediable.¹⁵⁷

3. Injunctions against defamation generally

Let us begin with one class of anti-libel injunctions: ones that enjoin any future defamatory statements about a plaintiff by a defendant.¹⁵⁸ If those injunctions are read as forbidding only constitutionally unprotect-

¹⁵² See, e.g., *State ex rel. Liversey v. Judge of Civ. Dist. Ct.*, 34 La. Ann. 741 (1882); *Life Ass'n of America v. Boogher*, 3 Mo. App. 173 (1874).

¹⁵³ Not entirely absent, [cite 1802 Vt. case; S.C. case], but rare.

¹⁵⁴ See *Willing v. Mazzacone*, 393 A.2d 1155 (Pa. 1978); *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014).

¹⁵⁵ See *infra* note ____.

¹⁵⁶ *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015); see also *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007) (allowing injunctions because “a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation,” for instance when the “defendant . . . [is] so impecunious as to be ‘judgment proof’”).

¹⁵⁷ Erwin Chemerinsky acknowledges that the worry that libel law won’t deter “the judgment proof defendant” “is not a frivolous concern,” but concludes that “the assumption behind the concern is troubling; poor people should have their speech enjoined, while the rich are allowed to speak so long as they pay damages.” Chemerinsky, *supra* note ___, at 170. Yet the answer to that objection, it seems to me, is to allow injunctions against the rich and poor alike, rather than to leave victims of defamation with no remedy at all against poor defamers.

¹⁵⁸ See, e.g., *Allor v. Retirement Strategies, Inc.*, No. 15-000818-CZ (Mich. Wayne Cnty. Cir. Ct. June 21, 2016) (enjoining counter-defendants “from any further acts of defamation or publication of false statements, comments or information regarding the [counter-plaintiffs] on any Internet website”); *MacArthur v. Sands*, No. 429-2017-CV-00376 (N.H. Cir. Ct. date), <https://www.lumendatabase.org/notices/15230797>; [many more].

ed defamation—*i.e.*, defamatory false factual statements said with the requisite mens rea—then this would basically recreate a narrower version of criminal defamation law. If I’m enjoined from libeling you, that injunction is like a mini-criminal-libel law, just for me and just when I’m speaking about you.

More broadly, a legal rule that allows such injunctions is a criminal libel law but with a free bite at the apple. I start by being able to say whatever I like, including defamatory falsehoods, without being chilled by the risk of criminal punishment. But once a court finds that I’ve libeled you, I will be threatened with criminal punishment for further libels against you.¹⁵⁹ Indeed, such a rule is in some way similar to a prosecutor’s office, in a state that has a criminal libel law, having a policy: “We won’t prosecute anyone for criminal libel unless they have first lost a libel lawsuit; once that happens, we will prosecute them if they libel the successful plaintiff again.”

And such general injunctions against future libels will offer much the same procedural protections as those offered by criminal libel law. No-one could be criminally punished for violating such an injunction unless the falsity of the statement (and any culpable mens rea) is established beyond a reasonable doubt.¹⁶⁰ If the criminal contempt proceeding carries a risk of jail time, the defendant will have a lawyer who can argue that the allegedly libelous statement isn’t really false.¹⁶¹

Likewise, just as prosecutions under criminal libel statutes that authorize sentences of over six months require a jury,¹⁶² criminal contempts that can lead to such sentences require a jury, too.¹⁶³ Indeed, juries are familiar enough in criminal contempt cases that a state could easily mandate juries in all criminal contempt cases involving anti-libel injunctions, regardless of the maximum sentence. State constitutional provisions that expressly contemplate juries in criminal libel cases, regardless of maximum sentence, may easily be so interpreted.¹⁶⁴

These libel-criminalizing injunctions thus have largely the same pluses and minuses as does criminal libel law, though both the pluses and minuses are in some respect reduced and in some respect increased. Because the injunction covers only one speaker and one subject, it chills

¹⁵⁹ [Cite.]

¹⁶⁰ *United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994).

¹⁶¹ *Id.*

¹⁶² *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *D.C. v. Clawans*, 300 U.S. 617, 625–27 (1986).

¹⁶³ *Id.* at 827.

¹⁶⁴ *See, e.g.*, MICH. CONST. art. 1, § 19; N.D. CONST. art. 1, § 4; N.M. CONST. art. 2, § 17; UTAH CONST. art. 1, § 15; [more]. Some states also read their state constitutions as securing the right to jury trial as to all crimes potentially punishable by imprisonment. *See, e.g.*, *State v. Bennion*, 730 P.2d 952, 964 (Idaho 1986).

less true speech than does criminal libel law, but it likewise deters less false speech.¹⁶⁵

[Discuss the doctrine criticizing follow-the-law injunctions, e.g., *EEOC v. AutoZone, Inc.*, 707 F.3d 824 (7th Cir. 2013).]

On the other hand, an injunction can be enforced by a judge who will generally take seriously allegations that his order has been flouted,¹⁶⁶ and prosecutors are likely to take violations of an injunction seriously as well.¹⁶⁷ (Indeed, in some states plaintiffs can themselves initiate contempt proceedings.¹⁶⁸) This may give an anti-libel injunction more teeth than criminal libel law normally has, given that prosecutors will likely often use prosecutorial discretion to decline to prosecute ordinary criminal libel cases. Injunctions may thus be somewhat more forceful than criminal libel law, again both in deliberately deterring false statements and inadvertently deterring true statements.

Such injunctions don't suffer from the infirmity of the law in *Near v. Minnesota*, which restricted much more than future criminal libels. That law authorized the judge to shutter an entire newspaper, on the grounds that the judge believed it to be "malicious, scandalous, or defamatory."¹⁶⁹ Injunctions against future libelous statements, on the other hand, are limited to libelous statements—the very statements that are already constitutionally unprotected against criminal libel laws.

As the Court noted in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*,¹⁷⁰ when it upheld an injunction against ads that were found to be constitutionally unprotected, "[t]he special vice of a prior restraint" condemned by *Near* "is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."¹⁷¹ When a speaker can be punished only for speech that is specifically found to be unprotected—whether so found in a normal criminal libel prosecution or in a criminal contempt hearing that uses the same procedures—the punishment shouldn't violate the First Amendment.¹⁷²

¹⁶⁵ For leading 1970s and 1980s articles arguing that subsequent criminal punishments usually chill speech more than injunctions do, see John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 427–29 (1983); Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 550–51 (1977); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 93 (1984).

¹⁶⁶ See, e.g., FED. R. CRIM. P. 42(a)(2).

¹⁶⁷ [Cite.]

¹⁶⁸ See, e.g., ALASKA R. CRIM. P. 90(b).

¹⁶⁹ 283 U.S. 697, 706 (1931).

¹⁷⁰ 413 U.S. 376 (1973).

¹⁷¹ *Id.* at 390.

¹⁷² David Ardia rejects such injunctions on the grounds that they "are overbroad because they are not precise enough to put the defendant on notice as to what speech will violate the injunction." [Cite.] But they seem to be no less precise than criminal libel law;

Injunctions do pose a risk of discriminatory governmental enforcement. Whether to issue an injunction is generally in the judge’s discretion;¹⁷³ and whether to prosecute a violation of the injunction is also a discretionary decision.

Injunctions are probably less likely to be discriminatorily enforced than criminal libel law. A prosecutor’s decision about whether to invest scarce resources in a criminal libel prosecution—as well as the prosecutor’s judgment about whether a statement was likely knowingly false, and whether that can be proved to a jury—is always going to be the sort of judgment call that can be affected, deliberately or subconsciously, by the ideology behind the statement. But injunctions involve more governmental discretion than civil damages decisions do, though the interpretation of ambiguous statements and the judgments of truth or falsehood necessarily involve some risk of discrimination as well.¹⁷⁴

Yet I doubt that this is reason enough to reject libel injunctions—or criminal libel law—outright. All criminal enforcement, as well as governmental enforcement of civil infractions, involves some such risk of discrimination.

Even content-neutral speech restrictions, such as noise limits, limits on the times that one can use public parks, restrictions on blocking pedestrian traffic, and the like can be enforced in a discriminatory way.¹⁷⁵ Police officers can enforce such rules more aggressively as to some demonstrations than against others.¹⁷⁶ Prosecutors can discriminate in choosing whether to press charges, and deciding what sentences to seek.¹⁷⁷ That’s not good—but it’s not reason enough to reject such rules just because all rules can be enforced with partiality. Likewise for libel injunctions, if I’m right that they are among the few tools that can do something about libel.

The risk of politicized enforcement can also be diminished if, as David Ardia suggests, libel injunctions are limited to speech on matters of “private concern.” I’m generally skeptical of the private concern/public concern line, which I think is very hard to draw in any principled, administrable way.¹⁷⁸ In libel cases, it may be less troublesome, partly because it is familiar: At least since *Dun & Bradstreet v. Greenmoss Builders*, courts have been distinguishing private-concern speech from public-concern to decide whether presumed and punitive damages are

and they are indeed much less broad than criminal libel law, because they apply only to speakers who have already been found civilly liable for prior defamatory statements.

¹⁷³ [Cite.]

¹⁷⁴ [Cite.]

¹⁷⁵ [Cite.]

¹⁷⁶ [Give likely examples.]

¹⁷⁷ [Give likely examples.]

¹⁷⁸ See *supra* note __ and accompanying text.

available absent “actual malice.”¹⁷⁹ Perhaps the same distinction can be effectively drawn in deciding whether to enjoin a statement.

On the other hand, courts have found it especially hard to decide whether consumer criticism of businesses is speech on a matter of public concern. Some courts conclude that, because businesses serve the public, the public has an interest in knowing whether they serve it badly.¹⁸⁰ And shoddy work or even borderline fraud by businesses or professionals, who are generally wealthier than the consumers they serve, can always be seen as having a political dimension: as class-based mistreatment, misuse of government licenses, sometimes alleged discrimination, and sometimes even alleged crime.¹⁸¹

Other courts tend to view such claims as reflecting purely personal disputes, at least unless there are allegations of a serious menace to public safety.¹⁸² Indeed, the vagueness of the public concern/private concern line is itself an invitation for an extra level of standardless discretion and viewpoint discrimination by judges who are deciding what is of legitimate public concern and what is not.¹⁸³

Yet consumer criticism of businesses is, from my review of takedown injunctions submitted to Google, the main subject of such injunctions. (Perhaps this is so because businesses are especially likely to have the money to hire a libel lawyer, and to be willing to use their money this way.) If the public concern test is inconsistent and unpredictable there, perhaps it is ill-suited to libel injunctions more generally.

¹⁷⁹ [Cite.]

¹⁸⁰ See, e.g., *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 889, 890 (2004) (consumer watchdog’s criticism of brokerage firm is of public concern because it is was “consumer protection information”); *Gardner v. Martino*, 563 F.3d 981, 984-85, 989 (9th Cir. 2009) (customer complaints about alleged quality and maintenance problems with personal watercraft sold by a dealer are of public concern); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014) (citing *Gardner* as an example of a holding that “even consumer complaints of non-criminal conduct by a business can constitute matters of public concern”); *Terry v. Journal Broadcast Corp.*, 840 N.W.2d 255, 266–67 (Wis. Ct. App. 2013); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 147–50 (2d Cir. 2000) (allegations that an attorney was an “an ‘ambulance chaser’ with interest only in ‘slam dunk cases’” are on a matter of public concern); *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3d 959, 962, 965 (9th Cir. 2008) (allegations that mobile home park owner was engaged in rent gouging, predatory practices, and trying to “run out the older residents to bring in newer homes” are on a matter of public concern); *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000) (statements critical of a private community’s manager are on a matter of public concern); *American Future Systems, Inc. v. BBB*, 872 A.2d 1202 (Pa. Super. Ct. 2005) (statements about consumer complaints are on a matter of public concern); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir.1990) (statements about effectiveness of consumer product are on a matter of public concern).

¹⁸¹ [Cite.]

¹⁸² See, e.g., *Zueger v. Goss*, 343 P.2d 1028, 1036 (Colo. Ct. App. 2014) (claim that art dealer was selling unauthorized reproductions was not on a matter of public concern). [Cite other cases, including recent federal district court case in Texas about an employment dispute.]

¹⁸³ [Cite Jim Weinstein’s viewpoint discrimination article.]

The better approach might be to try to draw more specific lines than the public/private concern line, focused on especially preventing injunctions that are especially likely to be dangerous. I think such limits on libel injunctions are not a constitutional requirement, because libel injunctions are generally constitutionally permissible. But as a matter of sound policy, it might be helpful to forbid some anti-libel injunctions altogether—for instance, injunctions against speech said about political officials or political candidates, or perhaps a few other narrow classes of speech. This may give judges a fairly clear dividing line, and one likely to be evenhandedly applied to prevent certain injunctions that we might think are especially likely to be politically motivated.

4. Post-trial injunctions against repeating specific statements found to be libelous

We have talked so far about injunctions barring libelous statements generally—“defendant shall not make any further libelous statements about plaintiff.” Many anti-libel injunctions, though, are narrower: They forbid only repetition of specific statements that the court has found to be libelous, e.g., “Defendant . . . is permanently enjoined from . . . communicating. . . anything that refers to plaintiff . . . as a pedophile or ascribing conduct to him that implies that he ever sexually abused anyone under 18 years of age in any fashion, or was convicted of the same.”¹⁸⁴

When statements have been found to be libelous, repeating those statements is similarly likely to lack constitutional value. Given that such repetition can constitutionally be punished as criminal libel—especially once a court decision notifies the speaker that the statements are false or at least likely false—it seems legitimate to punish it as contempt of court, when it is repeated in violation of an injunction. Perhaps because of this, the emerging modern rule seems to be that, once speech is found libelous, it can be enjoined.¹⁸⁵

¹⁸⁴ *Gorman v. Yaniz*, No. 2011-11238 (Pa. Ct. Com. Pl. Chester Cnty. Mar. 8, 2013).

¹⁸⁵ See, e.g., *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (applying Wisconsin law); *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007); *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302 (Ky. 2000); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); 218 S.E.2d 54, 62–63 (Ga. 1975).

Erwin Chemerinsky argues that “An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court’s order.” Chemerinsky, *supra* note __, at 171. Likewise, the Texas Supreme Court rejected such injunctions because a suitably narrow injunction, which “would enjoin the defamer from repeating the exact statement adjudicated defamatory,” “would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunc-

But these injunctions, though narrower than the “no future libels against plaintiff” injunctions, pose some extra dangers:

a. *Restricting speech without regard for changing circumstances:* A statement may be false when it’s enjoined, but becomes true afterwards.¹⁸⁶ (What if the plaintiff in the injunction quoted above does sexually abuse an under-18-year-old after the injunction is issued?) As the Texas Supreme Court reasoned in rejecting such injunctions, “the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged.”¹⁸⁷

Yet an injunction against repeating a statement, once issued, would forbid that statement even if it becomes true. And though “[i]f such a change in circumstances occurs, [the] defendant may move the court to modify or dissolve the injunction,” it “is no answer that a person must request the trial court’s permission to speak truthfully in order to avoid being held in contempt.”¹⁸⁸

b. *Lack of jury determination of falsehood:* Injunctions, especially when they come out of proceedings in which the plaintiff hasn’t asked for damages, are generally issued without any jury factfinding.¹⁸⁹ And even if there is a jury in the later criminal contempt prosecution for violating the injunction, the jury will only decide whether the statement was made—not whether the statement is false.

One can debate whether juries are a good idea as a matter of first principles. But many state constitutions expressly contemplate the presence of juries determining truth or falsehood in criminal libel cases. This suggests that juries must do the same when criminal contempt serves the function of criminal libel.

c. *Lack of proof of falsehood beyond a reasonable doubt:* In injunction proceedings, the judge determines that the statement is false by a preponderance of the evidence or, at most, by clear and convincing evidence.¹⁹⁰ Any future criminal contempt prosecution will only be focused

tion.” *Kinney*, 443 S.W.3d at __. And if “an injunction that goes beyond restraining verbatim recitations of defamatory statements and encompasses statements that are ‘substantially similar,’” “[s]ubtle differences in speech will obscure the lines of such an injunction and make it exceedingly difficult to determine whether a statement falls within its parameters.” *Id.* at __. But this seems overstated (as the cases cited at the start of the footnote implicitly conclude): Courts have broad experience with determining when two statements have an equivalent meaning, and should be treated as interchangeable, whether for the purposes of civil liability, criminal law (e.g., the law of true threats), or criminal contempt law.

¹⁸⁶ Chemerinsky, *supra* note __, at 171.

¹⁸⁷ *Kinney*, 443 S.W.3d at 97.

¹⁸⁸ *Id.*

¹⁸⁹ [Cite some states and circumstances that are exceptions.]

¹⁹⁰ The Supreme Court has held that, in cases brought by public figures or public officials on matters of public concern, the plaintiff must prove by clear and convincing evi-

on whether the defendant repeated the forbidden statement, not on whether the statement is false.¹⁹¹ Thus, this sort of “don’t repeat this statement” injunction—unlike criminal libel law, or a “don’t say libelous things about plaintiff” injunction—lets a statement be criminalized without any proof beyond a reasonable doubt that the statement was false.¹⁹²

d. *Absence of a lawyer*: The most serious and least noted problem with such “don’t repeat this statement” injunctions, though, is that they will often be entered based on a sharply lopsided factfinding process: Often, the plaintiff will have a lawyer, especially if it is a business suing a consumer, but the defendant will lack one.¹⁹³ This is unlike modern criminal libel prosecutions; so long as the prosecutor hasn’t disclaimed an interest in a jail sentence, in such prosecutions public defenders to be appointed for poor defendants.¹⁹⁴ And though a criminal contempt prosecution for violating an anti-libel injunction would involve a public defender, at that point in most jurisdictions the validity of the initial injunction can’t be challenged (because of the “collateral bar” rule).¹⁹⁵

dence that the defendant knew the statement was false (or was reckless about the possibility). [Cite *New York Times v. Sullivan*.] Some courts have inferred from this that the plaintiff must likewise prove the falsity of the statement by clear and convincing evidence as well. *See, e.g., DiBella v. Hopkins*, 403 F.3d 102, 114 (2d Cir. 2005) (so holding under New York law, and citing other cases so concluding in other states). Others disagree. *See, e.g., Moldea v. New York Times Co.*, 15 F.3d 1137, 1142 (D.C. Cir. 1994); *Bentley v. Bunton*, 94 S.W.3d 561, 586–87 (Tex. 2002).

¹⁹¹ [Briefly note that some states may have a different rule, because they don’t follow the collateral bar rule.]

¹⁹² Note that injunctions ordering that films be suppressed on the grounds that they are obscene don’t require proof beyond a reasonable doubt that the films are obscene. *California ex rel. Cooper v. Mitchell Bros.’ Santa Ana Theater*, 454 U.S. 90 (1981). But perhaps Justice Brennan was right in rejecting that, on the grounds that “The requirement that obscenity be proved beyond a reasonable doubt”—which is used in criminal obscenity prosecutions—“may not be diluted by transporting the determination to a prior civil proceeding, for the essence of the ‘crime’ in reality remains the sale of obscene literature rather than disobedience of a court injunction.” *McKinney v. Alabama*, 424 U.S. 669, 687 (1976) (Brennan, J., concurring in the judgment). “Both proceedings [injunction proceedings and criminal proceedings] thus present the same hazards to First Amendment freedoms, and those hazards may only be reduced to a tolerable level by applying the same rigorous burden of proof.” *Id.* at 687.

¹⁹³ *See, e.g., Obsidian Finance Group LLC v. Cox*, [cite] (trial); *Chan v. Ellis*, [cite] (trial). A few such cases might pique the interest of a lawyer who will take the case on appeal pro bono. But handling a case at trial is generally much more burdensome for a lawyer (especially one who is outside the jurisdiction) than handling it on appeal, especially when the case involves a good deal of fact investigation. A trial-level case is less likely to have the glamour of a potentially precedent-setting appellate case. And sometimes the defendant will be up against a plaintiff who can afford a private lawyer—for instance, if the lawsuit is over a defendant-consumer’s criticism of a business.

¹⁹⁴ [Cite.]

¹⁹⁵ *Walker v. City of Birmingham*, 388 U.S. 307, 317–18 (1967).

Anti-libel injunctions issued against poor defendants thus risk that speech may be found false without a lawyer making the case that the speech is actually true (or opinion or otherwise immune from liability). Indeed, many libel cases that seek injunctions lead to default judgments, likely often because the defendant can't afford a lawyer (or doesn't think that protecting his speech is worth the legal fees).¹⁹⁶ In such cases, speech may well be found to have been false just on the plaintiff's say-so, with at most modest oversight by a judge. The speech may not even have been found to have consisted of factual assertions, as opposed to opinions. In principle, a judge entering a default judgment should satisfy himself that the claim is legally viable,¹⁹⁷ but often judges won't really do that.¹⁹⁸

"Don't repeat this statement" injunctions thus allow speech to be taken down—not just chilled, as with the risk of civil damages—with little real assurance that it is false. Sometimes the end result may be fine: Many such cases likely do involve speech that is indeed false and defamatory, and it's good to give the subject of the speech a way to get it removed. But sometimes the end result may be suppression of accurate criticisms, or constitutionally protected opinions. And there's no real way of knowing which category each case falls into.

The prior restraint doctrine, with its suspicion of injunctions, might thus have a good deal of merit, though not for the reasons that initially animated it. (When the doctrine first arose, poor criminal defendants weren't generally entitled to court-appointed lawyers.) By preferring criminal punishment to a civil injunction, the doctrine makes it more likely that any takedown requirement comes as a result of at least a plausibly adversarial process, rather than a mismatched fight between a represented plaintiff and a lawyerless defendant, or a default judgment that stems from the defendant's inability to represent himself.

* * *

There are ways, I think, of dealing with each of these dangers. Takedown injunctions, which just order the removal of online speech, don't pose the changing circumstances danger. This is why the Texas Supreme Court, for instance, held that they are constitutional even though prohibitions on future repetition of such statements are unconstitutional.¹⁹⁹ (Sometimes a pure takedown injunction will be futile, if the defendant just keeps reposting the material; but often the defendant will have moved on, and taking down the material will give the plaintiff much of the protection he wants.²⁰⁰)

¹⁹⁶ [Cite examples.]

¹⁹⁷ [Cite.]

¹⁹⁸ [Cite.]

¹⁹⁹ *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014).

²⁰⁰ [Cite examples of takedown injunctions that seem to have proved effective.]

These dangers can also be ameliorated by expressly limiting the injunctions to prohibiting speech that has been adjudicated to be false, but only on the condition that it is false. Instead of “Defendant shall not repeat the statement ‘plaintiff has been cheating on his wife,’” the injunction could say something like, “Defendant shall not repeat the statement ‘plaintiff has been cheating on his wife,’ when such a statement is false.”

Then, if the facts change, the defendant would be able to so argue if he is prosecuted for criminal contempt (even without having to move the court to modify the injunction, since by its terms the injunction doesn’t apply if the statement has become true). Indeed, even if the facts haven’t changed, the defendant can demand that a jury find beyond a reasonable doubt that the statement is false. And the defendant would have a lawyer at that hearing to argue that the speech is indeed false.

This would be a pretty substantial change from existing injunction practices. And it will make the anti-libel injunction process more cumbersome and expensive, for plaintiffs and for courts, than the process is now in those states that use such injunctions. But if the goal of the system is to suppress those statements that are actually false, it needs to use a more reliable and balanced factfinding process than the one that often arises in existing injunction cases.

Of course, even a revised libel injunction process will still ultimately use the threat of criminal punishment to stop allegedly libelous speech. I have argued that, properly done, this shouldn’t pose any more constitutional problems than criminal libel prosecution does. But many people may think criminal libel law is bad policy, whether in its traditional form or in the narrower form created by the availability of libel injunctions. Perhaps they are ultimately correct: Perhaps the risk of criminal punishment for libelous speech is such a powerful deterrent that it will unduly chill too much valuable speech.

Yet for all their flaws, criminal libel law and anti-libel injunctions are the few tools that the legal system has for fighting libel—genuine, damaging libel, of the sort that the Court has repeatedly said is constitutionally unprotected—when a defendant is judgment-proof and civil damages liability won’t work. If we reject them, then we have to recognize that the legal system can do little to deter and punish libel in such situations.

B. Service Provider Takedowns and De-Indexing

1. Service provider takedowns

But perhaps the key lies not in enforcement by the legal system, but in enforcement by others, albeit in reliance on factfinding by the courts. Indeed, in recent years we’ve seen an experiment with such mixed private/public enforcement. Has that experiment been a success?

Damages, I suggested, are a largely mythical remedy in many (though of course not all) Internet libel cases. Injunctions are often what plaintiffs really want, and they may be theoretically consistent with First Amendment principles when limited to speech that has been found to be false and defamatory.

But if we're really getting real, are plaintiffs who want libelous posts taken down really after injunctions that will be enforced by courts, through contempt proceedings? What if the speakers are overseas? Or what if they post on a site, such as RipoffReport.com, that deliberately omits any technical means for users to remove their own posts, and has a policy of not taking down such posts itself?²⁰¹ (RipoffReport's stated argument is that people might often ask to take down their posts precisely because they are being pushed around by wealthy plaintiffs.²⁰²)

Or what if the speakers are anonymous? A much-discussed body of lower court precedents discusses what needs to be shown to order an Internet service provider or Web site operator to turn over user identification data.²⁰³ But users who put in even a little effort up front can easily protect their anonymity. They could use anonymous web services from home, or access the Internet from a library or Internet café that doesn't require them to enter a user id or a verifiable e-mail address.²⁰⁴ And you can't threaten to jail JohnDoe123.

That's why, for many takedown orders, enforcement by the government is beside the point. The real enforcement is by Google. You get an injunction finding that a page is defamatory (or some other court order expressing such a finding²⁰⁵). You send it to Google. And if Google wants to, the page that the injunction condemns vanishes from the search results.

Facebook, Twitter, Yelp, and some other sites will likewise often take down material from those sites when an injunction states that the material is defamatory. But Google is the power that can block access even when the service provider leaves it up.

At first, this system may seem pretty good all around. Google and the others have to put in some effort—but they don't have to themselves adjudicate the defamation cases, or take the heat for incorrect judgments. They feel they are doing the right thing, by helping block the spread of damaging lies. And they can still exercise some discretion in choosing what to remove or deindex and what to leave up.

²⁰¹ [Cite.]

²⁰² [Cite.]

²⁰³ [Doe v. Cahill et al.; cite leading law review articles.]

²⁰⁴ This is an oversimplification; in certain situations, and with enough work, it might be possible to identify even such anonymous posters. But often it won't be, at least without extraordinary efforts.

²⁰⁵ [Cite the Acknowledgment in the Illinois Jicheng Liu cyberstalking case.]

People who are being defamed also win, because they can usually get the defamation blocked. Courts win, because they get their orders enforced, and don't need to be bothered with time-consuming and often fruitless enforcement proceedings. And readers win, because they won't be deceived by falsehoods.

2. Forged court orders

But let us stop thinking like law professors, and start thinking like crooks. The difficulty of getting Google to essentially enforce a libel takedown injunction is that we need to get such an injunction. That takes time and money—and we might lose, if the allegations are true, or if the statements are opinion.

What if we skip the middleman, and just give Google an order that we wrote ourselves? Consider, for instance, this excerpt of a purported order (this one in a federal criminal case) submitted to Google as part of a takedown request:

It is also ORDERED that the Los Angeles Times and/or any other publication shall forthwith remove from their website, archives and/or records any mention of an alleged June 15, 1996, press release naming *Marcus Arthur Fontaine* and or/any other press release or document associated with the above mentioned cases where the name *Marcus Arthur Fontaine* may appear.

It is further ORDERED that no Internet provider shall maintain, make available, publish, carry, publicize, advertise and/or make public on their websites and/or internal files any mention of *Marcus Arthur Fontaine* as it relates to the cases above mentioned.

The order looked legit: It even had a PACER header, and a real federal district court case number. But no such order was present in the actual case file, because it was created by Fontaine or someone working on his behalf, not by the court. To its credit, Google apparently hasn't removed any references to Fontaine and his criminal prosecution from its indexes, perhaps because the substance of the order was so unlikely.

But other frauds are harder to spot. Here is the signature line from two nearly identical court orders that actually led to Google deindexing the pages mentioned in the order, mugshots of a DUI arrestee on Bail-BondCity.com:



Pamela J. L. Brown
Circuit Court Judge

The orders were ostensibly from the L.A. Superior Court—but, as Los Angeles lawyers know but most others understandably don't, there are no "Circuit Court Judge[s]" on the L.A. Superior Court. And when,

alerted by this oddity, I checked the roster of the Superior Court Judges (which is how most judges are known here), I saw that there was no Pamela J.L. Brown on the L.A. bench.²⁰⁶ It turns out that this order was largely adapted from one of the orders in the Gawker litigation,²⁰⁷ down to the “Circuit Judge” and the first name of the judge (Pamela). A federal district court order in Michigan was likewise adapted, using a fake case number, from another federal case in the same courtroom.²⁰⁸

But why be so sloppy? Here are two captions from orders, both of which were submitted to Google for takedown a month and a half apart.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL ACTION



SPR, INC,

Plaintiff,

vs.

JOHN DOE,

Defendants.

No. 160603108
E-file No. 1606063959

SPR Inc vs John Doe - ORDER



ORDER GRANTING CONSENT MOTION
FOR INJUNCTION AND FINAL JUDGMENT

and

²⁰⁶ The Chief Judge of the L.A. Superior Court, Judge Carolyn Kuhl, confirmed this.
[Cite.]

²⁰⁷ [Cite.]

²⁰⁸ [Cite.]

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL ACTION



SEAN CALLAGY,

Plaintiff,

vs.

ROBERT ROFFMAN,

Defendants.

No. 160603108
E-file No. 1606063959

Callagy Vs Roffman-ORDRF



16060310800008

**ORDER GRANTING CONSENT MOTION
FOR INJUNCTION AND FINAL JUDGMENT**

The second order corresponds to a real case; the first doesn't—the case number belongs to the second, and the Philadelphia court records reveal no case that was filed by any “SPR, Inc.”²⁰⁹

Two real Ohio cases had their case numbers—and much of the same boilerplate language—copied to create purported orders in three fake cases, though with different web sites being alleged to be defamatory.²¹⁰ One of those was aimed at taking down the same site (Serenity Point Recovery, an addiction treatment facility) that was the intended beneficiary of the *SPR* order. An ostensible Georgia order was likewise based on a real Georgia order.²¹¹ I found these fake orders, and others, by going through the Lumen Database, an archive in which Google and other companies place takedown requests that they receive.²¹² (The Lumen Database people, especially Adam Holland, were tremendously helpful in letting me get bulk access to that database.)

Now Google could try to avoid being tricked, by checking the case numbers against court dockets. But that would just catch the crude fakes. While we're thinking like crooks, why not submit a purported court order with the same case number and the same caption as a real case, but with completely different URLs that have supposedly been found to be defamatory? (One of the Ohio cases used something close to that technique.)

²⁰⁹ [Cite.]

²¹⁰ [Cite.]

²¹¹ [Cite.]

²¹² <http://lumendatabase.org>.

And many court record systems aren't online, so checking the authenticity of a judgment might be quite a production. If you want the system to actually be reliable, the overhead for Google and similar companies would have to markedly rise.

3. Real court orders, fake defendants

And forged court orders are just the beginning. Say you want a real court order, so that, even if Google checks with the courthouse, the order will be confirmed as authentic. You don't actually need a real defendant. Instead, you can

- a. sue a made-up defendant;
- b. submit the complaint together with a proposed injunction and a stipulation by the supposed defendant, agreeing to the injunction; and then
- c. get the injunction rubber-stamped by a judge who sees nothing controversial in the case.

I have found more than 25 injunctions that fit precisely this pattern. Most involve pro se plaintiffs, but they share a good deal of legal boilerplate, which makes me think that there was likely some "reputation management company" behind them; and indeed the plaintiffs in four of the cases have stated that they had hired one such company, Profile Defenders (or one of its sister companies, owned by Profile Defenders' owner).²¹³

Here is an example, though one in which I haven't confirmed the Profile Defenders link. Sukanto Tanoto is a rich Indonesian businessman. His niece Wendy Tanoto, who apparently lives in Taiwan, thinks Sukanto stole her side of the family's rightful share of the family funds. She puts up a site so claiming, as well as a Facebook page to which this site forwards.²¹⁴

Now Sukanto could sue Wendy, claiming defamation. But Wendy, who does have some money, might fight back—and the lawsuit would likely draw publicity of its own. Instead, short comments critical of Sukanto appear on one post, and another such comment is identified on the other. And then a lawsuit is filed in Philadelphia trial court, ostensibly by a Sukanto Talson, against a Noemi Martinez.²¹⁵

²¹³ [Cite.] Many thanks to Paul Alan Levy of Public Citizen, whose litigation in one of these cases, *Smith v. Garcia*, [cite], first confirmed that Profile Defenders was the responsible party, and to Matthew Chan, whose pro se litigation in his case, *Patel v. Chan*, [cite], added further confirmation. More broadly, thanks to Chan for first alerting me to his case, which led me to investigate this and find the dozens of likely fraudulent cases that I write about here.

²¹⁴ [Cite.] I'll refer to Sukanto Tanoto and Wendy Tanoto by their first names, because they share a last name.

²¹⁵ Complaint, *Talson v. Martinez*, No. 160603109 (Pa. Ct. Comm. Pl. June 27, 2016).

I live in Philadelphia, Sukanto Talson says, and I used to be named Sukanto Tanoto. The sites are actually about me. Neomi Martinez, who lives in Puerto Rico, wrote the comments, and she admits (in a document I'm filing together with the Complaint) that the statements are false and defamatory.²¹⁶ She stipulates to the entry of an injunction that I can submit to Google and other search engines, Talson says, "so that the link can be removed from their search results pursuant to their existing policies concerning deindexing of defamatory material."²¹⁷ A mere four days later, the order is issued.²¹⁸ And the injunction is then submitted to Google.²¹⁹

Now it turns out that neither a Sukanto Talson nor a Neomi Martinez could be found at the addresses given for them in the documents. A private investigator, Giles Martin of Lynx Investigations, was kind enough to help me (pro bono) by researching this, and I also checked myself on Lexis's People Search service.

It also seems very unlikely that Indonesian multimillionaire Sukanto Tanoto changed his name and moved to Philadelphia. The allegedly defamatory comments, which formed the ostensible basis for the injunction, are much less damaging than the criticisms in the body of the Facebook page and the Web site. I suspect that one of the comments, which was posted two years after the page and site was posted, and only two weeks before the lawsuit was filed, was deliberately posted in order to provide an ostensible basis for the lawsuit.

The real Sukanto Tanoto might not have actually been aware of all this. He may well have just hired a company that promised to get the material taken down, and assumed that they would do this legally (e.g., through a legitimate libel lawsuit).²²⁰ Some other ostensible plaintiffs in such lawsuits have indeed stated that they did not authorize the lawsuits, and didn't even know they were happening.²²¹ But that company deliberately filed the lawsuit knowing that it was bogus.

Google, it turns out, spotted this too, perhaps because the Sukanto Talson / Sukanto Tanoto inconsistency was too blatant. But in several other such cases, Google did indeed deindex the pages.²²²

I mentioned that the ostensible plaintiffs and ostensible defendants in these cases were ostensibly pro bono. (You know you're talking about dicey stuff when you have to use the word "ostensible" so often.) This is

²¹⁶ *Id.*

²¹⁷ Consent Motion, *id.*

²¹⁸ Order, *id.* (July 1, 2016).

²¹⁹ [Cite.]

²²⁰ [Cite Smith and Patel papers.]

²²¹ [Cite Callagy e-mail.]

²²² [Cite.]

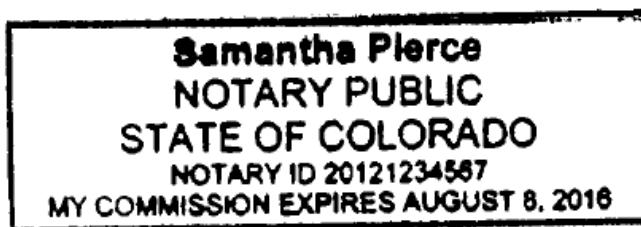
unsurprising, since many lawyers might be especially hesitant to engage in frauds on the court. Bar authorities may be more inclined than prosecutors to go after such frauds, and bar authorities need not prove misconduct beyond a reasonable doubt.²²³ In practice, bar authorities are not easy to persuade to go after such matters, but lawyers at least have special reason to fear enforcement attention.

And yet some such lawsuits are filed by lawyers, too. Here is a notary stamp from a stipulated injunction, accompanying the signature of the ostensible defendant. (I'm not including a citation to the case in this draft, because this is one of the few cases that I have managed to persuade bar authorities to investigate.)



Looks real—except if you go to the Georgia list of notaries²²⁴ (many states post the list online), you find only one Amanda Sparks, in a different county and with a different expiration date. I also checked all notaries in Fulton County whose commission expires Jan. 1, 2018, just in case there is an Amanda or an A there who might have changed her last name; I saw none that matched. I likewise couldn't find the ostensible defendant in public records for Georgia, but there is some possibility that the records are incomplete, or the defendant was just visiting from elsewhere (as the case at one point claims). A mystery notary is harder to explain.

But I only even thought of checking the notarization because a different stipulation on a different document in the same case bore this notarization:



Samantha Pierce, it turns out, also doesn't appear on the Colorado list of notaries. But there's something even more blatant there: Notary id 20121234567? And when you google "notary 20121234567," you find a

²²³ [Cite.]

²²⁴ [Cite.]

Colorado Secretary of State page from 2012,²²⁵ telling notaries that they need to get a new stamp, and offering this as a model (though the exact fonts and other formatting details are up to each notary):

JOHN Q. SAMPLE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20121234567
MY COMMISSION EXPIRES AUGUST 8, 2016

20121234567, August 8, 2016. The only thing the filed court document didn't parrot was the "John Q. Sample."

Of course, this is just an unusually brazen and incompetent example—and I wouldn't have noticed even this, if I hadn't been wary of the lawyer in the first place, because I had seen his name as a beneficiary of one of the pro se fake-defendant takedown lawsuits.²²⁶ How many more competent cheaters are there out there, who aren't making these mistakes, and aren't getting caught?

4. Real court orders, real defendants, no connection to the alleged defamation

Say, though, that a libel lawsuit is filed against a real defendant, who really does agree to the removal of the page. The signature is notarized, if necessary, by a real notary. But how can Google know whether the stipulating defendant actually wrote the supposedly defamatory material?²²⁷

Indeed, there is reason to think that at least a couple of dozen injunctions were gotten precisely this way. About a dozen takedown injunctions in Northern California in 2015–16 were aimed at posts on the PissedConsumer.com complaint site. But PissedConsumer.com asserts that it never got any subpoenas aimed at tracking down the pseudonymous authors of the posts; and the two Internet Protocol addresses that PissedConsumer could check for me came from Georgia and Texas, and not from Northern California, where all the defendants supposedly live.

It's possible, of course, that the two lawyers responsible for those injunctions tracked down the posters some other ways. (A business, for instance, might often be able to identify a complaining commenter based

²²⁵ [Cite.]

²²⁶ *Ruddie v. Kirschner*, [cite]. For other examples of lawsuits against seemingly fake defendants brought by lawyers, see, e.g., *Groza v. Handley* (Md.); *Smith v. Levin* (Md.).

²²⁷ If the material was posted pseudonymously, e.g., by "AngryConsumer666," then the defendant (call him Dan Donaldson) might be claiming that he's the real AngryConsumer666. But even if the material was posted under a seemingly real name, e.g., by "Matthew Chan," then Dan Donaldson might be claiming that Matthew Chan was actually a pseudonym, and that he's still the real author.

on the details of the complaint; if someone claims that you botched his legal case in a particular way, you might recognize him as the one client who has been pestering you for a refund.) But it seems unlikely that this would have been so in all of these cases, especially given the IP address data.

Likewise, there is a lawyer in a large city in the middle of the country (let's call it Chicago for now) who had apparently never filed any defamation cases in that city's courts until 2016. Then, in 2016, he filed seven cases, all of which involved defendants who stipulated to the judgment. In all the cases, the complaints stated that the defendants lived in Chicago. In all the cases, the defendants had their signatures notarized. And all the notarizations happened in Northern California.

Another Chicago lawyer had three more stipulated defamation takedown cases in 2016 that fit the same pattern, down to the Northern California notarizations. I've seen the same from three cases filed by a law firm in another state. I mentioned the cases to prosecutors, and the cases are still being investigated (which is why Chicago is a pseudonym here). But it's pretty clear that there is something fishy here.

And, again, if it weren't for the sheer volume of PissedConsumer cases, or the notarization pattern of the other cases, these sorts of frauds—if frauds they are—would be very hard to uncover. Certainly Google couldn't uncover them, short of doing comprehensive investigations of every order that it gets.

Now in those cases, I suspect that the defendants weren't actually responsible for creating the allegedly defamatory material. But in some cases I know that the defendants weren't responsible for creating the material, and indeed I know that the material is not defamatory, as a matter of law.

Consider this Maryland state court order, in which the court said (based on a form prepared by the plaintiff, and a stipulation by the defendant) that it

DECLARES and **FINDS** that Defendant Seemah Saul posted defamatory statements regarding Plaintiff on various websites. The defamatory statements were false and injurious statements made with either knowledge of falsity or in reckless disregard for the truth. While damages are presumed, this Court finds, having considered the testimony of Plaintiff, that he has suffered and continues to suffer actual damages as a result of the defamatory statements, which are linked and attached to the following URLs:

But what were the URLs, which were ultimately submitted to Google with a deindexing request? Here is an excerpt from the long list:

18) <http://www.survivinginfidelity.com/forums.asp?tid=486004>

19) <http://www.mdd.uscourts.gov/Opinions/Opinions/Mort%20Fertel%20v.%20Jan%20Davidson%2018%20Dec%2013.pdf>

20) <http://www.ripoffreport.com/r/Marriage-Fitness-With-Mort-Fertel/Baltimore-Maryland-21215/Marriage-Fitness-Mort-Fertel-Marriage-Fitness-DO-NOT-ORDER-THIS-IF-YOU-MAY-WANT-TO-RETUR-546374>

The lawyer for plaintiff had filed an earlier case in Maryland federal court against another defendant (Jan Davidson).²²⁸ He lost, when the defendant moved to dismiss for lack of personal jurisdiction.²²⁹ And then he had the chutzpah to get a state court order aimed at getting Google to deindex the federal court opinion, on the theory that Seemah Saul had somehow “posted defamatory statements regarding Plaintiff” in the official *Fertel v. Davidson* court opinion. (The mdd.uscourts.gov site doesn’t allow user comments, of course; the only author of the opinion is the federal judge.)

Or consider a similar order in an Arizona case, in which the plaintiff succeeded in getting a California state agency decision against him de-indexed by Google.²³⁰ That same order also led to deindexing a findlaw.com copy of an opinion that mentioned a person who had the same name as the plaintiff.²³¹ As a matter of law, both these documents could not be libelous.²³² As a matter of fact, the particular defendant in the Arizona case had nothing to do with posting them. But the court, dealing in that instance with a motion for default judgment, approved an order calling for the removal of those decisions.²³³

5. Real court orders, default judgments without any real attempt at service

[Discuss *Sharos v. Doe*, in which the defendant could easily have been found and served, but plaintiff’s lawyers claimed that they couldn’t find him.]

[Discuss *Quattracchi v. ComplaintsBoard.com*, in which the defendant’s alleged address and signature seems to correspond to plaintiff’s business associate, who doesn’t seem genuinely related to Complaints-Board.com at all.]

²²⁸ [Cite.]

²²⁹ [Cite.]

²³⁰ [Cite.]

²³¹ [Cite.]

²³² [Cite judicial immunity.]

²³³ [Cite.]

6. Real court orders, default judgments against unknown defendants

Finally, let's stop thinking like crooks now, and go back to honest life. Say that a plaintiff thinks some post is defaming him. But the post is pseudonymous, and subpoenaing the site's records yields a dead end. The plaintiff can use service by publication²³⁴ and then get a default judgment. The result isn't as quick or cheap as the fake-defendant-stipulation scam, but it's perfectly legal.

The trouble, though, is that there is really no basis for Google to think that the posted material is actually false: The author never showed up to defend the accuracy of the material, and thus there was no meaningful factfinding by the judge.²³⁵

Perhaps we shouldn't feel too bad for the poster's free speech. Maybe one price of anonymous speech should be that such speech is subject to a takedown injunction gotten through a default judgment: If you aren't willing to put your name to what you say, then you might be spared from having to pay for it, but the flip side is that you won't be able to defend it against a takedown.

But if Google's—or our—wants readers able to see material that may well be accurate, and that hasn't been reliably determined to be false, then takedown injunctions gotten under default judgments aren't good ways of serving that goal.

[Discuss small claims, e.g., *Wikikiss v. Benson*; see also *Malki v. Seidler*. Injunctive relief is likely not authorized in California, Cal. Code Civ. Proc. § 116.220(a)(5) suggests only when statute so specifies, but maybe that's not needed.]

[Example, *Scroppo v. Does*: “further barred from stating or implying that Plaintiff is a racist.”]

7. Stepping back: The trouble with the search engine takedown model

These practical problems with the search engine takedown model stem, I think, from several related theoretical problems.

²³⁴ [Cite.]

²³⁵ “When a defendant fails to appear . . . , the district court or its clerk is authorized to enter a default judgment based solely on the fact that the default has occurred.” *Anchorage Associates v. Virgin Islands Bd. of Tax Rev.*, 922 F.2d 168, 177 n.9 (3d Cir. 1990). And “[u]pon entry of default by the clerk of the court, the ‘defaulting defendant is deemed to admit every well-pleaded allegation in the complaint.’” *Breaking the Chain Foundation, Inc. v. Capitol Educational Support, Inc.*, 589 F.Supp.2d 25 (D.D.C. 2002) (citation omitted).

In principle, “before granting a default judgment, the Court must first ascertain whether ‘the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.’” *Chanel, Inc. v. Gordashevsky*, 558 F. Supp. 2d 532 (D.N.J. 2008) (citation omitted). Thus, a court could refuse to issue a default libel judgment on the grounds that, for instance, the defendant's statements were mere opinions as a matter of law. But in practice, busy judges often tend to rubber-stamp requests for summary judgment. [Cite.]

First, Google understandably thought that it could determine what's defamatory and what's not by relying on information being provided by the court system. And the court system understandably thought that it needn't worry about fake defendants, because plaintiffs' interests would only be served by suing real defendants.

But the very presence of the Google takedown policy gave an incentive for people to cheat the courts, and thus cheat Google. Google was counting on the signal from the courts, but now the signal is being spoofed. There is a security hole in the channel of communication, and the hackers of the legal system are exploiting it.

Second, many aspects of the civil justice system are focused not on truth-finding, but on settling disputes.²³⁶ Defendants can choose not to defend their cases; they've waived their rights, the legal system concludes, and thus have no legitimate basis to object to a default judgment and an injunction against them.

Likewise, a defendant can stipulate to a judgment, perhaps to avoid having to pay the plaintiff or to pay lawyers, or perhaps in exchange for being paid under a counterclaim,²³⁷ and the dispute is over. (Let's assume that the stipulation is genuine, not fraudulent.) The lawsuit between the plaintiff and the defendant is resolved. But there's no reason for third parties to assume that the outcome reflects what's true and what's false.

Even when defendants fight, they might fail to raise important defenses, perhaps because their lawyers don't know libel law well, or because the defendants are representing themselves and don't know libel law well themselves. For instance, the defendants might neglect to point out that allegedly libelous statements are actually opinion.²³⁸ Or they might neglect to argue that they are accurately reporting statements made in a court proceeding; such statements, even if mistaken, are privileged, because reporting on what is said in a court proceeding is seen as especially valuable.²³⁹

²³⁶ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1287-88, 1297 (1976).

²³⁷ See, e.g., Consent Order, *Monster T-Shirts, LLC v. Reed*, No. 2015-CP-32-01803, at 2 (S.C. Ct. Com. Pl. 11th Jud. Dist. Aug. 18, 2016); Agreed Judgment Entry and Permanent Injunction, *Geiss v. Els*, No. 2012-CP-07-1064 (S.C. Ct. Com. Pl. Jan. 28, 2012); Mediated Settlement Agreement, *Winn v. Moheb*, No. RS15788036 (Cal. Super. Ct. Alameda Cnty. May 12, 2016); cf. *Andrade v. Trimble*, No. 16-DVC-236622 (Tex. Dist. Ct. Fort Bend Cnty. Nov. 3, 2016) (noting that plaintiff paid defendant \$2000 to remove the post).

²³⁸ [Cite examples.]

²³⁹ If a defendant fails to properly argue absence of actual malice (or absence of negligence, if that's the relevant standard), then my objection doesn't fully apply: A false statement said without actual malice or negligence remains valueless, even if it shouldn't lead to damages liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Enjoining the repetition of such a statement thus wouldn't deny the public much valuable information. But enjoining the repetition of opinion would block constitutionally valuable speech.

Such waivers may lead to a judgment against the defendants, and that might soundly dispose of disputes as between the parties. But again this may mean little to third parties who are trying to decide what's false and thus useless to their readers (as well as harmful to the target), and what's true and thus valuable to their readers.

This helps show, I think, why Google and similar companies shouldn't be legally bound by injunctions issued against third parties. That might seem obvious as a matter of due process and remedies law: How could Google, Yelp, and the like be bound by a judgment entered against a third party, when they were never given notice of the case as it was proceeding, and thus had no opportunity to contest the matter?²⁴⁰ Yet the California Court of Appeal held in *Hassell v. Bird*²⁴¹ that Yelp could indeed be legally bound to remove an allegedly defamatory comment—even when the finding of defamation happened in a default judgment entered without any adversary argument by the comment author (who failed to appear) or by Yelp (which wasn't made a party).

The California Supreme Court has agreed to hear *Hassell*,²⁴² and I think it ought to reject any such automatic obligation on the part of Yelp, Google, and the like. Sometimes those services will themselves smell a rat, and conclude an order was fraudulently obtained, or at least demand more information from the person submitting the order.²⁴³ I've noticed, for instance, that Google generally hasn't deindexed government pages—though with some exceptions, likely accidental²⁴⁴—even when the orders were listed in takedown orders issued by other governments. Likewise, Google generally seems not to deindex mainstream media pages, especially when there is no reason to think that the authors of the pages are responsible for any defamation.

Sometimes Google or Yelp will hear from the target of the order, who can prove to them that the order is invalid.²⁴⁵ Sometimes they will hear from researchers who spot unsound orders.

This is useful input that they should be free to act on. Given how flawed the judicial system is as a factfinder—especially considering the possibility of default judgments, stipulations that reflect litigation pres-

²⁴⁰ [Cite, distinguish aiding-and-abetting cases.]

²⁴¹ [Cite.]

²⁴² [Cite.]

²⁴³ In *Hassell*, for instance, Yelp's lawyer pointed out that it was unclear that Hassell had properly served Bird—the proof of service stated that the complaint was delivered to an address in Oakland, but the reviewer had stated that she lives in Los Angeles, and the person who received the complaint in Oakland had said that “he hadn't seen [Bird] in a couple of months.” Moreover, Yelp thought there was not enough evidence that the two reviews that formed the basis of the lawsuit, posted by Yelp users J.D. and Birdzeye B., were actually written by the same person. Letter from Aaron Schur, Senior Director of Litigation, Yelp Inc. to Dawn L. Hassell, Feb. 3, 2014, at 2–3.

²⁴⁴ [Cite California administrative decision.]

²⁴⁵ *See, e.g.*, *Patel v. Chan*, [cite].

sure rather than factual inaccuracy, and outright fraudulent stipulations—online services should offer an extra check before an order leads to a takedown or deindexing.

Of course, if the online services are legally bound by the orders, they could still in principle move to intervene in the case and vacate the order. But this could easily run into the tens of thousands of dollars for even the simplest procedures, especially since the court orders can come from all over the country, and would require outside local counsel. The services would thus have very little incentive to fight even the most patently unsound court orders.

[Add brief discussion of the possibility of adapting the DMCA counter-notification model, and the weaknesses of that model, especially when applied to alleged libel.]

IV. PRIVACY (DISCLOSURE OF PRIVATE FACTS)

A. *The Official Model: Civil Liability*

For several decades, the legal system has generally tried to prevent disclosure of private facts using the risk of civil liability.²⁴⁶ The disclosure of private facts tort has been defined narrowly, as limited to information that is viewed as (1) highly sensitive and (2) not newsworthy, and only when (3) it is communicated to largish groups, rather than just a few friends.²⁴⁷ And some state courts have rejected the tort altogether, partly on First Amendment grounds.²⁴⁸ But the tort has been mostly accepted as the chief protection for informational privacy.²⁴⁹ And the recent \$140 million verdict in the *Gawker* case²⁵⁰ shows its potential effectiveness against media organizations: Few *Gawker*-like sites are likely to display unauthorized sex videos in the coming years.

But, as with libel, liability for disclosure of private facts does little to deter judgment-proof defendants, especially when they victimize poor potential plaintiffs. Say John posts nude photographs of Mary; Mary can't afford to hire a lawyer; and John lacks the assets that would make

²⁴⁶ [Cite Prosser article for the view as of 1960; Restatement of Torts.]

²⁴⁷ RESTATEMENT (SECOND) OF TORTS § 652D.

²⁴⁸ See *Brunson v. Ranks Army Store*, 73 N.W.2d 803 (Neb. 1955); *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988); *Anderson v. Fisher Broadcasting*, 712 P.2d 803 (Or. 1986); *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977); see also *Doe v. Methodist Hospital*, 690 N.E.2d 681 (Ind. 1997) (splitting 2-2-1 on whether the tort should be recognized, with one Justice expressing no opinion).

²⁴⁹ I myself think the tort is too broad and vague to be constitutional. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 *Stanford L. Rev.* 1049 (2000). But I am in the minority on this.

²⁵⁰ [Cite.]

the case appealing to a contingency fee lawyer. Unless Mary has a well-off supporter or a lawyer who will take the case pro bono—possible,²⁵¹ but unlikely—a civil lawsuit is hard to envision.

And, as with libel, litigants, prosecutors, and judges have been experimenting with other means for fighting what they see as invasions of privacy: criminal prosecution, and injunctions backed by the threat of criminal prosecution.

Injunction: <https://www.lumendatabase.org/notices/15403019>

B. Criminal Libel

Most of us view libel law today as a means for restricting false statements, while the disclosure of private facts tort punishes true statements.²⁵² But historically, criminal libel law has generally banned statements that injure reputation, which could include true statements.²⁵³ And while truth has long been a defense in libel cases, until the 1960s that defense has also required a showing that the true statement was said with “good motives” and for “justifiable ends.”²⁵⁴

I think that, under modern First Amendment libel jurisprudence, truth must be an absolute defense to libel prosecutions; and many courts agree.²⁵⁵ But some criminal libel statutes continue to punish even true statements if said for bad motives (or have continued to do so until recently).²⁵⁶ And some of these statutes have been used to prosecute revenge porn.²⁵⁷ Such material, the theory presumably goes, harms the victim’s reputation, and even if the depictions are accurate, they were distributed with bad motives (revenge) and without justifiable ends.²⁵⁸

²⁵¹ Billionaire investor Peter Thiel famously supported the lawsuit against Gawker. [Cite.] And in at least one prominent online speech case, the lawsuit by two Yale Law School students based on insulting, defamatory, and threatening postings on AutoAdmit.com, the plaintiffs got pro bono representation from Stanford law professor (and experienced practitioner) Mark Lemley and Connecticut lawyer (and Yale Law School research scholar) David N. Rosen. <http://blogs.wsj.com/law/2007/06/12/students-file-suit-against-autoadmit-director-others/>. Such help for plaintiffs, though, seems likely to be a rare exception.

²⁵² [Cite.]

²⁵³ [Cite.]

²⁵⁴ [Cite.]

²⁵⁵ *State v. Turner*, __ (Minn. Ct. App. 2015); *State v. Helfrich*, 922 P.2d 1159, 1161 (Mont. 1996); *Commonwealth v. Armao*, 286 A.2d 626, 632 (Pa. 1972); *Weston v. State*, 528 S.W.2d 412, 416 (Ark. 1975).

²⁵⁶ See IDAHO CODE §§ 18-4801, 4803; MINN. STAT. ANN. § 609.765 (2015) (held unconstitutional by *State v. Turner*, __ (Minn. Ct. App. 2015), in part because it did not provide for an absolute defense of truth); 21 OKLA. STAT. ANN. §§ 771, 774; WISC. STAT. ANN. § 942.01; 14 V.I. CODE § 1174.

²⁵⁷ [Cite.]

²⁵⁸ One can imagine revenge porn that involves false statements, explicit or implicit—for instance, posting such material while impersonating the victim, and thus falsely con-

Indeed, such privacy-protecting possibilities of criminal libel law date back to the very first case in which the good motives/justifiable ends test was articulated—the 1804 *People v. Croswell* argument by Alexander Hamilton (one of the last public acts of Hamilton’s life). Harry Croswell, a young Federalist editor, was indicted for libeling then-President Thomas Jefferson.²⁵⁹ Hamilton defended him, arguing that the truth had to be available as a defense in criminal libel cases—a position contrary to the common law as then understood.²⁶⁰ But Hamilton limited his proposal to truth said with good motives and for justifiable ends: Even the truth should not be immune from criminal punishment, he reasoned, if said “maliciously,” “to the gratification of the worst of passions, as in the promulgation of a man’s personal defects or deformity.”²⁶¹

Hamilton’s argument in favor of allowing truth as a defense did not prevail in that case: The court split 2 to 2, thus leaving Croswell’s conviction standing.²⁶² But Justice James Kent (who later became Chancellor) endorsed Hamilton’s views in his opinion.²⁶³ The following year, the New York Legislature enacted a statute implementing Hamilton’s view.²⁶⁴ In the decades after that, many state constitutions were framed precisely this way.²⁶⁵ And during the 1800s, the “good motives” test was sometimes seen as a protection for privacy, as in Chancellor Kent’s *Commentaries on American Law* (1827)²⁶⁶ or in *State v. Bienvenu* (1884):

veying the message that the victim actually released the material voluntarily. But these prosecutions didn’t involve such impersonation.

²⁵⁹ [Cite.] Curiously, Croswell’s alleged libel was that Jefferson, before he became President, had paid newspaper editor James Callender to libel then-Presidents George Washington and John Adams). Callender was himself convicted in 1800 under the Sedition Act, though Jefferson pardoned him. Callender was also the pamphleteer who first exposed Hamilton’s affair with Maria Reynolds.

Croswell was not prosecuted, of course, under the federal Sedition Act, which had expired by then and wasn’t renewed—despite an attempt by Federalist Congressmen to renew it, [cite], even when they knew that the President and administration whom it would protect would be Jefferson. But states still recognized the common-law crime of seditious libel; Croswell was prosecuted under it by New York authorities.

²⁶⁰ See generally 4 BLACKSTONE, COMMENTARIES *150–53; Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985).

²⁶¹ [Cite.]

²⁶² [Cite.]

²⁶³ [Cite.]

²⁶⁴ [Cite.]

²⁶⁵ [Cite.]

²⁶⁶ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 21, 22 (1827) (endorsing libel law as a means of punishing even true statements that reveal “personal defects, or misfortunes, or vices,” and thus injure “the peace and happiness of families” and produce “private misery, and public scandal and disgrace”).

Indeed, that would be a barbarous doctrine which would grant to the evil-disposed the liberty of ransacking the lives of others to drag forth and expose follies, faults or crimes long since forgotten, and perhaps expiated by years of remorse and sincere reform, with no other motive than to gratify hatred or ill-will by blasting the character and reputation of their victims. Such is not the law of Louisiana.²⁶⁷

(Note that this doctrine was limited to criminal law; the dominant rule in civil liability for libel was that the truth was an absolute defense,²⁶⁸ which might be why Warren & Brandeis’s famous *The Right to Privacy* article did not rely on the bad motives / unjustifiable ends doctrine.²⁶⁹)

Yet the theory that true statements can be punished when said with bad motives or for unjustifiable ends is a poor fit for privacy concerns.²⁷⁰ First, any such limitation would allow the punishment of many statements that do not invade privacy—for instance, reports of the target’s well-known misdeeds, if motivated by some motive deemed to be unworthy. Second, it would deter even well-intentioned statements that do not invade privacy, if a speaker is worried that his motives will be misunderstood. For these reasons, libel laws that include such a limitation on the defense of truth have been struck down as unconstitutional by almost all the courts that have considered them.²⁷¹

Third, criminal libel law would do nothing about intrusions on privacy that do not injure a person’s reputation. For instance, say that someone reveals that an ordinary citizen has cancer, a matter that the person has long tried to keep secret. Such a revelation wouldn’t expose the ill person to “hatred, contempt, ridicule, degradation or disgrace in society,” and often wouldn’t lead to “injury to business or occupation.”²⁷² Yet many privacy advocates view this as a paradigm example of a disclosure of private facts.²⁷³

Indeed, while the public disclosure of nude or sexual photos of a person might sometimes (in my view wrongly) lead to “ridicule, degradation

²⁶⁷ 36 La. Ann. 378, 382 (1884); see also *Castle v. Houston*, 19 Kan. 417, 425 (1877) (stating that criminal libel law outlaws publishing material “to create misery by exposing the latent and personal defects of associates or acquaintances,” though without explaining whether the punishment stemmed from concern about invasion of privacy or from concern about preventing fights or duels); Harnett & Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425, 437–43 (1949); Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 61–69 (1931).

²⁶⁸ See, e.g., *Castle*, 19 Kan. at 425; Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964) (concluding that only a small minority of states limited the defense of truth in civil cases).

²⁶⁹ [Cite.]

²⁷⁰ See Franklin, *supra* note 70, at 825.

²⁷¹ See *State v. Turner*, ___ (Minn. Ct. App. 2015); *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996); [more]. *But see* [cite].

²⁷² I quote the definition of criminal libel from MINN. STATS. ANN. § 609.765, but other statutes contain the same or similar language.

²⁷³ [Cite.]

or disgrace” for the victim, sometimes it would not. When stolen nude photos of actress Jennifer Lawrence were disclosed,²⁷⁴ my sense is that few thought the photos made her ridiculous, or caused her social degradation or disgrace. What made them harmful wasn’t that they damaged her reputation, but that they made public something that people should be able to keep private—a concern to which the criminal libel bad motives doctrine is not tailored.

C. Criminalizing the Disclosure of Private Facts Generally

Some states have recently generally criminalized the disclosure of private facts. As Part 0 noted, California courts have read the California “identity theft” statute to broadly criminalize intentional torts—such as libel and the disclosure of private facts—that use a person’s personal identifying information, including the person’s name or photograph. In *People v. Bollaert*, for instance, prosecutors used this theory to punish someone for running a revenge porn site (which also involved extortion).²⁷⁵ But the rationale of the court’s decision upholding the conviction would apply to all tortious disclosure of private facts, and not just the display of nude or sexual images.

A North Dakota statute makes this explicit, making it a crime to intentionally or recklessly “[e]ngage[] in harassing conduct by means of intrusive or unwanted acts, words, or gestures that are intended to adversely affect the . . . privacy of another person,” when this is done intending “to harass, annoy, or alarm . . . or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by the individual’s behavior.”²⁷⁶ Most tortious disclosure of private facts is likely to annoy the subject, and is said at least with recklessness of that possibility; it would thus be generally criminal.²⁷⁷

A North Carolina statute likewise banned “[p]osting . . . on the Internet [any] private, personal, or sexual information pertaining to a minor” “[w]ith the intent to intimidate or torment a minor.”²⁷⁸ The North Carolina Supreme Court held that this was unconstitutional, partly because the ban on posting “personal . . . information” was unconstitutionally overbroad.²⁷⁹

Minnesota law lets judges enjoin “repeated incidents of intrusive or unwanted acts, words, or gestures that . . . are intended to have a sub-

²⁷⁴ [Cite.]

²⁷⁵ [Cite.]

²⁷⁶ N.D. CENT. CODE § 12.1-31-01(1)(h) (2012).

²⁷⁷ The material in much of the rest of this subsection is borrowed from Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 NW. U. L. REV. 731, __ (2013).

²⁷⁸ N.C. GEN. STAT. § 14-458.1(a)(1)(d).

²⁷⁹ *State v. Bishop*, __ S.E.2d __ (N.C. 2016).

stantial adverse effect on the . . . privacy of another.”²⁸⁰ Violating such an injunction is a crime.²⁸¹ And Minnesota cases show that such “substantial adverse effect” on “privacy” can include the disclosure of private facts:

- *Johnson v. Arlotta* concluded that defendant’s “blogging and communications to third parties” about his ex-girlfriend could be enjoined on the grounds that they interfered with her “privacy,” regardless of “their truth or falsity.”²⁸²
- *Faricy v. Schramm* concluded that defendant’s sending a letter to his son’s Catholic school alleging that the son’s grade school math teacher²⁸³ was gay, and implying that the teacher should be fired as a result,²⁸⁴ and could likewise be enjoined.²⁸⁵ (The court of appeals reversed on the grounds that the statute applied only after repeated incidents of such speech, and the letter was a single incident.²⁸⁶)
- *Beahrs v. Lake* concluded that it was “harassment” for a fired employee to retaliate against his ex-employer by sending “photocopies of public documents” “to more than 60 of [the ex-employer’s] personal and business acquaintances.”²⁸⁷ The public documents were mostly related to the ex-employer’s past minor misconduct, including a document evidencing the ex-employer’s guilty plea to driving under the influence, a tax lien against the ex-employer, and a police report describing how one of the ex-employer’s employees “had been cited for selling a cigar to an underage decoy during a tobacco compliance check.”²⁸⁸ The court of appeals reversed on the grounds that the ex-employer “had no legitimate expectation of privacy” in “accurate copies of public

²⁸⁰ MINN. STAT. ANN. § 609.748, subdvs. 1(a)(1), (4)(a), (5)(a), (6) (West 2009).

²⁸¹ [Cite.]

²⁸² No. A11-630, 2011 WL 6141651, at *3 (Minn. Ct. App. Dec. 12, 2011). The *Johnson* opinion also expressed concern that the statements were indirect attempts to contact the ex-girlfriend, and not just speech about her. But the appellate court affirmed the trial court order that specifically directed defendant to “remove his blog [about the ex-girlfriend] from the Internet.” *Id.* at *2. And the appellate court believed defendant’s misconduct rested in part on his sending “extremely personal, sensitive information about” the ex-girlfriend to third parties and “shar[ing] sensitive information about [the ex-girlfriend] in a manner that substantially and adversely impacted her privacy interests.” *Id.* at *3, *5.

²⁸³ Statement of the Case of Appellant at 4–5, *Faricy v. Schramm*, No. C8-02-0689 (Minn. Ct. App. Apr. 29, 2002), <http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf>, at 4.

²⁸⁴ No. C8-02-0689, 2002 WL 31500913 (Minn. Ct. App. Nov. 12, 2001).

²⁸⁵ Restraining Order at 1, *Faricy*, No. C8-02-0689 (Minn. Dist. Ct. Mar. 1, 2002), <http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf>, at 13.

²⁸⁶ *Faricy*, 2002 WL 31500913, at *2.

²⁸⁷ No. C3-97-2222, 1998 WL 268075, at *1 (Minn. Ct. App. May 26, 1998).

²⁸⁸ *Id.*

records,”²⁸⁹ but the reasoning suggests that the statute might apply to mailings of embarrassing information that is not in public records.

The appellate decisions in *Faricy* and *Behrs* didn’t deny that speech about a person might be covered by the “privacy” prong of the state statute. And the decision in *Johnson* expressly concludes that speech that reveals embarrassing facts about a person can be “harassment,” and lead to a restraining order.²⁹⁰ Likewise, some courts even in other states have issued injunctions that ban people from revealing personal information about others, usually their ex-spouses or ex-lovers.²⁹¹

But even if a revival of criminal libel law can be justified, the criminalization of the disclosure tort strikes me as unsound. I won’t repeat here the debate about whether and when the disclosure tort is constitutional.²⁹² Yet even if the tort is constitutional, I think it’s neither wise nor constitutional to turn the tort into a crime.

To begin with, the “of legitimate concern to the public” standard is famously vague. The term requires a normative judgment that different people will likely make differently, and lower court cases haven’t made the matter clear, especially since the judgment is so fact-specific.²⁹³ Whether or not a statement about a person’s being homosexual, being transsexual,²⁹⁴ having an affair, suffering from an illness, owing a debt, and so on is “of legitimate concern” depends heavily on who the person is, what controversies he is involved in, what has been said about the allegations by others, and so on. As a result, it’s unlikely that further precedents will do much further clarify the uncertainty of the standard.

²⁸⁹ *Id.*

²⁹⁰ *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651 (Minn. Ct. App. Dec. 12, 2011). Likewise, in *Tarlan v. Sorensen*, No. C2-98-1900, 1999 WL 243567 (Minn. Ct. App. Apr. 27, 1999), plaintiff wife sought a restraining order on the grounds that defendant husband “released [plaintiff wife’s] medical records without her permission.” *Id.* at *2. The appellate court affirmed the denial of a restraining order, but concluded that “while both parties have said inappropriate things about each other in front of, or to their employees, neither party’s conduct rose to the level necessary to require the issuance of a harassment restraining order under Minn.Stat. § 609.748.” *Id.* The court’s reasoning seems to be that revelations of private information about others might be actionable under the statute if more egregious than that present in the case—for instance, if the information wasn’t just revealed to a few employees.

²⁹¹ [Cite.]

²⁹² *See supra* notes 248–249.

²⁹³ [Cite articles; cite Diane Lenheer Zimmermann, *Requiem for a Heavyweight*.]

²⁹⁴ *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983) (holding that a reasonable jury could conclude that publishing the fact that the first woman student body president at a community college was a transsexual wasn’t “newsworthy,” and was therefore actionable under the disclosure tort).

And even if such a vague standard is a permissible basis for civil liability, it may not be permissible when criminal punishment is involved.²⁹⁵

To be sure, there is a similarly normative value-of-the-speech standard that is used in criminal cases: the obscenity law exclusion of speech that has “serious literary, artistic, political, or scientific value.”²⁹⁶ But the definition of obscenity is hardly a great success story of First Amendment jurisprudence. Modern obscenity law has avoided posing a grave threat to free speech only because obscenity has in practice been read narrowly, and in particular has been limited to the sort of hard-core pornography that is very distantly removed from the communication of facts or ideas, whether on public topics or private topics.

Indeed, in recent years, the Court has refused to recognize new speech restrictions by analogy to obscenity law. In *United States v. Stevens*, the Court expressly rejected the theory that an exception for speech with “serious value” could save a ban on distribution of depictions of animal cruelty.²⁹⁷ In *Brown v. Entertainment Merchants Ass’n*, the Court refused to expand the obscenity-for-minors category to cover depictions of violence as well as sex, concluding that an exception for speech with serious value “does not suffice” to validate laws other than obscenity laws.²⁹⁸ And a two-Justice concurrence expressly noted the unacceptable vagueness of a “serious value” test when it is applied outside the area of pornography.²⁹⁹

It’s also not clear how the disclosure tort applies to Facebook and other social media used by people to communicate with their acquaintances.³⁰⁰ The tort, which was developed largely with the news media in mind, was never understood as keeping people from telling each other about developments in their social circle, whether these had to do with sexual behavior, disease, or financial setbacks.

²⁹⁵ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

²⁹⁶ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁹⁷ 130 S. Ct. 1577, 1591 (2010) (“In *Miller [v. California]*, we held that ‘serious’ value shields depictions of sex from regulation as obscenity We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation.” (internal citations omitted)).

²⁹⁸ 131 S. Ct. 2729, 2734 (2011).

²⁹⁹ *Id.* at 2746 (Alito, J., concurring).

³⁰⁰ For an example of a request for a restraining order based on alleged privacy invasions on Facebook, see *Olson v. LaBrie*, No. A11–558, 2012 WL 426585 (Minn. Ct. App. Feb. 13, 2012). The *Olson* court concluded that the Minnesota statute’s prohibition on actions that “have a substantial adverse effect” on another’s privacy should not be interpreted using tort law principles, and concluded that the speech there—“innocuous family photos” coupled with “mean and disrespectful” comments didn’t substantially affect privacy. *Id.* at *3. But if a court concluded that a harassment statute should be read in terms of the disclosure tort, and the speech did indeed deal with private matters, the court would have to decide whether Facebook posts constitute sufficient “publicity” to be civilly actionable and therefore (by hypothesis) enjoined and criminally punishable.

Such gossip is commonplace. It often has significant value to the participants, because it tells people who in their social circle is potentially untrustworthy or even dangerous. And restricting such speech would often affect people's ability to discuss their own lives: If you want to explain to your friends why you're depressed, or why you've broken up with someone, or why you're moving out of town or taking another job, you might need to tell them about your husband's cheating, your ex-boyfriend's sexually transmitted disease, your ex-girlfriend's impending bankruptcy, or even your mother's dementia.

For all these reasons, the tort has generally required "publicity" in the sense of communication beyond a small group of personal acquaintances.³⁰¹ But today, much of this speech has moved online, especially to sites such as Facebook. And the publicity requirement, developed in a time when people could either talk to a few people orally or to many thousands in a newspaper, does not offer much guidance about whether talking to one's circle of several dozen (or even several hundred) Facebook "friends" counts as "publicity."

As I've argued elsewhere and will elaborate on below, privacy concerns might suffice to justify narrow restrictions on clearly defined kinds of speech that very rarely have value—public or private—to listeners or speakers. Nude photos or sex tapes might be one example.³⁰² Social security numbers might be another.³⁰³ But a broad and vague criminal prohibition on speech that invades privacy ought not be constitutional.³⁰⁴

D. *Nonconsensual Pornography*

So, as with libel, criminalizing the entire category of disclosure of private facts is, I think, a bad idea. But narrower and clearer prohibitions may well be sound; and the criminalization of revenge porn—or, more precisely, nonconsensual porn³⁰⁵—is one such.³⁰⁶

³⁰¹ [Cite.]

³⁰² Volokh, *Freedom of Speech and Information Privacy*, *supra* note 92, at 1094; *see, e.g.*, *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (discussing jury verdict for plaintiff whose ex-husband had distributed nude photographs of plaintiff); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (stating that disclosure of nude photographs would generally be actionable).

³⁰³ *See, e.g.*, *Ostergren v. Cuccinelli*, 615 F.3d 263, 280, 285–86 (4th Cir. 2010) (suggesting that private persons who make public records available could be required to redact social security numbers, but not so long as the government itself fails to redact such information on its own sites); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1146 (2005).

³⁰⁴ *Dunham v. Roer*, 708 N.W.2d 552, 565–66 (Minn. Ct. App. 2006), thus erred, I think, in upholding the Minnesota ban.

³⁰⁵ As I've argued elsewhere, nonconsensual pornography should be banned regardless of whether the speaker is motivated by "revenge" or some other desire to distress. *See* Eugene Volokh, *Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1405–06

Nonconsensual porn is an especially severe intrusion on privacy. Sexually themed pictures of ourselves naked, or having sex, are about as “highly offensive” to a reasonable person’s sense of privacy as can be.³⁰⁷ And they are also almost never “of legitimate concern to the public”:³⁰⁸ they don’t contribute to the search of truth, democratic self-government, or people’s decisionmaking about their daily lives. Moreover, a ban on knowing distribution of nonconsensual porn is unlikely to deter valuable speech, because such a ban can be relatively precisely drafted.

And a First Amendment exception for nonconsensual porn is consistent with the Court’s recent shift to a tradition-based definition of the First Amendment exception.³⁰⁹ There is much to dislike about the obscenity exception, but the strongest case for protecting pornography arises when it involves “consenting adults.”³¹⁰

Obscenity doctrine thus already provides for a more relaxed substantive definition of obscenity when the material is distributed to people other than consenting adults, especially children³¹¹ but perhaps also unwilling viewers.³¹² Indeed, even the doctrine’s critics, such as Justice Brennan, have generally recognized that distribution of pornography to unwilling viewers might be restricted.³¹³ Distribution of pornography that involves unwilling models should be punishable as well, with the prurient interest and patent offensiveness requirements suitably relaxed.

To be sure, there are extraordinary situations in which even non-consensual porn might be valuable: Consider a hypothetical Anthony Weiner scenario in which then-Congressman Weiner sent actual naked

(2016). Say, for instance, that Alan has sexual photos of his ex-girlfriend Betty, Betty becomes famous, and Alan sells them not because he wants revenge—indeed, he may regret the pain he is causing her—but just because he wants the money. That should be no less culpable than distributing the photos because of a desire to get back at Betty for leaving him.

³⁰⁶ See, e.g., CAL. PENAL CODE § 647(j)(4)(A); CAL. CIV. CODE § 48.95; GA. CODE ANN. §§ 16-11-90(a)(1), (b)(1); HAW. REV. STAT. § 711-1110.9(1)(b). [Cite Danielle Citron; Mary Anne Franks; Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661 (2016).]

³⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 652D.

³⁰⁸ *Id.*

³⁰⁹ [Cite Stevens; *Brown v. Entertainment Merchants*; *Alvarez*.]

³¹⁰ [Cite.]

³¹¹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

³¹² *Redrup v. New York*, 386 U.S. 767, 769 (1967) (per curiam) (implying that material may be especially likely to be found obscene when it “assault[s] . . . individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it”).

³¹³ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (so interpreting *Redrup*).

pictures of himself to someone, rather than just a photo of himself with an erection covered by his underwear.³¹⁴

But an exception for images that have serious political, scientific, and perhaps artistic value should minimize this problem. In *United States v. Stevens*, the Court did hold that a ban on depictions of animal cruelty couldn't be upheld despite the existence of such an exception;³¹⁵ that rejection of the exception, though, relied heavily on how facially overbroad the original ban was.³¹⁶ As the Court's reasoning in *New York v. Ferber*, the child pornography case, suggests, when a ban is focused almost exclusively on constitutionally valueless speech, an exception for valuable speech would suffice to keep the ban constitutional.³¹⁷

So a prohibition on nonconsensual porn is a legitimate means of protecting privacy. And, returning to the theme of this Article, a criminal prohibition is necessary here.

A trial court did strike down the Vermont nonconsensual porn ban, partly on the grounds that "Even if the court assumes the State meets its burden of a compelling governmental interest, being protecting its citizens privacy rights and perhaps reputational rights, it does not meet its burden of showing there are no less restrictive alternatives," such as civil liability.³¹⁸ But the prospect of civil liability will do next to nothing in order to deter judgment-proof speakers, of whom there are millions.

E. Crime-Facilitating Personal Information: Home Addresses, Social Security Numbers, Bank Account Numbers

The disclosure tort has generally been applied to the publication of private information that embarrasses. But in principle, it could also be applied to the publication of private information that helps facilitate crimes against the person and thus makes the person fearful.

Indeed, three 1980s cases concluded that publishing the name of a crime witness might be tortious on this theory, if the criminals didn't know the name before, and could thus use the name to intimidate or si-

³¹⁴ [Cite actual Weiner story.]

³¹⁵ [Cite.]

³¹⁶ [Cite.]

³¹⁷ In *Ferber*, the Court held that a statutory exception for valuable speech wasn't necessary; all the Justices concluded that, at most, people who were distributing child pornography that nonetheless had serious value would be able to raise that as a defense in an as-applied challenge. Compare 458 U.S. 747, 775 (1982) (O'Connor, J., concurring) (arguing that no such as-applied defense was needed) with *id.* at 776–77 (Brennan, J., concurring in the judgment) (arguing that an as-applied defense had to be provided in the right cases). But the Court's reasoning makes clear that such a statutory exception, if it were provided, would be sufficient to deal with the rare instances of child pornography that has serious value.

³¹⁸ *State v. Vanburen*, No. 1144-12-15Bncr (Vt. Super. Ct. July 1, 2016).

lence the witness.³¹⁹ The same would in principle apply to publishing someone's home address, social security number, bank account numbers, and the like.³²⁰

But, as with nonconsensual pornography, cheap speech on the Internet makes it easier than ever for such information to get out. Indeed, newspapers often have strong nonlegal reasons not to publish the information: They may have customers or advertisers who would object to what they see as invasion of privacy. (Consider the public pushback against newspapers who publish the names and addresses of people who have permits to carry concealed weapons.³²¹) But individual bloggers might face no such pressure, especially if they blog pseudonymously. And, as with libel, many judgment-proof individual authors may be undeterred by damages.

Perhaps because of this, some states have begun to criminalize the publication of certain personal information that they believe can facilitate crimes against people. California law, for instance, allows courts to issue injunctions forbidding "post[ing] . . . on the Internet the home address or telephone number of any elected or appointed official if that official has . . . made a written demand of [the poster] to not disclose his or her home address or telephone number."³²² Illinois imposes a similar rule, though limited to judges.³²³ A Florida statute forbids publishing the names or home addresses of police officers, if the posting is done "maliciously, with intent to obstruct the due execution of the law or with the intent to intimidate, hinder, or interrupt any law enforcement officer in the legal performance of his or her duties."³²⁴

Two district courts have struck down such bans on the publication of home addresses,³²⁵ and I think they were right, because such infor-

³¹⁹ *Capra v. Thoroughbred Racing Ass'n*, 787 F.2d 463 (9th Cir. 1986); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988); *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982).

³²⁰ *City of Kirkland v. Sheehan*, No. 01-2-09513-7 SEA, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001) (refusing to enjoin distribution of police officers' names and addresses, but enjoining distribution of their social security numbers);

³²¹ [Cite.]

³²² CAL. GOV'T CODE § 6254.21.

³²³ ILL. COMP. STAT. ANN. § 90/2-5.

³²⁴ FLA. STAT. § 843.17; *see also* KAN. STAT. ANN. § 21-5905 (outlawing "knowingly making available by any means personal information about a judge or the judge's immediate family member"—including home addresses, photographs, family members' places of employment, and family members' schools—"if the dissemination of the personal information poses an imminent and serious threat to the judge's safety or the safety of such judge's immediate family member, and the person making the information available knows or reasonably should know of the imminent and serious threat"); COLO. REV. STAT. ANN. § 18-9-313 (similar, but applicable to police officers and prosecutors as well as judges, and excluding employment and schooling); ILL. COMP. STAT. ANN. § 90/3-1 (similar to Kansas statute).

³²⁵ [Cite *Brayshaw*; *Sheehan*.]

mation has valuable uses. Picketing people's homes is legal, unless it's forbidden by a specific ordinance.³²⁶ Even if such an ordinance bans focused residential picketing, the Court has upheld such bans in part because parading through the targets' neighborhood remains legal.³²⁷ Indeed, the Court struck down an injunction that banned all picketing within 300 feet of a person's home;³²⁸ such picketing near, even if not immediately in front of, a person's home must be constitutionally protected. And if parading past a person's home or picketing near it is protected, then people must be able to inform each other where that home is located.

Likewise, government officials' addresses may often be relevant to whether the officials are complying with local home maintenance ordinances, or whether they live in the proper district. In one recent incident, for instance, the mayor of a Los Angeles suburb was allegedly faulting businesses for having bars on their windows, and city code enforcement officials were citing people for having oil on their driveways. A critic responded by showing a photograph of the mayor's home at a city council meeting—the home's windows had bars, and there was oil on the mayor's driveway.³²⁹

And in *NAACP v. Claiborne Hardware Co.*, the Court held that people who were trying to enforce a black boycott of white-owned stores had a First Amendment right to post "store watchers" who would take down the names of noncomplying black residents, and then distribute and read aloud those names at black churches.³³⁰ Though that didn't involve the publication of people's addresses, it seems likely that most black citizens of Claiborne County, Mississippi in 1965 would know each others' addresses;³³¹ announcing the names was as good as telling people where all the noncompliers lived. Yet even though this was likely intimidating to many, especially since there were some violent incidents directed at

³²⁶ *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). Even if focused residential picketing is banned by a city ordinance, parading through the targets' neighborhood is constitutionally protected. See *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 775 (1994); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). I think it's therefore not correct to say that information including a person's address "is intrinsically lacking in expressive content." Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 397, 404 (2003).

³²⁷ *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988).

³²⁸ *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 775 (1994).

³²⁹ [Cite Paul Cook.]

³³⁰ [Cite.]

³³¹ Claiborne County was a rural county that had only about 7,500 black residents. U.S. DEPT OF COMMERCE, COUNTY AND CITY DATA BOOK 1972, at 258

noncompliers,³³² the Court held that an injunction against such speech was unconstitutional.³³³

More broadly, people's addresses have long been included in many public records, such as voter rolls, property tax records, and political candidacy registration forms. Indeed, all law professors and law students have free access to a massive database of address information in Lexis's People Search service. Others can get access to similar such services on an item-by-item basis online, and relatively cheaply.³³⁴

I can certainly see why people would prefer not to have their names posted on free, high-profile political advocacy sites, where they can easily be seen by hotheads, a few of whom might be inclined to vandalism or worse. But so long as such information is broadly available, and is useful for at least some sorts of political advocacy, I think its distribution cannot be banned.

On the other hand, as I've argued before, certain kinds of information—such as social security numbers, computer passwords, bank account numbers, and other such material—generally lack lawful use. Their distribution therefore can be properly restricted, in order to prevent unlawful uses.³³⁵

And if that is so, then such restrictions can only be effective if they carry the risk of criminal punishment—either direct punishment, or punishment for violating an injunction against distributing such material. Civil damages liability under the disclosure tort, or under some specialized statute, might have sufficed when mass distribution was almost entirely the province of the media (and of other established organizations). Such liability is largely ineffective when judgment-proof defendants can distribute the information online.

V. HARASSMENT

Finally, we turn to one other area that has burgeoned in recent years, far away from the U.S. Supreme Court: the law of “anti-harassment” injunctions, which ban a vast range of offensive speech about their beneficiaries.

A. *Speech-restrictive “anti-harassment” injunctions*

Let me start with some examples:

³³² [Cite.]

³³³ [Cite.]

³³⁴ [Cite.]

³³⁵ See Eugene Volokh, *Crime-Facilitating Speech*, [cite]; Eugene Volokh, *The “Speech Integral to Unlawful Conduct Exception*, [cite].

The poet: Linda Ellis wrote a poem called “The Dash,” about life and death.³³⁶ The poem spoke to many people, who then posted it on their own web pages—only to draw letters from Ellis threatening copyright infringement lawsuits, and demanding payments of thousands of dollars as settlements.³³⁷ People began to criticize her in discussions on a site run by Matthew Chan, which had been set up to criticize allegedly excessive demands by copyright owners; there were eventually thousands of posts condemning her.³³⁸ Ellis then sued Chan and got an “antistalking” injunction, which ordered Chan to remove “all posts relating to Ms. Ellis” from the site—not just allegedly defamatory posts, not just allegedly threatening posts, but all posts.³³⁹

The business rival: Billionaire businessman Alki David posted sharply critical statements about business rival John Textor, who competes with David in producing holograms for the music industry.³⁴⁰ David also sent some e-mails directly to Textor. Textor then got a court order barring David from, among other things, “posting any tweets” or “any images . . . directed at John Textor without a legitimate purpose.”³⁴¹

The police officer: Patrick Neptune believes police officer Philip Lanoue cut him off in traffic, gave him an unjustifiable ticket, and then informed Neptune’s parents of the incident. Neptune responded by criticizing police officer Philip Lanoue on the site *copblock.org*,³⁴² sending several letters to public officials, and sending three letters to Lanoue’s home address. Lanoue got a court order barring Neptune from, among other things, “posting anything on the Internet regarding the officer.”³⁴³

The judge: Richard Heit’s fiancée, Sharon Streng, was involved in a family court case. Heit was upset about (among other things) Judge Cheryl Matthews’s handling of the cases, so he said some harsh things about the judge: “They are all liars,” “We will take [Judge] Matthews [Petitioner] out. She has had it in for you from the start. She is only one step over a traffic cop. She will be in jail,” “We will get this to appeals and take them all down,” “A farce! A mockery! A FUCKING JOKE! Dis-

³³⁶ [Cite.]

³³⁷ [Cite.]

³³⁸ The site had been initially set up in the wake of Getty Images sending such demand letters—which Chan and others labeled “extortion letters”—in 2006; hence the name, <http://extortionletterinfo.com>.

³³⁹ [Cite.]

³⁴⁰ See Eriq Gardner, *Hollywood Hologram Wars: Vicious Legal Feud Behind Virtual Mariah, Marilyn and Mick*, HOLLYWOOD REP., May 28, 2015, <http://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401>.

³⁴¹ *David v. Textor*, 189 So. 3d 871, 874 (Fla. Ct. App. 2016).

³⁴² <http://www.copblock.org/150994/florida-cop-tells-mommy-seat-belt-scofflaw/>.

³⁴³ *Neptune v. Lanoue*, 178 So. 3d 520 (Fla. Ct. App. 2015).

honest Judge,” “DO NOT VOTE FOR JUDGE CHERYL MATTHEWS if that is where you vote,” and the like.³⁴⁴ Another judge issued a restraining order that seemingly forbade Heit from making similar statements, and perhaps making any statements at all about Judge Matthews.³⁴⁵

The forensics expert and former state board member: Stacy David Bernstein is a clinical forensic psychologist—apparently a fairly prominent expert, who sometimes gives talks and classes at the FBI and other law enforcement organizations. He was also, until January 2015, a member of the Connecticut Board of Firearms Permit Examiners, a position to which he was appointed by the governor.³⁴⁶

Robert Serafinowicz had been a friend of Bernstein’s, but the two had a falling out. Serafinowicz then started criticizing Bernstein online (for instance, pointing to an abuse prevention order that had been entered against Bernstein, a judgment apparently entered against Bernstein for unpaid debts, and a possible arrest of Bernstein 30 years before), and sending letters to various government agencies that had dealings with Bernstein. Bernstein got a court order forbidding Serafinowicz from posting “any information, whether adverse or otherwise, pertaining to [Bernstein] on any website for any purpose.”³⁴⁷

The planning board member: Ronald Van Liew was running for town council member against Colleen Stansfield, the incumbent; in past elections, he had called Stansfield “a liar and corrupt,” and had some personal run-ins with her as well. A trial court forbade Van Liew from, among other things, mentioning Stansfield’s “name in any ‘email, blog, [T]witter or any document.’”³⁴⁸

The ex-girlfriend and successful video game developer: Zoe Quinn is a prominent video game developer; she had a short romantic relationship with Eron Gjoni, also a video game programmer. After the relationship ended, Gjoni posted a Web page that condemned what he saw as Quinn’s emotional mistreatment of him. This led to a torrent of online criticism of Quinn by others, including some threats of violence, partly because Gjoni’s post was interpreted as suggesting that some of the favorable reviews of Quinn’s games were written by reviewers who were themselves romantically involved with Quinn.³⁴⁹ That in turn led to an

³⁴⁴ [Cite.]

³⁴⁵ [Cite.]

³⁴⁶ [Cite.]

³⁴⁷ [Cite.]

³⁴⁸ [Cite; https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/01/critic-may-not-mention-planning-board-members-name-in-any-email-blog-twitter-or-any-document/?utm_term=.6781ea53de5d.] This temporary restraining order was reversed by another judge at the hearing for the permanent order ten days later, and the Massachusetts Supreme Judicial Court eventually held that Stansfield’s restraining order petition might have constituted malicious prosecution on her part. Van Liew v. Stansfield, [cite].

³⁴⁹ [Cite.]

ongoing debate between Quinn’s supporters and opponents—the Gamergate controversy, which is far too long and complicated to detail here.³⁵⁰ But what is significant for our purposes is that Quinn got a court order forbidding Gjoni from “post[ing] any further information about [Quinn] or her personal life on line or . . . encourag[ing] ‘hate mobs.’”³⁵¹

These are just seven examples, but the list can go on.³⁵²

B. *Why are courts doing this?*

[Acknowledge that some of the orders are against people with assets.]

I have discussed elsewhere why I think such orders generally violate the First Amendment.³⁵³ When I wrote that article, I had a few examples in hand; but the subsequent three years have provided many more, including all the ones given above. Some courts have indeed rejected such orders as unconstitutional,³⁵⁴ though others have upheld them.³⁵⁵

Here, I just want to speculate about why courts are so willing to enter such extraordinarily broad orders. And the reason, I suspect, is connected to the democratized, cheap speech provided by the Internet.

Repeated criticism, even if it consists of opinions and accurate factual statements, is undoubtedly disquieting. It can damage reputation, often using claims that a judge may view as unfair, even though not libelous. That is especially so if the criticism becomes prominent in Google searches for one’s name, and defines one to strangers or casual acquaintances. And if the criticism gets more of a direct readership, for

³⁵⁰ For accounts of this from somewhat different perspectives, see Zachary Jason, *Game of Fear*, BOSTON MAG., May 2015, <http://cle/2015/04/28/gamergate/>; Cathy Young, *Gamergate: Part I: Sex, Lies, and Gender Games*, REASON, Oct. 12, 2014, <http://reason.com/archives/2014/10/12/gamergate-part-i-sex-lies-and-gender-gam>; Cathy Young, *Gamergate: Part 2: Videogames Meet Feminism*, REASON, Oct. 22, 2014, <http://reason.com/archives/2014/10/22/gamergate-part-2-videogames-meet-feminis>.

³⁵¹ [Cite.]

³⁵² See also, e.g., *Scott v. Blum* (Fla. Ct. App.); documentary filmmaker case (Fla. Ct. App.); Montana case.

³⁵³ [Cite Northwestern article.]

³⁵⁴ [Cite Fla. cases.] Some courts have also rejected prosecutions under criminal harassment statutes, or even struck down some criminal harassment statutes as unconstitutionally overbroad. *State v. Bishop* (N.C.); *State v. Burkert* (N.J. Super. Ct. App. Div.) (quoting Northwestern article), *rev. granted*, ___ (N.J. Sept. 30, 2016); *State v. Bigelow* (Mass. 2016) (quoting Northwestern article); *State v. Marquan M.* (N.Y. 2015); *State v. Golb* (N.Y. 2015).

³⁵⁵ *Evilsizor* (Cal. Ct. App.); follow-up Cal. App. case; *Lambert* (Pa. Ct. App.); *Wedding v. Harmon* (Ky. Ct. App. 2016); *Westbrooke Condominium Ass’n v. Pittel*, 2015 WL 133874 (Minn. Ct. App.).

instance if it gets redistributed via Twitter or Facebook, it can lead to threats against the person being criticized, or even physical attacks.³⁵⁶

Such criticism can be perceived as intruding on privacy, by making its targets feel that they have become the object of others' curiosity or amusement. The law does not generally treat that as actionable invasion of privacy (outside the narrow zone of the disclosure of private facts), but I suspect many people perceive it as an intrusion, and some judges may agree. The criticism, especially if repeated and seemingly obsessive, may make the targets feel vaguely menaced, even in the absence of constitutionally unprotected true threats of violence.

Now all of this, by itself, cannot justify restricting speech. *Near v. Minnesota*, one of the two earliest cases in which the Court struck down government action on First Amendment grounds, involved a newspaper's repeated, unfair, anti-Semitic criticisms of various people.³⁵⁷ But the Court held that the newspaper could not be shuttered to prevent such speech—only lawsuits and criminal prosecutions for specific constitutionally unprotected libelous statements would be allowed.³⁵⁸

Likewise, *Organization for a Better Austin v. Keefe* made clear that repeated criticism could not be enjoined, even when it was deliberately distributed in a private figure's home town and urged people to call his home phone number.³⁵⁹ The Organization for a Better Austin believed that Keefe was engaging in unethical real estate marketing, which would change the racial mix of the neighborhood away from the integration that the Organization preferred.³⁶⁰ They leafletted near Keefe's home (deliberately choosing that area rather than the town where Keefe had his office), at times approaching people who were leaving Keefe's church.³⁶¹ They left leaflets at the homes of Keefe's neighbors.³⁶² Yet when a judge enjoined the leafletting, the Supreme Court reversed.³⁶³

NAACP v. Claiborne Hardware Co. likewise held that even repeated criticisms, which the private-figure subjects understandably found troubling, couldn't be enjoined and couldn't even lead to damages liability.³⁶⁴ The NAACP was organizing a black boycott of white-owned stores in Claiborne County, Mississippi. Some black residents didn't want to go along, so to pressure them the NAACP stationed "store watchers" out-

³⁵⁶ [Cite Gamergate; other examples; compare *NAACP v. Claiborne Hardware Co.*]

³⁵⁷ [Cite.]

³⁵⁸ [Cite.]

³⁵⁹ 402 U.S. 415, 417 (1971).

³⁶⁰ *Id.* at ___.

³⁶¹ *Id.* at 417.

³⁶² *Id.*

³⁶³ *Id.* at 419–20. "Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Id.*

³⁶⁴ [Cite.]

side the stores, took down the names of black shoppers, announced the names in black churches, and distributed a mimeographed list with the names of the shoppers. Unsurprisingly, there were some violent attacks on blacks who didn't participate in the boycott, likely stemming from their refusal to participate. Yet the Supreme Court held that this speech was protected.³⁶⁵

By the late 1930s, then, it was pretty clear that even scurrilous, repeated vilification in newspapers could not be enjoined. *Organization for a Better Austin* and *Claiborne* made the same clear for repeated criticism by organizations. Very few, if any, courts today would be inclined to enjoin alleged "harassment" or "stalking"—in the form of publications, whether in print or online—by a newspaper or by a familiar-looking, traditionally organized advocacy group. Yet for some reason some judges are willing to enjoin such speech by individuals. Why?

I suspect this flows from two related reasons. First, precisely because newspapers cost money to publish, and try to make money from subscribers or advertisers, they tend to be accountable to their readers and tend to publish what their readers want, in the style the readers want. That a newspaper is printing something itself indicates the likely value of the speech.³⁶⁶ Even a judge who found the speech loathsome or pointless might have thought twice about imposing his own views in preference to the views of editors and readers.³⁶⁷ Likewise, if an established political advocacy group thought some speech worth saying, that was evidence that the speech had value to public debate.

Second, newspaper speech can have many motives, but the most plausible ones tend to be public-regarding. Perhaps the publisher, editor, reporter, or columnist has a political agenda; quite likely the advocacy group does. Perhaps they are just pandering to readers' tastes, but even that means that they want to entertain or inform readers about something that many readers cared about. It's possible that newspaper writers are just trying to wreak private vengeance, or are irrationally obsessed—but that seems unlikely, especially since such motivations (at least if transparent enough) are likely to lead to market pushback from readers.

And the same is likely true for speech by advocacy groups, even relatively little-known ones such as the Organization for a Better Austin: Whatever a judge might think of their ideology, it seems likely that the

³⁶⁵ *Id.* at __.

³⁶⁶ [Cite.]

³⁶⁷ Occasional cases did conclude that speech in newspapers wasn't "newsworthy" and thus could lead to liability for disclosure of private facts. *See, e.g.,* *Briscoe v. Reader's Digest*, [cite], *overruled*, *Gates v. Superior Court*, [cite]; *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983). But I don't know of any incidents of an outright injunction against a newspaper's publishing anything further about a person.

speech was motivated by ideology. Even a judge who suspects that base motives are at play (e.g., that a rich publisher is trying to get revenge against a politician or business leader who had frustrated the publisher's business plans) might be reluctant to enjoin such mainstream speech based on speculation about motive.

But once individuals can easily speak, without having to persuade any intermediary about the worth of their speech, judges are likely to see much more speech that seems pointless and ill-motivated. Motive turns out to be very important under many harassment or stalking statutes, which condemn speech that is said with "the intent to annoy" or with "no legitimate purpose."³⁶⁸ (I have argued that such motive is generally irrelevant to the value of the speech, and should thus not be used to justify restricting speech that has presumptively valuable content;³⁶⁹ but the statutes are premised on a different view.) Indeed, some courts have taken the view, in government employee speech cases, that speech that is motivated by purely personal motives is to be treated as on a matter of "private concern," even when its content would suggest that it's on a matter of public concern.³⁷⁰

Of course, the speakers in all these cases would likely take a different view of the value of the speech, and of their own motives. I suspect that they think they really do have valuable things to say, and that their motives are to inform the public.

Indeed, none of these cases, with the possible exception of *Van Valkenburg v. Gjoni*, involve speech that would likely have been seen as "purely on a matter of private concern" if it had been published in a newspaper or had been distributed by a political advocacy group. And even Gjoni's speech, tied as it is to broader discussions of romantic relationships, alleged emotional abuse, and the like, may well be seen as on a matter of public concern. Compare, for instance, *Bonome v. Kaysen*, where a woman's published book that discussed the sexual details of a past relationship was seen as being enough on a matter of public concern to defeat a disclosure of private facts lawsuit.³⁷¹ And explaining how one feels, and who made one feel that way, is an important part of telling the story of one's life, whether in a memoir or on a blog post.³⁷²

³⁶⁸ [Cite.]

³⁶⁹ [Cite UCLA article; Nw. article.]

³⁷⁰ [Cite.]

³⁷¹ The lover's name wasn't mentioned in the book, but he plausibly alleged that he could be easily identified by those who knew the couple. 17 Mass. L. Rptr. 695 (Mass. Super. Ct. 2004); see also *Anonsen v. Donahue* (Tex. Ct. App. 2003); *Campbell v. Seabury Press* (5th Cir. 1980).

³⁷² See Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 Wash. U. L. Rev. 905, 907-11 (2006); Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy*, 67 Wash. & Lee L. Rev. 589.

If I'm right, then judges just aren't trusting individual speakers in the newly democratized mass communications system to define what is worth talking about, and to talk about it without being second-guessed about their motivations. Media organizations and political organizations are given latitude to say even things that judges may view as unfair or cruel.³⁷³ But private speakers are not—and the judges think that threatening criminal punishment for violating an injunction is the necessary means for stopping such speech.

As I mentioned, I think that such a view is wrong, and that speech that's outside the traditional First Amendment exceptions (speech that isn't, for instance, libel or true threats) should remain free even if judges think it's worthless or ill-intentioned. But I think these injunctions come about because judges see that everyone can speak the way that established media and political organization have long spoken—and judges often don't like it.

VI. CONCLUSION

*Reno v. ACLU. Ashcroft v. ACLU (I). United States v. American Library Association. Ashcroft v. ACLU (II).*³⁷⁴ Perhaps *Elonis v. United States* (if you focus on the facts of that case rather than the legal issue).³⁷⁵ Those are the Internet First Amendment cases that the Supreme Court has considered, mostly dealing with shielding children from sexually themed material, but also, in *Elonis*, online threats.³⁷⁶

But this is not where most of the interesting recent Internet free speech developments have arisen. Rather, they have come in surprising places:

- the survival and perhaps resurgence of criminal libel law;
- trial courts' broad acceptance of anti-libel injunctions;
- trial courts' willingness to issue remarkably broad bans on public online speech about people, in the name of preventing "harassment" or "stalking";

³⁷³ For a similar argument about why courts are more likely to find actionable invasion of privacy in speech of non-mainstream-media sources, see Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER, Dec. 19, 2016 ("This kind of deference to journalistic judgment about what constitutes 'truthful information of public concern' may be a vestige of a more orderly period in journalistic history. The implicit trust in the news media reflected in these rulings may not extend today to the operators of Web sites, a change that could also have ramifications for traditional news organizations.").

³⁷⁴ 521 U.S. 844 (1997); 535 U.S. 564 (2002); 539 U.S. 194 (2003); 542 U.S. 656 (2004).

³⁷⁵ 135 S. Ct. 2001 (2015).

³⁷⁶ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), also happened to involve online speech, as well as mailed letters, but that fact played very little role in the Court's reasoning.

- the criminalization, whether through outright criminal laws or through injunctions enforced using the threat of contempt, of disclosure of private facts;
- the enactment of narrower restrictions on specific kinds of false statements and disclosure of private facts, such as impersonation and nonconsensual porn;
- the enforcement of injunctions not by courts but by Google and similar Internet platforms.

Some of these developments have been promising. Some have been misguided. But they all represent, I think, the legal system's bottom-up struggle with the dark side of cheap speech and of the democratization of mass communications.

For decades, the main lever for dealing with libel and disclosure of private facts has been the threat of civil damages liability. As that lever has become increasingly irrelevant for many speakers—judgment-proof speakers, anonymous speakers, offshore speakers—the legal system has had to grasp for other levers, odd as they might have seemed in 1993. This, I hope, has been a story worth considering, and worth following in the coming years.