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## **BLOGGERS AS LIMITED-PURPOSE PUBLIC FIGURES: NEW STANDARDS FOR A NEW MEDIA PLATFORM**

AMY KRISTIN SANDERS AND SARAH ARENDT

*The traditional public-figure doctrine must be adapted to the new faces of online media and the ever-changing conversation outlets available to news consumers on the Internet. After reviewing the traditional tests for plaintiff status determinations in defamation cases, this article establishes a legal standard that American courts should use to determine plaintiff status in cases involving bloggers who sue for defamation. It establishes the proper level of notoriety bloggers must attain before they are considered limited-purpose public figures. Using specific examples from relevant jurisprudence involving both traditional media defamation cases and online defamation cases, this article outlines a three-part test that courts should employ to determine whether a blogger should be considered a public figure. The determination of a blogger's status is of great importance in defamation litigation because bloggers classified as public figures must prove actual malice to succeed in their defamation lawsuits. Further, establishing standards to protect the online discussion of matters of public controversy is imperative.*

**Keywords:** defamation, libel, public figure, private figure, Internet, blog

### **I. INTRODUCTION**

If the traditional, mainstream media are considered the Fourth Estate, then the blogosphere has become the Fifth Estate. News and information now travel at a much faster rate, and the Internet showcases a broader array of viewpoints than ever before. Information no longer develops solely through the formal newsgathering and editing process, and the printing press is no longer vital to information dissemination. Bloggers can publish a post – whether it be an opinion-based rant or a factual news story

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gathered using traditional journalistic reporting methods – in a matter of minutes. And just like stories originating from the mainstream media, these more informal Web-based reports often incorporate pictures and video.

This popular media phenomenon, often referred to as citizen journalism,<sup>1</sup> has taken the mass media industry by storm. Some scholars and media critics argue that blogs provide a better source of news and information because they do not serve the interests of Big Media entities, who have the ability to control content and frame news stories pursuant to the desires of their corporate owners.<sup>2</sup> What the blogosphere lacks in professional writing and editing, they argue, it makes up for in information transparency and readers' opportunities to provide comments and corrections.<sup>3</sup> The 2009 political unrest in Iran illustrates the intrinsic value of blogs; a significant amount of the breaking news coming out of the country during the media blockade came from eyewitness accounts posted on Twitter.<sup>4</sup> As a result of the growing reliance on blogging and tweeting, many members of the institutional press have created online content just to compete, and many of the mainstream media Web sites now include blogs written by journalists or readers.<sup>5</sup>

As the blogosphere gained popularity and began to be perceived as a real threat to the institutional press in the early 2000s, an unavoidable and natural tension grew between professional journalists and bloggers.<sup>6</sup> News organizations saw readership and circulation numbers decline as citizens without journalism degrees or professional

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<sup>1</sup> A variety of definitions exist, as one article on the Poynter Institute's Web site indicates when describing a range of possible definitions that include simply allowing reader comment to adding on full-fledged reader-edited wikis. Steve Outing, *The 11 Layers of Citizen Journalism* (June 15, 2005), [http://www.poynter.org/content/content\\_view.asp?id=83126](http://www.poynter.org/content/content_view.asp?id=83126). According to PC Magazine, citizen journalism is defined as: "News and commentary from the public at large. Using wiki sites and blogs, anyone can contribute information about a current event. Also known as 'collaborative citizen journalism' (CCJ), 'grassroots media' and 'personal publishing,' the concept behind citizen journalism is that many volunteers help to ensure that the information is more accurate than when it is being reported from only one source." *Encyclopedia*, PC MAGAZINE (2009), [http://www.pcmag.com/encyclopedia\\_term/0,2542,t=citizen+journalism&i=55411,00.asp](http://www.pcmag.com/encyclopedia_term/0,2542,t=citizen+journalism&i=55411,00.asp).

<sup>2</sup> Wilson Lowrey, *Mapping the Journalism-Blogging Relationship*, 7 JOURNALISM 477, 486 (2006).

<sup>3</sup> David Kline, *The Voice of the Customer*, in *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE* 103 (David Kline & Dan Burstein eds., 2005).

<sup>4</sup> See, e.g., Ari Berman, *Iran's Twitter Revolution*, THE NATION (June 15, 2009), available at <http://www.thenation.com/blogs/notion/443634>; Josh Levy, *Iran, Twitter and the CNN Fail* (June 15, 2009), <http://www.savetheinternet.com/blog/09/06/15/iran-twitter-and-cnn-fail>.

<sup>5</sup> For example, the *Los Angeles Times* has an entire page dedicated to its various blogs, including those covering entertainment, politics, autos and food and health. See *Blogs*, L.A. TIMES, <http://www.latimes.com/services/site/la-blogs-list-splashpage,0,3923395.htmlstory>. See also *Blogs*, N.Y. TIMES, <http://www.nytimes.com/ref/topnews/blog-index.html>.

<sup>6</sup> Lowrey, *supra* note 2, at 478.

experience began to steal readers and subscribers from the mainstream media outlets.<sup>7</sup> New media commentator Jay Rosen has described this process as the natural result of competition: “As events unfolded and as journalists and bloggers had so much to do with one another, it was inevitable that conflicts would arise. So a contest of authority began.”<sup>8</sup>

In recent years, many mainstream media organizations have attempted to embrace the trend toward a more informal approach to journalism. In fact, many now encourage members of the community to submit pictures and videos taken on cell phones for dissemination on the news organization’s Web site.<sup>9</sup> Reporters and editors have found bloggers to be great sources for stories that would have otherwise gone unreported. Reader-sourced content also provides examples of the kinds of stories and topics that are likely to attract the attention and comments of community members, and mainstream media journalists can use these as inspiration for future investigative stories.

However, the decision of some journalists to embrace the blogosphere and all it has to offer does not mean that bloggers don’t still find themselves at odds with other members of the mainstream media. A blogger with a unique voice who is ardently critical of his subject has the potential to attract more attention than an objective journalist who publishes only balanced reports on controversial topics. Some bloggers even direct their criticism at members of the mainstream media,<sup>10</sup> and it is simply a matter of time before the blogging community’s criticisms are returned in the form of defamatory attacks on specific, notorious bloggers.

American courts are only beginning to address cases involving blogger plaintiffs, but both the state and federal judicial systems appear woefully unprepared to handle defamation cases involving bloggers engaged in newsgathering activities. Although the U.S. Supreme Court’s 1974 decision in *Gertz v. Welch*<sup>11</sup> clearly provides some guidance to courts making a determination of plaintiff status, that case occurred before the Internet’s development into a medium of mass communication. As a result, the opinion does not address the relevant complications and issues that arise in online defamation cases. The traditional public-figure doctrine enunciated in *Gertz* must be adapted to the new faces of online media and the ever-changing conversation outlets available to news consumers on the Internet.

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<sup>7</sup> See, e.g., Annys Shin, *Newspaper Circulation Continues to Decline: Internet, Cable Cited as Competition*, WASH. POST, May 3, 2005, at E03; Richard Perez-Pena, *Newspaper Circulation Continues to Decline Rapidly*, N.Y. TIMES, Oct. 27, 2008, at B4.

<sup>8</sup> Jay Rosen, *Where Have All the Journalists Gone? An Interview with Jay Rosen*, in *BLOG!*, *supra* note 3, at 316.

<sup>9</sup> CNN has led the way among media entities, encouraging readers to submit photos and videos through iReport as well as to follow CNN on Twitter. See *iReport*, CNN, available at <http://www.cnn.com/ireport>.

<sup>10</sup> See, e.g., Dan Gillmor, *Principles of New Media Literacy*, CENTER FOR CITIZEN MEDIA BLOG (Dec. 26, 2008), <http://dangillmor.com/blog/tag/media-criticism>; MEDIA CRITICISM, <http://www.mediacritiques.com>.

<sup>11</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

After reviewing the traditional tests for plaintiff status determinations in defamation cases, this article creates a legal standard that American courts should use to determine plaintiff status in defamation cases involving blogger plaintiffs. It provides a test that establishes the level of notoriety bloggers must attain before they can be considered limited-purpose public figures. Using specific examples from relevant jurisprudence involving both traditional media defamation cases and online defamation cases, the article outlines a three-part test that courts should use to determine whether a blogger plaintiff is a public figure. The determination of a blogger's status as a public figure is of great importance in defamation litigation because bloggers classified as public figures must prove actual malice to succeed in their defamation lawsuits. Such a high level of fault greatly increases the burden of proof that falls to the plaintiff while providing a greater amount of protection for speech on the Internet.

## II. THE BLOGOSPHERE TAKES SHAPE

A blog, short for weblog, has various definitions, including an online journal where bloggers simply express themselves<sup>12</sup> or a new form of amateur journalism.<sup>13</sup> Writers create entries, called posts, which are placed in reverse chronological order on the Web page. The blog's readers can often comment on individual posts in a section underneath each post. Clay Shirky, an expert on the social and economic effects of Internet technology,<sup>14</sup> described the medium as "a lightweight publishing platform that's so simple an individual can do it."<sup>15</sup> With programs such as Blogger<sup>16</sup> and Wordpress<sup>17</sup> dedicated to helping users create blogs, the average elementary school student could easily create and maintain a functioning blog. It is also exceptionally easy to join the community of bloggers, whose members write about every topic imaginable and post from all over the world.

Bloggging has been considered a form of personal media because of the ability of others to respond to a blogger's posts.<sup>18</sup> Paul Saffo, a distinguished visiting scholar with Stanford's Media X research project, has suggested that bloggers generally intend their posts to reach an audience, and they expect members of the audience will comment on their writing: "Mass media, you're a passive watcher. Personal media, you're an active

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<sup>12</sup> See Dave Winer, *What Makes a Weblog a Weblog?*, WEBLOGS AT HARVARD LAW, (May 23, 2003), <http://web.archive.org/web/20041116085413/http://blogs.law.harvard.edu>.

<sup>13</sup> Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 187 (2006).

<sup>14</sup> Clay Shirky, *Blogs as Bottom-up Innovation: Interview with Clay Shirky*, in BLOG!, *supra* note 3, at 286.

<sup>15</sup> *Id.* at 288.

<sup>16</sup> BLOGGER, <http://www.blogger.com>.

<sup>17</sup> WORDPRESS, <http://wordpress.org>.

<sup>18</sup> Paul Saffo, *Gazing at the Crystal Ball of Blogging: An Interview with Paul Saffo*, in BLOG!, *supra* note 3 at 340.

participant ... personal media, you answer back, you expect an answer back, you take it for granted that you can answer back and you're outraged when you can't."<sup>19</sup>

The practice of blogging started in the mid-1990s.<sup>20</sup> Most of the early blog writers were also blog readers.<sup>21</sup> However, the number of people who blog greatly increased in the early 2000s, with the creation and growing popularity of personal blog-hosting tools.<sup>22</sup> These hosting Web sites, such as LiveJournal<sup>23</sup> and Blogger,<sup>24</sup> allowed registered members to blog on their own member homepages, which meant aspiring bloggers did not need to purchase a domain name to launch their blogs. As hosting Web sites gained popularity, the number of functioning blogs soared into the millions.<sup>25</sup> Bloggers seeking a more professional look and reliable technical support often chose to pay monthly fees to commercial hosting companies instead of relying on free hosting companies. Other blogs are hosted as side-features on larger social networking Web sites, such as MySpace,<sup>26</sup> Zaadz,<sup>27</sup> and Facebook.<sup>28</sup>

Because it is easier than ever for anyone with access to the Internet to create a blog, many of these writers are everyday people who are not working journalists. However, some professional journalists maintain personal blogs separate from their professional ventures. These "non-professional" blogs take the form of everything from political rants to local gossip to diary-styled entries.<sup>29</sup> Although blogging may be merely a hobby for some, others consider their Web writing a job.<sup>30</sup> But fewer than 20 bloggers in the United States actually earn their living from blogging.<sup>31</sup> Many writers use

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<sup>19</sup> *Id.*

<sup>20</sup> Dan Burstein, *From Cave Painting to Wonkette: A Short History of Blogging*, in *BLOG!*, *supra* note 3 at xiii.

<sup>21</sup> Shirky, *supra* note 14, at 287.

<sup>22</sup> According to research conducted in 2006 by the Pew Internet and American Life Project, 55% of bloggers reported using hosting Web sites such as LiveJournal or Blogger. Interestingly, 38% of respondents either did not know what they used or refused to answer. See AMANDA LENHART & SUSANNAH FOX, *BLOGGERS: A PORTRAIT OF THE INTERNET'S STORYTELLERS* 14 (2006), available at <http://www.pewinternet.org/Reports/2006/Bloggers.aspx>

<sup>23</sup> LiveJournal was started in 1999 as a free online publishing platform and now hosts more than 16 million blogs. *About Us*, LIVEJOURNAL, <http://www.livejournalinc.com/aboutus.php>.

<sup>24</sup> Blogger was started in August 1999 by three friends who eventually sold their start-up to Google. *The Story of Blogger*, BLOGGER, <http://www.blogger.com/about>.

<sup>25</sup> Shirky, *supra* note 14, at 287.

<sup>26</sup> MYSPACE, <http://www.myspace.com>.

<sup>27</sup> <http://www.zaadz.com>.

<sup>28</sup> FACEBOOK, <http://www.facebook.com>.

<sup>29</sup> According to research conducted in 2006 by the Pew Internet and American Life Project, 52% of bloggers say that expressing themselves creatively is one of the major reasons they blog while 50% cite sharing their personal experiences with others as one of the major reasons. See Lenhart & Fox, *supra* note 22, at 1.

<sup>30</sup> *Id.*

<sup>31</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 20 (2007).

blogging as a way to gain notoriety or spread their views on a specific topic, while some celebrities use blogs to promote personal causes or political views.<sup>32</sup>

Some bloggers have appeared to become recognized “experts” in their field. These bloggers maintain top-tier blogs that have become commercial in nature and are measured based on site traffic and links to the site.<sup>33</sup> Perez Hilton,<sup>34</sup> the well-known celebrity gossip blogger, and Matt Drudge, the founder of the *Drudge Report*,<sup>35</sup> typify this camp of notorious bloggers. Similarly, *The Huffington Post*,<sup>36</sup> *Gawker*,<sup>37</sup> and *College Candy*<sup>38</sup> are highly popular blogs published with the help of many contributing bloggers. In fact, *The Huffington Post* drew most of its original appeal from the fact that celebrities and other leaders in business, government and entertainment often serve as contributing writers.<sup>39</sup>

Entire Web sites have been devoted to ranking and monitoring the top blogs, and bloggerschoiceawards.com hands out awards for deserving blogs in almost every category imaginable, from “best political blog” to “hottest mommy blogger.”<sup>40</sup> One of the most-referenced blog-monitoring sites is Technorati.com.<sup>41</sup> It includes a list of “Top 100 Blogs” and provides links to blogs and specific major stories on its homepage.<sup>42</sup> Technorati’s homepage also includes a tab featuring “Rising Posts and Stories,” which helps lesser-known blogs gain notoriety in cyberspace.<sup>43</sup>

The world of blogging today has even spawned “micro-blogging,”<sup>44</sup> where users describe their current status in a limited number of characters and then distribute it via

<sup>32</sup> Two of the most well-known blogs that fall into this category are Arianna Huffington’s *Huffington Post* and law professor Glenn Reynolds’ *Instapundit* blog, known for its Libertarian perspective.

<sup>33</sup> Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L.J., 1159-60 (2006).

<sup>34</sup> PERZHILTON.COM, <http://perez Hilton.com>.

<sup>35</sup> DRUDGE REPORT, <http://www.drudgereport.com>.

<sup>36</sup> THE HUFFINGTON POST, <http://www.huffingtonpost.com>.

<sup>37</sup> GAWKER, <http://gawker.com/>.

<sup>38</sup> COLLEGE CANDY, <http://collegecandy.com>.

<sup>39</sup> Notable columnists include Jonathon Alter, Sidney Blumenthal, Howard Fineman, and George Will, among others. See *Columnists*, THE HUFFINGTON POST, <http://www.huffingtonpost.com>.

<sup>40</sup> IZEA, Inc., *2008 Bloggers Choice Awards*,

<http://www.bloggerschoiceawards.com/categories/21> (last visited May 15, 2008).

<sup>41</sup> According to Technorati.com, “Technorati was founded to help bloggers to succeed by collecting, highlighting, and distributing the online global conversation. As the leading blog search engine and most comprehensive source of information on the blogosphere, we index more than 1.5 million new blog posts in real time and introduce millions of readers to blog and social media content.” See *About Us*, TECHNORATI, <http://technoratimedia.com>.

<sup>42</sup> *Top 100 Blogs*, TECHNORATI, <http://technorati.com/pop/blogs>.

<sup>43</sup> TECHNORATI, <http://technorati.com>.

<sup>44</sup> Akshay Java, Xiaodan Song, Tim Finin & Belle Tseng, *Why We Twitter: Understanding Microblogging Usage and Communities*, PROCEEDINGS OF THE JOINT 9TH WEBKDD AND 1ST SNA-KDD WORKSHOP 1 (2007), available at <http://ebiquity.umbc.edu/paper/html/id/367/Why-We-Twitter-Understanding-Microblogging-Usage-and-Communities>.

mobile phone, e-mail, instant message, or the Web.<sup>45</sup> Twitter is one well-known example of this phenomenon.<sup>46</sup> It is a Web site designed to let viewers track the whereabouts and activities of their friends. Users simply answer the question, “What’s happening?” with a sentence containing fewer than 140 characters. In other words, Twitter updates serve as mini-blog posts – thoughts that are written in a second yet still constitute the popular functions of blogging.

Like traditional blogging, micro-blogging has given rise to defamation litigation. In March 2009, California clothing designer Dawn Simorangkir, known online as Boudoir Queen, filed suit in Los Angeles Superior Court against actress Courtney Love for a tweet in which Love complained about being billed for custom clothing.<sup>47</sup> Simorangkir alleged that after charging Love for multiple clothing orders, Love refused to pay and began to spread malicious lies about Simorangkir using Twitter. Simorangkir claimed that on March 17, Love posted this defamatory comment on her Twitter feed: “oi vey dont fuck with my wardrobe or you willend up in a circle of corched eaeth hunted til your dead.”<sup>48</sup> The lawsuit claimed that, “by using her fame and influence to reach millions of people, Love has achieved her goal of destroying Simorangkir’s small business and causing irreparable damage to Simorangkir’s name and reputation.”<sup>49</sup> At the time of this writing, the defamation lawsuit, believed to be first based on a tweet, was pending in the California courts after Judge Aurelio Munoz denied Love’s motion to dismiss in October 2009.

Blogging has also been characterized as a self-correcting medium.<sup>50</sup> According to Arianna Huffington, founder of *The Huffington Post*, “If there’s a fact that a blogger puts out that’s wrong, the chances of it being corrected quickly are very great.”<sup>51</sup> If a blogger posts incorrect information, readers, who almost always have the option of commenting on the blog posts,<sup>52</sup> have the ability to instantly correct the information. Often, they provide links to primary documents or sources that prove the legitimacy of their corrections.<sup>53</sup> The blogger can either ignore the posts and let them serve as a

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<sup>45</sup> *Id.* at 1.

<sup>46</sup> See <http://twitter.com>.

<sup>47</sup> Eriq Gardner, *Courtney Love Sued for Twitter Defamation*, REUTERS.COM (March 30, 2008).

<sup>48</sup> Plaintiff’s First Amended Complaint, Superior Court of California, Case No. BC410593, available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=37246c46-679c-452f-b474-61f4d864aef2>. For updated information on the, see also *Simorangkir v. Love*, available at <http://www.citmedialaw.org/threats/simorangkir-v-love>.

<sup>49</sup> *Id.*

<sup>50</sup> Arianna Huffington, *Punching Holes in Old Faded Mirrors: Interview with Arianna Huffington*, in *BLOG!*, *supra* note 3 at 345.

<sup>51</sup> *Id.*

<sup>52</sup> According to research conducted in 2006 by the Pew Internet and American Life Project, nearly 90% of bloggers allow their readers to comment. Lenhart, *supra* note 22, at 20.

<sup>53</sup> Gerry Legnose, *Blogs and Big Media: A Comparative Study of Agendas* (May 21, 2008) (unpublished paper presented at the annual meeting of the International Communication Association in Montreal).

corrective tool for readers, or can edit the post in question to correct the misleading information.

Bloggers often gain readers, and eventually notoriety, when other bloggers link to their Web sites. Because many obscure blogs do not show up in Google blog searches, a majority of bloggers rely on linking as their primary means of increasing readership. According to professors Daniel Drezner and Henry Farrell, who are both active bloggers:

Most bloggers desire a wide readership, and conventional wisdom suggests that the most reliable way to gain web traffic is through a link on another weblog. A blog that is linked to by multiple other sites will accumulate an ever-increasing readership as more bloggers discover the site and create hyperlinks on their respective Web pages.<sup>54</sup>

Drezner and Farrell argue this process of growth-by-linking has created an uneven distribution of popular, high-traffic blogs. “There are a few highly ranked blogs with many incoming links, followed by a steep falloff and a very long list of medium-to-low ranked bloggers with few or no incoming links.”<sup>55</sup> It follows that, as the blogosphere continues to grow, relatively few blogs will emerge as focal points that attract readers from multiple topic communities.<sup>56</sup>

In a 2006 article, law professor and blogger Glenn Reynolds (of Instapundit fame) pointed out that the Internet blogging community is a low-trust culture because it lacks an editorial chain, unlike newspapers that function in a higher-trust environment.<sup>57</sup> Because members of the mainstream media function in a higher-trust, corporate environment, readers generally take their word regarding factual assertions. This is not the case in the blogosphere, where links to primary sources play a key role in both the blog posts<sup>58</sup> themselves and the comments readers leave.<sup>59</sup>

Reynolds also argued the blogging community collectively frowns on libel lawsuits, including lawsuits in which bloggers are plaintiffs. He said, “Anyone threatening a blogger with legal action – even if that person is a blogger as well – can expect a generally hostile response from many, many other bloggers.”<sup>60</sup> This reluctance to rely on traditional legal processes can often be traced to the development of social norms within the blogosphere.

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<sup>54</sup> Daniel W. Drezner & Henry Farrell, *Web of Influence*, in *BLOG!*, *supra* note 3 at 87-88.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Reynolds, *supra* note 32, at 1159-60.

<sup>58</sup> According to research conducted in 2006 by the Pew Internet and American Life Project, nearly 90% of bloggers allow their readers to comment. Lenhart, *supra* note 22, at 20.

<sup>59</sup> Rebecca MacKinnon, *BLOGGING, JOURNALISM & CREDIBILITY: BATTLEGROUND AND COMMON GROUND* 12 (2005), available at [http://cyber.law.harvard.edu/publications/2005/Blogging\\_Journalism\\_Credibility](http://cyber.law.harvard.edu/publications/2005/Blogging_Journalism_Credibility) (2006).

<sup>60</sup> Reynolds, *supra* note 33, at 1159-60.

Professor Fernanda B. Viégas' work supports Reynolds' finding that members of the blogosphere have created underlying community standards. Viégas found bloggers have implemented informal community guidelines for publishing the names of people and companies in their blog entries.<sup>61</sup> He discovered bloggers have branched off into topic communities and created "social norms" to govern their various communities.<sup>62</sup> As these topic communities take shape, the legal system must be able to identify and distinguish between them as well as understand the norms of these communities.

The wealth of scholarly information devoted to the blogosphere is a testament to its increasing prominence in today's society. Much of this literature recognizes that bloggers have created their own online communities with unique cultural norms. However, the American legal system must take these developing social norms into account as it creates a public-figure standard that will both adequately protect an individual's reputation while providing the breathing room needed to ensure robust and uninhibited discussion in these online communities.

## II. DEFAMATION AND THE BLOGOSPHERE

### A. DEFAMATION IN AMERICA

The *Restatement (Second) of Torts* defined defamation as a statement that tends to expose the victim "to hatred, ridicule or contempt."<sup>63</sup> It also noted: "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>64</sup> Defamation can result in a pecuniary injury, emotional distress, or both.<sup>65</sup>

The common law of defamation arose because of society's "pervasive and strong interest in preventing and redressing attacks upon reputation."<sup>66</sup> It is rooted in the concept of the sanctity of reputation and the importance of the role of reputation in society.<sup>67</sup> The idea that a person's reputation has significant worth is a fundamental belief that has been recognized throughout American history, and the sanctity of reputation played a very important role in the lives of many Founding Fathers, including Benjamin Franklin and Alexander Hamilton. In fact, Hamilton was killed in a duel after he purportedly published a defamatory statement about Aaron Burr during the 1804 New York gubernatorial race.

Robert C. Post points out that common law has attempted to protect three distinct concepts of reputation: reputation as property, reputation as honor, and reputation as

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<sup>61</sup> Fernanda B. Viégas, *Bloggers' Expectations of Privacy and Accountability: An Initial Survey*, 10 J. OF COMP. MEDIATED COMM. 12 (2005).

<sup>62</sup> *Id.*

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>64</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (1977).

<sup>65</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>66</sup> *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

<sup>67</sup> See generally David Anderson, *Reputation, Compensation & Proof*, 25 WM. & MARY L. REV. 747 (1984).

dignity.<sup>68</sup> Reputation, in its function as property, resembles goodwill. It is gained as a result of an individual's efforts and labor.<sup>69</sup> Reputation as a form of honor arises when a person identifies with the "normative characteristics of a particular social role and in return, personally receives from others the regard and estimation that society accords to that role."<sup>70</sup> The final concept Post discussed was reputation as dignity. According to Post, this concept of reputation is the most relevant in the discussion of American defamation law. He asserts "the law of defamation can be conceived as a method by which society polices breaches of its rules of deference and demeanor, thereby protecting the dignity of its members."<sup>71</sup> All three of these concepts continue to play leading roles in defamation suits brought by libel plaintiffs.

The common law of defamation and its goal of protecting reputation must be balanced with the First Amendment's protections of freedom of speech and the press.<sup>72</sup> The American legal system has attempted to strike this balance by incorporating a constitutional fault requirement in certain defamation claims to alleviate the tension between "the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."<sup>73</sup>

### 1. History of the Public-Figure Doctrine

The U.S. Supreme Court first drew a distinction between public plaintiffs and private plaintiffs in its landmark *New York Times v. Sullivan* decision.<sup>74</sup> There, the Court first introduced the concept of the public official for purposes of defamation.<sup>75</sup> Although the *Sullivan* Court distinguished between public officials, whom the Court ruled must prove actual malice, and private persons, who would be allowed to succeed by proving a lesser degree of fault, it never defined "public official" or "official conduct."<sup>76</sup> The Court held public officials could not collect damages unless they proved the defendant had knowledge of the statement's falsity or published the statement with reckless disregard for the truth.<sup>77</sup> The Court based its decision on the idea that debate regarding public issues and concerning public officials should be "uninhibited, robust, and wide-open."<sup>78</sup> The Court reasoned that discussion of public officials' conduct plays a key role in

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<sup>68</sup> Robert C. Post, *The Social Foundation of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693, 699, 710 (1986).

<sup>69</sup> *Id.* at 693.

<sup>70</sup> *Id.* at 699-700.

<sup>71</sup> *Id.* at 710.

<sup>72</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>73</sup> *Gertz*, 418 U.S. at 342.

<sup>74</sup> *Sullivan*, 376 U.S. at 283.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Sullivan*, 376 U.S. at 280.

<sup>78</sup> *Id.* at 271.

democracy. It also recognized the importance of a citizen's right to criticize a government official to ensure the government remains responsive to its constituents.<sup>79</sup>

The burden of proving actual malice rests solely on the plaintiff, and doing so is no easy task. Furthermore, it must be proven by "clear and convincing evidence" as opposed to civil litigation's traditional standard of preponderance of the evidence.<sup>80</sup> Although the determination of actual malice is a subjective one, the Court has made it clear that actual malice consists of more than an "extreme departure" from professional journalistic practices.<sup>81</sup> Further, it is not enough for the plaintiff to show ill-will or carelessness on the part of the defendant.<sup>82</sup> Simply put, the actual malice standard often prevents plaintiffs from succeeding in their defamation lawsuits and provides a large degree of protection for speech.

The Court applied the *New York Times v. Sullivan*<sup>83</sup> standard to a class of plaintiffs it would call "public figures" three years later in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.<sup>84</sup> Wally Butts, the University of Georgia's athletic director, sued Curtis Publishing after it ran an article in the *Saturday Evening Post* claiming Butts had helped fix a football game between the University of Georgia and the University of Alabama.<sup>85</sup> Butts was employed by the Georgia Athletic Association, a private corporation, and could not be considered a public official.<sup>86</sup> The plaintiff in *Associated Press v. Walker*, a political activist who had previously served in the Armed Forces, sued the AP after a dispatch accused him of leading a riot attack on federal marshals at the University of Mississippi.<sup>87</sup> Because Walker had a following of other political activists known as the "Friends of Walker," the Court ruled he was a man of political prominence who met the criteria for public figures.<sup>88</sup>

The Court cited two specific grounds for applying the *New York Times* actual malice rule to public figures. First, the Court said public figures have more access to self-help in order to rectify the situation.<sup>89</sup> This means that public figures usually have more access to media than private individuals, and therefore have a better chance of exposing the defamatory statement as a falsehood or rebutting the statement. Second, the Court said public figures deserve less protection than private persons because public figures have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them" based on their higher-profile position in society.<sup>90</sup>

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<sup>79</sup> *Id.* at 269.

<sup>80</sup> *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986).

<sup>81</sup> *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

<sup>82</sup> *Id.* at 666.

<sup>83</sup> *Sullivan*, 376 U.S. at 279.

<sup>84</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

<sup>85</sup> *Butts*, 388 U.S. at 135.

<sup>86</sup> *Id.* at 135.

<sup>87</sup> *Id.* at 140.

<sup>88</sup> *Id.*

<sup>89</sup> *Butts*, 388 U.S. at 155.

<sup>90</sup> *Gertz*, 418 U.S. at 345.

The Court found that because both Butts and Walker commanded continuing public attention, they had sufficient access to the media to argue the falsity of the defamatory statements and potentially rebut their potential for harm.<sup>91</sup> The Court ruled Butts had attained public figure status simply because of the status of his position as athletic director<sup>92</sup> and Walker qualified as a public figure because he had thrust himself into “the vortex of an important public controversy.”<sup>93</sup> Courts continue to employ this vortex standard when determining public figure status in their current jurisprudence.<sup>94</sup>

Chief Justice Earl Warren expounded on the negligible difference between a public figure and public official in his concurrence and instead urged the Court to use the phrase ‘public men.’<sup>95</sup> Warren said:

Many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large ... And surely, as a class, these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities.<sup>96</sup>

It seems apparent, therefore, that Chief Justice Warren considered access to self-help critical to the distinction between public figures and private individuals.

The Court broadened the concept of the public figure in *Gertz v. Welch* when it outlined the possibility of three distinct types of public figures: the all-purpose public figure, the limited-purpose or vortex public, and the involuntary public figure.<sup>97</sup> Elmer Gertz, a Chicago lawyer representing a family in a high-profile murder case, brought a defamation suit against Robert Welch’s magazine *American Opinion* for an article it published.<sup>98</sup> The article implied Gertz had a criminal record and labeled him a “Communist-frontier.”<sup>99</sup> The Court held that Gertz’ service on city committees and involvement as an attorney at a coroner’s inquest was not enough to consider him as a

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<sup>91</sup> *Butts*, 388 U.S. at 154.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See, e.g.*, *Ogle v. Hocker*, 279 Fed. Appx. 391, 399 (6th Cir. 2008). “Under these standards, Ogle fails to qualify as a limited-purpose public figure. Hocker’s allegedly defamatory statements concerned Ogle’s actions in a hotel room in Belgium. Even if true, these actions plainly did not thrust Ogle to the forefront of any public controversy. Nor is that conclusion disturbed by the public stir that later surrounded Hocker’s accusations. Therefore, since nothing shows that Ogle thrust himself into the vortex of a public issue, Ogle will be treated as a private figure plaintiff.”

*Id.*

<sup>95</sup> *Butts*, 388 U.S. at 165 (Warren, C.J., concurring).

<sup>96</sup> *Id.* at 164 (Warren, C.J., concurring).

<sup>97</sup> *Gertz*, 418 U.S. at 351.

<sup>98</sup> *Id.* at 327.

<sup>99</sup> *Id.* at 326.

public official.<sup>100</sup> The Court also rejected the alternative claim that Gertz was a public figure, noting that he did not have general fame or notoriety in the community.<sup>101</sup>

In *Gertz*, the Court defined limited-purpose public figures as those plaintiffs who have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>102</sup> The Court therefore narrowed its public figure definition and recognized that very few people could be considered all-purpose public figures.<sup>103</sup> “Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life.”<sup>104</sup> Public figure status, the Court ruled, should be determined by considering the plaintiff’s participation in the controversy at issue.<sup>105</sup>

In *Gertz*, the Court acknowledged the importance of the plaintiff’s access to the media when determining public-figure status.<sup>106</sup>

The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error, and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.<sup>107</sup>

Although the Court acknowledged that self-help through access to media is not always effective, it argued that the concept still had bearing on determining the plaintiff’s status.<sup>108</sup>

Two years later, the Court clarified the meaning of public controversy in *Time, Inc. v. Firestone*.<sup>109</sup> It held that although the rather messy divorce of a very wealthy couple was of general interest to many readers, the “dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz*.”<sup>110</sup> Even though the plaintiff, Mary Alice Firestone, had sought out the help of the judicial system in obtaining a divorce, this did not constitute thrusting herself to the forefront of a public controversy because the Court did not consider this a voluntary action.<sup>111</sup> She had no

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<sup>100</sup> *Id.* at 352.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 345.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 352.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 344.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 366 n.9.

<sup>109</sup> *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

<sup>110</sup> *Id.* at 454.

<sup>111</sup> *Id.*

other choice but to turn to the court system for dissolution of her marriage, and therefore she deserved the same private-party classification as any anonymous divorcée.

In *Hutchinson v. Proxmire*, the Supreme Court limited the circumstances in which plaintiffs could be considered limited-purpose public figures.<sup>112</sup> Professor Ronald Hutchinson sued Senator William Proxmire after Proxmire awarded Hutchinson a “Golden Fleece of the Month Award,” which Proxmire used to draw attention to what he considered wasteful government spending.<sup>113</sup> The Court ruled that Hutchinson was not a limited-purpose public figure and did not have to prove that Proxmire acted with actual malice because Hutchinson had been “bootstrapped” into the controversy. The Court found that no controversy involving Hutchinson would have existed without the publication of Proxmire’s defamatory statement.<sup>114</sup> “To the extent that the subject of [Hutchinson’s] published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.”<sup>115</sup> In other words, a plaintiff cannot be considered a limited-purpose public figure when the controversy in which he was entangled resulted from the defamatory publication.

The Court also looked to the scope of Hutchinson’s media access and his role in a public controversy to conclude that he was not a public figure. It determined Hutchinson’s access to the media came only after Proxmire’s statement and was limited to responding to Proxmire’s award.<sup>116</sup> The Court reasoned that Hutchinson had not assumed any role of public prominence related to government expenditures.<sup>117</sup> The applications for federal grants and the professional articles that Hutchinson published did not invite the level of public notoriety necessary to reach public-figure status.<sup>118</sup>

Simply becoming involved in a matter that attracts public attention does not automatically turn a private person into a public figure. In *Wolston v. Reader’s Digest Ass’n, Inc.*,<sup>119</sup> the Court held that a private person does not become a public figure simply because he becomes involved with a matter that attracts public attention.<sup>120</sup> In 1958, Ilya Wolston failed to appear in front of a grand jury conducting an investigation into Soviet intelligence agents in the United States, and his refusal to appear attracted the attention of news media organizations.<sup>121</sup> Washington and New York newspapers published at least seven stories about Wolston.<sup>122</sup> In 1974, Reader’s Digest Association published a book in which Wolston was identified as a “convicted” “Soviet agent” despite the fact that he had never even been indicted for espionage.<sup>123</sup> Wolston sued *Reader’s Digest* for

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<sup>112</sup> *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

<sup>113</sup> *Id.* at 114.

<sup>114</sup> *Id.* at 135.

<sup>115</sup> *Id.* at 136.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 113.

<sup>118</sup> *Id.* at 135.

<sup>119</sup> *Wolston v. Reader’s Digest Assn., Inc.*, 443 U.S. 157 (1979).

<sup>120</sup> *Id.* at 167.

<sup>121</sup> *Id.* at 162.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 159.

defamation. The Court held that doing something that attracts media or public attention does not automatically make the person a public figure.<sup>124</sup> It also said limited-purpose public figure status cannot be imposed on a plaintiff who has been “dragged unwillingly into the controversy” at issue.<sup>125</sup> It buttressed its arguments with the fact that the plaintiff never discussed the controversy with the media, and the Court ruled Wolston did not qualify as a public figure.<sup>126</sup>

## 2. Current Tests for Limited-Purpose Public Figures

The U.S. Court of Appeals for the D.C. Circuit established one of the most frequently used standards to gauge the level of notoriety needed for a plaintiff to be considered a limited-purpose public figure. It ruled in *Waldbaum v. Fairchild Publications, Inc.*<sup>127</sup> that the president and CEO of a cooperative could be considered a limited-purpose public figure based on his work in a particular industry.<sup>128</sup> According to the court, “When one assumes a position of great influence within a specific area and uses the influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate.”<sup>129</sup> It went on to express doubt as to whether a majority of the public must know a person for him to achieve the “general fame or notoriety” the Supreme Court mentioned in *Gertz*:

Rather, we conclude that “general” fame means being known to a large percentage of the well-informed citizenry ... we therefore conclude that nationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety where he was defamed, i.e., where the defamation was published.<sup>130</sup>

Notorious blogger Arianna Huffington reiterated this idea when she said, “You don’t need to reach everybody in order to have an impact on the national dialogue. You put thoughts and ideas out there and they enter the cultural bloodstream.”<sup>131</sup> Similarly, the Supreme Court of Florida recently noted that a statement could be defamatory even if it prejudiced the plaintiff in the eyes of only a minority of the community, provided that the minority is substantial and respectable<sup>132</sup>—borrowing language from the Supreme Court’s 1909 decision in *Peck v. Tribune Co.*<sup>133</sup>

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<sup>124</sup> *Id.* at 167.

<sup>125</sup> *Id.* at 166.

<sup>126</sup> *Id.* at 167.

<sup>127</sup> *Waldbaum v. Fairchild, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980).

<sup>128</sup> *Id.* at 1300.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1295.

<sup>131</sup> Arianna Huffington, *Punching Holes in Old Faded Mirrors*, in *BLOG!*, *supra* note 3, at 346.

<sup>132</sup> *Jews for Jesus v. Rapp*, 997 So.2d 1098, 1099 (Fla. 2008).

<sup>133</sup> *Peck v. Tribune Co.*, 214 U.S. 185 (1909).

Even legal scholars have addressed the need to use the relevant audience to determine whether someone's reputation has been injured during the discussion of a public controversy.<sup>134</sup> In his article, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*,<sup>135</sup> Robert Post applied the idea of relevant audience when determining the boundaries of public discourse. He argued that courts in the past have looked at three factors to determine whether a statement constitutes public discourse: the generic intent of the speaker, the size of the audience reached, and the identity of the audience.<sup>136</sup> The broader the audience, the more likely the speech is to be considered part of the public discourse.<sup>137</sup> According to Post, the demographics of the audience are relevant even if a statement is made to only one person because if the speaker is a public official the statement could be considered part of the public discourse.<sup>138</sup>

Simply being a part of the public discourse, however, does not mean a statement rises to the level of a public controversy—which is necessary to give rise to limited-purpose public figure status. In *Waldbaum*, the D.C. Circuit Court of Appeals made it clear that a public controversy must include an actual dispute. “A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.”<sup>139</sup> The court reasoned that a plaintiff is a limited-purpose public figure if he has attempted to have, or realistically could be expected to have, a major impact on a public dispute.<sup>140</sup> The court qualified this statement, however, by defining a public dispute as one that has a substantial effect on members of society beyond the participants in the lawsuit.<sup>141</sup>

The Second Circuit enunciated a similar test used to determine whether a plaintiff would be considered a limited-purpose public figure. In *Lerman v. Flynt Distributing Co. Inc.*,<sup>142</sup> the court encountered a question of defamation involving mistaken-identity when one of Larry Flynt's publications, *Adelina*, published two nude photos of an actress who had appeared in one of Jackie Collins Lerman's movies and mistakenly labeled them as images of Lerman.<sup>143</sup> The court articulated a four-prong test to determine whether a plaintiff was a limited-purpose public figure. Under the *Lerman* standard, the plaintiff must have: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself

<sup>134</sup> See Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COMM. L. & POL'Y 231 (2010)

<sup>135</sup> Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 675-78 (1990).

<sup>136</sup> *Id.* at 677-678.

<sup>137</sup> *Id.* at 678.

<sup>138</sup> *Id.*

<sup>139</sup> *Waldbaum*, 627 F.2d at 1296.

<sup>140</sup> *Id.* at 1297.

<sup>141</sup> *Id.*

<sup>142</sup> *Lerman v. Flynt Distributing Co., Inc.*, 789 F.2d 164 (2d. Cir. 1986).

<sup>143</sup> *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 137 (2d. Cir. 1984).

into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.”<sup>144</sup> The court held Lerman had achieved international recognition as the author of nine novels that discussed sex and had successfully invited public attention to her views about sex and gender, which qualified her as a limited-purpose public figure for the topic.<sup>145</sup>

In *Lerman*, the Second Circuit added an additional wrinkle to the D.C. Circuit’s *Waldbaum* approach. By adding the fourth prong focused specifically on access to the media, the Second Circuit expanded earlier references to the plaintiff’s ability to rebut the defamatory statement. As Daniel P. Dalton pointed out in his article, *Defining the Limited Purpose Public Figure*,<sup>146</sup> it is the final part of the test that makes the *Lerman* approach unique by requiring that the plaintiff maintain regular and continuing access to the media to be considered a limited-purpose public figure.<sup>147</sup> Although such a requirement may have seemed a heavy burden in *Lerman*’s pre-Internet era, it is quite easy to imagine a court could find bloggers’ continuous blogging would provide sufficient access to consider them limited-purpose public figures under the *Lerman* standard. Thus, the level of protection the Second Circuit may have intended to provide plaintiffs when including the fourth prong of the test has all but evaporated in the Internet age.

## B. PUBLIC-FIGURE DOCTRINE AND THE BLOGOSPHERE

After *Gertz* and *Waldbaum*, it is hard to imagine many bloggers who would achieve the type of notoriety required of an all-purpose public figure. Certainly one might imagine a situation in which a select few bloggers, such as Matt Drudge, rise to the level of prominence expected of an all-purpose public figure. The more typical situation involves a blogger who communicates with a smaller audience, typically about a limited range of topics. At best, it seems most bloggers would be more properly classified as limited-purpose public figures or even private persons. Thus, it is imperative that courts act prudently when determining the status of blogger plaintiffs because it affects the level of fault they will have to prove to succeed in a defamation lawsuit.

The Court’s limited-purpose public figure doctrine has not gone without its critics. Since the Court’s 1974 decision in *Gertz*, legal scholars have debated the standards that everyday citizens must meet to attain public-figure status.<sup>148</sup> Some specific parts of the doctrine that have sparked a number of debates include the plaintiff’s access to media, the role a plaintiff must play in a controversy to become a public figure, and

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 147.

<sup>146</sup> Daniel P. Dalton, *Defining the Limited Purpose Public Figure*, 70 U. DET. MERCY L. REV. 47 (1992).

<sup>147</sup> *Lerman*, 745 F.2d at 137.

<sup>148</sup> See, e.g., Amy Kristin Sanders, *Defining Defamation: Plaintiff Status in the Age of the Internet*, 1 J. MEDIA L. & ETHICS 155 (2009). Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833-37, 862 (2006).

whether the plaintiff has tried to engage in corrective speech.<sup>149</sup> Of these, the plaintiff's access to media seems to be most relevant in the blogging context.

In lawsuits brought in the pre-Internet era, the lower courts regularly relied on the three-prong *Waldbaum* analysis to determine whether the plaintiff was a limited-purpose public figure.<sup>150</sup> This included looking at whether the controversy was public in the sense that people other than the immediate participants were likely to feel the impact of its resolution, whether the plaintiff had more than a minor role in the controversy, and finally whether the alleged defamation was relevant to the role the plaintiff played in the controversy.<sup>151</sup> The *Waldbaum* approach clearly addresses the plaintiff's involvement in a matter of public controversy, but it is incomplete because it does not address the plaintiff's access to self-help through access to the media – a key component to whether the plaintiff can rebut the defamatory statement.

When faced with defamation cases involving blogger plaintiffs, the most obvious course of action would be for the court to rely on jurisprudence involving similarly situated plaintiffs whom the courts had considered limited-purpose public figures. Such a comparison becomes particularly useful when the previous plaintiff undertook some sort of journalistic function because many well-known bloggers attempt to undertake the responsibilities and habits of professional journalists, including reporting, interviewing and linking to primary source documents instead of simply posting unsubstantiated opinion.<sup>152</sup>

At least one federal court has held a plaintiff engaged in journalistic activities was a limited-purpose public figure. In *Renner v. Donsbach*,<sup>153</sup> the U.S. District Court for the Western District of Missouri ruled that Dr. John Renner, who worked as a physician and professor in Kansas City, was a limited-purpose public figure for the purposes of his defamation lawsuit.<sup>154</sup> Renner wrote many scholarly journal articles and wrote a weekly newspaper column on health and nutrition.<sup>155</sup> He filed suit for defamation against Kurt Donsbach, as well as other members of the International Institute of Natural Health Sciences Inc. and National Health Federation, after they published statements claiming Renner was aligned with “drug therapies” that were contrary to the concept of “health freedom.”<sup>156</sup> The court held Renner was a limited-purpose public figure because he had

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<sup>149</sup> *Id.*

<sup>150</sup> *Waldbaum*, 627 F.2d at 1300.

<sup>151</sup> *Trotter v. Jack Anderson Enters. Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987). The court ruled that “1) the controversy at issue is public in the sense that it is the subject of discussion and people other than the immediate participants are likely to feel the impact of its resolution, 2) the plaintiff had more than a trivial or tangential role in the controversy, and 3) the alleged defamation was germane to the plaintiff's participation in the controversy.” *Id.*

<sup>152</sup> *See, e.g.*, TPM, <http://www.talkingpointsmemo.com>.

<sup>153</sup> *Renner v. Donsbach*, 749 F. Supp. 987 (W.D. Mo. 1990).

<sup>154</sup> *Id.* at 988.

<sup>155</sup> *Id.* at 989.

<sup>156</sup> *Id.*

“written extensively” in the area as a newspaper columnist and had “appeared on at least one nationally broadcast television program discussing health and nutrition issues.”<sup>157</sup>

The *Renner* case provides a link between the traditional media world and the digital media world that courts may use when considering defamation claims involving blogger plaintiffs. Many bloggers perform functions similar to those of newspaper columnists and freelancers like Dr. Renner. Bloggers who express their views on matters of public concern or controversy are writing the equivalent of a newspaper column for distribution via the Internet. Blogging has even taken on characteristics comparable to appearing on a television show. Bloggers can upload videos of themselves to their blogs – also known as vlogging<sup>158</sup> – that can then be viewed by audiences as large and diverse as those who watch nationally televised programs.

Plaintiffs’ use of the media has not been confined merely to undertaking traditional journalistic endeavors such as those involved in *Renner*. Strategic communication practices, including the issuance of press releases and the use of advertisements have also qualified. The Second Circuit found the priests of Contemporary Mission to be limited-purpose public figures in their defamation suit against the *New York Times* because they had “openly availed themselves to the media, issuing press releases, making public statements and addressing ‘open letters’ to Cardinal Carberry of St. Louis.”<sup>159</sup> The court also relied on the more than 12 million solicitations the priests had sent out over four years to advertise their various mail-order products as an indication that they had actively worked to attract public attention toward their business activities.<sup>160</sup>

The First Circuit held that public figure status could be attributed to those who pronounce themselves as experts in a field or authorities on a subject, a title that many bloggers claim on their blogs.<sup>161</sup> In *Gray v. St. Martin’s Press, Inc.*,<sup>162</sup> the court ruled Robert Gray was a limited-purpose public figure because of his renowned reputation as a lobbyist in Washington, D.C.<sup>163</sup> “The record shows that Gray was a central figure in this controversy, being identified as one of the best-known of the high-level Washington public relations experts, an emblematic figure, and a self-professed defender against attacks on lobbying.”<sup>164</sup> The court also used the fact that Gray’s work attracted comment and criticism in publications like *Time*, *Newsweek* and the *Washington Post* as evidence proving his level of notoriety in the community.<sup>165</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> See CNN iREPORTS video blogs, <http://ireport.cnn.com>.

<sup>159</sup> *Contemporary Mission, Inc., v. New York Times*, 842 F.2d. 612 (2d. Cir. 1988).

<sup>160</sup> *Id.* 627.

<sup>161</sup> For example, the Counterterrorism Blog claims to be “the first multi-expert blog dedicated solely to counterterrorism issues, serving as a gateway to the community for policymakers and serious researchers.” COUNTERTERRORISM BLOG, <http://counterterrorismblog.org>.

<sup>162</sup> *Gray v. St. Martin’s Press Inc.*, 221 F.3d 243 (1st Cir. 2000).

<sup>163</sup> *Id.* at 251.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Building on *Waldbaum*, a number of authors have proposed their own approaches to determining relative access to corrective speech and the role such access should have in the determination of plaintiff status. Aaron Perzanowski proposed that courts apply the actual malice standard based on the plaintiff's relative access to corrective speech instead of simply the plaintiff's status as a public figure.<sup>166</sup> He created a test that examined the plaintiff's respective means of communication, relative notoriety, access to the relevant audience, and efforts to engage in or permit counter speech.<sup>167</sup> Perzanowski argued that the original public-figure doctrine incorrectly assumed equality among media defendants, represented a failure of the marketplace of ideas, and had to be updated to accommodate technological advances, including the blogosphere.<sup>168</sup> He claimed his standard reflected a "sensitivity to the increased diversity among defamation defendants and the concomitant variety of corrective speech opportunities."<sup>169</sup> However, Perzanowski's test lent so much weight to access to corrective speech that it failed to first question whether the topic of defamation was a matter of public controversy. In fact, Perzanowski rejected the court's dependence on public controversy and argued "the relative access test allows courts to avoid deciding the murky and dangerous question of the relative value of speech."<sup>170</sup> This jettison of public concern inquiries is inconsistent with actual malice jurisprudence.

Others have argued Internet communicators categorically should not be considered public figures. Michael Hadley asserted "there are fundamental inequities of power between speakers on the Internet."<sup>171</sup> He said the structural aspects of the Internet, which create substantial inequities of access and power, make it virtually impossible to effectuate any successful reply to false defamatory statements.<sup>172</sup> However, this argument seems flawed. Communication over the Internet has become a fundamental part of everyday life, and society cannot ignore the fact that people of prominence discuss matters of public controversy using blogs and other Web sites. Although it may be impossible to effectively answer every defamatory statement made via the Internet, the Supreme Court recognized this issue as it related to traditional defamation in its *Gertz* decision, saying, "Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry."<sup>173</sup>

### III. BLOGGERS AS LIMITED-PURPOSE PUBLIC FIGURES: A NEW TEST

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<sup>166</sup> Perzanowski, *supra* note 146, at 862.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 835.

<sup>169</sup> *Id.* at 837.

<sup>170</sup> *Id.* at 869.

<sup>171</sup> Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 478, 492, 499, 501-503 (1998).

<sup>172</sup> *Id.* at 501.

<sup>173</sup> *Gertz*, 418 U.S. at 366 n.9.

Although the limited-purpose public figure standards discussed above have merit, they do not adequately address the issues that courts face when determining whether bloggers should be treated as limited-purpose public figures. The standard proposed in this article takes valuable pieces from a number of the approaches mentioned above and combines them into a more workable test that considers communication in light of the Internet. The use of standards similar to those in *Renner*, *Contemporary Mission*, and *Gray* could very effectively be applied to the blogosphere.

One key component to any public figure determination involving bloggers must be a quantitative inquiry into the blogger's notoriety. Several methods could be used to accomplish such a task. As proposed below, a court could evaluate links to the plaintiff's blog to assess the blogger's notoriety. In addition, comments about the plaintiff's blog found on other blogs and Web sites serve as evidence that the plaintiff attracted comment and criticism in the relevant community. Links and comments would also be helpful in judging the readers' perception of the blogger as an expert in a particular field.

When determining whether a blogger plaintiff is a limited-purpose public figure, the court must focus on three specific aspects of the plaintiff's blog and blogging habits: 1) whether the blogger was well-known among members of the relevant community; 2) whether the topic the blogger was discussing is a legitimate matter of public controversy; and finally, 3) whether the blogger had access to a majority of the defendant's audience to engage in corrective speech.

First, the court must define the subject matter on which the blogger focuses his posts. This inquiry begins by ascertaining the general topic of the blog. The inquiry should specifically define the subject matter and determine the exact area of the blogger's expertise and notoriety. Once the court has defined the blog topic, those findings can be used to define the scope of the relevant community, which would be composed of users who take an active interest in the plaintiff's blog or other blogs with a similar focus. Most likely, community members would be regular readers of the plaintiff's blog who participate in the discussion by contributing their own thoughts through comments, links or other posts.

Subsequently, the court must determine whether the blogger is well known among members of the relevant community. Such an emphasis on notoriety echoes the standards set out in *Gertz*, where the Court based its definition of a limited-purpose public figure on the plaintiff's level of notoriety. Prominence also played a role in the Court's *Hutchinson* decision, when it determined Hutchinson was a private plaintiff because he had not been well known prior to the defamation lawsuit. Quantitatively, courts could evaluate the notoriety of a specific blogger and his blog using several measures, including the number of daily views it receives or the number of times other Web sites or blogs have linked to the plaintiff's blog. Because members of the blogosphere gain prominence primarily through linking,<sup>174</sup> the practice should be considered in any analysis of the blogger's status as a plaintiff. Typing the specific keywords related to the plaintiff's blog into a prominent search engine could also help courts determine the level of popularity and influence the blogger has in the relevant

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<sup>174</sup> Daniel W. Drezner & Henry Farrell, *Web of Influence*, in *BLOG!*, *supra* note 3 at 87-88.

community. For example, blogs that do not show up in a keyword search are not likely to be considered prominent.

Once it has been determined that the blogger is prominent in his community, the court must determine whether the topic at issue in the lawsuit is a legitimate public controversy. The D.C. Circuit used a public controversy standard in *Waldbaum* when it defined a limited-purpose public figure as someone who could be expected to have a substantial impact on a dispute that affected other who were not involved in the lawsuit. To determine whether a public controversy exists, the court must decide whether the blogger has spurred discussion and comment from members of the public on the topic at issue in the lawsuit. However, just because a thought has been posted does not automatically make it part of the public discourse. Even if a blog post draws attention from the public, it does not necessarily create a public controversy. Therefore, courts should use caution when determining the existence of a public controversy. In this regard, the D.C. Circuit's *Waldbaum* test proves quite useful to a court that must decide whether the resolution of the dispute will effect others not specifically involved in the lawsuit. An affirmative answer to that question, according to the *Waldbaum* test, would indicate the existence of a public controversy within the relevant community.

The third and final prong of the proposed test is the most important. Although many of the scholarly standards mentioned above included prongs devoted to self-help, which is clearly relevant in the Internet context, they do not do enough to address the plaintiff's access to media, which is the most commonly accepted form of self-help in defamation cases. If the blogger plaintiff has access to the vast majority of the defendant's audience, he likely has enough access to the media to respond to the defamatory statement and defend his reputation. Clearly, as the Court said in *Gertz*, such access does not negate the impact of the defamatory statement. Instead, it must be taken into consideration when determining both plaintiff status and damages. In such an instance, significant access to the media and opportunity for rebuttal weighs heavily in favor of a finding that the blogger plaintiff is a limited-purpose public figure. If, on the other hand, the defendant reaches a much broader audience than the blogger, the blogger does not have a realistic opportunity to rebut the defamatory statements and repair his reputation in the eyes of the vast majority of the defendant's audience. Or, if most members of the defendant's audience read the defamatory statements and do not know the plaintiff or do not read the plaintiff's blog, such facts must weigh heavily in favor of a finding that the blogger should be considered a private person.

#### IV. CONCLUSION

The blogosphere will undoubtedly change and grow as technological advances are made on the Internet. This is also true of the delicate relationship between bloggers, reporters and other members of the mainstream media. The relationships and formal titles that bloggers and online journalists share are also likely to shape the jurisprudence in this area. Further, as the relationship between media entities and their audiences change, so too will the importance of access to the media as a form of self-help. As a result,

litigation will likely require the legal system to update its public figure test or create a new one.

The *Gertz*, *Waldbaum* and *Lerman* standards, as enunciated individually, simply cannot hold up in the ever-developing blogosphere. Although the *Gertz* standard stressed the importance of access to the media as a prerequisite for limited-purpose public figure status,<sup>175</sup> it did not take into account—quantitatively or qualitatively—the level of media access available to the plaintiff versus that of the defendant. It also lacked a workable definition for a public controversy. The *Waldbaum* standard, which contained some guidance related to the existence of a public controversy,<sup>176</sup> failed to mention the plaintiff's access to the media as a means of self-help. Finally, the *Lerman* standard,<sup>177</sup> which was clearly the most sophisticated of the three, failed to consider whether the plaintiff's audience was similar in nature to the defendant's audience, a key benchmark for both notoriety and efficacy of rebuttal as well as the key element to test proposed in this paper. The proposed test incorporates the most workable portions of the three existing tests and includes new considerations to create a standard adaptable to the blogosphere. It also quantifies both the plaintiff and defendant's audiences, a task that is becoming more realistic as blogs become commercialized and increasingly track the number of views they receive each day.

As courts decide new defamation cases and more precedent is created, the definition of an Internet community will likely change and adapt as well. Should blogs and online media sites start charging membership or subscription fees, for example, it would alleviate many of the difficulties courts face when ascertaining the plaintiff and the defendant's audiences. This would make determining overlap between the plaintiff and defendant's respective communities much easier.

Regardless of specific technological developments, one thing is clear: American courts must update their public-figure standard to accommodate the ever-changing role of technology in mass communication. Outdated standards that view only high-level players as having access to the media are clearly erroneous in today's world of instantaneous global communication. Further, the Internet has, to some extent, leveled the playing field to allow for significant amounts of rebuttal speech that has the ability to reach many of the consumers of the allegedly defamatory statements. These factors make it imperative that the courts construct a standard that continues to protect speech and public discourse in light of the modern practicalities of mass communication.

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<sup>175</sup> *Gertz*, 418 U.S. at 344.

<sup>176</sup> *Waldbaum*, 627 F.2d at 1297.

<sup>177</sup> *Lerman*, 745 F.2d at 137.

# JUDICIAL SAFEGUARDS AGAINST “TRIAL BY MEDIA”: SHOULD BLASI’S “CHECKING VALUE” THEORY APPLY IN INDIA?

ARPAN BANERJEE

*In India, the free press-free trial debate assumes intriguing dimensions. For years, India’s criminal justice system has been in a dysfunctional state, bogged down by endemic corruption. Yet, following the liberalization of India’s economy, many independent news channels have been born. One consequence of this institutional imbalance has been the pre-emptive news coverage of pending trials. The media has exposed attempts by the rich and powerful to subvert justice.*

*In this article, I examine Indian precedents regarding the application of two possible safeguards against prejudicial media coverage — the quashing of a trial and penalties for contempt of court. I submit that the Indian judiciary has consistently refrained from taking punitive action against the press for making prejudicial remarks, preferring to issue token proclamations against a “trial by media” instead. However, I argue that the judiciary ought to be more assertive and at least contemplate the use of mild sanctions against the media. Here, I question the feasibility of following Vincent Blasi’s “checking value” theory — which provides a strong theoretical justification for prejudicial media coverage — in India.*

**Keywords:** free press, fair trial, India, trial by media, Blasi, checking value

## I. INTRODUCTION

“I am doing much better than Mahatma Gandhi [would have done] in this case.”<sup>1</sup> Ram Jethmalani, one of India’s foremost criminal lawyers, made this remark during a heated television interview, while discussing a murder case that had dominated national headlines. Manu Sharma, the son of an influential politician and Jethmalani’s client, had been acquitted of murder despite strong evidence pointing to his guilt — a not uncommon outcome in Indian criminal trials involving powerful figures. Angered by Sharma’s acquittal, members of civil society began a well-publicised campaign on behalf of the murder victim’s family. An exposé conducted by a news magazine revealed that

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<sup>1</sup> Karan Thapar, *Interview with Ram Jethmalani*, CNN IBN, Nov. 19, 2006, available at <http://www.ibnlive.com/news/devils-advocate-ram-jethmalani/26553-3.html>.

Sharma's family may have bribed witnesses. Sharma was eventually convicted for murder by the Delhi High Court and the Supreme Court of India upheld the verdict. Jethmalani, however, accused the media of denying Sharma his right to a fair trial and of committing "the highest form of contempt" of court<sup>2</sup> — reasoning he later put forward before the Supreme Court.<sup>3</sup>

Jethmalani's potshot at Mohandas "Mahatma" Gandhi was in response to an interviewer's mention of Gandhi's righteous values. Ironically, Gandhi — a Middle Temple barrister — had once been found guilty of contempt of court for prematurely making comments about a case involving political dissidents.<sup>4</sup> Jethmalani's comments thus prompt the central question which this paper seeks to discuss — should Indian courts condone a "trial by media"?

In most liberal democracies, conflicts arise between the right of the press to comment on pending trials and the right of an accused to a fair trial. In the case of the world's largest democracy, this conflict assumes some interesting dimensions. India's criminal justice system has perpetually been saddled by factors like the inadequate protection of victims' rights and endemic corruption among law enforcement officials, allowing the coercion and bribing of witnesses to go unchecked.<sup>5</sup> The Supreme Court of India has despondently observed: "Over the years...a large number of trials have been hijacked...The accused have succeeded in manipulating the witnesses...judges and lawyers have remained handicapped."<sup>6</sup> A former Attorney General of India says that "a parallel mafia" has effectively usurped the Indian legal system,<sup>7</sup> while a former Chief Justice of India believes that India's criminal justice system is "on the verge of collapse."<sup>8</sup> Some years ago, responding to a press report about a venal magistrate, the

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<sup>2</sup> Sagarika Ghose, Interview with Ram Jethmalani, CNN IBN, Nov. 3, 2006, available at <http://www.ibnlive.com/news/who-the-hell-is-press-to-decide-who-is-indefensible/25393-3.htm>.

<sup>3</sup> *Sharma v. State* MANU/SC/0268/2010 ¶¶ 145-152.

<sup>4</sup> *Re Mohandas Gandhi* 1920 A.I.R. (Bom.) 175.

<sup>5</sup> See generally Subhradipta Sarkar, *The Quest for Victims' Justice in India*, 17 HUM. RTS. BRIEF 16 (2010); Seema Soni and Harish Sandhu, *KTS Tulsi: If We Do Not Strengthen The Criminal Justice System, Mafias Will Begin To Rule The Country*, HALSBURY'S LAW MONTHLY, Apr. 2009, available at <http://www.halsburys.in/k-t-s-tulsi.html>; Neeraj Mishra, *Criminal Flaws*, INDIA TODAY, Apr. 3, 2006, available at <http://www.india-today.com/itoday/20060403/nation.html>.

<sup>6</sup> Dhananjay Mahapatra, *Criminal Justice System Has Collapsed: SC*, TIMES OF INDIA, Feb. 6 2009, available at <http://timesofindia.indiatimes.com/india/Criminal-justice-system-has-collapsed-SC/ articleshow/4083289.cms>.

<sup>7</sup> HS Rao, *Indian Justice System on Verge of Collapse: AG*, INDIAN EXPRESS, Jun. 12, 2003, available at <http://www.expressindia.com/news/fullstory.php?newsid=22128>.

<sup>8</sup> *Criminal Justice System Faces Collapse*, HINDU, Mar. 12, 2006, available at <http://www.hindu.com/2006/03/12/stories/2006031215660800.htm>.

Supreme Court of India reportedly made this damning observation: “[O]nly God knows what will happen to the country.”<sup>9</sup>

In *Zahira v. Gujarat*,<sup>10</sup> the Supreme Court pressed the government to establish a witness protection program — advice that has been ignored so far. Yet, even if a witness protection program is implemented in India, widespread corruption could nullify this improvement. For many decades, there have been calls for police reforms in India. Such proposals have been overlooked because of the “lack of a political will on the part of successive governments.”<sup>11</sup>

While India’s justice system has stagnated for many years, another vital democratic institution of the country, the media, has contrastingly witnessed vast structural changes. Following the liberalization of the Indian economy in the 1990s, a vibrant television media landscape, featuring scores of popular and independent news channels, has been created. A consequence of this enormous institutional imbalance has been the pre-emptive media coverage of criminal trials. However, vexed judges have criticised this as an unhealthy trend.

In this article, I examine Indian precedents regarding the application of judicial safeguards against prejudicial media coverage. I specifically focus on two safeguards—the quashing of trials and penalties for contempt of court. I argue that while the Indian judiciary’s annoyance towards prejudicial media coverage has increased noticeably in recent years, judges have been reluctant to impose sanctions against the media, preferring to issue facile proclamations of disapproval instead. Though many benefits have flowed from activist media coverage, the judiciary should contemplate imposing mild sanctions in certain cases.

Part II of this paper discusses the raging “trial by media” controversy in India. In Part III, I examine whether the freedom of the press should be allowed to override an accused person’s right to a fair trial. Here, I refer to Vincent Blasi’s theory of the “checking value” of the media. Parts IV and V respectively discuss two possible judicial safeguards against prejudicial media coverage. In Part IV, I examine whether a “trial by media” can warrant the quashing of a trial, making reference to recent judgments. In Part V, I analyze case law on contempt of court.

## II. THE “TRIAL BY MEDIA” PHENOMENON IN INDIA

The Supreme Court of India has defined “trial by media” to mean “the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law.”<sup>12</sup> While apparently

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<sup>9</sup> Rakesh Bhatnagar, *Warrant on Kalam for Rs 40,000*, TIMES OF INDIA, Jan. 29, 2004, available at <http://timesofindia.indiatimes.com/articleshow/451035.cms>.

<sup>10</sup> (2004) 4 S.C.C. 158.

<sup>11</sup> Raghava Krishnaswami Raghavan, *The Indian Police: Problems and Prospects* 33(17) PUBLIUS: J. FEDERALISM 119, 121 (2003).

<sup>12</sup> *Anand v. Registrar*, (2009) 8 S.C.C. 106 (Del.) ¶ 174.

borrowed from *Wikipedia*,<sup>13</sup> this definition is nevertheless apposite. Significantly, the definition does not dispute that even the publication of true information may constitute a trial by media. Under the Universal Declaration of Human Rights, anyone charged with a criminal offence is entitled to a fair trial and has the right to be presumed innocent until proved guilty in a court of law.<sup>14</sup> It is precisely this right that a trial by media impinges upon. The Supreme Court of India has recognized the right to a fair trial as a part of the Fundamental Rights of citizens to equality and life and personal liberty, conferred by two articles of the Constitution of India.<sup>15</sup> Under Articles 32 and 226 of the Constitution, the Supreme Court of India and the High Courts of various states can respectively issue writs against the state for the enforcement of Fundamental Rights.

The phrase “trial by media” gained currency in Western countries during the proliferation of television news coverage in the 1960s.<sup>16</sup> In contrast, the flourishing of new television channels has been a comparatively recent phenomenon in India. Television broadcasting was a state monopoly in the country until the 1990s.<sup>17</sup> A “somnolent and widely discredited” government channel was India’s only television news source for many years.<sup>18</sup> Today, as a consequence of economic liberalization, there are over 200 private news channels in India. This has led to a “welter of exposés” being broadcast on television.<sup>19</sup> It has become more difficult for the rich and powerful to indulge in criminal acts without being subject to public scrutiny. A good example of this changed scenario is the disparate coverage of inter-religious violence during the 1980s and the present decade.

In 1984, hundreds of Sikhs were killed during violent reprisals after the assassination of the former Prime Minister Indira Gandhi by her Sikh bodyguards. A judicial commission named a prominent politician of the Indian National Congress (INC)

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<sup>13</sup> *Trial By Media*, WIKIPEDIA, May 3 2010, [http://en.wikipedia.org/wiki/Trial\\_by\\_media](http://en.wikipedia.org/wiki/Trial_by_media). The Supreme Court did not acknowledge *Wikipedia* as the source for the definition. However, that *Wikipedia* is the source is confirmed by PERCEPTION: WEBSTER’S QUOTATIONS, FACTS AND PHRASES 372 (2008).

<sup>14</sup> Universal Declaration of H.R., G.A. Res. 217A, art. 10, 11, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>15</sup> INDIA CONST. art. 14 states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” INDIA CONST. art. 21 states: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” See *Maharashtra v. Shah* (1982) 1 S.C.R. 299, 302; *Agarwal v. Agarwal* (2003) 6 S.C.C. 230 ¶ 38; *Sarkar v. Assam* (2008) 9 S.C.C. 204 ¶ 11, 44; *Aga v. Punjab* (2008) 9 S.C.A.L.E. 681 ¶ 154.

<sup>16</sup> DWIGHT TEETER & BILL LOVING, *LAW OF MASS COMMUNICATIONS* 503-6 (2001).

<sup>17</sup> Nikhil Sinha, *Doordarshan, Public Service Broadcasting and the Impact of Globalization: A Short History*, in *BROADCASTING REFORM IN INDIA* 22 (Monroe E. Price & Stefaan G. Verhulst, eds., 2000).

<sup>18</sup> Khozem Merchant, *The Television Revolution: India’s New Information Order* (Reuter Foundation Paper 42, University of Oxford).

<sup>19</sup> Praveen Swami, *Breaking News: The Media Revolution*, in *THE STATE OF INDIA’S DEMOCRACY* 177 (Sumit Ganguly, Larry J Diamond & Marc F Plattner, eds., 2007).

party as having “very probably” been involved in the killings.<sup>20</sup> But the politician, who went on to become a minister in successive INC-led governments, has managed to evade prosecution.<sup>21</sup> In 2002, activists linked to far-right Hindu outfits killed hordes of Muslims in the state of Gujarat, as purported revenge for the murder of Hindu pilgrims by suspected Muslim extremists. Unlike the anti-Sikh riots, the Gujarat riots received enormous media coverage.<sup>22</sup> A sting operation conducted by a magazine culminated in the arrest of political activists and even a former minister.<sup>23</sup> A senior lawyer, serving as amicus curiae in one of the Gujarat riots cases, has admitted that the media’s coverage of events has pressurised the police to investigate the cases seriously.<sup>24</sup>

It is indisputable that the Indian media has influenced the course of at least three recent high-profile cases, which I shall now discuss. In all these cases, the accused belonged to influential families and were using their clout to subvert justice.

#### A. JESSICA LALL CASE

At a party in New Delhi, a model-cum-bartender named Jessica Lall was shot dead by a drunken gatecrasher, after she refused to serve him alcohol. Several witnesses identified the attacker as Manu Sharma, the son of an INC politician and a relative of the former President of India Shankar Dayal Sharma. However, during Sharma’s trial, nearly all witnesses, including Jessica’s fellow bartender, recanted their initial statements made to the police.<sup>25</sup> Meanwhile, a policeman investigating the case complained to his superiors that Sharma’s family had colluded with some police officials and destroyed evidence. This complaint was strangely ignored.<sup>26</sup> A trial court eventually acquitted Sharma for lack of evidence.

<sup>20</sup> R Suryamurthy, *Nanavati Pins Tytler for '84 Riots*, TRIBUNE, Aug. 9, 2005, available at <http://www.tribuneindia.com/2005/20050809/main1.htm>.

<sup>21</sup> *Court Accepts Clean Chit to Tytler*, HINDUSTAN TIMES, Apr. 28, 2010, available at <http://www.hindustantimes.com/rssfeed/newdelhi/Court-accepts-clean-chit-to-Tytler/Article1-536579.aspx>; Anshuman G Dutta, *1984 Anti-Sikh Riots: The Agony of Proving Tytle's Innocence*, MIDDAY, Dec. 2, 2009, available at <http://www.mid-day.com/news/2009/dec/021209-jagdish-tytler-sikh-riots.htm>.

<sup>22</sup> Nidhi Bhardwaj, *Missing the Story: Where was the Media in 1984?* CNN IBN, 2008, available at <http://ibnlive.in.com/news/missing-the-story-where-was-the-media-in-1984/61753-3.html> (last visited May 15, 2010).

<sup>23</sup> Rana Ayyub, *Finally, The First Sign of Justice*, TEHELKA, Apr. 11, 2009, available at [http://www.tehelka.com/story\\_main41.asp?filename=Ne110409finally\\_the.asp](http://www.tehelka.com/story_main41.asp?filename=Ne110409finally_the.asp).

<sup>24</sup> *Trial By Media, Last Hope for Justice in Gujarat*, CNN IBN, 2007, available at <http://ibnlive.in.com/news/trial-by-media-last-hope-for-justice-in-gujarat/51464-3-single.html> (last visited May 15, 2010).

<sup>25</sup> Bhavna Vij-Aurora, *Deaf Mute Blind*, OUTLOOK, March 13, 2006, available at <http://www.outlookindia.com/article.aspx?230514>.

<sup>26</sup> *Id.*

Sharma's acquittal led to a public outcry. Backed by the media, a nationwide "Justice for Jessica" campaign ensued.<sup>27</sup> The campaign intensified after a magazine carried out a sting operation which suggested that witnesses had been bribed by Sharma's family.<sup>28</sup> Another news outlet leaked a written statement that Manu Sharma had given to the police shortly after the murder. In the statement, Sharma had apparently confessed to the murder. Under Indian law, a confession made to the police in the absence of a magistrate — which was true of the leaked statement—is inadmissible as evidence in a court of law.<sup>29</sup> However, the channel which leaked the statement argued that it "only lent credence to the fact that... Manu Sharma killed Jessica Lall."<sup>30</sup> Meanwhile, a well-known journalist threw caution to the winds and condemned Sharma as "a craven killer."<sup>31</sup> Some sections of the press also criticized the trial court judge who acquitted Sharma.<sup>32</sup> Sharma was found guilty of murder when the case went up to the Delhi High Court on appeal. The High Court had fast-tracked the case in the wake of the Justice for Jessica campaign. The High Court criticized the trial court's decision as "positively perverse" and referred to the revised statement of Jessica's fellow bartender as a "concoction."<sup>33</sup> In April 2010, the Supreme Court of India upheld the Delhi High Court's judgement.<sup>34</sup>

#### B. PIYADARSHINI MATTOO CASE

The Justice for Jessica campaigners also drew attention to the botched trial of Santosh Singh, the son of a top police official. Singh had been charged with the rape and murder of a law student named Piyadarshini Mattoo. Like Manu Sharma, Singh had been acquitted by a trial court for lack of evidence. The trial court judge made this bizarre observation about Singh: "Though I know he is the man who committed the crime, I acquit him, giving him the benefit of the doubt."<sup>35</sup> The judge rebuked the police for their sloppy investigation, lamenting that the rule of law in India apparently did not extend to "those who enforce the law" and "the children of such persons."<sup>36</sup> On appeal, Singh was

<sup>27</sup> Somini Sengupta, *Acquittal in Killing Unleashes Ire at India's Rich*, N.Y. TIMES, March 13, 2006, available at [http://www.nytimes.com/2006/03/13/international/asia/13india.html?\\_r=1](http://www.nytimes.com/2006/03/13/international/asia/13india.html?_r=1).

<sup>28</sup> Vineet Khare and Harinder Baweja, *Killers of Justice*, TEHELKA, Oct. 7, 2006, available at [http://www.tehelka.com/story\\_main20.asp?filename=Ne100706killers\\_of\\_CS.asp](http://www.tehelka.com/story_main20.asp?filename=Ne100706killers_of_CS.asp).

<sup>29</sup> The Indian Evidence Act, No. 1 of 1872 §§ 25, 26.

<sup>30</sup> Brijesh Pandey, *Manu Confessed to Jessica's Murder*, CNN IBN, May 25, 2006, available at [www.ibnlive.com/news/run-manu-has-shot-jessica/11358-3-single.html](http://www.ibnlive.com/news/run-manu-has-shot-jessica/11358-3-single.html).

<sup>31</sup> B. Dutt, *Ram and Manusmriti*, HINDUSTAN TIMES, Nov. 4, 2006, available at [http://httabloid.com/news/181\\_1835670,0008.htm](http://httabloid.com/news/181_1835670,0008.htm).

<sup>32</sup> Vij-Aurora, *supra note 25*; Harinder Baweja and Vineet Khare, *Is There Any Hope Jessica Will Get Justice?*, TEHELKA, Mar. 25, 2006, available at [http://www.tehelka.com/story\\_main17.asp?filename=Ne032506\\_Is\\_there\\_CS.asp](http://www.tehelka.com/story_main17.asp?filename=Ne032506_Is_there_CS.asp).

<sup>33</sup> *State v. Vashisht* (2009) 93 D.R.J. 145 ¶¶ 30, 55.

<sup>34</sup> *Sharma v. State* MANU/SC/0268/2010.

<sup>35</sup> TK Rajalakshmi, *A Shocking Acquittal*, FRONTLINE, Dec. 25, 1999, available at <http://www.hinduonnet.com/fline/fl1627/16270340.htm>.

<sup>36</sup> *State v Singh* (2006) 133 D.L.T. 393 ¶ 52.

sentenced to death by the Delhi High Court, which criticized the trial court for having “mauled justice.”<sup>37</sup> Like Manu Sharma’s trial, this trial too had been expedited by the High Court.

### C. SANJEEV NANDA CASE

In the words of the Delhi High Court, the case of Sanjeev Nanda resembled a Bollywood film plot.<sup>38</sup> Nanda — the son of a wealthy businessman and the grandson of India’s former Navy Chief — had been arrested for allegedly running over and killing six people while driving his BMW in an intoxicated state. During Nanda’s trial, a homeless man who had survived the accident revised a statement he had made to the police and claimed that the victims had been mowed down by a truck rather than a car. This volte-face weakened the prosecution’s case.<sup>39</sup>

However, an investigative news report revealed that the case was being manipulated. While the case was still pending in the trial court, the news channel NDTV conducted a sting operation using another witness in the case.<sup>40</sup> Carrying a hidden camera, the witness met Nanda’s lawyer as well as the state-appointed prosecutor. The footage showed Nanda’s lawyer attempting to bribe the witness, while the state prosecutor appeared to be complicit. Soon after the exposé, Nanda was tried on a fast-track basis. A trial court convicted Nanda for culpable homicide and criminal negligence. The Delhi High Court quashed the culpable homicide conviction but upheld the conviction for criminal negligence.<sup>41</sup> Commenting on the sting operation, the High Court observed that the Indian justice system risked becoming “a laughing stock.”<sup>42</sup> The High Court also debarred the two errant lawyers from appearing before it, but for a mere four months.<sup>43</sup> Regrettably, even this light punishment was opposed by some members of the bar.<sup>44</sup> Moreover, after initially suspending the membership of the two lawyers, the Supreme Court Bar Association soon revoked its suspension order.<sup>45</sup>

## III. TRIAL BY MEDIA VERSUS FREEDOM OF THE PRESS

<sup>37</sup> *Id.* ¶ 53.

<sup>38</sup> *Nanda v. State* (2009) 160 D.L.T. 775 ¶ 170.

<sup>39</sup> *Survivor’s Testimony Couldn’t Save Nanda*, 2008, available at <http://ibnlive.in.com/news/survivors-testimony-couldnt-save-nanda--timeline-other-such-cases/72706-3.html>.

<sup>40</sup> *BMW Case: Lawyers Collude, Stung*, May 31, 2007, <http://ibnlive.in.com/news/bmw-case-lawyers-collude-stung/41781-3.html?from=search-relatedstories>.

<sup>41</sup> *Nanda v. State* (2009) 160 D.L.T. 775 ¶¶ 258-265.

<sup>42</sup> *Id.* ¶ 376.

<sup>43</sup> *Court on its Own Motion v. State* (2008) 151 D.L.T. 695.

<sup>44</sup> *High Court Not Authorised to Debar Anand, Khan: Lawyers*, Aug. 21, 2008, <http://ibnlive.in.com/news/high-court-not-authorised-to-debar-anand-khan-lawyers/71763-3.html>.

<sup>45</sup> *BMW Sting: SCBA Revokes Anand, Khan Suspension*, INDLAW, Jun. 19, 2007, available at <http://www.indlaw.com/guest/DisplayNews.aspx?D4A699F9-DBDC-4FB1-890A-11D873C744FE>.

In the 19<sup>th</sup> century, John Stuart Mill advanced the classical liberal justification for freedom of speech. Mill reasoned that free speech aids in the discovery of truth, which leads to societal progress.<sup>46</sup> Mill, however, qualified this view by framing what is known as the harm principle. Mill hypothesised that a person's liberties could be curbed against his or her will, through legal or moral sanctions, in order to "prevent harm to others."<sup>47</sup> Mill's philosophy has played an important role in the development of constitutional free-speech jurisprudence in India.<sup>48</sup> Article 19(1)(a) of the Constitution gives all citizens the Fundamental Right to "freedom of speech and expression." Article 19(2) permits the state to make laws imposing certain "reasonable restrictions" on this right.<sup>49</sup> Hence, compared to the wording of the First Amendment,<sup>50</sup> Article 19 is prima facie less tolerant of freedom of speech.<sup>51</sup> This difference was also noted by Justice Douglas of the United States Supreme Court in *Kingsley v. Regents*.<sup>52</sup> Archived debates of the Constituent Assembly of India, the body entrusted with framing the Constitution, show that the imposition of restrictions on the right to free speech was perceived to reflect the philosophy of Mill's harm principle.<sup>53</sup>

However, Mill developed his theory aeons before the advent of television and investigative journalism. In the context of the free press-fair trial debate, a more modern theory has been adduced by Vincent Blasi. Blasi argues that free expression is valuable "because of the function it performs in checking the abuse of official power," a function he calls the "checking value" of free speech.<sup>54</sup> According to Blasi:

The checking value is promoted by close and critical press coverage of the behavior of officials charged with the responsibility of investigating crime and adjudicating guilt. Particularly when the charges in question concern the abuse of official power, it is absolutely essential

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<sup>46</sup> See JOHN STUART MILL, ON LIBERTY 33-4, 63 (1859).

<sup>47</sup> *Id.* 21-22.

<sup>48</sup> See generally Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis*, 2 DREXEL L. REV. 557 (2010).

<sup>49</sup> Under INDIA CONST., art. 19(2), the State may restrict the rights conferred by Article 19 by making "any law, in so far as such law imposes reasonable restrictions . . . in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

<sup>50</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

<sup>51</sup> HM SEERVAI, 3 CONSTITUTIONAL LAW OF INDIA 710 (2004).

<sup>52</sup> 360 U.S. 684, 698 (1959).

<sup>53</sup> CONSTITUENT ASSEMBLY DEBATES VOL XI-XII 727 Nov. 21, 1949 (AC Guha).

<sup>54</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 528 (1977).

that the press be permitted to second guess the prosecuting authorities to prevent them from protecting or coddling their political associates.<sup>55</sup>

In India, media reportage has made it difficult for the rich and powerful to hinder the course of justice. The likes of Sharma, Singh, and Nanda would very likely have evaded the arm of the law had it not been for activist news channels. Yet, to invoke Blasi's theory to justify the trial by media, which undoubtedly happened in all those cases, poses two apparent problems.

First, Blasi seems to justify a trial by media in cases where a public official is tried.<sup>56</sup> According to Blasi, "The central premise of the checking value is that the abuse of official power is an especially serious evil — more serious than the abuse of private power..."<sup>57</sup> In cases where a serving official is being prosecuted, "the public's need to learn as soon as possible everything there is to know about the behavior of the public official outweighs the risk that he will thereby be denied a fair trial..."<sup>58</sup> Blasi adopts Lockean reasoning and believes that a democratic government is a product of social contract between the state and its citizens. Thus, "the general populace must be the ultimate judge of the behavior of public officials."<sup>59</sup> To accept the checking-value theory, "one must be at least a Lockean democrat."<sup>60</sup> Although Sharma, Singh, and Nanda had links with public officials, they were not public officials themselves. If a wealthy, non-state actor bribes a witness it is not an abuse of state power. Hence, a justification for trial by media in India must be based on a philosophy that is similar to Blasi's but more expansive in scope. Essentially, the government-centric focus of the checking value must be expanded to include private actors. Arguably, this would entail a concomitant reduction in the power of the media to second guess investigators, since there is no social contract between the general populace and private actors.

The second problem with importing Blasi's theory is his reliance on the First Amendment.<sup>61</sup> As noted earlier, the Indian Constitution is not as liberal as the American Constitution in matters of free speech. The Supreme Court of India has also opined that American judgements on freedom of speech should not be followed in India for this reason.<sup>62</sup> Blasi argues that the checking value of the press was "the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment."<sup>63</sup> However, the framers of India's Constitution seemed to have taken a more skeptical view of the media. To illustrate, Article 19(2) of the Constitution allows the state to enact "any law...in relation to contempt of court" which imposes reasonable restrictions on the freedom of speech. One Member of the Constituent Assembly had presaged the

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<sup>55</sup> *Id.* 636.

<sup>56</sup> C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 232 (1992).

<sup>57</sup> *Id.* 538.

<sup>58</sup> *Id.* 637.

<sup>59</sup> *Id.* 542.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* 635-6.

<sup>62</sup> *Parate v. Maharashtra*, (1961) 3 S.C.R. 423 ¶ 24.

<sup>63</sup> Blasi, *supra* note 53 at 527.

possibility of trial by media while discussing this provision. The Member had stated: “If there is no power to proceed for Contempt of Court, anyone may start a newspaper trial ...and thereby seriously prejudice the fair and impartial trial of a case.”<sup>64</sup>

In Sanjeev Nanda’s case, the Delhi High Court observed that while it was the job of the media to expose the “misdeeds” of the “high and mighty,” it could not go “over board.”<sup>65</sup> Arguably, the condonation or condemnation of a trial by media in India must be based on this premise, which is essentially a tempered version of Blasi’s philosophy. Moreover, it is a settled principle that “justice should not only be done, it should manifestly and undoubtedly be seen to be done.”<sup>66</sup> Thus, the checking value should not always be allowed to outweigh the right of an accused to a fair trial. In an Indian context, the imposition of sanctions for prejudicial coverage is justified in some circumstances. What the law has to address is two key questions. First, in what situations does a by trial media go overboard? Secondly, what are the sanctions that should be imposed upon the media when it does go overboard?

I will seek to answer these questions by examining the scope of post-dissemination judicial safeguards against a trial by media, i.e. safeguards applied by courts after the dissemination of prejudicial information. The Law Commission of India, in a report addressing the emerging subject of trial by media, has stated that a pre-dissemination restraint is an exception to the principle of open justice. It “limits public debate and knowledge more severely” than a post-dissemination sanction. Hence, it can only be “limited to extreme cases” and must be “subjected to stringent conditions.”<sup>67</sup> The Commission suggested that pre-dissemination restraints should be imposed by courts only if there is a “real risk of serious prejudice” to a trial.<sup>68</sup> This recommendation was partially based on principles of English law.<sup>69</sup>

For reasons of expediency, I will focus on post-dissemination safeguards rather than pre-dissemination safeguards. The prevailing trial by media controversy in India has usually revolved around the dissemination of information which is unknown to courts and has thus not been previously embargoed. For example, the judges presiding over the trial of Manu Sharma and Sanjeev Nanda were obviously unaware of the content of the sting operations conducted by news channels. Neither could they anticipate the numerous comments condemning these defendants, often aired on live television. I will specifically focus on the scope of two important post-dissemination safeguards — the quashing of trials and the law of contempt of court.

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<sup>64</sup> 12 C.A.D. 399 (Statement of N Ahmad).

<sup>65</sup> (2009) 160 D.L.T. 775 ¶ 377.

<sup>66</sup> *R. v. Sussex, ex p. McCarthy* [1924] 1 K.B. 256, 259.

<sup>67</sup> LAW COMMISSION OF INDIA, TRIAL BY MEDIA: REPORT ON FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE 161-2 (1973) (Law Comm’n No 200, 2006) .

<sup>68</sup> *Id.* 227.

<sup>69</sup> In the United Kingdom, the Contempt of Court Act § 4(2) allows courts to postpone the publication of information which would create a “substantial risk of prejudice” to a proceeding or imminent proceeding. The Commission explained that it was employing the words “real risk” and “serious prejudice” as prior restraint (as opposed to postponement) requires “more stringent conditions.”

#### IV. DOES TRIAL BY MEDIA INVALIDATE A TRIAL?

*Pillai v. Kerala* was a seminal Indian case where a defendant argued that biased media coverage could prejudice a trial.<sup>70</sup> In *Pillai*, a politician facing corruption charges petitioned the Supreme Court of India to shift his trial venue, alleging that “adverse publicity in the press” had rendered a fair trial impossible. The Supreme Court dismissed the petition and declared that it would be wrong to assume that judges could be influenced consciously or subconsciously by “propaganda or adverse publicity.”<sup>71</sup> It was essentially this perception of judicial impartiality which made the Delhi High Court reject the defence’s plea for a retrial in the high-profile *Parliament Attack Case*.<sup>72</sup>

##### A. THE PARLIAMENT ATTACK CASE

In December 2001, terrorists entered the outer premises of Indian Parliament. The terrorists were eventually killed by commandos, but not before having taken the lives of eight guards. The Indian government blamed Islamic terrorist groups in Pakistan for the attack, and India and Pakistan were soon on the brink of war.<sup>73</sup> The Indian police arrested four Muslim Indian citizens and charged them with having been involved in planning the attack. Among those arrested was Mohammed Afzal.

Some argued that the Indian media’s coverage of the case precluded the possibility of Afzal’s receiving a fair trial.<sup>74</sup> The trigger for such criticism was the fact that the Delhi police had invited news channels to record a confessionary statement by Afzal while he was in police custody. The statement, which was inadmissible as evidence, was broadcast by many channels. Meanwhile, a leading news channel broadcast a film reconstructing the Parliament attack conspiracy. The film was criticized for parroting the prosecution’s version of events.<sup>75</sup> Afzal had sought a stay on the telecast of the film, arguing that it would prejudice his trial.<sup>76</sup> However, the Supreme

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<sup>70</sup> (2000) 7 S.C.C. 129.

<sup>71</sup> *Id.* ¶ 9.

<sup>72</sup> *State v. Afzal*, (2003) 107 D.L.T. 385.

<sup>73</sup> See generally PR CHARI, PERVAIZ IQBAL CHEEMA AND STEPHEN P COHEN, *FOUR CRISES AND A PEACE PROCESS: AMERICAN ENGAGEMENT IN SOUTH ASIA* 149-183 (2007).

<sup>74</sup> Arundhati Roy, *And His Life Should Become Extinct*, *OUTLOOK*, Oct. 31, 2006, available at <http://www.outlookindia.com/article.aspx?232979>; Nandita Haksar, *Tried by the Media: The S.A.R. Geelani Trial*, SARAI, 2004, available at <http://www.sarai.net/publications/readers/04-crisis-media/20nandita.pdf> (last visited May 15, 2010).

<sup>75</sup> Nandita Haksar & K. Sanjay Singh, *December 13*, SEMINAR, 2003, available at <http://www.india-seminar.com/2003/521/521%20nandita%20haksar%20&%20k.%20sanjay%20singh.htm> (last visited May 15, 2010).

<sup>76</sup> *Zee News v Sandhu* (2003) 1 S.C.A.L.E. 113.

Court of India rejected the plea and stated that judges were trained not to be influenced by such pre-trial publicity.<sup>77</sup> The trial court eventually sentenced Afzal to death.

When Afzal appealed his conviction to the Delhi High Court, his lawyer, Colin Gonsalves, sought a retrial. Gonsalves, a prominent human rights activist, contended that Afzal's televised statement had constituted a "media trial" which had "seriously prejudiced" the trial court judge, or had at least engendered "the possibility of causing serious prejudice" in his mind.<sup>78</sup> It was thus argued that Afzal had been deprived of his right to a fair trial.<sup>79</sup> To buttress his submission, Gonsalves cited three American judgements: *Rideau v. Louisiana*,<sup>80</sup> *Coleman v. Kemp*,<sup>81</sup> and *Sheppard v. Maxwell*.<sup>82</sup> A paucity of Indian case law on this subject presumably made Gonsalves cite precedents from foreign shores.

In *Rideau*, a video showing Wilbert Rideau confessing to the police about his alleged crimes was broadcast on local channels. During Rideau's trial, some jurors had stated under oath that they had seen Rideau's televised confession. But a plea seeking a change of trial venue was denied. Rideau was sentenced to death and the trial court's verdict was upheld by the Supreme Court of Louisiana. On appeal, the United States Supreme Court reversed the decision. Speaking for the majority, Justice Stewart stated that since the local public "had been exposed repeatedly... to the spectacle of Rideau personally confessing" about his alleged crime, "subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." The Court accordingly held that the refusal to change the trial venue had constituted "a denial of due process of law."<sup>83</sup>

In *Coleman*, Wayne Coleman was charged with multiple murders. The local press carried several articles condemning Coleman. Coleman's plea for a change of trial venue was rejected and he was sentenced to death by a trial court jury. An appellate court reversed the decision and ordered a retrial.<sup>84</sup> The appellate court felt that the public had been "overwhelmed...with prejudicial and inflammatory publicity." Importantly, the appellate court acknowledged that "overwhelming evidence" of Coleman's guilt had been presented at his trial, but justified its order for a retrial on the premise that even "an obviously guilty defendant" had a "right to a fair trial before an impartial jury."<sup>85</sup>

According to Teeter and Loving, when "the free press-fair trial controversy is raised, the case most likely to be mentioned" is *Sheppard*.<sup>86</sup> In this case, Sam Sheppard, a doctor in Ohio, was charged with murdering his wife. While newspapers openly proclaimed that Sheppard was guilty, Sheppard claimed that the culprit has been an

<sup>77</sup> *Id.* ¶ 6.

<sup>78</sup> *State v. Afzal*, (2003) 107 D.L.T. 385 ¶¶ 121, 123.

<sup>79</sup> *Id.* at ¶¶ 135, 136.

<sup>80</sup> 373 U.S. 723 (1963).

<sup>81</sup> 778 F.2d 1487 (11<sup>th</sup> Cir. 1985).

<sup>82</sup> 384 U.S. 333 (1966).

<sup>83</sup> 373 US 723, 726 (1963).

<sup>84</sup> *Coleman v. Kemp*, 778 F.2d 1487 (11<sup>th</sup> Cir. 1985).

<sup>85</sup> *Id.* 1539-41.

<sup>86</sup> TEETER & LOVING, *supra* note 16 at 525-31.

anonymous intruder.<sup>87</sup> During Sheppard's trial, local newspapers were flooded with articles portraying Sheppard in unfavorable light. A jury unanimously convicted Sheppard of murder. However, there later surfaced evidence which suggested that Sheppard could have been innocent, such as the emergence of leads that a mentally disturbed man may have committed the murder.<sup>88</sup> Amidst these developments, Sheppard pleaded for a retrial. The United States Supreme Court held that the "deluge of publicity" against Sheppard "had reached at least some of the jury", thus depriving Sheppard of his right to receive a fair trial.<sup>89</sup> The Court accordingly directed the state of Ohio to either release Sheppard or institute a fresh trial. A retrial did take place and Sheppard was acquitted.

It is easy to see why Gonsalves cited these American judgments. The frenzied media coverage of the American cases was comparable to the Indian media's coverage of the *Parliament Attack Case*. Yet, the events surrounding *Sheppard* demonstrate that a person should not be pronounced guilty before a trial with certainty. Furthermore, even if a person is clearly guilty, the decisions in *Coleman* and *Rideau* established that the dissemination of even accurate information can also deny a defendant the right to a fair trial.

The Delhi High Court, though, was not swayed by Gonsalves's reasoning. The Court declined to apply the American precedents on the elementary premise that trials in India are conducted by judges and not juries. Quoting the Supreme Court's observations in *Pillai*, the High Court reasoned that judges were well-trained and experienced enough to "shut their minds" and ignore media reports.<sup>90</sup> The Court added that there was a complete separation of powers between the executive and the judiciary in India. The only action the Court took was to simply state the practice of interviewing those in police custody was "disturbing" and ought to be "deprecated."<sup>91</sup> When Afzal appealed against his conviction to the Supreme Court, the media trial argument was not raised again. The Supreme Court upheld Afzal's death sentence.<sup>92</sup>

## B. JESSICA LALL CASE

Recently, when Manu Sharma appealed against his conviction by the Delhi High Court to the Supreme Court of India, Ram Jethmalani also raised a trial-by-media defence. Jethmalani argued that one of the reasons why the Supreme Court should acquit Sharma was because Sharma's trial in the Delhi High Court "was prejudiced by the wild allegations" levelled by the mass media, which "proclaimed him as guilty despite even

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<sup>87</sup> See generally, JAMES NEFF, THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE (2001).

<sup>88</sup> *Id.* 195-6.

<sup>89</sup> 384 U.S. 333, 357 (1963).

<sup>90</sup> (2003) 107 D.L.T. 385 ¶¶ 136-8.

<sup>91</sup> (2003) 107 D.L.T. 385 ¶ 139.

<sup>92</sup> *State v. Sandhu*, (2005) 11 S.C.C. 600.

after his acquittal by the [t]rial [c]ourt.”<sup>93</sup> While the Supreme Court did not directly address the question of whether judges could be biased, it seems that the Court acquiesced with earlier pronouncements declaring the infallibility of judges.

The Court held that a “trial by media did, though to a very limited extent, affect the accused [Sharma].”<sup>94</sup> However, the Court held that the media’s coverage was “not tantamount to a prejudice” which warranted Sharma’s acquittal.<sup>95</sup> The Court remarked that a trial by media should “not hamper fair investigation by the investigating agency” or cause “impediments in the accepted judicious and fair investigation and trial.”<sup>96</sup> Thus, the Court seemed to imply that the media could influence investigators but not judges.

### C. IMPACT OF THE DECISIONS

The decisions in *Pillai* and the *Parliament Attack Case* — and, to a lesser extent, the *Jessica Lall Case* — have affirmed that prejudicial media coverage cannot annul a trial in India because judges are considered emotionally infallible. This is a somewhat contentious assumption. In *Pennekamp v. Florida*, Justice Frankfurter said that judges were “also human” and could be influenced unconsciously by news reports.<sup>97</sup> In *Attorney General v. BBC*, Lord Dilhorne stated: “It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media...This claim to judicial superiority over human frailty is one that I find some difficulty in accepting.”<sup>98</sup> One study has argued that the behavioural assumption that the mindset of trained judges and lay jurors are different “deserves far closer scrutiny” from social scientists.<sup>99</sup>

In the wake of the Justice for Jessica campaign, there have been murmurs within the Indian bar about the susceptibility of judges to public pressure.<sup>100</sup> During the Justice for Jessica campaign, the then Chief Justice of India reportedly urged the media to exercise restraint as some judges could be “confused”<sup>101</sup> — a revealing choice of word. Some days after this remark, the Delhi High Court similarly observed: “The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also...has the tendency to put pressure on ...the court.”<sup>102</sup> The Court

<sup>93</sup> *Sharma v. State* MANU/SC/0268/2010 ¶¶ 12, 145.

<sup>94</sup> *Id.* ¶ 145.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* ¶ 148.

<sup>97</sup> 328 U.S. 331, 357 (1946).

<sup>98</sup> [1981] AC 303, 335.

<sup>99</sup> Stephan Landsman & Richard Rakos, *A Preliminary Inquiry Into the Effect Of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCIENCES AND THE LAW 113, 126 (1994).

<sup>100</sup> Geeta Pandey, *Justice Delayed, But Not Denied*, BBC, 2006, available at [http://news.bbc.co.uk/2/hi/south\\_asia/6059426.stm](http://news.bbc.co.uk/2/hi/south_asia/6059426.stm) (last visited May 15, 2010); Vir Sanghvi, *Priyadarshini: Now What?* HINDUSTAN TIMES, Oct. 21, 2006.

<sup>101</sup> *CJI Concern Over Trial By Media*, THE STATESMAN, Nov. 5, 2006.

<sup>102</sup> *Indian Council of Legal Aid v. State* (Writ Petition 17595/2006, Nov. 27, 2006) (Jain CJ), available at <http://www.indiankanoon.org/doc/1802633/>.

added: “Judges are also human beings and when [a] hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed.”<sup>103</sup>

Nevertheless, it should still be assumed that judges are not vulnerable like jurors, because of the “need to preserve judicial authority.”<sup>104</sup> The Delhi High Court was thus justified in refusing to apply the American precedents which Afzal’s counsel had cited. In these circumstances, the law of contempt of court is a more appropriate post-dissemination safeguard against a trial by media.

## V. TRIAL BY MEDIA AND THE LAW OF CONTEMPT

### A. THE LAW OF CONTEMPT OF COURT

In British India, the contempt jurisdiction of courts was based not on any statute or enactment, but on the assumption that it was an inherent power of a court of record.<sup>105</sup> The Constitution reaffirmed this. The Constitution designates the Supreme Court and the High Courts as courts of record and gives them the power to punish for contempt of court.<sup>106</sup>

The enactment of the Contempt of Courts Act 1971 saw the detailed codification of the law of contempt. The Act splits the offense of contempt of court into civil and criminal offenses. While civil contempt pertains to the non-compliance of court orders, criminal contempt is defined to include the publication of matter which prejudices or interferes with the due course of any pending judicial proceeding, or interferes with or obstructs the administration of justice.<sup>107</sup> According to Section 2 of the Act, a judicial proceeding in a criminal case begins when a charge sheet is filed or when a court issues a warrant or an order of summons. A judicial proceeding ends when the case is finally decided by a court, including any appellate review. A criminal contempt proceeding can be initiated by: (i) the Supreme Court of India or a High Court *suo moto*, (ii) a designated law officer like the Attorney General of India or the Solicitor General of India, or (iii) by any person, with the approval of such a law officer.<sup>108</sup> A person found guilty of contempt of court may be punished with a fine or imprisonment. However, a court may waive punishment if a contemnor issues an apology to the court’s satisfaction.<sup>109</sup>

The Act exempts from liability the publication of “a fair and accurate report of a judicial proceeding.”<sup>110</sup> In the context of the trial-by-media debate, this exemption is not very relevant. When a case is pending, “the media may only report fairly, truly, faithfully and accurately the proceedings...without any semblance of bias towards one or the other

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<sup>103</sup> *Id.*

<sup>104</sup> Landsman and Rakos, *supra note* 100 at 126.

<sup>105</sup> K. BALASANKARAN NAIR, LAW OF CONTEMPT OF COURT IN INDIA 27-9 (2004).

<sup>106</sup> INDIA CONST. art. 129, 215.

<sup>107</sup> Contempt of Courts Act 1971 § 2(c).

<sup>108</sup> Contempt of Courts Act 1971 §15.

<sup>109</sup> Contempt of Courts Act 1971 §12.

<sup>110</sup> Contempt of Courts Act 1971 §4.

party.”<sup>111</sup> In 2006, the Act was amended to allow “truth...in public interest” as a defence to a charge of contempt.<sup>112</sup> The amendment implemented a recommendation of the National Commission to Review the Working of the Constitution (NCRWC).<sup>113</sup> Although courts have yet to discuss the scope of this new defence in detail, the defence is likely to play an important role in future cases involving a trial by media.

## B. PRE-LIBERALIZATION ERA CASES

Before the 1990s, courts displayed a tendency to apply the law of contempt strictly. In *Re Mohandas Gandhi*,<sup>114</sup> the Bombay High Court found Gandhi guilty of contempt of court. Gandhi had written an article in support of two lawyers who were facing disciplinary proceedings before the Bombay High Court for signing a petition criticising the Raj. Gandhi had leaked an official letter written by a British judge against the two lawyers. Arguing his own case, Gandhi contended that he had been “within the rights of a journalist in publishing the letter,” as it was of “great public importance.”<sup>115</sup> The Court rejected this defence, remarking that Gandhi was suffering from “some strange misconception...as to the legitimate liberties of a journalist.”<sup>116</sup> Judge Marten warned that the administration of justice “would be frustrated if newspapers were free to comment on or make extracts from proceedings which were still *sub judice*.”<sup>117</sup> In another Raj-era case, a High Court found an editor guilty of contempt for accusing a man of filing a “false” police complaint against his neighbour “on account of enmity”.<sup>118</sup> Chief Judge Thomas observed: “A journalist has no right to write in the tone the accused has used...No editor has a right to assume the role of an investigator and try to prejudice the court against any person.”<sup>119</sup>

In independent India, the strict approach of Raj-era judges was emulated by High Courts across the country. In *Bijoyananda v. Balakrushna*,<sup>120</sup> the publication of an editorial deploring a defendant as a “bribe giver” was held to be in contempt of court. The Court stated that it would not allow cases “to be tried by newspapers.”<sup>121</sup> In *Frey v. Prasad*,<sup>122</sup> a newspaper referred to two defendants as “smugglers” without inserting the adjective “alleged.” The Court held that this technically amounted to contempt, although

<sup>111</sup> *Court on its Own Motion v. State*, (2008) 151 D.L.T. 695 ¶ 6.

<sup>112</sup> Contempt of Courts Act 1971 §13(2), amended by Contempt of Courts (Amendment) Act 2006 § 2.

<sup>113</sup> 1 REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, para. 7.4.1 (2002).

<sup>114</sup> 1920 A.I.R. (Bom.) 175.

<sup>115</sup> *Id.* at 177.

<sup>116</sup> *Id.* at 180.

<sup>117</sup> *Id.* at 178.

<sup>118</sup> *District Magistrate v. Ali*, 1940 A.I.R. (Oudh) 137.

<sup>119</sup> *Id.* at 137.

<sup>120</sup> 1953 A.I.R. (Ori.) 249.

<sup>121</sup> *Id.* at ¶¶ 14, 15.

<sup>122</sup> 1958 A.I.R. (Punj.) 377.

the contemnors were pardoned after issuing an apology.<sup>123</sup> In *Rao v. Gurnani*,<sup>124</sup> an editor was fined for contempt of court after his newspaper leaked a confessionary statement made to the police by a murder suspect. The Court felt that the editor was trying to “instil in the minds of his readers, feelings of hatred towards the accused” and “create an impression” of guilt.<sup>125</sup>

In *Padmawati v. Karanjia*,<sup>126</sup> a magazine published an article suggesting that certain men had been falsely charged with rape and murder. The Court convicted the editor of contempt, remarking that it was not permissible to “pander to the idle and vulgar curiosity of people who desire to know before the matter is out in the ordinary course in a Court of Justice.”<sup>127</sup> In *Shamim v. Zinat*,<sup>128</sup> a newspaper article reconstructing a murder — while the case was still pending — was ruled to be in contempt of court. The Court reminded the media to refrain from “publications which constitute opinions upon the merits of the case or create an atmosphere for or against an accused person before his or her case is finally decided.”<sup>129</sup>

### C. POST-LIBERALIZATION ERA CASES

Following the post-90s media boom, the Indian judiciary has admonished investigative journalists on many occasions. But courts have curiously resisted applying their contempt powers *suo moto*. In *Maharashtra v. Gandhi*,<sup>130</sup> the Supreme Court of India expressed its annoyance at the “great harm” that had been caused to a rape trial by prejudicial news reports. But the Court did not invoke its contempt jurisdiction and merely made this staid observation: “A trial by press, electronic media or public agitation is the very antithesis of [the] rule of law.”<sup>131</sup> In *Kartongen v. State*,<sup>132</sup> the Delhi High Court concluded that the defendants in a corruption case had been the victims of a “trial by media.” But this finding was not enough to make the Court apply its contempt powers. Similarly, in *Dubey v. Lokayukt*,<sup>133</sup> a High Court rebuked the media for making prejudicial comments on pending cases, but chose not to exercise *suo moto* contempt jurisdiction.

In *Labour Liberation Front v. Andhra Pradesh*,<sup>134</sup> a High Court noted that biased media coverage had “assumed dangerous proportions” in India, and that journalists would

<sup>123</sup> *Id.* ¶¶ 29-31.

<sup>124</sup> 1958 A.I.R. (Punj.) 273.

<sup>125</sup> *Id.* ¶¶ 18.

<sup>126</sup> 1963 A.I.R. (M.P.) 61.

<sup>127</sup> *Id.* ¶¶ 39, 40.

<sup>128</sup> 1971 Cri. L.J. (All.) 1586.

<sup>129</sup> *Id.* ¶ 7.

<sup>130</sup> (1997) 8 S.C.C. 386.

<sup>131</sup> *Id.* ¶ 37.

<sup>132</sup> (2004) 72 D.R.J. 693.

<sup>133</sup> (1999) 1 M.P.L.J. (M.P.) 711.

<sup>134</sup> (2005) 1 A.L.T. (A.P.) 740.

soon be “shown their place” by the judiciary.<sup>135</sup> Yet the Supreme Court showed leniency towards the media in two subsequent cases. In *Lohia v. West Bengal*,<sup>136</sup> the Supreme Court criticized a magazine for interviewing the parents of a woman allegedly murdered for dowry. Noting that the interview contained information that would be adduced in the forthcoming trial of the defendant, the Court concluded that articles of such a nature “would certainly interfere with the administration of justice.”<sup>137</sup> But the Court merely expressed “hope” that other journalists “would take note” of the Court’s “displeasure” and refrain from making prejudicial comments in pending cases.<sup>138</sup> During the appeal in the *Jessica Lall Case*, the Supreme Court observed that “various articles in the print media had appeared even during the pendency of the matter...and apparently, had an effect of interfering with the administration of criminal justice.”<sup>139</sup> But once again, the Court simply let off the media with a broad warning, saying: “We would certainly caution all modes of media to extend their cooperation to ensure fair investigation, trial, defence of accused and non interference in the administration of justice in matters *sub judice*.”<sup>140</sup>

There has occurred at least one recent instance where the judiciary did try to show the media its place. In 2009, the Kerala High Court deviated from the post-90s judicial trend and initiated *suo motu* contempt proceedings against a newspaper for prejudicial reporting. The proceedings had arisen from an article about a case involving the death of a nun named Sister Abhaya, which still remains unsolved after over 15 years.<sup>141</sup> While the local police claimed that Sister Abhaya had committed suicide, her parents and others suspected murder. A judge transferred the case to India’s Central Bureau of Investigation (CBI). The CBI concluded that Sister Abhaya had been murdered and arrested two influential Christian priests. The case underwent many twists and turns, which saw judges recusing themselves from the case and the apparent suicide of a policeman accused by the CBI of destroying evidence. In 2009, the Kerala High Court released the accused priests on bail. Judge Hema, who presided over the hearing, criticised the CBI for improperly investigating the case. The judge added that the media had indulged in the “sustained brain washing” of the public, and that the accused had been prematurely “sent to [the] gallows” by journalists.<sup>142</sup>

A newspaper published an article criticising Judge Hema’s decision to allow the bail application. The newspaper attributed the decision to the judge’s alleged proximity with a retired Christian Supreme Court judge. Defending the CBI, the newspaper alleged that certain Christian judges with links to the accused were trying to manipulate the case, and that Judge Hema’s decision had “only helped to magnify the suspicion of the

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<sup>135</sup> *Id.* ¶ 17.

<sup>136</sup> (2005) 2 S.C.C. 686.

<sup>137</sup> *Id.* ¶ 10.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* ¶ 152.

<sup>140</sup> *Id.* ¶ 152.

<sup>141</sup> Vicky Nanjappa, *Sister Abhaya Case Haunts Investigators*, REDIFF, March 2, 2009, available at <http://www.rediff.com/news/2009/mar/02sister-abhaya-case-haunts-investigators.htm>.

<sup>142</sup> *Sephy v. India* (2009) 1 K.L.T. 126 ¶¶ 94, 95.

people.”<sup>143</sup> This article resulted in the Kerala High Court initiating *suo moto* contempt proceedings against the newspaper’s editor and publisher. The Court criticised the “growing tendency” of the Indian media to make comments on the merits of pending cases and pronounce parties as guilty or innocent.<sup>144</sup> The Court reiterated that “[s]uch programmes...have the effect of interfering with the administration of justice and therefore, will amount to criminal contempt.”<sup>145</sup> The Court held that the newspaper article in question did have the tendency to interfere with the due course of justice and was thus an act of criminal contempt.<sup>146</sup> However, the Court accepted an apology from the contemnors and chose not to penalise them.<sup>147</sup>

## VI. SHOULD COURTS BE LENIENT TOWARDS THE MEDIA?

The judgments in *Pillai* and the *Parliament Attack Case* have established that biased media coverage is not a sufficient ground for seeking a retrial or a change in trial venue. This increases the importance of the law of contempt of court as a post-dissemination safeguard against media trials. Early precedents show that Indian courts construed the law of contempt strictly while applying it as a post-dissemination sanction. This was despite the fact that the country’s private media was nowhere near as influential as it is today. In one of the early contempt cases, the High Court even stated that journalism was not a lucrative career in India, and that those who entered the profession did so with “the purest impulse to serve the public cause.”<sup>148</sup> Since the recent proliferation of news channels, courts have become increasingly vexed with prejudicial media coverage. The judicial perception of journalists has also changed, and judges have linked such coverage with the mercenary motives of television producers to win more viewers.<sup>149</sup> Yet, ironically, the judiciary’s use of contempt jurisdiction has waned. While granting bail to the priests accused of murdering Sister Abhaya, Judge Hema remarked that “a threat of ill-repute” hangs “over the head of any judge who may ever dare to lift his/her pen and write or speak anything contrary to the “media-public verdict.”<sup>150</sup> This statement perhaps explains why courts have tolerated media trials in recent years.

I now return to the questions I had posed earlier: when does the media go overboard during a trial by media and what sanctions should be imposed in such circumstances? I have pointed out that quashing trials on grounds of prejudicial publicity is neither permissible, in light of judicial dicta, nor desirable, because of the need to preserve the authority of the judiciary. Therefore, the questions I have posed can be

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<sup>143</sup> *Court on its Own Motion v. Ravi* (2009) 2 K.L.J. 166 ¶ 3.

<sup>144</sup> *Id.* ¶ 16.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* ¶ 3, 17.

<sup>147</sup> (2009) 2 K.L.J. 166 ¶ 17-18.

<sup>148</sup> *Bijoyananda v. Balakrushna*, 1953 A.I.R. (Ori.) 249 ¶ 16.

<sup>149</sup> *Nanda v. State*, (2009) 160 D.L.T. 775 ¶ 377; (2005) 1 A.L.T. 740, (2004) 72 D.R.J. 693 ¶ 17.

<sup>150</sup> *Sephy v. India* (2009) 1 K.L.T. 126 ¶ 94.

reformulated thus — when should Indian courts apply their contempt powers to penalise the press for making prejudicial remarks?

Rajeev Dhavan, a leading Indian civil liberties lawyer, argues that it is “too late in the day to argue that investigative journalism must stop completely when a case becomes active within the meaning of contempt legislation,” since India’s “clumsy and corrupt” law enforcement machinery requires “press campaigns to reopen matters or take them further.”<sup>151</sup> Dhavan seems to imply that trial by media is inevitable, even desirable, and argues against a strict application of contempt laws to prevent this. This is a compelling and pragmatic view and seems to have been grudgingly accepted by Indian courts since the 1990s. But it will be naïve and dangerous to say that courts must totally refrain from invoking their contempt jurisdiction. A few years ago, a small-time journalist in India — who was later arrested — attempted to use doctored footage to frame a person against whom his friend bore a grudge.<sup>152</sup> It is quite possible for dodgy elements among the Indian media to knowingly publish lies and frame innocent persons. Courts should not hesitate to invoke contempt jurisdiction in such situations.

However, cases where prejudicial but largely truthful statements are made would pose a dilemma. Since the Act has now been amended to allow truth in public interest as a defence to a charge of contempt, it is unclear as to what extent some of the precedents, discussed earlier, are still valid. For instance, a newspaper had once been held liable for condemning a defendant as a “bribe giver.”<sup>153</sup> But what if a newspaper, which makes such a statement today, can substantiate it? Likewise, a newspaper which reconstructed a pending murder case was also found to be in contempt of court.<sup>154</sup> What if a newspaper acts in this manner where there is strong evidence against a defendant?

Unfortunately, the Supreme Court of India avoided a recent opportunity to elucidate the scope of the truth defence. Sanjeev Nanda’s counsel and the state prosecutor had filed contempt petitions against NDTV for airing its sting operation, which had shown both lawyers apparently trying to manipulate witnesses. The petitioners also complained of a “slant” in NDTV’s coverage.<sup>155</sup> NDTV invoked the truth-in-public-interest. NDTV argued that the case essentially involved a clash of “two competing public interests.”<sup>156</sup> The first public interest required the “purity” of a trial to be maintained. The second required the reportage of events concerning a trial which “can be considered as a matter of public concern,” even if such reportage may “have the tendency to impinge on the proceedings.”<sup>157</sup> NDTV submitted that “even if the telecast had any

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<sup>151</sup> Rajeev Dhavan, *Contempt of Court and the Press*, in COURTS, LEGISLATURES, MEDIA FREEDOM 35, 51 (KN Harikumar ed., 2006).

<sup>152</sup> *Court on Its Own Motion v. State* (2008) 146 D.L.T. 429; *Businessman Held in Teacher’s Sex Racket*, THE HINDU, Sep. 3 2007, available at <http://www.thehindu.com/2007/09/03/stories/2007090358030100.htm>.

<sup>153</sup> *Bijoyananda v. Balakrushna*, 1953 A.I.R. (Ori.) 249.

<sup>154</sup> *Shamim v. Zinat*, 1971 Cri. L.J. (All.) 1586.

<sup>155</sup> *Anand v. Registrar*, (2009) 8 S.C.C. (Del.) 106 ¶¶ 26, 168.

<sup>156</sup> *Id.* ¶ 171.

<sup>157</sup> *Id.*

potential to influence the trial proceedings that risk was far outweighed by the public good served by the programme.”<sup>158</sup>

The Court held that NDTV did not commit contempt because the sting operation primarily focussed on certain practices by lawyers appearing in the case.<sup>159</sup> The Court observed that “[t]here was nothing in the programme to suggest that” Nanda was either guilty or innocent, and NDTV thus “certainly did not interfere with or obstruct the due course of” Nanda’s trial.<sup>160</sup> While the Court bypassed an exposition of the truth defence for this reason, the Court gave indications that the defence would probably have succeeded in the case. For example, the Court felt that NDTV had made “a number of statements and remarks” which were factually incorrect,<sup>161</sup> and that its anchors were guilty of “wrong and inappropriate choice of words and expressions.”<sup>162</sup> The Court criticized certain personalities who, while speaking to NDTV, “tended to lose their self restraint and did not pause to ponder that they were speaking about a *sub-judice* matter and a trial in which the testimony of a court witness was not even over.”<sup>163</sup> But the Court also observed that the program was in the “larger public interest” and “served an important public cause.”<sup>164</sup>

The Court left some crucial doubts unanswered by declining to “go into the larger question...that even if the programme marginally tended to influence the proceedings...the larger public interest served by it was so important that the little risk should not be allowed to stand in its way.”<sup>165</sup> It is unclear if NDTV could have pleaded the truth defence had it conducted a sting operation, with a “slant,” targeting only Nanda. Or if it had reconstructed certain events, based on statements made by people filmed in the sting operation, and declared Nanda guilty. Nevertheless, it is an oft-cited rule that the term “public interest” should be used not “in the sense of something which catches the interest of the public out of curiosity or amusement, but in the sense of something which is of serious concern and benefit to the public.”<sup>166</sup> Therefore, arguably, courts must not always allow the new truth defence to be pleaded. What courts can perhaps do is contemplate the use of mild, largely symbolic sanctions in some cases where the media publishes truthful information about a defendant, but openly and persistently declares him or her as guilty or innocent.

The contempt jurisdiction of courts gives them the authority to impose the “soft” sanction of finding a person guilty of criminal contempt and then pardoning him or her, and the “hard” sanction of imposing a criminal penalty on a contemnor. Instead of merely issuing token proclamations against journalists — the standard judicial practice in recent times — courts could contemplate the use of “soft” sanctions as an alternative. In the case

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<sup>158</sup> *Id.* ¶ 171.

<sup>159</sup> *Id.* ¶ 175.

<sup>160</sup> *Id.* ¶¶ 175, 178.

<sup>161</sup> *Id.* ¶ 181.

<sup>162</sup> *Id.* ¶ 187.

<sup>163</sup> *Id.* ¶ 188.

<sup>164</sup> *Id.* ¶ 179.

<sup>165</sup> *Id.* ¶ 180.

<sup>166</sup> *British Steel v. Granada* [1981] AC 1096, 1113 (Megarry VC).

involving the death of Sister Abhaya, the Kerala High Court had done precisely this. Such sanctions will not make journalists abandon investigative journalism, but is likely to make them more circumspect and objective in their coverage. In cases involving false publications, courts may consider employing “hard” sanctions.

## **VII. CONCLUSION**

In India, the growing phenomenon of activist media coverage of criminal trials has seen some positive outcomes. It is even arguable that until India’s rotten criminal justice system is reformed, the judiciary must tolerate journalistic vigilantism. Nonetheless, I have advocated a slight tilting of the balance away from the right to free speech and towards the right of an accused to a fair trial. A journalist must not be given an absolute free reign to wantonly declare an accused person as innocent or guilty. While a proponent of Blasi’s “checking value” theory would probably oppose such curbs, they can still be justified because: (i) the Constitution of India is less permissive towards free speech than that of the United States, and (ii) Blasi’s theory was not conceptualized with private actors — such as the likes of Manu Sharma or Sanjeev Nanda — in mind. Thus, the Indian judiciary must be a little more assertive and do more than merely make disapproving statements directed at the media.

Indian courts have held that biased media coverage does not merit a retrial, a position that I have supported. But this also means that courts must not abandon the use of *suo moto* contempt powers as an alternative, post-dissemination safeguard against media trials. If a journalist goes overboard while commenting on a pending trial, courts can consider imposing what I have described as “soft” sanctions. In more serious cases involving false publications, “hard” sanctions can be imposed.

**FORGO THE FLIMSY SHIELD:  
WHY NEWS ORGANIZATIONS SHOULD THINK TWICE BEFORE  
CLAIMING SHIELD LAWS EXTEND TO ANONYMOUS ONLINE  
COMMENTERS**

PATRICK C. FILE

*This article contextualizes and compares cases in which news organizations have used state shield laws to fight subpoenas seeking the identity of anonymous commenters on their websites. The article first explains the technical and professional motivation behind news organizations' decisions to allow anonymous public comments on their websites, and then discusses John Doe subpoenas and the emerging judicial trends in determining when anonymous online speakers should be unmasked. The article then examines five cases in 2008 and 2009 in which news organizations fought John Doe subpoenas through state shield laws. Court reasoning and scholarly research on shield laws suggest that relying on a shield law to fight a John Doe subpoena is best avoided because such litigation unnecessarily provides courts with an opportunity to restrict those statutes and because news organizations are unlikely to prevail. Instead, the article suggests two alternative approaches that are stronger and less likely to create bad case law for the journalist's privilege: news organizations can defend their commenters and preserve the integrity of their anonymous online comment forums by asserting commenters' First Amendment rights through the principle of jus tertii standing; or they can take approaches that place the responsibility for anonymous speech with the speakers by allowing those individuals to choose to use the power of anonymous speech responsibly and fight a court order on their own if one arises.*

**Keywords:** reporter's privilege, shield laws, john doe subpoena, website, jus tertii

**I. INTRODUCTION**

The Internet is becoming a profoundly important resource for Americans who want to read, gather, or disseminate news. Internet users can access a universe of news and information, and as the Web becomes more interactive, non-journalists increasingly take part in the online production of and discussion about news. The ability for Internet

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users to comment — often anonymously or pseudonymously<sup>1</sup> — on online news stories has brought into focus the advantages and challenges of widespread anonymous speech. The ease and immediacy of publishing online has created many opportunities for otherwise silent citizens to contribute unpopular or controversial opinions to the marketplace of ideas, but it has also given rise to what some call “the dark side of anonymous online speech”: gossip, harassment, and defamation.<sup>2</sup>

Predictably, some anonymous online speech has led to legal actions. In order to seek legal remedies against anonymous speakers or to investigate whether those speakers have information pertinent to an alleged crime, plaintiffs must first unmask the anonymous online speakers. The primary procedural instrument available to plaintiffs in cases involving an unknown party is a John Doe subpoena, which can compel a third party website or Internet service provider (ISP) to turn over the anonymous individual’s identifying information. When anonymous online speakers have fought John Doe subpoenas, they have usually argued that the First Amendment protects their right to speak anonymously.<sup>3</sup> However, in several cases involving John Doe subpoenas directed at news organizations in 2008 and 2009, the news organizations themselves fought the subpoenas on behalf of the anonymous speakers, arguing that a statutory reporter’s privilege, or shield law, protected their right to refuse to disclose the identity of the anonymous speakers.<sup>4</sup> The subpoenas and the news organizations’ decisions to fight

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<sup>1</sup> There is a substantial difference between being anonymous, or unknown to a reader, and pseudonymous, or known to the reader by a false name. For the purposes of this paper, however, as has been the case in many courts, the terms anonymous and anonymity will be used to describe speech that is either anonymous or pseudonymous.

<sup>2</sup> Nathaniel Gleicher, *Note, John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 324 (2008). *See also* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); and Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability* 177 YALE L.J. POCKET PART 41 (2007).

<sup>3</sup> *See infra* Section III. *See, e.g.*, *McVicker v. King*, No. 2:09-cv-00436, 38 Media L. Rep. 1650 (W.D. Pa. Mar. 3, 2010); *Enterline v. Pocono Medical Ctr.*, No. 3:08-cv-1934, 37 Media L. Rep. 1057 (M.D. Pa. 2008); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Brodie v. Independent Newspapers, Inc.*, 407 Md. 415 (2009); *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); *In re Subpoena Duces Tecum to Am. Online, Inc. (In re AOL)*, 52 Va. Cir. 26 (Cir. Ct. Va. 2000).

<sup>4</sup> *State v. Martinez*, No. 17042B (Tex. 104th D. Ct. 2009)(oral ruling granting motion to quash); *Illinois v. Alton Telegraph*, No. 08-MR-548, (Ill. Cir. Ct. 3d Jud. Cir. May 15, 2009) (order denying, granting motion to quash), *available at* [http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-15-Alton Telegraph Decision.pdf](http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-15-Alton%20Telegraph%20Decision.pdf); *Beal v. Calobrisi*, No. 08-CA-1075, (Fl. Cir. Ct. Oct. 9, 2008) (order granting motion to quash) *available at* [http://www.medialaw.org/Content/NavigationMenu/Hot\\_Topics/Reporters\\_Privilege/State\\_RP\\_Cases/Order.pdf](http://www.medialaw.org/Content/NavigationMenu/Hot_Topics/Reporters_Privilege/State_RP_Cases/Order.pdf); *Doe v. TS et al*, No. CV 08030693, (Clackamas Cnty. Ct. Or. Sept. 30, 2008) (letter opinion granting motion to quash), *available at* [http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-09-30-Doe v. TS Letter Opinion\\_0.pdf](http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-09-30-Doe%20v.%20TS%20Letter%20Opinion_0.pdf); *Doty v. Molnar*, No. DV 07-22 (Mont. 13th Jud. Dist. Sept. 3, 2008) (transcript of hearing and oral ruling granting motion to

them using state shield laws have raised new wrinkles in the evolving legal arenas of anonymous online speech and reporter's privilege.

The purpose of this article is to contextualize and compare five cases in which news organizations have used state shield laws to fight subpoenas seeking the identity of anonymous commenters on their websites. Section II will explain the technical and professional motivation behind news organizations' decisions to allow anonymous public comments on their websites. Section III will discuss John Doe subpoenas and the emerging judicial trends in determining when anonymous online speakers should be unmasked. Section IV will examine five cases in 2008 and 2009 in which news organizations fought John Doe subpoenas through state shield laws. Court reasoning and previous scholarly research on shield laws suggest that reliance on a shield law defense in the instance of a John Doe subpoena is best avoided because news organizations are unlikely to prevail and because such litigation unnecessarily provides courts with an opportunity to restrict those statutes. Section V proposes two alternative approaches: news organizations that receive subpoenas for the identities of anonymous commenters would be better off to assert the First Amendment rights of those commenters through the principle of *jus tertii* (or third party) standing. At least two federal courts have recognized this approach. Asserting third party standing allows news organizations to use the full strength of the First Amendment to protect commenters' right to speak anonymously, rather than the fickle and often limited protection of a shield law, while simultaneously protecting the integrity of their communities of anonymous commenters. News organizations might also be wise to consider approaches that place the responsibility for anonymous speech with the speakers themselves by warning anonymous commenters to use the power of anonymous speech responsibly and allowing them to fight a court order on their own if one arises.

## II. NEWS ORGANIZATION WEBSITES AND ANONYMOUS COMMENTERS

News organizations have experimented with interactivity and community involvement on their websites since at least the early 2000s. This rise in interactivity has been part of a broader trend called Web 2.0, an Internet renaissance of the late 1990s and early 2000s that generally promoted a shift away from an Internet infrastructure that separated those who controlled Web content from most users, and toward a model that empowered users to create content of their own and contribute to the Web's "collective intelligence."<sup>5</sup> The shift was facilitated, in part, by the concurrent economic decline in dot-com businesses and a steady rise in the typical Internet user's connection speed.<sup>6</sup> The

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quash), available at [http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-09-03-Hearing and Oral Ruling on Billings Gazette Motion to Quash.pdf](http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-09-03-Hearing%20and%20Oral%20Ruling%20on%20Billings%20Gazette%20Motion%20to%20Quash.pdf).

<sup>5</sup> Tim O'Reilly, *What is Web 2.0*, Sept. 30, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>; See also Francis Pisani, *Journalism and Web 2.0*, 60 NIEMAN REPORTS 4, 42-44 (Winter 2006).

<sup>6</sup> O'Reilly, *What is Web 2.0*.

rise in the popularity of blogging<sup>7</sup> and the ubiquity of Wikipedia<sup>8</sup> are typical examples of Web 2.0 success stories.<sup>9</sup>

News organizations have adopted numerous ways for Internet users to interact and participate with their online news products, from voting in news polls to submitting their own videos and original reporting.<sup>10</sup> One of the simpler features allows readers to post their own comments alongside news stories or other posts.<sup>11</sup> Journalists have explained that inviting readers to join in a “conversation”<sup>12</sup> through comments is reflective of “the open culture of the Internet”;<sup>13</sup> it can serve democratic ideals by turning a news organization website into “a vibrant town square”<sup>14</sup> while also serving as a news gathering tool, helping journalists cultivate more sources or craft better coverage.<sup>15</sup> Some journalists have embraced interaction with news audiences because they see it as a natural progression of journalism,<sup>16</sup> necessary to the survival of news organizations as

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<sup>7</sup> See generally *State of the Blogosphere/2008*, TECHNORATI, <http://technorati.com/blogging/state-of-the-blogosphere/>.

<sup>8</sup> WIKIPEDIA, <http://www.wikipedia.org/>; see also Randall Stross, *Encyclopedic Knowledge, Then vs. Now*, N. Y. TIMES May 3, 2009, BU3, (attributing Microsoft’s decision to do away with its CD-ROM Encyclopedia brand, Encarta, to the success of Wikipedia and the Google search engine).

<sup>9</sup> O’Reilly, *supra* note 5.

<sup>10</sup> See CNN iREPORT, <http://www.ireport.com/>; CNN’s iReport, launched in April 2008, was among the first and is probably the most successful attempt to encourage television news audiences to submit their own content; other news organizations have added similar features; see, e.g., CBS NEWS CBSEYEMOBILE, <http://www.cbseyemobile.com/>; CBS News’s website “where everyone reports.”

<sup>11</sup> Some typical newspaper examples include WASH. POST, <http://www.washingtonpost.com/>, MINNEAPOLIS STAR TRIB., <http://www.startribune.com/>, and S.F. CHRONICLE, <http://www.sfgate.com/>.

<sup>12</sup> See, e.g., Jane B. Singer and Ina Ashman, “*Comment Is Free, but Facts Are Sacred*”: *User-generated Content and Ethical Constructs at the Guardian*, 24 J. OF MASS MED. ETHICS 1, 11, 15 (Jan. 2009) (“We’re no longer writing for people but having a conversation with them,” a print editor wrote” and “A print writer said he saw his pieces as ‘the beginning of a conversation’”); Pisani, *supra* note 5, at 43; Dan Gillmor is generally credited with most ardently arguing that journalism should become less of a “lecture” and more of a “conversation,” DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* 110-135 (2004).

<sup>13</sup> Lindsay Gsell, *Comments Anonymous*, 31 AM. JOURNALISM REV., 1, 16, (Feb./Mar. 2009).

<sup>14</sup> Andrew Alexander, *Channeling Online Rage*, WASH. POST, May 10, 2009, A17.

<sup>15</sup> Erin Rosa, *New Media, New Opportunities*, COLUM. JOURNALISM REV., Nov. 19, 2008, available at [http://www.cjr.org/starting\\_thoughts/new\\_media\\_new\\_opportunities.php](http://www.cjr.org/starting_thoughts/new_media_new_opportunities.php) (explaining how contacting commenters on her coverage of Colorado prisons, many of whom were corrections officers, allowed Rosa to “build[ ] an impressive Rolodex” of sources); see also Singer and Ashman, *supra* note 12, at 13 (GUARDIAN journalists discussing “a reconsideration of what the relationship with the public has been, is, and might be” as a result of interactive website features).

<sup>16</sup> See, e.g., Susannah Vila, *Open the Floodgates*, COLUM. JOURNALISM REV., Feb. 10, 2009, available at [http://www.cjr.org/starting\\_thoughts/open\\_the\\_floodgates.php](http://www.cjr.org/starting_thoughts/open_the_floodgates.php), (“Vibrant commenters, immediate coverage of breaking news by uncredentialed citizens, and the wilting force of the paper product are all just symptoms of a media environment that is increasingly, irrevocably, dependent on public participation”); and Pisani, *supra* note 5, at 44 (“A new news

moneymaking institutions,<sup>17</sup> or both.<sup>18</sup> Scholarly exploration of the role of comments and other user-generated content in news media is in its infancy, but preliminary research indicates that reporters see the value in promoting free and open online discourse about public issues, even if they remain somewhat ambivalent from the standpoint of professional ethics.<sup>19</sup>

A central question attached to news organizations' online comment policies has been to what extent commenters should be allowed to remain anonymous. On one hand, anonymity would seem to be at odds with traditional values of journalism ethics, including accountability and transparency.<sup>20</sup> Anonymity can encourage "moronic, anonymous, unsubstantiated and often venomous"<sup>21</sup> speech, some of which rises to the level of harassment or defamation.<sup>22</sup> On the other hand, offering some level of anonymity to commenters has generally won out in newsrooms because the benefits of promoting an open online discussion of the news have been thought to outweigh the disadvantages. Journalists argue that commenter anonymity is in keeping with an Internet culture that has developed to embrace anonymous speech. Steve Yelvington observed that although users of the earliest Internet public forums like Usenet and CompuServe mostly used their real names, the interactive Web was gradually and permanently transformed by a culture of online bulletin board users and America Online subscribers who were accustomed to using pseudonyms and "screen names."<sup>23</sup>

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ecosystem has to evolve, adapted to the multifaceted participation of people who not long ago were called an audience").

<sup>17</sup> Alexander, *supra* note 14, (allowing unfettered comments is "a way of increasing site traffic, a key to *The Post's* survival as its audience shifts online").

<sup>18</sup> See generally Rosa, *supra* note 15; Pisani, *supra* note 5; and Alexander, *supra* note 14.

<sup>19</sup> Singer and Ashman, *supra* note 12, at 19-20.

<sup>20</sup> See *Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, <http://www.spj.org/ethicscode.asp>; Tom Grubisich, *Sunshine for the Virtual Town Hall*, WASH. POST, May 14, 2007, A15 (an ethical argument against allowing total anonymity for commenters); and Singer and Ashman, *supra* note 12, at 5 (quoting GUARDIAN editor Alan Rusbridger: "There should be a high premium on transparency, collaboration and open discussion").

<sup>21</sup> Alexander, *supra* note 14; see also Gsell, *supra* note 13, (quoting a *Raleigh, N.C. News & Observer* editor who said websites that allow anonymous comments can become "unsavory neighborhoods with language that offends the sensibilities of decent people" and Deborah Howell, *Online Venom or Vibrant Speech?* WASH. POST, May 6, 2007, at B06 (quoting a reader who said the paper's online comments section are "like an open sewer."))

<sup>22</sup> See Leonard Pitts, *Anonymity Brings out the Worst Instincts*, MIAMI HERALD, March 31, 2010, ("Far from validating some high-minded ideal of public debate, message boards—particularly those inadequately policed by their newspapers and/or dealing with highly emotional matters—have become havens for a level of crudity, bigotry, meanness and plain nastiness that shocks the tattered remnants of our propriety.") Available at <http://www.miamiherald.com/2010/03/31/1555967/anonymity-brings-out-the-worst.html>.

<sup>23</sup> Steve Yelvington, *Why Anonymity Exists and Works on Newspapers' Web Sites*, 60 NIEMAN REP. 4, 29-30, (Winter 2006).

Moreover, online anonymity has been used to evoke a long American history of patriots and whistleblowers, from “Publius” to “Deep Throat” to Wikileaks.org.<sup>24</sup> Journalists and scholars have observed that ensuring anonymity encourages more people to speak up online who might otherwise remain silent. According to Yelvington, thanks to online anonymity “many voices ... silenced by fear of social consequences ... are now being heard on the Internet,”<sup>25</sup> and Professor Victoria Smith Ekstrand has argued “This faceless new medium not only offers unprecedented opportunities for anonymous speech, [it] opens positive new avenues of dialogue for marginalized groups.”<sup>26</sup>

As a general legal proposition, the United States Supreme Court has consistently held that the First Amendment protects anonymous speech, particularly in the context of political speech and elections.<sup>27</sup> The Court has invoked America’s “respected tradition of anonymity in the advocacy of political causes”<sup>28</sup> and observed that “anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. ... The obnoxious press licensing law of England, which was also

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<sup>24</sup> “Publius” was the pseudonym used by James Madison, Alexander Hamilton, and John Jay, authors of the Federalist Papers; see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 n.6 (1995). “Deep Throat” was the pseudonym used for FBI official W. Mark Felt, the secret source for Washington Post journalists Bob Woodward and Carl Bernstein’s explosive Watergate coverage in 1972 and 1973; see Editorial, *Deep Throat Speaks*, WASH. POST, June 1, 2005, at A18. WIKILEAKS, <http://wikileaks.org/>, is a website that invites people to anonymously post leaked documents and other materials in order to expose and discourage “unethical behavior” by corporations and governments. In February 2008, a federal judge in California approved a permanent injunction against the site, but reversed the order amid widespread condemnation from media and free speech advocates; see Jonathan Glater, *Judge Reverses His Order Disabling Web Site*, N. Y. TIMES, Mar. 1, 2008, at 11 and Adam Liptak and Brad Stone, *Judge Shuts Down Web Site Specializing in Leaks, Raising Constitutional Issues*, N. Y. TIMES, Feb. 20, 2008, at 14. See also Yelvington, *supra* note 23, (“Indeed, early American journalists often wrote under pen names, particularly in the Revolutionary period”); Victoria Smith Ekstrand, *Unmasking John and Jane Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 406-407 (2003) (“Anonymous speech in the United States has a long and rich history, from The Federalist to the thousands of colorful and vituperative postings on modern Internet bulletin boards”); and Gleicher, *supra* note 2, at 323, (Anonymous speech conjures the image of a pamphleteer who speaks out against corruption, defying the voices of power and publishing anonymously for fear of reprisal”).

<sup>25</sup> Yelvington, *supra* note 23.

<sup>26</sup> Ekstrand, *supra* note 24, at 407-408.

<sup>27</sup> See *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150 (2002) (striking down an Ohio village ordinance requiring any person or group that wanted to canvas door-to-door to register with the mayor and receive a permit); *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999) (striking down a state law requiring people circulating petitions dealing with issue referenda to wear identification badges); *McIntyre*, *supra* note 24, (finding that a state law prohibiting the distribution of anonymous or pseudonymous political campaign literature cannot survive First Amendment scrutiny); *Talley v. California*, 362 U.S. 60 (1960), (striking down a Los Angeles ordinance prohibiting all anonymous handbilling, holding that the city could employ means less restrictive of freedom of expression in the interest of protecting its citizens from fraud).

<sup>28</sup> *McIntyre*, 514 U.S. 334, 343 n.6 (1995).

enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.”<sup>29</sup> Scholars have said that the two leading cases on anonymous speech have left the scope of First Amendment protection “murky” and observed that the decisions have lent little clarity or guidance to lower courts grappling with the growing jurisprudence of anonymous online speech.<sup>30</sup> In *McIntyre v. Ohio Elections Commission*, the Court held that the government cannot prevent citizens from anonymously publishing handbills concerning a ballot initiative, or punish them for doing so. Later, in *McConnell v. FEC*, the Court qualified the right to anonymous speech by emphasizing the dangers of anonymous political speech and upholding a provision of a federal campaign reform law requiring purchasers of television advertisements advocating for or against a candidate for federal office to disclose their identities.<sup>31</sup>

Nevertheless, news organizations have come to recognize that they have an interest in trying to keep the online conversation civil,<sup>32</sup> even if the news organization, as a “provider of an interactive computer service” probably cannot be held civilly liable for the vicious or tortious things people post.<sup>33</sup> Some news organizations have struck a compromise that allows commenters to use a pseudonym or remain anonymous when commenting on news stories but also requires that they first register with the website, agree to a privacy policy and a set of commenting guidelines, and provide some basic identifying information like a home address or telephone number.<sup>34</sup> Journalists explain that these measures help to ensure some civility in the comments while also not imposing a burden on individuals who want to share comments and opinions without giving their name.<sup>35</sup> Overall, journalists and scholars argue that “the dark side of anonymous online speech” notwithstanding, allowing anonymous comments can help American news media

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<sup>29</sup> *Talley*, 362 U.S. 60, 64 (1960).

<sup>30</sup> Lyrrisa Lidsky and Thomas Cotter, *Authorship Audiences and Anonymous Speech*. 82 NOTRE DAME L. REV. 1537, 1538-1541 (2007).

<sup>31</sup> 540 U.S. 93 (2003).

<sup>32</sup> See *infra* note 34, especially Gsell and Alexander.

<sup>33</sup> The “Good Samaritan” provision of the Communications Decency Act, 47 U.S.C. § 230(c), states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” for the purposes of civil liability. Federal courts have interpreted § 230(c) broadly, applying it both to large, traditional ISPs, as well websites operated by individuals. Compare *Zeran v. AOL*, 129 F.3d 327 (4th Cir.1997) and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) to *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). Although no court has granted § 230 immunity to a news organization website, the broad judicial interpretation suggests news organizations would also be immune from tort liability for, for example, defamation or invasion of privacy.

<sup>34</sup> See Pat Walters, *Dealing with Comments: A Few Interesting Approaches*, POYNTER, May 31, 2007, <http://www.poynter.org/column.asp?id=103>; Gsell, *supra* note 13; Alexander, *supra* note 14; Howell, *supra* note 21; and Yelvington, *supra* note 23. See also *Doty*, DV 07-22, *supra* note 4, at 3, describing the Billings Gazette’s process of asking commenters to register.

<sup>35</sup> *Id.*, especially Walters, Gsell, and Alexander.

come closer to fulfilling one of their ideal democratic roles: promoting “debate on public issues [that] should be uninhibited, robust, and wide-open.”<sup>36</sup>

### **III. JOHN DOE SUBPOENAS: BALANCING PLAINTIFFS’ RIGHTS AND THE RIGHT TO ANONYMITY**

No matter the journalistic or legal justification for allowing commenters on online news stories to remain anonymous, the fact remains that anonymity on the Internet has given rise to numerous lawsuits, mostly for harassment or defamation. As previously mentioned, the primary way for individuals or corporations alleging wrongdoing to unmask their anonymous assailants or critics has been a John Doe subpoena.

John Doe appeared as a purely fictitious plaintiff or defendant at common law as early as the 1600s, but the term has been mostly used in American courts in the last four or five decades as a stand-in for real but as-yet unknown defendants.<sup>37</sup> Until the 1990s, John Doe cases mostly included civil rights lawsuits against unknown and unnamed law enforcement officials.<sup>38</sup> Being able to file suit against John or Jane Doe allows a plaintiff to utilize court-sanctioned methods of discovery to identify him or her, so the plaintiff can move ahead on the merits of the lawsuit.<sup>39</sup> One common method of discovery is a subpoena, directed at a third party that knows or can uncover the identity of John Doe, demanding that the third party identify John Doe to the plaintiff. John Doe subpoenas were relatively rare before the 1990s, but as anonymous speech has proliferated online, John Doe lawsuits and John Doe subpoenas have become a much more common occurrence.<sup>40</sup>

In the online context, John Doe subpoenas are usually directed at a website or Internet Service Provider (ISP) that might be able to identify the unknown defendant. The identities of anonymous online speakers are usually indiscernible to most Internet users. However, the company that hosts the offending comment can often discover the speaker’s identity because it can provide the Internet protocol (IP) address assigned to the speaker’s computer.<sup>41</sup> Identifying an anonymous speaker often involves two steps: first, a subpoena to the website that hosted the comment in order to identify the IP address

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<sup>36</sup> *N. Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>37</sup> Carol Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, at 885-891 (1996).

<sup>38</sup> *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a cause of action existed for a plaintiff who was searched and arrested without a warrant); *Screws v. United States*, 325 U.S. 91 (1945) (holding law enforcement officers accountable for beating a suspect to death).

<sup>39</sup> Gleicher, *supra* note 2, at 327.

<sup>40</sup> *See generally* Gleicher, *supra* note 2; Jason Miller, *Who’s Exposing John Doe*, 13 J. TECH. L. & POL’Y 227 (2008); Ryan Martin, *Freezing the Net: Rejecting A One-Size-Fits-All Standard For Unmasking Anonymous Internet Speakers In Defamation Lawsuits*, 75 U. CIN. L. REV. 1217 (2007); Ekstrand, *supra* note 24; and Lyrissa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

<sup>41</sup> Gleicher, *supra* note 2, at 328.

attached to it, and second, a subpoena to the ISP that assigned the IP address to the speaker at the specific time the offending comment was posted in order to identify the IP address owner's computer.<sup>42</sup> The ISP will often be able to identify both the computer using the targeted IP address and the account information of that computer's owner, which can include a name, address, or telephone number. The IP address can only establish that the account owner was responsible for the computer that was used to publish the offending comment, and not that the account owner actually made the offending comment, but unless the computer is accessible to members of the public or the account owner can argue that a specific third party accessed the computer without permission, the information provided by the ISP is usually enough for the plaintiff to name the account owner in the lawsuit and proceed.<sup>43</sup> Assuming that the anonymous John Doe commenter has been notified of the subpoena, which is generally required by procedural rules, he or she can remain anonymous while fighting to quash it.<sup>44</sup>

Although the Supreme Court has not set specific boundaries of First Amendment protection against John Doe subpoenas regarding online speech, general protections for anonymous speech have provided a First Amendment basis for John and Jane Does to challenge subpoenas attempting to unmask them. Meanwhile, standards for when plaintiffs can unmask anonymous online speakers are emerging from lower courts. Most John Doe subpoenas in the Internet context have involved defamation of either an individual<sup>45</sup> or corporation,<sup>46</sup> but other cases involved an unlawful termination employment discrimination claim,<sup>47</sup> a sexual harassment claim,<sup>48</sup> a trademark claim,<sup>49</sup> and a claim of "hacking" into a computer network in violation of federal law.<sup>50</sup> State and federal courts have generally followed standards that require plaintiffs to at least provide substantial legal and factual evidence that their claim has merit before a court will unmask an anonymous speaker. Courts have experimented with a variety of approaches which have alternately favored plaintiffs and defendants,<sup>51</sup> but the standards that have arisen as John Doe subpoenas have become more prevalent usually require plaintiffs to notify the anonymous defendants of the subpoena and give them adequate time to

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp.2d 1205 (D. Nev. 2008); *Best Western Int'l v. Doe* 2006 U.S. Dist. LEXIS 77942, (D. Ariz. 2006); *Mobilisa*, 170 P.3d 712; *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007); *2TheMart.com*, 140 F. Supp. 2d 1088; *Dendrite Int'l*, 775 A.2d 756; *In re AOL*, 52 Va. Cir. 26.

<sup>46</sup> See *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Greenbaum v. Google*, 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); *Krinsky*, 72 Cal. Rptr 3d 231; *Cahill*, 884 A.2d 451.

<sup>47</sup> *McVicker*, 38 Media L. Rep. 1650.

<sup>48</sup> *Enterline*, 37 Media L. Rep. 1057.

<sup>49</sup> *Columbia*, 185 F.R.D. 573.

<sup>50</sup> *Mobilisa*, 170 P.3d 712.

<sup>51</sup> *Gleicher*, *supra* note 2, at 337-344.

respond, identify the specific comments on which the plaintiff is basing his or her claim, and show that the claim has a chance of succeeding in court. The most significant difference among the standards is illustrated in a difference between the two most cited cases addressing online anonymity, *Dendrite International, Inc. v. Doe* and *Doe No. 1 v. Cahill*.<sup>52</sup> Under the *Dendrite* test, established by a New Jersey state appellate court in 2001, once the plaintiff has notified the anonymous defendant of the subpoena and given him or her sufficient time to respond, the plaintiff must provide sufficient evidence that his or her claim is substantial enough to go before a jury. As a final step, the court must balance whether the strength of the plaintiff's case outweighs the anonymous speaker's First Amendment right to free speech.<sup>53</sup> The *Cahill* test, established by the Delaware Supreme Court in 2005, omits the balancing test, which the court called "unnecessary." The *Cahill* court reasoned that the consideration of the merits of plaintiff's claim "is itself the balance," adding that the balancing test, which arguably adds an additional layer of First Amendment protection for the anonymous speaker, "needlessly complicates the analysis."<sup>54</sup> Whatever the differences among courts around the country that have approached the issue, overall, the emerging standards have allowed many Does to successfully defend their right to speak anonymously.

#### IV. SUBPOENAS TO NEWS ORGANIZATIONS AND THE APPLICATION OF SHIELD LAWS: "SOURCES" OR "INFORMATION"?

Cases that arose in 2008 and 2009 added new wrinkles to the issue of anonymous online speech, as subpoenas in several civil actions,<sup>55</sup> a murder investigation,<sup>56</sup> and a murder prosecution<sup>57</sup> sought the identities of anonymous commenters on newspaper websites. However, rather than notify the anonymous potential defendants and allow them to fight to quash the subpoenas on their own, as has typically been the case with ISPs and other websites, newspapers in Montana, Oregon, Florida, Illinois, and Texas<sup>58</sup> fought to quash the subpoenas, arguing that their respective state shield laws, which

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<sup>52</sup> According to LexisNexis on June 7, 2010, *Cahill* has been cited by 24 court cases and referenced in 62 law review articles, 2 statutes, 3 treatises, and 53 court documents; *Dendrite* has been cited in 30 court cases and referenced in 70 law review articles, 11 treatises, and 49 court documents.

<sup>53</sup> *Dendrite*, 775 A.2d at 760-761.

<sup>54</sup> *Cahill*, 884 A.2d at 461.

<sup>55</sup> *Beal v. Calobrisi*, *Doe v. TS et al.*, *Doty v. Molnar*, *supra* note 4.

<sup>56</sup> *Illinois v. Alton Telegraph*, *supra* note 4.

<sup>57</sup> *State v. Martinez*, *supra* note 4.

<sup>58</sup> See BILLINGS (MONT.) GAZETTE, <http://www.billingsgazette.net/>; PORTLAND (ORE.) MERCURY, <http://www.portlandmercury.com/>, and WILLAMETTE WEEK, <http://wwweek.com/>; NW. FLA. DAILY NEWS, Fort Walton Beach, <http://www.nwfdailynews.com/>; ALTON (ILL.) TELEGRAPH, <http://www.thetelegraph.com/>; and ABILENE (TEX.) REPORTER-NEWS, <http://www.reporternews.com/>.

allow journalists to refuse to disclose their confidential sources or information, extended to the anonymous commenters on their websites.<sup>59</sup>

Thirty-seven states and the District of Columbia have adopted some form of shield law, from Maryland in 1896 to Wisconsin in May 2010.<sup>60</sup> To whom these laws extend and under what circumstances the covered entities can refuse to disclose information vary widely, from laws that specify which institutions, entities, and media are covered, to laws that are “medium-neutral” and cover specified journalistic activities rather than entities.<sup>61</sup> The general legal rationale for shield law protection, whatever its breadth, is that the news media can best serve the public when journalists can promise confidentiality to sources that provide sensitive or secret information that the public has a need or a right to know. If the government is able to force journalists to disclose their sources or secrets, it can, in effect, “annex the journalistic profession as an investigative arm of government.”<sup>62</sup> Supporters of the privilege argue that if journalists are forced to disclose sources or secrets, the free flow of information to the public will be chilled, either because sources will be unwilling to share information with journalists if confidentiality cannot be guaranteed, or because journalists will be unwilling to report sensitive or secret information that might lead to a subpoena. The First Amendment basis

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<sup>59</sup> The five cases are *State v. Martinez*, No. 17042B (Tex. 104th D. Ct. 2009); *Illinois v. Alton Telegraph*, No. 08-MR-548, (Ill. Cir. Ct. 3d Jud. Cir. May 15, 2009); *Beal v. Calobrisi*, No. 08-CA-1075 (Fl. Cir. Ct. Oct. 9, 2008); *Doe v. TS et al*, No. CV 08030693, (Clackamas County Ct. Or. Sept. 30, 2008); and *Doty v. Molnar*, No. DV 07-22 (Mont. 13th Jud. Dist. Sept. 3, 2008).

<sup>60</sup> ALA. CODE § 12-21-142 (LexisNexis 2009), ALASKA STAT. §§ 09.25.300 to .390 (2009), ARIZ. REV. STAT. § 12-2237 (2008), ARK. CODE ANN. § 16-85-510 (LexisNexis 2008), CAL. CONST. ART. I, § 2(b), CAL. EVID. CODE § 1070 (LexisNexis 2008), COLO. REV. STAT. 13-90-119 (LexisNexis 2008), CONN. GEN. STAT. § 52-146t (LexisNexis 2008), DEL. CODE ANN. tit. 10 §§ 4320 to 4326 (2009), D.C. CODE ANN. §§ 16-4701 to 4704 (LexisNexis 2009), FLA. STAT. ANN. § 90.5015 (LexisNexis 2009), GA. CODE ANN. § 24-9-30 (2009), HAW. REV. STAT. ANN. § 621-x (LexisNexis 2009), 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (LexisNexis 2009), IND. CODE ANN. §§ 34-46-4-1 to -2 (LexisNexis 2009), KANSAS HB 2585 (signed April 15, 2010, effective July 1, 2010), KY. REV. STAT. ANN. § 421.100 (LexisNexis 2009), LA. REV. STAT. ANN. §§ 45:1451 to 1459 (2008), ME. REV. STAT. ANN. tit. 16, § 61 (2008), MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2008), MICH. COMP. LAWS SERV. § 767.5a (LexisNexis 2009), MINN. STAT. §§ 595.021 to .025 (2008), MONT. CODE ANN. §§ 26-1-901 to -903 (2007), NEB. REV. STAT. ANN. §§ 20-144 to -147 (LexisNexis 2009), NEV. REV. STAT. ANN. §§ 49.275, 49.385 (2009), N.J. REV. STAT. §§ 2A:84A-21 to 21.13 (2009), N.M. STAT. ANN. § 38-6-7 (LexisNexis 2008), N.Y. CIV. RIGHTS LAW § 79-h (Consol. 2009), N.C. GEN. STAT. § 8-53.11 (2009), N.D. CENT. CODE § 31-01-06.2 (2009), OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2009), OKLA. STAT. tit. 12, § 2506 (2009), OR. REV. STAT. §§ 44.510 to .540 (2007), 42 PA. CONS. STAT. ANN. § 5942 (2008), R.I. GEN. LAWS §§ 9-19.1-1 to .1-3 (2009), S.C. CODE ANN. § 19-11-100 (2008), TENN. CODE ANN. § 24-1-208 (2009), TEX. CIV. PRAC. & REM. CODE § 22.021, TEX. CODE CRIM. PROC. § 38.11 (LexisNexis 2010), WASH. REV. CODE ANN. § 5.68.010 (LexisNexis 2009), WIS. STAT. § 885.14 (2010).

<sup>61</sup> Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in an Age of Strict Construction*, 14 COMM. L. & POL'Y 235–272 (2009).

<sup>62</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

for a journalist's privilege is primarily an innovation of the twentieth century,<sup>63</sup> and in *Branzburg v. Hayes* in 1972, the U.S. Supreme Court rejected the constitutional argument as a basis for extending a qualified privilege to journalists to refuse to disclose sources before grand juries.<sup>64</sup> Nevertheless, states have continued to use a rationale based on the protection of the free flow of information to extend a statutory privilege to journalists, and a conditional, qualified privilege based on the First Amendment developed in several federal jurisdictions following the *Branzburg* decision.<sup>65</sup>

The fact that the five cases examined here involved state trial courts, along with the variety of terminology, breadth, and judicial interpretation of state shield laws means that only the most general of conclusions can be drawn at this early stage, but interesting and instructive issues arise. A central question is whether anonymous commenters should be considered confidential "sources" themselves or whether the commenters' identities should be considered unpublished "information." In Illinois, when the *Alton Telegraph* moved to quash a subpoena seeking the names, addresses, and IP addresses of five anonymous people who posted comments under a story detailing the arrest of a murder suspect, it argued that the Illinois shield law<sup>66</sup> covered the identities of the anonymous commenters as "sources" of information. The Telegraph contended that, "in the digital age," information provided by anonymous commenters "is no different from anonymous tips provided to newspaper reporters telephonically or in written form."<sup>67</sup> Judge Richard Tognarelli of the Third Judicial Circuit of Illinois disagreed with the *Telegraph*, however, ruling instead that the five commenters at issue were significantly different from the traditional anonymous sources covered by the state shield law.<sup>68</sup> "It is clear that the reporter did not use any information from the [commenters] in researching, investigating,

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<sup>63</sup> See *Garland v. Torre*, 259 F.2d 545 (2d. Cir. 1958) (rejecting a qualified First Amendment-based privilege for *New York Herald Tribune* columnist Marie Torre); STEPHEN BATES, THE REPORTER'S PRIVILEGE, THEN AND NOW, Research Paper R-23, Joan Shorenstein Center on Press, Politics and Public Policy, April, 2000. Available at [www.hks.harvard.edu/presspol/publications/papers/research\\_papers/r23\\_bates.pdf](http://www.hks.harvard.edu/presspol/publications/papers/research_papers/r23_bates.pdf), stating that *Torre* was the first case to present a "well-honed" First Amendment-based argument for a privilege.

<sup>64</sup> 408 U.S. 665 (1972).

<sup>65</sup> Twenty state shield laws were passed after *Branzburg*, including Tennessee, in 1972; Nebraska, North Dakota, Oregon, and Minnesota, in 1973; and Oklahoma, in 1974. The federal circuits that have recognized a journalist's privilege are the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th, 11th, and D.C. See *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705, (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Baker v. F & F Investments*, 470 F.2d 778 (2d Cir. 1972). In *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997), an 8th Circuit Court noted that the existence of a journalist's privilege is an open question in that circuit. *But see McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (stating that a *Branzburg*-based constitutional privilege rests on "thin ice").

<sup>66</sup> 735 ILL. COMP. STAT. 5/8-901-909 (Lexis 2009).

<sup>67</sup> *Alton Telegraph*, *supra* note 4, at 2.

<sup>68</sup> *Id.* at 5.

or writing the article,” Judge Tognarelli wrote in a September 29, 2009 decision. “Comments were ... made between various [commenters], between themselves, without comment, input or discussion from the reporter. It would not appear that the [commenters] were ‘sources’ for the *Telegraph* news article.”<sup>69</sup> In upholding the subpoenas for two of the five commenters whose comments were most relevant to the investigation, Judge Tognarelli added, “It cannot be said that forcing *The Telegraph* to reveal what information it has about voluntary, unsolicited online commentators, in this case, will make the public unwilling to express their opinions or to provide information during the course of a reporter’s actual investigation, in future cases, nor does it deny the public the right to receive complete unfettered information in this and future instances.”<sup>70</sup>

In Florida and Oregon, however, judges considered the identities of the anonymous online commenters to be “information” protected by the shield laws.<sup>71</sup> For the news organizations moving to quash the subpoenas, this argument appeared to be an easier row to hoe. In the Florida case,<sup>72</sup> Judge G. Robert Barron’s August 10, 2009, decision to quash a subpoena issued to the *Northwest Florida Daily News* ultimately turned on the fact that the plaintiff, who was seeking to sue John Doe for defamation, failed to meet statutory criteria requiring that he demonstrate “clearly and specifically” that the information sought “is relevant and material” to the case, that it “cannot be obtained from alternative sources,” and that “a compelling interest exists” for its disclosure.<sup>73</sup> But along the way, Judge Barron ruled that the identity of an anonymous commenters on the *Daily News* website was “information” acquired by a “journalist ... while actively gathering news” as the Florida shield law defines it.<sup>74</sup>

Meanwhile, in Oregon, Judge James Redman of the Clackamas County Court quashed a subpoena from a would-be defamation plaintiff in a September 30, 2008, ruling issued in the form of a letter to all parties.<sup>75</sup> In the letter opinion, Judge Redman

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<sup>69</sup> *Id.* Tognarelli was reluctant to go far into discussing standards of applicability of the shield law in the online context, stating, “it is for the legislature, not this Court, to determine that applicability.” *Id.* at 6. Notably, Tognarelli used the words “blogs,” “comments,” “bloggers,” and “commentators” interchangeably to describe the speech and speakers on the *Alton Telegraph* website. Words were substituted here for clarity, but it is noteworthy that the Judge does not appear to make a distinction between an individual who posts a comment on a website and one who is a blogger. This author would argue that the two are substantially different, in that a commenter usually posts a short response to a longer article, whereas a blogger is more often responsible for creating initial or original content, often for his or her own website. The courts would do well to begin to recognize these important semantic distinctions.

<sup>70</sup> *Id.* at 6.

<sup>71</sup> *Doe v. TS et al.*, supra note 4; *Beal v. Calobrisi*, supra note 4.

<sup>72</sup> *Beal v. Calobrisi*, supra note 4.

<sup>73</sup> *Id.* at 2. See FLA. STAT. § 5015(2)(a)-(c) (Lexis 2009).

<sup>74</sup> FLA. STAT. § 90.5015 (Lexis 2009). In pertinent part, Fla. Stat. § 90.5015(2) states “a professional journalist has a qualified privilege ... not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations obtained within the normal scope of employment.”

<sup>75</sup> *Doe v. TS et al.*, supra note 4.

granted the *Portland Mercury* and *Willamette Week's* motion, ruling that Oregon's shield law<sup>76</sup> extends to the anonymous commenter's IP address and other identifying information because they qualify as "information" under Or. Rev. Stat. § 44.520(b), which allows a newspaper to refuse to disclose "Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public."<sup>77</sup> Lest his ruling be considered a broad inclusion of all online commenters, however, Redman added the caveat that he might have decided differently had the comments at issue "been totally unrelated to the blog post."<sup>78</sup>

It should come as no surprise that Judges Tognarelli and Redman expressed some degree of discomfort with considering anonymous commenters to be protected by state shield laws. Judges are naturally inclined to practice restraint when faced with a novel issue, and shield law jurisprudence involving anonymous website users is certainly novel. Moreover, most state shield laws incorporate specific and often exhaustive lists of the individuals and organizations they are meant to include,<sup>79</sup> and in at least one case, a clause specifically excluding certain individuals.<sup>80</sup> Courts have traditionally been extremely disinclined to extend shield law coverage beyond the individuals and types of information specifically mentioned in the statutes. For example, in determining who can be considered a "journalist" for the purposes of shield law protection, courts in only seven states—California, Colorado, Illinois, Louisiana, Maryland, New Jersey, and New York—have extended statutory protection to individuals not explicitly included in the law.<sup>81</sup> In two extreme examples, a Michigan court ruled in 1986 that a television news reporter could not claim the state's statutory privilege because, at the time, the statute only included a reference to reporters for print publications,<sup>82</sup> and in 2005 the Eleventh Circuit U.S. Court of Appeals refused to extend the Alabama shield law to a *Sports*

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<sup>76</sup> OR. REV. STAT. §§ 44.510–540 (Lexis 2007).

<sup>77</sup> *Id.*

<sup>78</sup> *Doe v. TS et al.*, *supra* note 4, at 2.

<sup>79</sup> See Anthony Fargo, *Analyzing Federal Shield Law Proposals: What Congress can Learn from the States*, 11 COMM. L. & POL'Y 35, 56-59 (2006).

<sup>80</sup> FLA. STAT. ANN. § 90.5015(1)(a), "Book authors and others who are not professional journalists, as defined in this paragraph, are not included in the provisions of this section."

<sup>81</sup> See *Downey v. Coalition Against Rape & Abuse*, 31 Media L. Rep. 2582 (Dist. N.J. 2003), *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274 (Cal. App. 4th 1999); *McCall v. Oroville Mercury Co.*, 191 Cal. Rptr. 280 (Cal. App. 3d 1983), *Henderson v. People*, 879 P.2d 383 (Colo. App. 1994); *People v. Slover*, 323 Ill. App. 3rd. 620 (Ill. App. 2001); *Becnel v. Lucia*, 420 So. 2d 1173 (La. 1982); *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855 (Md. 2006); *Kinsella v. Welch*, 827 A.2d 325 (N.J. Super. Ct. App. Div. 2003); *In re Petition of Burnett*, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993); *Gastman v. North Jersey Newspapers Co.*, 603 A.2d 111, (N.J. Super. Ct. App. Div. 1992); *In re Avila*, 501 A.2d 1018 (N.J. Super. Ct. App. Div. 1985); *In re Application of Codey*, 589 N.Y.S.2d 400 (N.Y. App. Div. 1992); *People v. Bonnakemper* 345 N.Y.S.2d 900 (N.Y. Crim. Ct. 1973).

<sup>82</sup> *In re Contempt of Stone*, 154 Mich. App. 121, 125-126 (1986).

*Illustrated* reporter because the statute specifically mentions newspapers, radio stations, and television stations, but not magazines.<sup>83</sup>

The ubiquity of online information dissemination has not led judges to stretch shield laws to encompass bloggers or other Internet publishers, despite increasingly sophisticated legal claims that “we’re all journalists now.”<sup>84</sup> For example, in April 2010, a New Jersey appellate court ruled that a blogger could not claim the state’s shield law because she failed to make a *prima facie* showing that she was a member of the news media, as the law required.<sup>85</sup> The court recognized precedent calling for a liberal interpretation of the shield law, but nevertheless found that the blogger “exhibited none of the recognized qualities or characteristics traditionally associated with the news process, nor has she demonstrated an established connection or affiliation with any news entity” when she investigated criminal activity in the online adult entertainment industry.<sup>86</sup> For now, *O’Grady v. Superior Court*, where the California Court of Appeal extended that state’s shield law to two blogs reporting on unreleased Apple Computer products,<sup>87</sup> stands as a notable anomaly rather than a clarion call for judges to embrace society’s new “lonely pamphleteers.”<sup>88</sup>

Previous scholarly research also lends support to the proposition that arguments that analogize anonymous commenters to confidential sources are not likely to succeed. In a 1997 study of judicial interpretation of state shield laws, Professor Laurence Alexander and Ellen Bush found that courts quashed subpoenas seeking the identity of confidential sources 70 percent of the time.<sup>89</sup> However, courts were most likely to quash the subpoenas in the relatively few states—just 13 at the time—that had absolute shield laws: laws that have no qualifications in the form of multi-step or balancing tests.<sup>90</sup> With these statistics in mind, many news organizations that attempt to defend anonymous online commenters will probably miss out on the circumstances in which they are most likely to have the subpoenas quashed, since the commenters are unlikely to be considered confidential sources. Meanwhile, courts have been much less likely to quash subpoenas that seek confidential information, which is a much closer fit in drawing an analogy to the confidential identity of an anonymous commenter. The Alexander and Bush study found

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<sup>83</sup> Price v. Time 416 F.3d 1327 (11th Cir. 2005); see also ALA. CODE § 12-21-142 (Lexis 2009).

<sup>84</sup> SCOTT GANT, WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE (2007).

<sup>85</sup> Too Much Media, LLC v. Hale, No. A-0964-09T3, 38 Media L. Rep. 1673 (Sup. Ct. N. J., App. Div. April 22, 2010).

<sup>86</sup> *Id.* (emphasis in original).

<sup>87</sup> 44 Cal. Rptr. 3d 72 (Cal. App. 6th 2006).

<sup>88</sup> *Branzburg*, 408 U.S. at 704 (noting “the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”).

<sup>89</sup> Laurence Alexander and Ellen Bush, *Shield Laws On Trial: State Court Interpretation of the Journalist’s Statutory Privilege*, 23 J. LEGIS. 215, 219 (1997).

<sup>90</sup> *Id.* For example, Montana has an absolute shield law. See *infra* text accompanying notes 93-96.

that courts quashed subpoenas for confidential or unpublished information less than 35 percent of the time.<sup>91</sup>

Moreover, judicial reluctance to read shield laws broadly will persist regardless of whether the anonymous commenters are considered to be confidential sources or their identities are considered to be confidential information acquired in the news gathering process. A comprehensive textual analysis of all 37 shield statutes would be useful in this instance, but it is beyond the scope of this article. Nevertheless, it is not particularly controversial to claim that courts are likely to follow a reasoning pattern that is similar to the common sense approach of Judge Tognarelli, who was reluctant to consider commenters who contribute information or commentary *after* an article is published to be confidential sources for the purposes of the news *gathering* process.<sup>92</sup> In most instances, should a reporter wish to follow a tantalizing lead offered by an anonymous commenter, the reporter will attempt to follow up personally, which would bring the commenter into the realm of more traditional sources.

The Montana and Texas cases bear mentioning at this point because they are the clear outliers. In Montana, thanks to a shield law that is broad in its inclusion and absolute in its terms, the *Billings Gazette* could argue confidently in a hearing before Judge G. Todd Baugh of the 13th Judicial District that a subpoena from a would-be defamation plaintiff should be quashed under Montana's Media Confidentiality Act.<sup>93</sup> The *Gazette* argued that the Act, which states that "no ... newspaper ... may be required to disclose ... the source of ... information in any legal proceeding if the information was gathered, received, or processed in the course of ... its business,"<sup>94</sup> should be interpreted to include the identity of the anonymous commenters on the *Gazette's* website. The Act provides an absolute shield, meaning if a court determines that it covers the entity claiming the shield as well as the information it refuses to disclose, the subpoena must be quashed.<sup>95</sup> Judge Baugh took little time with the issue, making an oral ruling from the bench that the Montana shield law required that the subpoena be quashed, stating that,

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<sup>91</sup> *Id.* at 221.

<sup>92</sup> Judge Tognarelli even cited a previous Illinois state court decision, *People v. Slover*, 323 Ill. App. 3rd. 620 (Ill. App. 2001), that stated "the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants, and other persons providing news to a reporter" *Id.* at 624. Nevertheless, he declined to extend the language of the law to anonymous commenters if the state legislature had not explicitly chosen to do so.

<sup>93</sup> MONT. CODE ANN. §§ 26-1-901-903 (Lexis 2007).

<sup>94</sup> *Id.* at § 26-1-902(1). The full text is: "Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business."

<sup>95</sup> *Id.*

“Though technology has advanced since the time of the creation of [the shield law], it, nonetheless, is very broad and it does cover the situation we have here before us.”<sup>96</sup>

Texas District Court Judge K. Lee Hamilton also dispensed quickly with a question of whether commenters on the *Abilene Reporter-News* website should be identified. A lawyer for 16-year-old murder suspect Michael Martinez Jr. sought the identities of people who commented on the newspaper’s stories about the murder because he was concerned the jury pool for Martinez’s trial could be tainted.<sup>97</sup> In an oral ruling from the bench, Judge Hamilton quashed the subpoena. Texas’s broad new shield law, less than two months old in June 2009, extends to “any confidential or nonconfidential unpublished information, document, or item obtained or prepared while acting as a journalist,” or the source of that information.<sup>98</sup> Judge Hamilton said that the law extended to the identities of anonymous commenters on the *Reporter-News* website.<sup>99</sup>

Overall, news organizations that decide to use their state shield laws to fight subpoenas for the identities of anonymous commenters are not likely to find themselves in the position of the *Billings Gazette* or *Abilene Reporter-News*, nor should they expect courts to follow the lead of Judges Baugh, Redman, Barron, or Hamilton. Most courts will not be willing to extend the terms of state shield laws to include the identities of anonymous online commenters, regardless of whether their identities are considered confidential sources or confidential information, unless or until lawmakers revise the statutes to explicitly include them.

## V. BETTER ALTERNATIVES

More important than the question of whether and when courts are likely to extend shield law protection to anonymous commenters, however, is the fact that better legal alternatives are available. For example, *jus tertii* standing—or third party standing—can allow a news organization to assert the First Amendment rights of anonymous commenters whose identities are sought. A third party standing approach is likely to appeal to news organizations which set out to protect the identity of anonymous commenters because it allows news organizations to affirmatively fight for the rights of

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<sup>96</sup> *Doty v. Molnar*, *supra* note 4, at 30. It is unclear from the transcript of the hearing whether Judge Baugh considered the anonymous commenters on the *Billings Gazette* website to be “sources” or “information.” The Montana shield law appears to treat both confidential sources and information identically, however, so such an analysis would probably not be necessary.

<sup>97</sup> Daralyn Schoenewald, *Judge Rules Names of ARN Online Commenters Do Not Have to be Turned Over*, ABILENE REPORTER-NEWS, June 19, 2009, available at <http://www.reporternews.com/news/2009/jun/19/hearing-held-over-need-to-reveal-arn-commenters/>; Patrick File, *Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts*, 14 SILHA BULL., 1 (Summer 2009); *see also State v. Martinez*, *supra* note 4.

<sup>98</sup> TEX. CODE CRIM. PROC. § 38.11 §§ 3(a)(1-2) (LexisNexis 2010).

<sup>99</sup> Daralyn Schoenewald, *Judge Rules Names of ARN Online Commenters Do Not Have to be Turned Over*, Abilene Reporter News, June 19, 2009, available at <http://www.reporternews.com/news/2009/jun/19/hearing-held-over-need-to-reveal-arn-commenters/>.

an online community with the full force of the First Amendment defense as opposed to the more flimsy shield law defense.

In two cases in different federal district courts in Pennsylvania, news organizations have successfully fought attempts to force them to disclose the identities of anonymous commenters using the third party standing approach.<sup>100</sup> In the first case, *Enterline v. Pocono Medical Center*, Judge Richard Caputo denied plaintiff Brenda Enterline's motion to compel the *Pocono Record* to identify eight commenters on its website. Enterline believed the commenters had personal information relevant to her sexual harassment suit against the Pocono Medical Center.<sup>101</sup> Caputo found that the *Pocono Record* had standing to assert the rights of its commenters because the commenters "face practical obstacles preventing [them] from asserting their rights on behalf of themselves," namely, that the commenters would have to be identified in order to assert their own rights. "This loss of anonymity is the very harm that [the *Pocono Record*] seeks to prevent," Caputo wrote.<sup>102</sup> Caputo further concluded that the relationship between the *Pocono Record* and its commenters was the type of relationship that allowed the newspaper to assert the commenters' First Amendment rights. For this conclusion, the judge relied on *In re Verizon Internet Services, Inc.*, where a federal district judge found that Verizon had a vested interest in vigorously protecting its subscribers' First Amendment rights in order to maintain and broaden its client base.<sup>103</sup> Judge Caputo also cited *Virginia v. American Booksellers Association*, where the United States Supreme Court found that bookstores may raise First Amendment rights on behalf of booksellers.<sup>104</sup> The *Pocono Record* successfully argued that preventing it from asserting its commenters' First Amendment rights would "compromise the vitality of the newspaper's online forums, sparking reduced reader interest and a corresponding decline in advertising revenues."<sup>105</sup>

In the second case, *McVicker v. King*, federal district court judge Terrence McVerry quashed a subpoena for the identities of seven commenters on YourSouthHills.com, the website of the South Hills Record.<sup>106</sup> Plaintiff William McVicker sought to compel *South Hills Record* owner Trib Total Media to disclose the commenters' identities as part of his unlawful termination and discrimination lawsuit against the city council members who fired him. Judge McVerry relied heavily on the *Enterline* decision and its similarity to the case before him in determining that Trib Total Media had standing to assert the First Amendment rights of its seven anonymous commenters. "The trend among courts which have been presented with this question is to hold that entities such as newspapers, internet service providers, and website hosts may,

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<sup>100</sup> *McVicker v. King*, No. 2:09-cv-00436, 38 Media L. Rep. 1650 (W.D. Pa. March 3, 2010); *Enterline v. Pocono Medical Ctr.*, No. 3:08-cv-1934, 37 Media L. Rep. 1057 (M. D. Pa. 2008).

<sup>101</sup> *Enterline*, No. 3:08-cv-1934, at 13.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Enterline*, No. 3:08-cv-1934, at 5 (citing *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 at 258 (D.D.C. 2003)).

<sup>104</sup> *Id.* at 6 (citing *Virginia v. American Booksellers Association*, 484 U.S. 383 at 392-93 (1988)).

<sup>105</sup> *Id.* at 6.

<sup>106</sup> *McVicker*, No. 2:09-cv-00436, at 13.

under the principle of *jus tertii* standing, assert the rights of their readers and subscribers,” McVerry wrote.<sup>107</sup> “This Court agrees with the decision and reasoning employed by Judge A. Richard Caputo in *Enterline*.”<sup>108</sup>

A closer examination of the *Enterline* case shows that although determining whether a news organization can assert third party standing to defend the First Amendment rights of its commenters can be somewhat complicated, it is not likely to be an especially onerous standard for the news organizations to meet. According to Judge Caputo, The United States Supreme Court’s three-part “irreducible constitutional minimum” of standing, articulated most recently in 1997 in *Bennett v. Spear*,<sup>109</sup> requires: (1) that the plaintiff have suffered an “injury in fact”: an invasion of a judicially cognizable interest which is (a) concrete and particular and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that the injury be likely, as opposed to merely speculative.<sup>110</sup>

Judge Caputo also identified the Court’s three prudential standing requirements, the most operative here being the third, which generally prohibits third party standing but articulates exceptions to that rule.<sup>111</sup> According to Caputo, “even when a plaintiff has alleged injury sufficient to meet the [U.S. Constitution, Article III] ‘case or controversy’ requirement, the Supreme Court has held that the plaintiff ... must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>112</sup> However, the Court has made exceptions “[w]here practical obstacles prevent a party from asserting rights on behalf of itself.”<sup>113</sup> Where practical obstacles exist, courts must consider whether the third party has sufficient injury-in-fact to satisfy the minimum constitutional standing requirement, and “whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.”<sup>114</sup> Moreover, in the specific context of the First

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<sup>107</sup> *Id.*, at 8.

<sup>108</sup> *Id.*

<sup>109</sup> 520 U.S. 154, at 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 560 (1992)).

<sup>110</sup> *Enterline*, No. 3:08-cv-1934, at 3-4.

<sup>111</sup> The first two prudential requirements are (1) that standing cannot apply “when the asserted harm is a generalized grievance shared in a substantially equal measure by all or a large class of citizens”; and (2) that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” See *Enterline*, No. 3:08-cv-1934, at 4 (citing *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

<sup>112</sup> *Enterline*, No. 3:08-cv-1934, at 4 (citing *Warth*, 422 U.S. at 499).

<sup>113</sup> *Enterline*, No. 3:08-cv-1934, at 4 (citing *Secretary of Maryland v. Joseph H. Munson Co.*, 497 U.S. 947, at 956 (1984)).

<sup>114</sup> *Id.*

Amendment, the Court has relaxed the third-party-standing rules specifically because those rules could chill speech.<sup>115</sup>

As discussed above, Judge Caputo had little difficulty in finding that the *Pocono Record* met the exceptions for the Supreme Court's prohibition on third-party standing. News organizations across the country that assert third party standing to protect the identities of website commenters can expect a similar result. The practical obstacle to anonymous commenters asserting their right to anonymous speech should be quite clear: it would be nearly impossible for the commenters to assert that right without coming forward and identifying themselves. The injury-in-fact is also quite clear: that a forced disclosure of the identity of otherwise anonymous commenters damages the integrity and vitality of the news organization's comment forums, which can lead to a decline in active website users and cause a decline in advertising revenue. It could also chill speech if commenters are afraid they might be the next targets of a subpoena, a fact which lowers the bar to third party standing even further. Finally, it is unlikely that judges will have reason to doubt the ability for a news organization to properly frame or defend with adversarial zeal the First Amendment rights of its online commenters.

A third-party assertion of commenters' First Amendment right to speak anonymously is plainly preferable to the questionable approach of raising a state shield law. First and foremost, although scholars have noted that the outer limits of the right to anonymous speech are far from clear,<sup>116</sup> the basic principle that individuals have a right to anonymity in their speech is not controversial and has been affirmed consistently by the United States Supreme Court.<sup>117</sup> A good media lawyer will recognize that a strong constitutional approach to fighting a subpoena is better than a flimsy (and in some states, absent) approach that asks a court to stretch a statutory privilege meant to cover journalists' confidential sources. The fact that shield laws form a patchwork of protection across the country also lends support to the argument that the *jus tertii* approach is superior, since it effectively creates a national standard in so far as it relies on the federal standards for establishing third party standing as well as the First Amendment, which applies to all the states via the Fourteenth Amendment.<sup>118</sup>

News organizations might also find that it is not in their best interest to become entangled in the legal quarrels of independent users of their websites. To this end, another approach effectively places the responsibility for anonymous speech with the speakers

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<sup>115</sup> *Enterline*, No. 3:08-cv-1934, at 5 (citing *Eisenstadt v. Baird*, 405 U.S. 438 at 445 n. 5 (1972) (“Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech. *E. g.*, *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). *See United States v. Raines*, 362 U.S. 17, 22 (1960).”).

<sup>116</sup> *See supra* text accompanying notes 30-31 (discussing the “murky” scope of protection afforded to anonymous speech by the United States Supreme Court).

<sup>117</sup> *See supra* text accompanying note 27 (asserting that “the Court has consistently upheld the general proposition that anonymous speech is protected.”).

<sup>118</sup> *Gitlow v. New York*, 268 U.S. 652, at 666 (1925).

themselves. Like ISPs and other websites, news organizations can take steps to identify and notify the targets of litigation whose identity is sought, and let those individuals stand up for their own right of anonymous speech. As discussed in Section III, a notification requirement has become incorporated in the more widely accepted tests for unmasking anonymous web users, including both *Dendrite* and *Cahill*. Few practical obstacles stand in the way of news organizations making it standard practice to take steps to notify the commenters whose identity is sought through a John Doe subpoena if the law requires it. As previously discussed,<sup>119</sup> news organizations increasingly acquire basic contact information for individuals who comment on their websites, and news organizations could use that contact information as a means of notifying the individual that he or she is the subject of a subpoena. Even without basic contact information, the news organization could make a good faith effort to notify anonymous individuals of a subpoena through any of the multitude of means of mass communication to which it has access, including a notice in print or on television, or a prominently placed message on its website.

Moreover, news organizations should not overlook the importance of terms of service, also known as user agreements or terms of use, in explaining to users not only the importance of speaking civilly while using the website, but also the potential consequences if they fail to do so. For example, users of *The Portland Mercury* website are bound by its “Guidelines and Terms of Use,” which are found via a link at the bottom of every page on the site. Not only do the guidelines warn users not to post content that is unlawful, abusive, harassing, defamatory, or in violation of copyright, trademark or protections for trade secrets, they also inform users that they “acknowledge and agree that *The Portland Mercury* may fully cooperate with any law enforcement authorities or court order requesting or directing disclosure of information or materials in *The Portland Mercury*’s possession.”<sup>120</sup> Some critics might argue that a policy of doing nothing more than notifying commenters who are targets of a court order seeking their identity is antithetical to the notion that news organizations should be willing to stand up in the name of freedom of speech anytime or anywhere. But as news organizations face increasing budget concerns and cutbacks, they must seriously consider whether they want to commit their limited resources to defending anonymous contributors to a forum that recalls an “open sewer” as much as it does a “vibrant town square.”<sup>121</sup>

Case law on anonymous online speech remains brand new and has not yet developed a clear way forward. Courts will draw lines and make distinctions as cases arise and facts dictate, and the approaches proposed here should not be delivered without caveats. It is perhaps most important to observe that although the U.S. Supreme Court has consistently extolled the value of anonymous speech in American society in principle, in

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<sup>119</sup> See *supra* text accompanying note 34.

<sup>120</sup> *Guidelines and Terms of Use*, THE PORTLAND MERCURY, <http://www.portlandmercury.com/portland/ThePortlandMercurysGuidelinesandTermsofUse/Page>. But see the website of *Willamette Week*, which has no readily apparent terms of service agreement. Users of that website also need not register to post comments. WILLAMETTE WEEK, <http://wweek.com>.

<sup>121</sup> See *supra* text accompanying notes 11-23 (discussing the benefits and drawbacks of allowing anonymous commenting on news websites).

practice the Court has only directly dealt with the right to anonymous speech in political contexts.<sup>122</sup> The right to remain anonymous in the face of a subpoena is by no means legally absolute, and news organizations that trade an ill-fitting shield law defense for a *jus tertii* First Amendment defense might not necessarily improve their chance of success if the case involves speech which is far from the core of the First Amendment, for example allegedly harassing or defamatory speech which involves a private plaintiff's personal affairs. In other words, a court might be as likely to look unfavorably upon a news organization's third-party assertion of First Amendment rights as it is a theory that stretches a statutory privilege too far. On principle alone, news organizations might find that the best overall policy is to avoid any legal defense of the rights of commenters, since their activities do not resemble the traditional source-reporter relationship that has been legally protected in most states, and if commenters can speak for themselves, they should be prepared to fight a subpoena for their identity if their speech prompts legal action. Either way, news organizations can be better citizens and stand a much better chance of defending and promoting free speech rights if they forgo the flimsy shield provided by a state shield law in favor of the First Amendment, or even step aside and let John and Jane Doe go it alone.

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<sup>122</sup> See *supra* text accompanying notes 27-31.

**IS IT MYSPACE OR THE SCHOOL'S SPACE?  
CONFUSION AND CONTRADICTION IN THE PUNISHMENT OF STUDENT  
CYBERSPEECH**

TEMPLE NORTHUP

*The purpose of this article is to review U.S. Supreme Court precedents that apply to student speech and see how those are then applied by lower courts to student cyberspeech. In particular, this article examines if the U.S. Supreme Court's recent case involving student speech, Morse v. Frederick, has helped lower courts distinguish when student speech that occurs on the Internet is punishable by schools. This article finds that overall, there is considerable confusion and contradiction in how the lower courts treat cyberspeech. Some consider cyberspeech outside their legal reach while others find it acceptable to punish students who post online what they deem to be inappropriate material. The article concludes with a possible solution that would help clarify how courts should handle student cyberspeech cases.*

**Keywords:** cyberspeech, Internet, student speech, Tinker, Morse

In 1990, if students were upset with their teachers or principal, they would get together after school and discuss them using language that was, most likely, not particularly kind. Flash forward twenty years and students are still getting together to complain about their teachers and principals; however, technology has changed a great deal in the intervening decades – in 2010, they are as likely to communicate over the Internet as they are to communicate face-to-face. While the sentiments of the two groups are identical, one form of communication is strictly limited to friends while the other is open to virtually anyone with a computer. Similarly, one form of expression would never have gotten a student in trouble, yet the other is becoming the center of a hotly debated issue – student online can then get them in trouble at school.<sup>1</sup> To what extent a

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<sup>1</sup> See, e.g., J.S. v. Bethlehem Area School District, 757 A.2d 412 (Pa. Commw. Ct. 2000), in which a student was expelled for making threatening and derogatory comments about teachers on his website.

student cyberspeech – as students across the country are increasingly finding that what they post can get in trouble for what he or she writes or posts online is a new frontier in the student-speech debate, and the implications of current court decisions could last for generations to come.

Currently, lower courts are divided when it comes to student cyberspeech. For instance, Aaron Wisniewski found out firsthand that activities performed online can be punishable by a school.<sup>2</sup> Wisniewski created an AOL Instant Messenger icon for himself that featured a cartoon head being shot; the head was labeled with the name of one of his teachers.<sup>3</sup> While only a few of his friends saw this icon, and he never used the icon at school, school officials suspended him when it came to their attention – an action the U.S. Court of Appeals for the Second Circuit upheld.<sup>4</sup> In contrast, Karl Beidler created a Web page that mocked the assistant principal of his school, something the Washington Superior Court held as being off campus and therefore out of the domain of school authorities.<sup>5</sup> While these two cases are different factually, there were factors that both judges considered: (1) whether speech that occurred at home, but was posted online, could be considered school speech and (2) which precedent applied.

This article explores those issues and differentiates among the cyberspeech decisions that lower courts have reached. Furthermore, this article fills a gap in the literature in two important ways. First, no other scholarly articles have analyzed lower court opinions involving student cyberspeech by comparing those decisions before the most recent Supreme Court ruling related to student speech, *Morse v. Frederick*, with those post-*Morse* in order to investigate if and how *Morse* provides any clarification to the issues being considered. To date, there have only been four Supreme Court decisions that involved student speech, so when a new one is written, it is important to see what impact it is having on lower courts. Second, this article suggests a new standard to apply when considering student cyberspeech. By adopting this new standard, schools and courts would have clear guidance as to what can be considered protected student cyberspeech.

The U.S. Supreme Court has yet to grant *certiorari* in a case involving online student speech, so it has been left entirely to the lower courts to resolve these issues. To fully understand student cyberspeech, this article begins with a discussion of the four major U.S. Supreme Court holdings that specifically address student speech in general. Next comes an analysis of cases that involved student speech created off campus but then brought onto campus. This helps illuminate how lower courts have interpreted U.S. Supreme Court student speech precedents as they apply to speech that was not created on school grounds. A review of the scholarly literature on student cyberspeech is next, followed by an analysis of cases involving student cyberspeech in an attempt to see if consistent approaches are developing in the lower courts. Finally, this article concludes

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<sup>2</sup> Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34 (2nd Cir. 2007).

<sup>3</sup> *Id.* at 35-36.

<sup>4</sup> *Id.* at 40.

<sup>5</sup> Beidler v. North Thurston School District, No. 99-2-00236-6 (Wash. Super. Ct., July 18, 2000).

with a discussion of the future of student cyberspeech and suggests a solution that could help clarify the confusion that seems to be occurring.

In order to find all cases involving student cyberspeech, a search was performed using LexisNexis and Westlaw. This was done in two-step process. First, I executed a search using “student” and “speech” as the search terms. This resulted in almost 500 cases. Second, within those results, I performed a search using a variety of terms, including “website,” “webpage,” “internet,” “myspace,” “online,” and “cyberspeech.” To further ensure that every case post-*Morse* was included, I identified all cases that cited *Morse*. I then read each of those documents to determine if it involved cyberspeech. A census of all published cyberspeech cases should have resulted from those searches.

### I. FROM ARMBANDS TO BONG HITS; FOUR DECADES OF STUDENT SPEECH PRECEDENT

The seminal U.S. Supreme Court case about student speech is *Tinker v. Des Moines Independent Community School District*.<sup>6</sup> In *Tinker*, students were suspended for violating the dress code after they wore black armbands to protest the Vietnam War.<sup>7</sup> The Court held that wearing armbands in protest was “closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.”<sup>8</sup> Justice Fortas famously wrote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>9</sup> Furthermore, there was no evidence that the wearing of the armbands by the students disrupted classes in any manner.<sup>10</sup> Instead, the suspension came from the fear of such a disturbance, and “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>11</sup> Justice Fortas concluded by clearly spelling out that a material disruption or invasion of rights must occur during school hours in order for a student’s speech to be punishable:

A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or

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<sup>6</sup> 393 U.S. 503 (1969).

<sup>7</sup> *Id.* at 504.

<sup>8</sup> *Id.* at 505-06.

<sup>9</sup> *Id.* at 506.

<sup>10</sup> *Id.* at 512.

<sup>11</sup> *Id.* at 508.

type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>12</sup>

In a concurrence, Justice Stewart added that “a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”<sup>13</sup> In other words, while Justice Stewart agreed that students do maintain First Amendment protection, the reality is that children in school do not necessarily have the freedom of choice or the cognitive ability to differentiate and choose among speech messages. Because of this, there could be times in which student speech might need to be controlled.

Seventeen years after *Tinker*, the Court again visited student speech, this time in *Bethel School District No. 403 v. Fraser*.<sup>14</sup> In *Fraser*, school administrators punished a student for giving a speech that included explicit sexual metaphors in front of the student body.<sup>15</sup> Contrary to *Tinker*, the Court found the punishment did not infringe on Fraser's First Amendment rights. The Court found it necessary to make a distinction between the “nondisruptive, passive expression of a political viewpoint in *Tinker*”<sup>16</sup> and the sexual nature of Fraser's speech. Chief Justice Burger stated that the “freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>17</sup> In fact, the Court reasoned that the speech rights of students were not the same as the speech rights of adults.<sup>18</sup> Furthermore, “mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.”<sup>19</sup>

While this was the U.S. Supreme Court's first exception to the *Tinker* standard, Justice Brennan made one critically important point in his concurrence: “If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”<sup>20</sup> These are important remarks as Justice Brennan was stressing that while there are exceptions to the First Amendment rights of students, those exceptions are limited to within the schoolhouse gates.

Two years after *Fraser*, another exception to *Tinker* was found in *Hazelwood School District v. Kuhlmeier*.<sup>21</sup> In this instance, the Court held that a student newspaper could be regulated in any reasonable manner by the school.<sup>22</sup> “A school must be able to

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<sup>12</sup> *Id.* at 512-13 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>13</sup> *Id.* at 515 (Stewart, J., concurring).

<sup>14</sup> 478 U.S. 675 (1986).

<sup>15</sup> *Id.* at 676. By today's standards, his remarks were rather tepid.

<sup>16</sup> *Id.* at 680.

<sup>17</sup> *Id.* at 681.

<sup>18</sup> *Id.* at 682-83.

<sup>19</sup> *Id.* at 683.

<sup>20</sup> *Id.* at 688.

<sup>21</sup> 484 U.S. 260 (1988).

<sup>22</sup> *Id.* at 271.

set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards.”<sup>23</sup> The Court then looked to distinguish this decision from that of *Tinker*:

[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities *so long as their actions are reasonably related to legitimate pedagogical concerns*.<sup>24</sup>

*Kuhlmeier* added another exception to the original substantial disruption standard set forth in *Tinker*, now adding a “reasonable” standard by which schools could limit speech if the reason for regulation was “pedagogical concerns.”<sup>25</sup> This effectively created a balancing test that lower courts would have to follow, balancing the First Amendment rights of students with the educational interests of schools.

*Morse v. Frederick* is the final and most recent case the U.S. Supreme Court has heard involving student speech.<sup>26</sup> In *Morse*, a student brought action against his principal for infringing upon his First Amendment rights when she suspended him for holding a banner that read “BONG HITS 4 JESUS” at an officially sanctioned school event.<sup>27</sup> The Court sided with the principal and found that schools can discipline students if the speech can be interpreted as advocating illegal drug use, regardless of whether it threatened to cause substantial disruption.<sup>28</sup> In doing so, the Court created another exception to the *Tinker* standard, something Justice Thomas noted in his concurrence:

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that

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<sup>23</sup> *Id.* at 271-72.

<sup>24</sup> *Id.* at 272-73 (emphasis added).

<sup>25</sup> Importantly, the Court also held that the speech has to be school-sponsored. However, it could be reasonably argued that almost any speech occurring on school grounds could be considered “school-sponsored.” In other words, if a school is specifically permitting speech to occur on its grounds, then it is implicitly sponsoring it by not preventing it from continuing. Therefore, the important part of this decision for present purposes is the loosening of the *Tinker* standard. The distinction of school sponsorship will be taken back up later.

<sup>26</sup> 127 S. Ct. 2618 (2007).

<sup>27</sup> *Id.* at 2619.

<sup>28</sup> *Id.* It is interesting to note that the main focus of the dissent is not whether student speech could be disciplined when it advocated illegal drug use; instead, the dissent disagreed that the message of the sign could reasonably be seen as advocating drug use.

our jurisprudence now says that students have a right to speak in schools except when they don't.<sup>29</sup>

Justice Thomas was correct that the Court's opinion was ambiguous enough to be interpreted as permission to increase school's ability to punish off-campus speech. Kathleen Conn made the following observation about the decision:

[T]he Supreme Court fashioned the rationale for its decision by distilling from *Fraser* two basic principles: that (1) the special characteristics of the school environment circumscribe students' First Amendment rights, and (2) *Tinker's* mandate that school authorities must demonstrate "substantial disruption" before regulating student speech during school-sponsored activities should no longer apply.<sup>30</sup>

Furthermore, an issue that the *Morse* Court side-stepped is that the speech originated and occurred off campus.<sup>31</sup> The banner that was unfurled was not made at the school, nor was it displayed on school property. This means the banner must have come from somewhere else. Therefore, the speech that the principal punished was speech that was created off campus, displayed off campus, and never caused a disruption. While the decision focused on the fact that the message was promoting drug use, the reality is that lower courts could potentially interpret the decision as applying to almost any messages that go against what the school endorses, even when they do not cause material disruptions.<sup>32</sup> This furthered the idea that restrictions on school speech could apply to speech that, harking back to *Kuhlmeier*, does not fit within the school's pedagogical concerns.

## II. WHEN OFF-CAMPUS SPEECH COMES ON CAMPUS

While there is a fairly clear U.S. Supreme Court precedent that specifically allows for the regulation and punishment of student speech that occurs at school or school-sanctioned events, much less clear is what the Court's response might be to the punishment of speech that is created off campus and never reaches the school or speech that is created off campus but then finds its way on. The lower courts have been left on their own to deal with these types of occurrences.

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<sup>29</sup> *Id.* at 2634.

<sup>30</sup> Kathleen Conn, *The Long and the Short of the Public School's Disciplinary Arm: Will Morse v. Frederick Make a Difference?*, 227 Ed. Law Rep. 1, 7 (2008).

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> In fact, Clay Calvert has noted how lower courts have distorted the decision in *Morse* in order to suppress speech. See Clay Calvert, *Up In Smoke: The Distortion of Morse v. Frederick and Justice Alito's Narrow Concurrence by Lower Courts*. Paper presented to the Law Division, 2009 AEJMC Southeast Colloquium.

One of the first instances of a lower court hearing a case involving speech created off campus then brought on was *Shanley v. Northeast Independent School District*.<sup>33</sup> Five students were punished for publishing and distributing an “underground” newspaper entirely off campus – but the newspaper was brought on campus by students.<sup>34</sup> Judge Goldberg, writing for the U.S. Court of Appeals for the Fifth Circuit, noted that the court did “not feel it necessary to hold that *any* attempt by a school district to regulate conduct that takes place off the school grounds and outside school hours can never pass constitutional muster.”<sup>35</sup> However, the student speech did not even approach the “material and substantial” disruption standard established by *Tinker*, nor was anything published vulgar, obscene, or libelous.<sup>36</sup> The significance of this case is that the court implied there could be situations or circumstances in which speech created off campus that finds its way on could be punished – it just was not justified with the current set of facts.

Nine years later, in *Thomas v. Board of Education*, the U.S. Court of Appeals for the Second Circuit heard a case that involved students’ being punished for a paper they published off campus that happened to be brought on.<sup>37</sup> Judge Kaufman opened with the premise that the authority of the school should not reach beyond the school’s property:

[The] willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gates. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government.<sup>38</sup>

Therefore, any punishment of student activity off campus would be held to a stricter standard than the punishment of speech on campus. Kaufman categorically declared that “school officials are powerless to impose sanctions for expression beyond school property.”<sup>39</sup> Instead, he said that parents have the responsibility to discipline their children away from the schools.<sup>40</sup>

Other courts have also held that student speech created off campus cannot be punished.<sup>41</sup> For instance, the Ninth Circuit held that “[t]he student distribution of non-school-sponsored material . . . cannot be subjected to regulation on the basis of

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<sup>33</sup> 462 F.2d 960 (5th Cir. 1972).

<sup>34</sup> *Id.* at 964.

<sup>35</sup> *Id.* at 974.

<sup>36</sup> *Id.* at 975.

<sup>37</sup> 607 F.2d 1042 (2d Cir. 1979).

<sup>38</sup> *Id.* at 1044-45.

<sup>39</sup> *Id.* at 1050 n.13.

<sup>40</sup> *Id.* at 1051.

<sup>41</sup> These cases have not always involved underground publications; the suspension of a student who gave his teacher a vulgar gesture away from school was reversed, the court holding that the gesture did not pose a true threat. *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986).

undifferentiated fears of possible disturbances or embarrassment to school officials.”<sup>42</sup> Similarly, in 2004, the Fifth Circuit found that student speech that was created off campus and never intended to be brought onto school grounds is not punishable.<sup>43</sup> In many ways, this decision was similar to *Shanley* in that the important distinction for the court was that the speech was not intentionally brought to school – in other words, if off campus speech was intentionally brought on, then it would have been considered on campus despite being created off.

While most cases mentioned thus far have held that the punishment of speech created off the school grounds was not punishable, some courts have come to a different conclusion.<sup>44</sup> These courts used *Tinker* as the standard by which to judge the student speech in question. For instance, in *Board of Education of Monticello Central School District v. Commissioner of Education*, a student created a newspaper from his home then brought it for distribution to school.<sup>45</sup> In the paper, the student called for destruction of school property, including for students to “urinate on the floors, throw garbage in the courtyard, scrawl graffiti on school walls and smoke in the bathroom.”<sup>46</sup> It is not surprising that school administrators found support in the courts for suspending the student since the possibility of material disruption was reasonably foreseeable.

Applying the *Tinker* standard in *Killion v. Franklin Regional School District*, another case of student speech brought on campus, Judge Ziegler wrote that “because the . . . list was brought on campus, albeit by an unknown person, *Tinker* applies.”<sup>47</sup> However, the court held that there was no apparent disruption to school, the speech was not threatening, and though it was lewd, because it was created off campus, the *Fraser* standard did not apply.<sup>48</sup>

In *Boucher v. School Board of the School District of Greenfield*, a student printed a newspaper that included instructions on how to hack into the school’s computer systems.<sup>49</sup> Judge Reynolds, writing for the majority in the Seventh Circuit, noted that the speech was not political or opinion but a direct instruction on how to disrupt the school:

The article is neither an essay on computers in the abstract nor a mere hostile critique of Greenfield High School. Instead, it purports to be a blueprint for the invasion of Greenfield’s computer system along with encouragement to do just that. It is a call to action detrimental to the tangible interests of the school.<sup>50</sup>

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<sup>42</sup> 861 F.2d 1149, 1158 (9th Cir. 1988).

<sup>43</sup> 393 F.3d 608 (5th Cir. 2004).

<sup>44</sup> It is interesting to note that the bulk of the cases that have been decided against students have come in the last eleven years. This perhaps reflects that society has become more willing to restrict students’ rights in the wake of the many school shootings that have occurred.

<sup>45</sup> 91 N.Y. 2d 133 (N.Y. 1997).

<sup>46</sup> *Id.* at 138.

<sup>47</sup> 136 F. Supp. 2d 446, 455 (W.D. Penn. 2001). This case involved a top-ten list created by a student, Bozzuto, which poked fun at the athletic director in childish and vulgar ways.

<sup>48</sup> *Id.*

<sup>49</sup> 134 F.3d 821 (7th Cir. 1998).

<sup>50</sup> *Id.* at 828.

Judge Reynolds noted the possibility that substantial disruption could occur, and in fact was encouraged, thereby limiting the First Amendment protection under *Tinker*.

Finally, in *Pangle v. Bend-Lapine School District*, Chris Pangle wrote the names, addresses, and phone numbers of his high school's teachers and encouraged students to abuse that information.<sup>51</sup> Judge Edmonds concluded that such speech had no more value in a school than lewd and vulgar speech:

The advocacy of acts such as bomb threats, interfering with the public address system, poisoning and harassment of school personnel and explosions on school grounds is a form of expression that extends beyond mere protest. Had the activities Chris advocated been effectuated, those activities certainly would have impinged on the safety and rights of other students and school personnel. Such speech is inconsistent with and undermines the basic function of a public school no less than the lewd, indecent or offensive speech expressed at the school assembly in *Fraser*.<sup>52</sup>

The court recognized that student speech that encourages activities that would endanger student and staff safety and cause disruptions is not afforded the same protection as wearing armbands as a sign of protest was in *Tinker*.

Therefore, there is conflict among the circuits and lower courts as to how to address speech that is created off campus and then brought on. The Second and Ninth Circuits have held that off-campus speech is not punishable, whereas the Seventh Circuit has held it is. Meanwhile, the Fifth Circuit has hinted that material written off campus could be punished under the right circumstances, but if it was never intended to be brought on, then it cannot be considered on-campus speech. These distinctions and disagreements will become even more important, and even more ambiguous, as student cyberspeech is considered.

### III. CYBERSPEECH

After the initial three Supreme Court cases addressing student speech, Denning and Taylor noted that there were still at least five important questions not yet resolved: (1) Can schools regulate off-campus speech? (2) What speech poses a "material and substantial" disruption to school operations? (3) May schools regulate non-disruptive speech? (4) What "rights of other students" may schools protect through speech regulation? (5) What does *Kuhlmeier* mean for student speech cases?<sup>53</sup>

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<sup>51</sup> 169 Ore. App. 376 (2000).

<sup>52</sup> *Id.* at 397.

<sup>53</sup> Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 840-50 (2008).

In many ways, it seems that Denning and Taylor did not fully appreciate the implications from *Kuhlmeier*, as the answer to questions three and four can be found in a full understanding of the *Kuhlmeier* decision. After all, *Kuhlmeier* involved non-disruptive speech that related to pedagogical concerns. Furthermore, one of the censored articles in *Kuhlmeier* related to the potential invasion of privacy of a student. While the Court held that the restricted speech had to be school-sponsored, it nevertheless created an exception for schools to censor speech that is neither disruptive nor lewd if the school has legitimate reasons for doing so. It also allows school administrators to limit speech they see as exposing other students' private information.

The *Morse* holding shed some light on the question of whether schools can regulate off-campus speech. In *Morse*, the Court held that schools can regulate off-campus speech if the speech occurs at a school-sanctioned event. Schools can also regulate non-disruptive speech, and the well-being of other students (protecting them from pro-drug messages) can be enough to punish speech. *Morse* gives some clues as to when off-campus speech can be punished, but it does not directly address speech that occurs at non-school-sanctioned events.

Denning and Taylor's second question addressing what speech poses a substantial disruption to school operations has not been addressed by the U.S. Supreme Court after it established the precedent. In many ways, this is not entirely inconsistent with other important decisions the Supreme Court has made, in that the Court often establishes a standard and then uses future decisions to define exactly what was meant by that standard. With *Tinker*, the Supreme Court has only discussed exceptions to the rule, rather than attempting to further clarify it, thereby leaving lower courts to decide when and what constitutes a substantial disruption.

All of these factors become even more important when cyberspeech is considered. The unique configuration of the Internet poses some challenges for the courts to apply the previous standards as anything that is posted online is instantly accessible virtually anywhere on the planet – including at schools. Therefore, speech that is created online, even if done away from school, can then be considered “brought” on campus as it is accessible at any computer at school. Trying to establish which U.S. Supreme Court precedent to use and whether that off-campus speech is punishable then becomes the difficult task for the lower court hearing a student cyberspeech case.

Currently, there is not a large body of scholarly research that has explored student cyberspeech, though Wolking provides an excellent overview to the cases.<sup>54</sup> Those authors who have specifically examined cyberspeech usually begin by separating cyberspeech into that which was created on campus and that which was created off campus.<sup>55</sup> Student cyberspeech that is created on campus, of course, falls under the

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<sup>54</sup> Tova Wolking, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 BERKELEY TECH. L.J. 1507- 1530 (2008).

<sup>55</sup> See Thomas E. Wheeler, *Slamming in Cyberspace: The Boundaries of Student First Amendment Rights*, 47-MAY RES GESTAE 24, 27-29 (2004), which seems to contradict itself by noting that the on/off-campus distinction is quite easy to interpret as all that matters is the point of origin of the speech. However, Wheeler then goes on to say that focusing on the “location of receipt rather

precedents outlined thus far.<sup>56</sup> Similarly punishable is student speech that would not be protected even if made by an adult.<sup>57</sup> Rita Verga wrote that student speech that is created off campus but disrupts school is not necessarily protected,<sup>58</sup> and Tracy Adamovich noted that when such speech is analyzed, the *Tinker* standard is usually used.<sup>59</sup> However, Verga also pointed out that courts have not been entirely clear about what defines a disruption, nor is it entirely clear who has to be affected in order for the disruption to occur.<sup>60</sup>

Scholars have also tried to create new standards courts should use in place of or in conjunction with *Tinker*. For instance, Adamovich posits that a new way to analyze student cyberspeech would be to apply the standards used for public employee speech.<sup>61</sup> Part of her proposed test includes considering whether the student intended for the cyberspeech to reach the campus – a somewhat curious inclusion since cyberspeech is, by definition, everywhere. Also, to try to determine a student's intention would seem difficult at best. Kyle Brenton, on the other hand, suggests scrutinizing cyberspeech through the lens of personal jurisdiction.<sup>62</sup> Brenton argues that a school's authority "should depend on whether the student intended to cause harm in the school."<sup>63</sup> However, "intent to cause harm" is not a clearer phrase than a substantial disruption. While "in the school" is, in many ways, the key thrust to Brenton's argument, and one that we will return to later, replacing *Tinker's* potentially ambiguous standard with one just as ambiguous is not the best solution.

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than the location of creation is sensible and has the benefit of creating a bright-line test for administrators and students." The problem with this logic, of course, is being seen throughout the on/off-campus distinction: Anything created and posted on the Internet is accessible anywhere. If a school administrator finds out about a negative website, then all he or she would have to do is go to school and access it, thereby making it "on-campus" under Wheeler's standard. This would obviously be far too inclusive.

<sup>56</sup> *Id.* at 25-27.

<sup>57</sup> For example, speech that would be considered a "true threat" or "fighting words" would not be protected if created off-campus or on-campus because it is not protected speech as defined in *Watts v. United States*, 394 U.S. 705 (1969).

<sup>58</sup> Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 733-38 (2007).

<sup>59</sup> Tracy L. Adamovich, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1095 (2008).

<sup>60</sup> Verga, *supra* note 58, at 747-48. For instance, if a student writes something that may be emotionally trying for a teacher, but does not actually interrupt a class, can that be considered a substantial disruption?

<sup>61</sup> Adamovich, *supra* note 59, at 1102-04.

<sup>62</sup> Kyle W. Brenton, *BONGHITS4JESUS.COM? Scrutinizing Public School Authority Over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1230-34 (2008).

<sup>63</sup> *Id.* at 1236.

Hader also suggested a new standard for courts to use.<sup>64</sup> In her opinion, “schools would have jurisdiction to regulate only speech that occurs when the school has assumed control and supervision over the student who is speaking.”<sup>65</sup> This is taken from standards related to negligence as this “control and supervision” standard is often used to determine if the school has acted in a negligent manner. However, it seems as though this standard is inappropriate as it is too lenient toward students. In other words, without explicitly stating so, Hader is taking a hard line stance that no speech created away from school can be punished. This would seem to distance itself too far from *Tinker* because even if the speech were extremely disruptive at school, it would still be acceptable because it was not created while the student was under the school’s control or supervision.

Tabor, instead of suggesting an entirely new standard, indicated that cyberspeech that targets students should be differentially enforced as compared to speech that targets teachers, administrators, or the school itself.<sup>66</sup> In his view, it is unconstitutional to punish any off-campus speech that does not relate to another student. While distinguishing who or what is being attacked by cyberspeech could be an important consideration, Tabor, like Hader, goes too far in not considering at all the effect that cyberspeech may have on the school itself. Again, this seems to move too far from *Tinker* in not considering at all the disruptions that have occurred.

There has also been some confusion between cyberspeech and cyberbullying. Cyberbullying occurs when one student intimidates in some fashion another student entirely through the Internet or other electronic communication device.<sup>67</sup> However, the underlying issues are different for cyberbullying, and that difference can be understood by considering the vague definition of disruption with which Varga struggled. With cyberbullying, the disruption that occurs is usually limited to the individual being bullied.<sup>68</sup> Applying the *Tinker* standard would not make sense because the *Tinker* standard requires a substantial disruption to the class or school, not the individual.<sup>69</sup> That distinction is subtle but important, so addressing cyberbullying is outside the scope of this article, which is confined strictly to cyberspeech.

#### IV. PRE-MORSE CASE ANALYSES

The first instance of cyberspeech specifically being discussed was in the 1998 decision of *Beussink v. Woodland School District*.<sup>70</sup> Beussink created a website at home and not during school hours that criticized his high school in crude and vulgar

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<sup>64</sup> Harriet A. Hader, *Supervising Cyberspeech: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563-1605 (2009).

<sup>65</sup> *Id.* at 1594.

<sup>66</sup> Jacob Tabor, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561-604 (2009)

<sup>67</sup> Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 784-787 (2008).

<sup>68</sup> Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271 (2008).

<sup>69</sup> *Id.*

<sup>70</sup> 30 F. Supp. 2d. 1175 (E.D. Mo. 1998).

language.<sup>71</sup> When another student showed the webpage to school authorities, Beussink was suspended – a suspension that ultimately led to failure in all of his classes.<sup>72</sup> In deciding this case, the U.S. District Court relied heavily on *Tinker*, noting throughout that there was “no evidence of a disturbance” at the school.<sup>73</sup> In fact, the court stated that “the only disruption ... occurred when the disciplinary notice was delivered.”<sup>74</sup> In making its decision, the court held that the suspension appeared to be grounded in the principal’s dislike of the content of the website, rather than any disturbance:

Principal Poorman’s testimony does not indicate that he disciplined Beussink based on a fear of disruption or interference with school discipline (reasonable or otherwise.) Principal Poorman’s own testimony indicated he disciplined Beussink because he was upset by the content of the homepage. Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.<sup>75</sup>

The court concluded by noting that it is “unpopular speech that invites censure,” and it is specifically that type of speech for which the First Amendment was designed.<sup>76</sup>

As the first case to address cyberspeech, the locale of the speech was not part of the court’s decision. It also never addressed whether Beussink intended for the speech to be brought on campus. Instead, the opinion solely relied on *Tinker* to the exclusion of *Fraser* and *Kuhlmeier*, strongly articulating that the speech was protected because no substantial disturbance occurred.

A case similar to *Beussink* was *Beidler v. North Thurston School District*.<sup>77</sup> Beidler created a webpage that parodied the assistant-principal of his high school. When the webpage became known to school administrators, Beidler was expelled.<sup>78</sup> Like the court in *Beussink*, the judge in this case relied on *Tinker*, noting the lack of substantial disruption.<sup>79</sup> Furthermore, the court rejected the school district’s claim that the *Fraser* or *Kuhlmeier* standards should be used, stating that both of those standards are circumstance-specific and not at all analogous to the present case.<sup>80</sup> Accordingly, the court ruled in favor of the student.

In *Emmett v. Kent School District*, some signs of the court’s being unsure how to handle cyberspeech can be seen.<sup>81</sup> Like the previous cases, this involved a student’s

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<sup>71</sup> *Id.* at 1177.

<sup>72</sup> *Id.* at 1180.

<sup>73</sup> *Id.* at 1178.

<sup>74</sup> *Id.* at 1179.

<sup>75</sup> *Id.* at 1180.

<sup>76</sup> *Id.* at 1181.

<sup>77</sup> *Beidler v. N. Thurston Sch. District*, No. 99-2-00236-6 (Wash. Super. Ct. July 18, 2000).

<sup>78</sup> Plaintiff’s Motion for Partial Summary Judgment at 3-4, *Beidler v. N. Thurston Sch. Dist.* No. 3, No. 99-2-00236-6 at 3 (Wash. Super. Ct. July 18, 2000).

<sup>79</sup> *Beidler*, No. 99-2-0023606 at 3.

<sup>80</sup> *Id.* at 4-5.

<sup>81</sup> 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

creating a mock-website for his high school.<sup>82</sup> Included in the website were “obituaries” for two of the student’s friends, as well as a feature that allowed visitors to vote on who should “die” next.<sup>83</sup> A local news program heard about this website and misreported that the student had created a “hit-list” of individuals Emmett wanted to kill.<sup>84</sup> The principal then suspended Emmett. In its ruling, the court noted that *Fraser* and *Kuhlmeier* did not apply and that this speech fell outside the jurisdiction of the school:

In the present case, Plaintiff’s speech was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in *Kuhlmeier*. It was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.<sup>85</sup>

The court concluded that there is “no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.”<sup>86</sup>

In *Emmett*, the court recognized that two of the three previous U.S. Supreme Court holdings did not apply. This left the court with *Tinker*; however, it was not *Tinker* the court relied upon because the speech was outside the school’s control. Instead, it considered whether the speech presented a true threat. Since it was found it did not, the speech was protected and the school district was not within its power to suspend Emmett.

In *Coy v. Board of Education*, Coy created a website from home that described the exploits of his friends, including a section that described various “losers” at his school.<sup>87</sup> While the descriptions of the losers were at times crude, they were not obscene.<sup>88</sup> When the principal found out about the website, he decided to expel Coy for 80 days.<sup>89</sup> As in previous cases, *Tinker* was the precedent used:

[T]he Court finds the circumstances of this case nearer those of *Tinker* than *Fraser*. ... Unlike *Fraser*, there was no evidence that he compelled 600 other students to

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<sup>82</sup> *Id.* at 1089.

<sup>83</sup> *Id.* In fact, Emmett’s writing of these obituaries stemmed from a class assignment in which the students had to write their *own* obituaries. Emmett had so much fun with this assignment, he decided to start doing tongue-in-cheek obituaries for his friends.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1090.

<sup>86</sup> *Id.* at 1090.

<sup>87</sup> 205 F. Supp. 2d 791 (N.D. Ohio 2002). This case involved a middle-school student, but that is only referenced in describing the facts of the case.

<sup>88</sup> *Id.* at 795. The fact that it was not obscene is an important distinction similar to the finding that speech did not pose a “true threat.” Both obscenity and true threats are not protected speech, so that if Coy’s website could be considered obscene, it would be treated differently.

<sup>89</sup> *Id.* at 798.

view his website. And unlike *Fraser*, Coy's website, while crude, was not the "elaborate, graphic, and explicit sexual metaphor" at issues in that case.<sup>90</sup>

The court concluded that "to justify disciplining Coy, the school district must show that his expressive activity 'materially and substantially interfered'" with the school, something it was not able to show.<sup>91</sup>

In *Coy*, it can be inferred that the court felt the *Fraser* standard should not apply to cyberspeech because there cannot be a captive audience on the Internet in the same way as there was in *Fraser*. Furthermore, the court acknowledged the speech may have occurred outside of the school's jurisdiction, presumably because it was on the Internet.<sup>92</sup> However, whether the speech occurred on or off campus was never further addressed.

In 2002, the Commonwealth Court of Pennsylvania became one of the first courts to directly address the issue of cyberspeech in *J.S. v. Bethlehem Area School District*.<sup>93</sup> In fact, the court discussed the particular dilemma cyberspeech creates:

This appeal presents our court with the difficult issue of whether a school district may, consistent with the First Amendment to the United States Constitution, discipline a student for creating at home, and posting on the Internet, a web site that, *inter alia*, contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal.<sup>94</sup>

The facts of this case are not altogether dissimilar from the cases already discussed. On his own computer and on his own time, J.S. created a web page called "Teacher Sux," which made derogatory comments about his math teacher and principal.<sup>95</sup> When the teacher saw the website, she became frightened because it included statements about how much the student wanted her dead, and she eventually took a year's leave of absence due to emotional problems.<sup>96</sup> The principal also felt the website had a detrimental effect on the community at-large.<sup>97</sup> The school district concluded that the website posed a threat to the teacher and caused harm to the community; accordingly, J. S. was expelled.<sup>98</sup>

The first issue the court considered was whether the statements did, indeed, constitute a "true threat." By considering the context of the statements, the court held that they did not, although they were "sophomoric, crude, high offensive and perhaps

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<sup>90</sup> *Id.* at 799.

<sup>91</sup> *Id.* at 801.

<sup>92</sup> *Id.* at 799.

<sup>93</sup> 757 A.2d 412 (Pa. Commw. 2000). This case again involves a middle school student. While it is possible that students could be treated differently based on whether they are in middle school, high school, or college, there is no mention of his age other than in the opening remarks, so it can be assumed that is not a factor in the decision.

<sup>94</sup> *Id.* at 850.

<sup>95</sup> *Id.* at 644.

<sup>96</sup> *Id.* at 646.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 647.

misguided.”<sup>99</sup> However, just because the website contained no true threats, the court felt the school could still punish J.S. for his cyberspeech because the speech affected the school:

We find there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus. ... Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connect with this particular School District. ... Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property.<sup>100</sup>

The court was then left with the decision of which standard to apply, something it was also not entirely sure about. “In essence, the type of speech at issue ... straddles the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*.”<sup>101</sup> Ultimately, it was the question of “disruption” that was the key to the case, with the court stating there was a substantial disruption caused to the school environment so that the school was acting appropriately when it punished J.S.<sup>102</sup>

*J.S.* is important because it clearly recognized the authority of school administrators to punish speech created off campus. In his concurrence, Chief Justice Zappala agreed with the outcome of the case, but felt that the court had gone too far in giving schools the ability to punish cyberspeech because it was accessed at school: “[T]he fact that a web site is merely accessed at school by its originator is an insufficient basis upon which to base a characterization of the speech as on-campus speech.”<sup>103</sup> However, because the court felt that the speech could be considered on-campus speech, it was logical to apply the previous standards.

Three more cases occurred before the *Morse* decision. In *Mahaffey v. Aldrich*, a student was punished for creating a webpage that included the statement “people I wish would die.”<sup>104</sup> The court recognized that the speech occurred off campus and may not be under the school’s jurisdiction, but then went on to analyze the case using *Tinker*.<sup>105</sup> The court stated that the school’s “regulation of Plaintiff’s speech on the website without any proof of disruption ... was a violation of Plaintiff’s First Amendment rights.”<sup>106</sup> Again, the court decided not to issue an opinion on whether cyberspeech is punishable by a school, instead stating that if it was punishable, the school did not meet its burden.

In *Flaherty v. Keystone Oaks School District*, a student was punished for posting “offensive” statements in an online message board.<sup>107</sup> The court held that the school

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<sup>99</sup> *Id.* at 658.

<sup>100</sup> *Id.* at 667-68.

<sup>101</sup> *Id.* at 669.

<sup>102</sup> *Id.* at 674-75.

<sup>103</sup> *Id.* at 678.

<sup>104</sup> 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002).

<sup>105</sup> *Id.* at 783-84.

<sup>106</sup> *Id.* at 786.

<sup>107</sup> 247 F. Supp. 2d 698, 700-01 (W.D. Pa. 2003).

policy used to punish Flaherty was unconstitutionally broad and vague, in part because it permitted “school officials to discipline a student for abusive, offensive, harassing or inappropriate expression that occurs outside of school premises not tied to a school related activity.”<sup>108</sup>

Finally, in *Requa v. Kent School District*, Requa was punished for creating and posting a video on YouTube.com that included video of one of his teachers with captions such as “Caution Booty Ahead.”<sup>109</sup> Interestingly, both the school and court agreed that the video itself was protected speech and not punishable by the school.<sup>110</sup> Instead, it was the filming of the video, which occurred during class hours, for which the school was seeking to punish Requa. The court agreed that the school was well within its rights to punish the student for that; not only was it against school policy, but also, using *Tinker*, the court held that the behavior of the students in the video caused a substantial disruption.<sup>111</sup>

Prior to *Morse*, then, most courts were reluctant to take a clear stand on the issue of cyberspeech. In the lone exception, *J.S.*, the court held that cyberspeech is punishable by school administrators. However, regardless of the certainty of the courts as to whether cyberspeech could be punished, they all relied on *Tinker* and examined the facts to determine if a substantial disruption occurred as a result of the speech. Prior to *Morse*, most courts ruled in favor of the students if the punishments given by the schools related to cyberspeech.

## V. POST-MORSE CASE ANALYSES

The first cyberspeech case after *Morse* was *Wisniewski v. Board of Education*.<sup>112</sup> Wisniewski created an AOL Instant Messaging icon that depicted a pistol firing a shot into a person’s head, with a label underneath reading “Kill Mr. VanderMolen,” who was Wisniewski’s teacher.<sup>113</sup> As a result of this icon, Wisniewski was suspended for one semester on the ground that the icon represented a true threat.<sup>114</sup> The Second Circuit, however, chose not to consider whether or not the icon was a “true threat,” stating that the school district had broader authority to punish student speech than just considering whether it was threatening.<sup>115</sup> Instead, the court used *Tinker* and held that Wisniewski’s icon posed a foreseeable risk of causing a substantial disruption. Therefore, the school was justified in his suspension.<sup>116</sup>

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<sup>108</sup> *Id.* at 706.

<sup>109</sup> 492 F. Supp. 2d 1272, 1273-74 (W.D. Wash. 2007).

<sup>110</sup> *Id.* 1278-9.

<sup>111</sup> *Id.* at 1280-1.

<sup>112</sup> 494 F.3d 34 (2d Cir. 2007).

<sup>113</sup> *Id.* at 35-6.

<sup>114</sup> *Id.* at 36.

<sup>115</sup> *Id.* at 37-8.

<sup>116</sup> *Id.* at 38-40. It is interesting to note that this court, and others after it, held that the speech in question could cause a foreseeable disruption. However, the speech in question has usually been readily available for a significant amount of time before the school administrators discover it, and

In its opinion, the court held that it was inconsequential whether Wisniewski intended for his IM to be communicated to school authorities.<sup>117</sup> In fact, in a footnote, Judge Walker added that “a school may discipline a student for off-campus expression that is likely to cause a disruption on campus only if it was foreseeable to a reasonable adult ... that the expression might reach campus.”<sup>118</sup> This is an interesting addition, because a reasonable adult would most likely believe that anything posted on the Internet “might” reach a campus. In other words, using this standard, everything posted on the Internet can be considered “on-campus” speech.

In *Wisniewski*, the court did not use *Morse* as a central part of its analysis, although it did mention it in a footnote as a further explanation as to why Wisniewski was subject to discipline even though he was not on campus.<sup>119</sup> It also mentioned *Morse* in relation to Wisniewski’s behavior since Wisniewski was being punished for something that was not merely offensive or in conflict with the school’s pedagogical concerns.<sup>120</sup> Therefore, the impact of *Morse* on this case was fairly minor, as the court more heavily relied on *Tinker*. *Fraser* and *Kuhlmeier* were similarly ignored.

The effects of *Morse* were felt more deeply in *Layshock v. Hermitage School District*.<sup>121</sup> In this case, Layshock created a Myspace.com page for his principal that included many false statements about him.<sup>122</sup> As a result, Layshock was suspended for ten days and prohibited from attending graduation. The court recognized the difficulties inherent in this case as it had to “balance the freedom of expression of a student with the responsibility of a public school to maintain an environment conducive to learning.”<sup>123</sup> In fact, the decision quoted *Morse* as *Morse*, too, questioned the limits of school-speech jurisdiction.<sup>124</sup> In highlighting this predicament, the court wrote:

The threshold, and most difficult, inquiry is whether the school administration was authorized to punish Justin for creating the profile. The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide-web. Public schools are vital institutions, but their reach is not unlimited.<sup>125</sup>

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the speech is usually removed instantly by the student. It seems the use of “foreseeable disruption” as a reason to punish does not quite fit with the facts of these cases; however, it is what courts often choose to use.

<sup>117</sup> *Id.* at 40.

<sup>118</sup> *Id.* at 40, n.4.

<sup>119</sup> *Id.* at 39, n.3.

<sup>120</sup> *Id.* at 40.

<sup>121</sup> 496 F. Supp. 2d 587 (W.D. Pa. 2007). This case is still on-going and was recently argued before the U.S. Court of Appeals for the Third Circuit.

<sup>122</sup> *Id.* at 590-1.

<sup>123</sup> *Id.* at 595.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 597.

Ultimately, the court stated that it is up to the school to prove an appropriate nexus between the cyberspeech and school, and that “the Court will not defer to the conclusions of the school administrators” about when there is a sufficient connection.<sup>126</sup>

In this case, the school district argued that both *Fraser* and *Tinker* applied.<sup>127</sup> However, citing *Morse*, the court rejected the argument that *Fraser* was applicable, noting that *Fraser* involved student speech at an assembly and would not apply to off-campus speech.<sup>128</sup> Furthermore, it did not believe the nexus between the profile and any disturbances on campus could be proven, especially since “the School has not demonstrated that the ‘buzz’ or discussions were caused by Justin’s profile as opposed to the reaction of administrators.”<sup>129</sup> Therefore, the school district failed in proving that the profile caused a substantial disruption on campus, which would be required under *Tinker*.<sup>130</sup>

It is important to note, though, that the court felt this case was a “close call.”<sup>131</sup> In particular, it acknowledged the similarity between this case and *J.S.* However, “this Court respectfully reaches a slightly different balance between student expression and school authority.”<sup>132</sup> While there are some differences, the court in *J.S.* felt there was a sufficient nexus between the off-campus speech and the school disruption, whereas this court did not. While it is unlikely that *Morse* was the deciding factor, it is important to recognize that the *Morse* decision was used to dismiss *Fraser* as applying to cyberspeech cases as well as to affirm that school administrators do not have absolute authority beyond the schoolhouse gates.

In *J.S. v. Blue Mountain School District*, as in *Layshock*, a student created a fake Myspace.com profile for her principal.<sup>133</sup> However, this court stated that a substantial disruption was not required, and directly rejected “*Tinker* and its progeny” as being applicable.<sup>134</sup> The reason is that the speech involved in *Tinker* was political, whereas the speech in this case was not. In fact, citing *Morse* as an example, the court held that the U.S. Supreme Court has repeatedly shown that a disruption is not required.<sup>135</sup> Instead, “as vulgar, lewd, and potentially illegal speech, ... we find that the school did not violate the plaintiff’s rights in punishing her for it even though it arguably did not cause a substantial disruption of the school.”<sup>136</sup>

The court also addressed whether student speech created off campus could reasonably be punished. In the opinion, the court stated that the “website addresses the principal of the school. Its intended audience is students at the school. A paper copy of

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<sup>126</sup> *Id.* at 599.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 600.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 601.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 602.

<sup>133</sup> No. 07-585 (M.D. Pa., Sept. 11, 2008).

<sup>134</sup> *Id.* at 7.

<sup>135</sup> *Id.* at 11.

<sup>136</sup> *Id.* at 12-13.

the website was brought into school, and the website was discussed in school.”<sup>137</sup> For these reasons, the court saw a clear nexus between off campus and on, and because of that, the speech was punishable under *Fraser*.<sup>138</sup> In comparing this case to *Layshock*, this court “come[s] out on the other side of what the court deemed to be a ‘close call.’”<sup>139</sup>

Finally, the U.S. Court of Appeals for the Second Circuit decided another student speech case in *Doninger v. Niehoff*.<sup>140</sup> In this instance, Doninger, upset that her principal was considering moving “Jamfest,” a popular concert held at the school, emailed a large number of people urging them to call the principal and complain about the potential move.<sup>141</sup> She also blogged about the incident, again encouraging individuals to call in.<sup>142</sup> These actions resulted in Doninger being punished.<sup>143</sup>

The court acknowledged that had this speech occurred on campus, it would have fallen under *Fraser's* control because Doninger used vulgar language in her blog; however, the court did not feel it was clear that *Fraser* would apply to speech created off campus.<sup>144</sup> The court did state, though, that *Tinker* would apply and that the threshold had been met to consider Doninger's actions to be substantially disruptive.<sup>145</sup> Not surprisingly, the court's rationale for this came from its previous decision in *Wisniewski*, and it made almost no references to *Morse*.

Perhaps the most interesting facet of *Doninger* and *Wisniewski* is that both cases were decided by the Second Circuit. Both of these cases seem to contradict what that court had held twenty years earlier in *Thomas v. Board of Education*.<sup>146</sup> As noted earlier, the court in *Thomas* held that students could not be punished for the creation of a newspaper after school hours, even though it was distributed on campus. The similarity between *Thomas* and *Doninger* and *Wisniewski* is apparent and reflects the fact that the court, in twenty years, had grown more conservative in its approach to student speech. Indeed, the decisions in *Doninger* and *Wisniewski* contain barely any references to *Thomas*, perhaps an indication that the court itself recognized its own inconsistency.

## VI. FROM MYSPACE TO MESSAGE BOARDS: THE FUTURE OF STUDENT CYBERSPEECH

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<sup>137</sup> *Id.* at 14.

<sup>138</sup> This court never addressed previous courts' rejections of *Fraser* based on the fact that *Fraser* was equally about a captive audience and, therefore, could not be accurately applied to Internet cases.

<sup>139</sup> *Id.* at 17.

<sup>140</sup> 527 F.3d 41 (2d Cir. 2008).

<sup>141</sup> *Id.* at 43-4.

<sup>142</sup> *Id.* at 45.

<sup>143</sup> *Id.* at 46. It should be mentioned that Doninger's only punishment was being excluded from running for future class officer positions and did not involve any suspensions. The court, while recognizing that the punishment was relatively small, did not use that as part of its decision-making process.

<sup>144</sup> *Id.* at 49-50.

<sup>145</sup> *Id.*

<sup>146</sup> *Thomas*, 607 F.2d. 1042.

From the analysis of cases pre- and post-*Morse*, it is apparent that *Morse* did not have much of an effect on how the courts handle student cyberspeech. In fact, most opinions refer to *Morse* as being in line with *Fraser* and *Kuhlmeier* and as creating another exception to *Tinker*'s "substantial disruption" test.

That most of the courts are ignoring *Morse* is itself very interesting. There are only four Supreme Court cases related to student speech. It would seem likely, therefore, that each and every one of those cases would be something a lower court would consider heavily in any case related to student speech. There are at least two plausible reasons that the courts have not heavily relied on *Morse* to this point.

The first is that courts have viewed *Morse* as *sui generis* and not felt that it applied to their current facts. In other words, it is possible that courts have interpreted *Morse* as strictly applying to speech that relates to the support of illegal drug use. Since none of the cyberspeech cases have related to that, then it could be that those judges who have ignored *Morse* simply do not see how it applies to their current cases.

A second possibility is that lower courts are using a "wait and see" approach to see how other courts are applying *Morse*. While it is certainly possible to argue that *Morse* only applies to cases when the facts are very similar, it is also possible to argue that *Morse* continues to broaden a school's authority to punish speech that is created away from school grounds. However, this is extending the ruling further than some judges may be willing to go and so they could be waiting to see how it is applied in other courts before venturing out on their own.

The first possibility would seem to find some support in *Layshock*.<sup>147</sup> As discussed, that court used *Morse* to limit the authority of *Fraser* to very specific instances. While some courts had used *Fraser* to uphold the punishment of lewd or vulgar student speech in general, including speech that occurred off campus, in *Layshock*, the court noted that in *Morse*, the U.S. Supreme Court specifically stated that *Fraser* does not give schools "unfettered latitude to censor student speech."<sup>148</sup> The *Layshock* opinion then interprets this as meaning that *Fraser* applies only to specific factual circumstances similar to those in *Fraser*.<sup>149</sup>

In *J.S.*, it is possible to see some support for the second possibility. In that case, it was held that *Morse* was in line with other cases that suggest that disruptions did not have to occur for speech to be punished. In that way, *Morse* is being used to further extend the ability for schools to distance themselves from *Tinker*. At the same time, though, the court did not go into a full analysis of *Morse*, perhaps because it was unclear exactly what the implications were. Therefore, there is an indication that *Morse* could be used to get further distance from *Tinker*, but it was not entirely discussed how.

This confusion about how to use *Morse* can also be seen in the fact that the courts have not been entirely consistent regarding the standard they chose to apply to cyberspeech. It is safe to say the majority used *Tinker*, but others chose *Fraser* and

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<sup>147</sup> *Layshock*, 496 F. Supp. 2d. 587.

<sup>148</sup> *Id.* at 599-600.

<sup>149</sup> *Id.* at 600.

discounted the need for substantial disruption to occur as they viewed the case as being an exception to *Tinker*. Furthermore, courts interpreted *Tinker* very broadly in what they viewed to be “disruptive” and often stated that a potential disruption was sufficient to allow schools to punish cyberspeech. Indeed, this would seem to reflect one of the questions discussed by Denning and Taylor: what speech exactly constitutes a “disruption”?<sup>150</sup>

The reliance on foreseeable disruptions, rather than an actual disruption, stems from a brief statement in the original decision of *Tinker*; however, it would appear that courts are relying too heavily on that sentence rather than considering whether a disturbance actually occurs. In the closing paragraph of the majority’s decision in *Tinker*, Justice Fortas concluded that “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premise in fact occurred.”<sup>151</sup> It can be inferred that an important factor in deciding the reasonableness of forecasting future disturbances is based on whether a disturbance has already occurred. In *Tinker*, students had worn the armbands and no major disruptions erupted. Therefore, the U.S. Supreme Court held that punishment could not occur. In some cyberspeech cases, the Internet postings have been “published” for weeks and even months and no disturbances occurred, yet courts held that a disruption *could* occur.

The reliance on what might happen rather than what has happened is in many ways reminiscent of the “bad tendency” test the U.S. Supreme Court originally articulated in *Patterson v. Colorado*.<sup>152</sup> Many current courts are seeing student cyberspeech as something that might have the tendency or possibility to have negative effects at school. Just like the bad tendency test was abandoned by the U.S. Supreme Court, the current direction of relying on possibilities rather than fact also needs to be abandoned. Otherwise, *Tinker* is being extended well beyond what Justice Fortas was envisioning in 1969.

Equally confusing are the courts’ differing opinions as to the extent of control schools possess to punish speech that occurs off school grounds. While none stated there should be an absolute ability for schools to regulate or punish off-campus speech, many wrote that once the cyberspeech was accessed on campus, it was “brought on” and could then cause a disruption. Others took a slightly more cautious approach, speaking of the nexus that needs to be clearly established between the cyberspeech and school. Still others questioned the authority of the school to punish any speech that occurs after school hours and away from school property; however, even those who questioned the authority of the school still felt it necessary to consider the facts and apply the appropriate standard.<sup>153</sup>

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<sup>150</sup> Denning and Taylor, *supra* note 52, at 842.

<sup>151</sup> *Tinker*, 393 U.S. at 514.

<sup>152</sup> 205 U.S. 454 (1907).

<sup>153</sup> It is interesting to observe, though, that the times when a court noted its uncertainty about the school’s authority to extend its powers to the Internet, they would strictly apply the *Tinker* standard and rule in favor of the student.

In light of Columbine and other school shootings, there is no doubt school administrators have a difficult decision in trying to distinguish what Internet posting by a student may be something they need to be worried about.<sup>154</sup> However, it would seem many of the school's behaviors are rooted in the "undifferentiated fear" discussed in *Tinker*.<sup>155</sup> After all, a fear of disruption does not constitute an actual disruption.

The great irony of almost all of these cases is that the largest disturbances seem to occur when the school administrators punish the cyberspeech. By taking students out of class and suspending or expelling them, the schools draw more attention to whatever the students have done than they would have ever garnered for themselves. In fact, in every case, when school administrators brought the student in to discuss his or her cyberspeech, the student always voluntarily and quickly removed the cyberspeech from the Internet. If administrators were content to stop at that point, most if not all of these cases would never have arisen. The fault, then, lies not only with courts, but with the school administrators who also seem to be acting with undifferentiated fear.

It should also be noted that some legislators believe that it is up to them to carefully craft laws that would try to articulate exactly what type of speech is allowable, much as they are attempting to do now with the very real problem of cyberbullying. However, this is a much less desirable solution than adopting a new definition to use. After all, each state could wind up with a slightly different law punishing slightly different speech, which would ultimately still lead to the courts needing to clarify exactly what is permissible.

There are two main questions, then, that still need to be resolved: (1) can cyberspeech that is created off-campus be punished and (2) if it can be, what precedent should apply? In many ways, while the first is intellectually interesting if difficult to conceptualize, answering the second may negate or at least clarify the first. The courts have, at times, acknowledged the predicament of schools punishing speech that is created and accessed away from school grounds. Accordingly, an important aspect of their analysis has been to establish an appropriate nexus between any speech that occurred off-campus and the school grounds. As will be demonstrated, with the appropriate standard, that nexus becomes obvious.

The solution, in fact, is staring courts in the face: They need to return to a more traditional and strict view of *Tinker*. *Fraser* is not an appropriate standard because the justices clearly articulated that, had the speech occurred away from the school, it would not have been punishable. Furthermore, part of the rationale was that because it occurred during a school assembly, the audience was in some ways "captive." The same cannot be said for the Internet, as it is hard to argue that anyone would be forced to expose themselves to a certain website. Similarly inappropriate would be *Kuhlmeier*, which related to speech that was school sponsored and related to pedagogical concerns. While

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<sup>154</sup> For a more in-depth look at seeing how courts have reacted to and been influenced by school shootings, see, Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE UNIV. L. REV. 1 (2008).

<sup>155</sup> *Tinker*, 393 U.S. at 508.

it is easy to argue that almost any speech that occurs on campus could be considered “school sponsored,” it is hard to imagine many scenarios in which this would likely occur in relation to a student’s Internet postings.<sup>156</sup> Finally, *Morse* should not be used as it only applied to school-sponsored activities, whether they occur on or off campus. The creation of websites away from school is clearly not a school-sponsored event, so *Morse* would not apply.

The original wording of *Tinker* was to punish speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>157</sup> The first half of that statement involves a serious disruption to the daily operations of the school. This is perhaps the standard that has been misinterpreted most often. Equally important, though, is the second half of the definition, which pertains to the disclosure of personal information. In order to make things more clear, a new definition based on the original *Tinker* is suggested: for student speech that is published on the Internet to be punishable, a demonstrable and material disruption to school or a clear invasion of the rights of other students has to occur.<sup>158</sup> If no material disruption is present, the burden has to fall on the school to show without any doubt that a disruption is likely and imminent. Therefore, this standard would allow for the punishment of speech created away from the school if it causes disruptions within the school. This would not allow the school to punish speech that it merely finds annoying.

If applied appropriately, this definition should make the question of whether cyberspeech is considered on or off campus a moot point – if a disruption occurs, the speech can be punished. By definition, that disruption *is* the test to determine whether a nexus exists. If no disruption occurs, there is clearly not a strong enough nexus between the speech and the school to consider it something that can be punished. In other words, it is the disruption of school that marks the act of the speech being “brought on” campus – not its mere availability in cyberspace.

This disruption also pertains to the invasion of the rights of other students. Following the logic of *Tinker*, this does not relate to an invasion of privacy toward another student. Rather, this relates to an invasion of a student’s rights that would then inhibit his or her ability to go to school and learn. For instance, if a student repeatedly began posting malicious statements about another student, which in turn was creating a hostile or uncomfortable venue for the maligned student at school, then the speech would be punishable. This provision would enable schools to create environments most

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<sup>156</sup> If a student created a website that purportedly represented the school or a group related to the school, then it could reasonably be argued that the speech might appear to be school sponsored. Otherwise, it will certainly be clear to any reasonable person that the Internet writings are the views of the student and in no way represent the school’s views. This is an important distinction because for most speech that occurs on campus, *Kuhlmeier* could be seen to be limiting because most speech could be considered school sponsored. In the context of the Internet, though, *Kuhlmeier* should be generally ignored.

<sup>157</sup> *Tinker*, 393 U.S. at 513.

<sup>158</sup> Obviously, as discussed earlier, speech that is not protected regardless of setting, such as true threats, would continue to be punishable.

amenable to learning for all students. Importantly, the wording in this standard demands a “clear invasion” of rights, so minor incidents would not be actionable.

Re-examining some of the cases mentioned above, it can be seen how this new standard could be applied to alleviate confusion. When Wisniewski created an AOL IM icon that depicted a threat to a teacher, there was little to no disruption to any classroom activities. This makes sense – his AOL icon is something that would only be seen by his friends and not the general public. Because there was no material disruption to school, this speech should not have been punished using the new standard. If the teacher felt that the icon represented a true threat, then he could have contacted the authorities to investigate the manner further.

Similarly, when Layshock created a fake Myspace.com page for the principal of the school, it is not surprising that a material disruption did not occur. There is little doubt that the page was discussed at school, but having the student body discuss a parody profile does not rise to the level of a true disruption. Therefore, the appropriate actions of the school would have been to simply ask the student to remove the website rather than suspend the student. Again, the important issue here is disruption. If the principal had felt truly defamed, then there were other actions that could have occurred, such as filing a lawsuit against the student.

Finally, considering the actions of Doninger, it again does not seem that a true disruption occurred. Instead, school administrators were upset at the blog postings and emails and chose to punish Doninger for what was written. Under this standard, had there been a material disruption due to the Internet postings, Doninger certainly would have been subject to being punished; however, no such disruptions occurred.

Many school administrators would probably object to the adoption of a more conservative view of *Tinker*. However, there are other legal avenues available if a school or principal is concerned with a student's Internet postings. For one, if the postings appear to be threatening the life of a student, teacher, or any other school administrator, then the school can contact local authorities and they can investigate to determine whether the speech constitutes a “true threat.” If so, the police have far more serious punishments for the student than merely being suspended or expelled. Similarly, school administrators, who have felt that they have been defamed by Internet postings, can sue in civil court the students involved in order to try to win damages.<sup>159</sup>

School administrators, presumably in an effort to save time and money, are opting to skip other legal remedies and simply suspend the student using a standard similar to the bad tendency one that has long been abandoned. While many courts have allowed this reasoning to stand, others have rejected it, which has created confusion and contradiction within the legal system. A potential solution to this problem is to revert to the more conservative understanding of *Tinker* which requires a substantial disruption to be more than just a remote possibility. By demonstrating an actual disruption, a strong

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<sup>159</sup> In fact, the principal in *Layshock* has an on-going defamation suit against Layschock. While it is difficult to imagine that he, or most other public officials like him, will win a defamation suit and be able to prove actual malice, the remedy does exist in our legal system.

nexus between the Internet speech and school will be shown, allowing for the speech to fall under the school's jurisdiction.