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Right to Be Forgotten or Right to Not Be Talked About? Public and Private Speech
Regulation and the Panic About Critical Speech on the Interactive Web

A dissertation submitted in partial satisfaction of the requirements for the degree Doctor
of Philosophy

in

Communication

by

Benjamin A. Medeiros

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The Dissertation of Benjamin A. Medeiros is approved, and it is acceptable in quality and form for publication on microfilm and electronically:

Chair

University of California, San Diego
2016

TABLE OF CONTENTS

Signature Page	iii
Table of Contents	iv
Vita	v
Abstract of the Dissertation	vi
Introduction	1
Chapter 1 Why and How Has US Law Typically Regulated Reputational Information?	18
Chapter 2 Perspectives On the Information Dynamics and Speech Affordances of the Web	50
Chapter 3 Facilitating Rebuttal Or Peddling the Magic Wand? The Rise of Reputation Management and the Reputational Imperative	94
Chapter 4 Introduction to Reputation and Consumer Review Platforms: Yelp	133
Chapter 5 Reputation and Consumer Review Platforms Continued: “Gripe” Sites	182
Chapter 6 Reputational Conflicts Over Independent “Citizen Criticism” on the Web	242
Chapter 7 Convergence Journalism, Reputation, and the Search for the Boston Marathon Bombers.....	313
Conclusion An Exception That Proves the Rule.....	359
Bibliography	378

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ABSTRACT OF THE DISSERTATION

Right to Be Forgotten or Right to Not Be Talked About? Public and Private Speech
Regulation and the Panic About Critical Speech on the Interactive Web

by

Benjamin A. Medeiros

Doctor of Philosophy

University of California, San Diego, 2016

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This dissertation analyzes the legal, social, and architectural dimensions of three sets of platform-specific reputational disputes in order to understand how people negotiate the reputational impact of personally critical speech. The cases involve individuals criticized on nominal “consumer review” websites, bloggers writing as “professional-amateur” journalists, and crowd-sourced criminal investigations on the social media platform Reddit.

Techno-utopian optimism about the decline of traditional media gatekeepers has given way to widespread lament over the apparent vulnerability of our “online

reputations.” Such lament is steeped in a thoroughly neoliberal conception of increased personal responsibility to protect one’s reputation as an exchangeable asset. This perceived imperative has prompted several responses.

Some call for the law to afford greater control over the speech of others. Such calls challenge the conventional wisdom in First Amendment theory that “counterspeech” is the preferred remedy for critical speech that is not false or egregiously invasive. Yet efforts to compel search engines to de-index links or impose greater liability on platform operators for third-party speech are largely legal and political dead ends in the U.S.

More vexing are some emergent combinations of law and private action that have conflicting implications within theories of free speech and democracy. The search engine optimization tactics of the “reputation management” industry often obviate litigation through direct counterspeech. My case studies demonstrate that some of its efforts achieve the kind of non-judicial resolution of reputational disputes that legal reformers have sought for decades.

On the other hand, reputation managers and their clients routinely use “reputational” concerns as a rhetorical pretext for silencing an expanded range of critical speech than is traditionally actionable. Reputation management thus simultaneously embodies a broader reactionary ethos regarding public discussion. This ethos is at odds with liberal speech norms that valorize the cacophony of competing views and the promotion of “republican virtue” when citizens collectively confront troubling ideas or sentiments. Ultimately, the paradox of reputation management demonstrates how the

neoliberal imperative to fashion oneself as a “brand” perhaps threatens robust public discussion as much as overly stringent libel and privacy laws would.

Introduction

Right now, University of Connecticut student Luke Gatti is surely concerned with the criminal charge of disturbing the peace that he faces. The charge stems from an October 5, 2015 incident when Gatti drunkenly shoved a cafeteria manager who had refused him service and repeatedly barked his now infamous order of “some *fucking* bacon jalapeno mac and cheese.” But it is possible that he is even more concerned by the fact that a video of the encounter has gone viral online. The video has inspired myriad articles that have themselves attracted thousands of comments — most of which excoriate Gatti. Both journalists and users of social platforms like *Reddit* have connected the dots with past incidents involving similar conduct. As a result, Gatti’s social media pages were located within hours of the appearance of the video. In short, internet gawkers have been viewing a remarkably intimate and comprehensive portrait of Luke Gatti’s life — where he grew up, what he does for fun, who his friends are, and what he looks like when he behaves badly. If someone were to later look up information about him online, that person would find a less than flattering portrait. Gatti’s reputation — what others think about him, essentially — has likely taken a hit.

Traditionally, American tort law provides civil remedies when speech is injurious to reputation if such speech is not otherwise valuable to the public. If someone publishes false factual assertions that make a person appear unscrupulous (and therefore unworthy of collaboration or friendship), for instance, the subject of the statements can sue for libel. Additionally, if someone publicizes information that is technically true but

embarrassingly private and non-newsworthy, the subject of the statement can sue for one of the torts that covers invasion of privacy. In this way, the law recognizes that a reputation is a valuable but fragile social asset. It is easy to damage and hard to rebuild. One can spend years setting the record straight after one false statement or repairing one's image after a supremely embarrassing disclosure. Further, defamation and invasion of privacy are doubly undesirable because they pollute public discourse with what the law deems "worthless" information. In the legal analysis, therefore, the speech interest in such utterances is easily outweighed by the social harm they cause. Those narrow categories of speech are thus not protected by the First Amendment.

At first glance, Gatti's case does not quite fit either defamation or invasion of privacy. Gatti was acting out in public and the video is not altered, making it nominally "true." Further, there is clearly some public appetite to discuss him. The discussion over social media and in online publications ranged from a more prurient digital *schadenfreude* to measured debates about the nature of privilege and double standards in law enforcement. In First Amendment parlance, we would say that the discussion of the Gatti video therefore has value in the "marketplace of ideas" — the open forum for deliberation and exchange in which people decide which ideas to accept and which to reject.

The presumption in First Amendment jurisprudence has been that non-tortious speech is *worth* protecting because it has some sort of redeeming social and informational value. Most fundamentally, it might express the speaker's liberty in a way that contributes

to the development of his or her identity and beliefs. It might also enhance the marketplace of ideas by contributing to the “search for truth” and generating further exchange. Even intemperate or insulting speech is thought to have value: it expresses the passion of the speaker, and punishing speech on these grounds would inevitably involve suppressing strongly held political or social beliefs (for which the First Amendment otherwise reserves the most robust protection). Much personally critical speech that could adversely impact reputation is in fact protected. The defamation and invasion of privacy torts offer no relief from critical statements that are true or from critical or inflammatory opinions that cannot be proven true or false.

Both the expression of beliefs and the provocation of dialogic engagement have long been recognized as essential justifications for why legal protections for speech are essential in a democratic society. The corollary presumption, therefore, has been that *counterspeech* — rebutting statements in the marketplace of ideas — should be the remedy for all but a very narrow set of categories that either create imminent harm (like incitement or threats), do not really express “beliefs” in any recognizable sense (like obscenity or perhaps speech instrumental in committing crimes), or actually detract from the marketplace of ideas (like libel).

Cases like Gatti’s show how the digital speech environment forces us to reconsider this core normative question about what speech is “worth” protecting and when to simply counsel more speech as the remedy. This is because Gatti’s case captures a paradigmatic digital age scenario in which speech that is probably legally protected is thought (by

some) to still cause immense and undeserved reputational harm. Were Gatti to simply do nothing going forward, for instance, his “name search” results on search engines would likely be dominated indefinitely by link after link pertaining to this one incident and his subsequent court appearances. Gatti therefore represents a kind of paranoid social cliché that evolved with the web 2.0¹ era: one’s reputation can be compromised in an instant by criticism or documented bad behavior that is visible on the web, yet one might not have any recourse through civil law.

Both the circulation of the video and the commentary about Gatti may have value in the marketplace of ideas, but is this enough to justify such an all-encompassing effect on him? Must we pursue the “search for truth” or the expression of individual liberty so aggressively when it comes to statements about *people*? When criticism or embarrassing information is so easily published on interactive social platforms and then aggregated via search engines, does the law no longer strike the right balance between free speech and reputation? In the absence of legal remedies, what other steps can people like Gatti take to vindicate themselves?

Focus of the Project:

This project focuses on the remedies pursued in situations like Gatti’s. These are instances in which the alignment between traditional tort law remedies, First Amendment theory, and speech on interactive platforms appears somewhat askew. This is generally

¹ From Wikipedia: “Web 2.0 describes World Wide Web sites that emphasize user-generated content, usability, and interoperability.” Web 2.0 websites stand “in contrast to Web sites where people are limited to the passive viewing of content.” “Web 2.0,” *Wikipedia*. https://en.wikipedia.org/wiki/Web_2.0 (accessed 4/13/2016).

for at least one of three reasons. The alignment might seem askew because technical features of the speech platforms in question frustrate ordinary legal remedies. In the most common scenario, the speakers are anonymous (and thus difficult to sue) but the platform operator is statutorily shielded from liability because it could not possibly screen all of the third party speech it hosts. Sometimes the alignment appears askew because the statements seem to resist the neat categorization as either “fact” or “opinion” demanded by tort law. Finally, there are those cases like Gatti’s in which speech might be legally protected, but it generates such broadly visible vitriol that some feel it *should* be regulated based on its disproportionate reputational impact.

Tort law has never provided a complete remedy to all reputational harm. In practice, reputation defense has always involved a combination of judicial action and “self-help” through counterspeech. Even if a statement is legally actionable, there might also be some non-legal work one might perform to vindicate one’s reputation. In fact, the lawsuit itself could even be used as a vehicle primarily for publicizing one’s victimhood rather than collecting the putatively restorative money damages.

This dissertation thus investigates the following questions: how do disputes that take shape over particular digital platforms involve a different kind of balance between “self-help” and legal mechanisms than they did in an age when reputation was most often threatened by speech in the mass media? What approaches to counterspeech are pursued and what do these demonstrate about the complementary roles of the law and private action in protecting reputation?

In pursuing these questions, I attempt to show first and foremost that private avenues for dispute resolution occupy an increasingly central role in many such cases. The technologies of the internet and interactive speech platforms may have made us more vulnerable to widespread critical speech or exposure, but they also afford different opportunities for counterspeech and reputation defense. We can respond to allegations or criticism wherever they appear; we can influence the order of search results pertaining to our names; we can even create much of the content that comprises these search results. In short, the affordances for counterspeech are auspicious. These possibilities are primarily evaluated according to two fundamental developments in the speech landscape of the web. The first is the importance of decisions by information platforms themselves about what speech is and is not permissible. The second is the work of private public relations companies that are called on to “manage” the visible speech about a client by influencing the order of links in search engine results — or “search engine optimization” (SEO).

The unique contribution of the project in the socio-legal literature about free speech, reputation, and technology thus lies in its attempt to be one of the first studies that grapples comprehensively with the profound social awareness — paranoia, even — about “online reputation” and commentary about people on the web. Many studies bemoan this state of affairs and point to failures of the law to protect both material and dignitary interests in reputation.² This study, by contrast, focuses on emergent attitudes about the personal management of reputation and the efforts to actually address these

² See e.g. Danielle Citron, *Hate Crimes in Cyberspace*. Cambridge: Harvard UP (2014); Meg Leta Jones, *Ctrl + Z: The Right to Be Forgotten*. New York: NYU Press (2016).

perceived vulnerabilities that have evolved along with the interactive web. Perhaps new legal remedies are necessary; the first step, however, is pursuing a deeper account of how the disputes actually unfold and what conceptions seem to be driving them.

The project thus tries to take into account how attitudes about reputation influence the way that putatively harmful speech is dealt with: what kind of critical speech should be expected, how it will be received and used, and what to do about it. Phenomena like viral Twitter shaming, extortionate publication of intimate information or photographs, accusations of misconduct on an adversary's blog, or dubious reviews of your product or service (or maybe simply your character) on a review website are no longer shocking digital novelties. In fact, citizens are now encouraged to be hyper-vigilant about reputation and how speech on the web can affect it. The recognition that the speech environments of the web present novel reputational challenges has catalyzed new information production and sharing practices, new attitudes about harm, new business opportunities, and even perhaps new conceptions of our mediated selves. Being outraged at one's reputational fragility and expecting the state to do something about it is routinely cast as an antiquated approach; the contemporary reputational zeitgeist mandates a more pro-active mentality.

The most material argument advanced in this dissertation is social and legal: such an understanding of reputation complicates the traditional valorization of counterspeech as the ideal remedy for injurious speech in libel law and First Amendment jurisprudence. Specifically, I argue that while the salutary effects ordinarily associated with

counterspeech have been enhanced in several different regulatory registers (within the framework developed by Lawrence Lessig for understanding non-legal complements to “regulation”),³ these measures are not unambiguously “pro-speech” in their effects on the marketplace of ideas.

In addition to the empirical questions about how disputes are approached and what ideas shape them, the project ultimately questions what these disputes over reputational information reflect about the social and democratic values associated with reputation and free speech. A secondary layer of the argument is therefore cultural: I attempt to show how the idea of “reputation” has become a kind of placeholder term through which anxieties are expressed about a newfound vulnerability to speech on the web and the loss of a certain kind of control over our mediated selves. Reputation is, in this pervasive formulation, compromised when we simply perceive a diminished ability to control how we appear to others. This formulation is much more capacious than that employed in the traditional legal context.

Pursuing the above arguments ultimately provides insight into broader theoretical questions regarding the implications of speech regulation by public and private entities. In short, much of the “regulation” of speech regarding reputation is accomplished on the web through non-judicial “counterspeech” means and at the whim of internet companies’ internal policies about speech. A robust literature recognizes the increasing practical primacy of private companies in dictating what speech actually circulates in the

³ These are: code (technical architecture), norms, and the market. Lessig’s formulation of each will be discussed in detail in chapter two. See Lessig, *Code and Other Laws of Cyberspace*, 85-86.

marketplace of ideas.⁴ At the same time, there is great disagreement over when different counterspeech tools are appropriate and how the standards of private websites should or should not accord with limitations of the First Amendment on government restriction of speech. Such debates thus show how uncertainty over the balance between free speech and reputation online in fact intersects with debates about the impact of privatization and neoliberalism in America.⁵

The “reputation management” branch of the public relations industry is a primary locus for understanding the place of private counterspeech in the digital environment. Both professional and amateur tactics of reputation management are critical to the outcomes of each of the case studies. In essence, reputation management accomplishes what the law often cannot: it renders speech invisible (or less visible) when a client deems it undesirable. The activity of reputation managers reveals much about both the means by which reputation defense is pursued as well as the attitudes about reputation and free speech that drive them. The research in this dissertation demonstrates that

⁴ For a discussion of the impact that private intermediary policies have on the acceptable uses of digital speech networks, see Dawn Nunziato, *Virtual Freedom*. For a more accessible discussion of the practical impact that private terms of service have on what speech in fact circulates over social media platforms, see Jeffrey Rosen, “The Delete Squad.” For a non-digital example that focuses on the ways in which private shopping malls (that set their own rules about acceptable conduct within their walls) are perhaps replacing the traditional “town square” regulated by the government, see Jennifer Coffin, “The United Mall of America.”

⁵ The term neoliberalism is used here to refer to the overarching ideology ascendant toward the end of the twentieth century that combines an emphasis on the economic and political virtues of privatization, free market economics, and a reduced welfare state with a cultural valorization of attitudes like entrepreneurialism and self-help. As used in this project, the term is therefore mainly intended to signify the overlapping cultural and economic frameworks that Lisa Duggan describes in *The Twilight of Equality*. As she writes, “privatization and personal responsibility” are the terms that “define the central intersections between the *culture* of neoliberalism and its economic vision.” Lisa Duggan, *The Twilight of Equality*. Boston: Beacon Press (2003), 12.

sometimes both the hysteria around reputation management and the tools used to accomplish it can be as censorial as overly stringent libel laws in their raw impact on the volume and richness of public debate. Other times, however, they offer paths to resolution that avoid some of the shortcomings and blind spots of the tort system. Further, these cases should prompt us to reconsider the perceived necessity of creating new legal mechanisms that offer subjects of critical speech greater control over how that speech is disseminated.

In practical terms, the disputes examined here evince combined engagements of the judicial process, private terms of service and intermediary authority, and outright counterspeech. A reputation management effort might, for instance, combine direct appeals to intermediaries like Google or Twitter for content management (often using their own established grievance mechanisms) with the creation of one's own self-published social media content and copyright law "takedown" notices for any reproduced images that the complainant him- or herself took. The complainant might pursue a court order declaring certain content defamatory in order to convince intermediaries to remove the content even if he or she has no intention of filing an actual lawsuit. Or perhaps the complainant might indeed file a lawsuit — except the suit seems to have a much greater impact as a publicity maneuver than as a means of collecting compensatory monetary relief (usually because the defendant has no money). Efforts at reputation management also are sometimes simply unscrupulous: both individuals and professional firms routinely threaten dubious but theoretically credible legal actions that convince those

without significant legal knowledge or resources to de-publish critical material. Such approaches invoke “law” in the abstract, but they depend more on a kind of social dynamic for their effect.

At first glance, such phenomena might appear to constitute a kind of “privatization” of privacy and reputation defense. In this formulation, the state is thought to be abdicating its role in protecting citizen security in a way that benefits private companies and those able to avail themselves of their services at the expense of the public good. Such a development could logically be connected with the myriad critiques — such as that of Wendy Brown in *Undoing the Demos* — that decry the valorization of *homo economicus* in the neoliberal society, or the compulsory formulation of every decision and aspect of human subjectivity through the surplus-maximizing logic of market economics.⁶ Indeed, the imperative to fashion a strong reputation is overwhelmingly described not in terms of strengthening social bonds or bolstering some sense of personal pride and self-development, but of maximizing one’s labor or social exchange value.

Through the lens of free speech law and discourse, however, such assessments are analytically incomplete. Nominally “private” reputational resolutions often afford speech-maximizing solutions that foreground counterspeech. In some ways they therefore avoid the pitfalls of lawsuits and militate against the otherwise ill-advised creation of laws or platform content policies that indiscriminately target critical speech. In other words, they

⁶ Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution*. Cambridge: MIT Press (2015).

help preserve a robust public debate even if they burden individuals to assume some of their own reputational defense. The services of companies like Reputation.com undoubtedly cost money and disproportionately benefit those of greater means (in the way that anything that costs money would), but the legal system itself is hardly free. Further, reputation management often targets the actual speech in question, while judicial remedies like monetary damages or even injunctions would struggle to similarly suppress the circulation of the originally damaging speech. Subjects of critical speech are hardly “abandoned” by the legal process in some cases; in fact, they are sometimes more empowered by private tools than they would be under tort law.

Reputation management thus in some ways realizes the counterspeech aspirations that have eluded legal reformers for some time. As will be discussed in depth in chapter one, legal reform efforts to make libel law more efficient and fair have long acknowledged that the legal proceeding itself is sometimes essentially used by litigants as a supplementary publicity mechanism. Scholars studying the issue in the 1970s and 80s determined that many plaintiffs engaging the legal system to vindicate their reputations in fact did so only as a means of sending a message to their adversaries or to the public. Many such plaintiffs also indicated that they would gladly accept some kind of correction of the record instead of damages from a defamation trial. Some of these findings foreshadowed the kinds of hybrid approaches that one can discern in the efforts to vindicate reputation and which have intensified in response to the perceived threats of online platforms.

Nonetheless, we should not ignore the other ways that reputation management discourse perpetuates a mentality that holds that whitewashing of any critical or candid speech is not only a virtual prerequisite for personal success; it is a digital age entitlement. Though unsurprising given its economic prerogative, professional reputation management discourse promotes alarm and paranoia about reputational fragility. The most excessive of such attitudes form a kind of caricature in which the operative concept of “reputational harm” put forward is really something tantamount to simply “critical speech.” As attorney and popular blogger Ken White has postulated, this vision of how speech and reputation should be balanced relies on an insidious substitution of language that evokes violence for language that evokes disagreement. Such substitutions frame something otherwise celebrated in the American free speech tradition (e.g. “criticism”) as something scary and not worthy of protection (e.g. “bullying,” “lynch mob,” or “witch hunt”).⁷ Discussions of digital technology and reputational harm thus evince a profound disagreement in American society over the value and impact of personally or commercially critical speech itself.

Some are clear to distinguish what might be truly novel about how certain uses of online platforms threaten reputation in a way that is not adequately remedied by existing legal and technological tools. The tendency, however, is to slip from complaints about, say, malicious falsehoods to complaints about mean-spirited attacks, insulting speech, or even principled but acerbic disagreement. The subjects of such speech have a panoply of

⁷ Ken White, “If You Disagree With This Post, You’re Joining a Bullying Lynch Mob.” *Popehat.com*, August 17, 2015. <https://popehat.com/2015/08/17/if-you-disagree-with-this-post-youre-joining-a-bullying-lynch-mob/> (accessed 4/13/2016).

tools for managing its reputational effects, and some of these disputes need not actually be thought of as “reputational” in nature at all. Despite some disquieting signs, we should be wary of letting the panic about reputational fragility lead us to create what Justice Brennan warned of 50 years ago: a personal right to essentially not be discussed at all.⁸

The actual operation of any new paradigm of “privatized” reputation defense is therefore multifaceted and must be situated in the context of specific disputes. In some cases, such “privatization” helps to accomplish particular counterspeech goals that the law has long struggled to vindicate. In others, it appears to undermine a genuine commitment to the democratic goal of open dialogue that the First Amendment promotes. For some, private reputation management provides a kind of redress that the law never could; for others it is little more than a scam that preys on the bewildered and the desperate. Either way, it is too simplistic to reduce the fixation on “online reputation” and nominally private dispute resolution to another kind of neoliberal ruse in which the state has abandoned protection of the weak at the behest of the powerful. This is true even despite the thoroughly neoliberal rendering of the self as an exchangeable asset that characterizes the overall logic of reputation management — a logic widely embraced by participants in the disputes examined here.

Overall then, the goal of examining the conflicts covered in each case chapter is to complicate orderly narratives about the newfound precariousness of the so-called

⁸ This is a paraphrase of one of Brennan’s rhetorical flourishes in the 1967 case *Time v. Hill*: “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.” *Time v. Hill*, 385 U.S. 388 (1967).

“reputation society”⁹ and the larger context of “neoliberalism” in which it is embedded. The arguments outlined above are intended to be more analytical than polemical. At the same time, their aggregate implications would seem to counsel that we resist the now fashionable notion that something dramatic must be done to protect citizens from the lower barriers to entry for speech online.

Structure of the Project:

Methodologically, the chapters draw on legal cases, interviews with activists and participants in disputes, analysis of comments in public web forums, and the counsel of industry professionals in reputation management. The first two chapters chart the evolution of efforts to balance free speech and reputational concerns, the impact of technology and the media environment on such efforts, and their resonance with particular theories of free speech and democracy. The empirical section of the dissertation opens with an introduction to the tactics of the “reputation management” industry and, more importantly, the ethos about critical speech that it promotes (and that is echoed in popular depictions of its work). The case chapters concern three clusters of reputational conflicts around particular uses of online platforms.

The first involves some seemingly unorthodox uses of the consumer review platforms Yelp and Ripoff Report. The peculiar kind of “information” that these sites provide about individuals highlights the blurring of professional and personal identity on the web. Many have called for the law to impose greater liability on these websites for

⁹ This phrase appears sporadically in the literature on technology and reputation. See, for instance Hassan Masum and Mark Tovey, *The Reputation Society: How Online Opinions Are Shaping the Offline World*. Cambridge: MIT Press (2012).

the speech of third parties (they currently enjoy a “safe harbor” for merely hosting such speech). Much of the speech they host is sophomoric and uncouth; some of it is probably false. The analysis attempts to demonstrate that counterspeech options, architectural adaptations by the platforms themselves, and a slight reconceptualization of the impact of the speech on these sites might suffice while also eliminating the problematic speech and due process issues that come with imposing greater liability.

The second examines independent bloggers who draw on personal experiences to expose (what they see as) some publicly-consequent wrongdoing and adopt a kind of “amateur professional”¹⁰ journalistic identity in the process. Such speakers are sometimes unpleasant, and their speech may not completely embody the idealized characteristics of the “citizen critic” extolled in First Amendment theory. Yet their speech can also add to the marketplace of ideas, and it is in some ways uniquely vulnerable to silencing. This is because the technical architecture of the web affords more comprehensive means for determined complainants to silence resource-poor speakers. In turn, those complainants sometimes opportunistically appropriate the discursive cachet of terms like “cyberbullying” to regulate critical but largely non-tortious speech.

The final cluster concerns distributed efforts to analyze information about crimes over the social media platform Reddit and the insight they provide into the reputational consequences of “peer-produced” knowledge on the web. These cases demonstrate that

¹⁰ This term of course predates web 2.0 in the popular lexicon, but it also became a buzzword in tandem with the ascent of web 2.0 platforms. Charles Leadbeater and Paul Miller of the think tank Demos wrote in 2004, for instance, that “in the last two decades, a new breed of amateur has emerged: the Pro-Am, amateurs who work to professional standards.” See, Charles Leadbeater and Paul Miller, *The Pro-Am Revolution*. London: Demos (2004), 12.

the internal architecture of a platform like Reddit may be insufficient to rectify all reputational harm through counterspeech or moderation. At the same time, many users of such platforms have evolved a set of self-policing norms that could ultimately prove more powerful than legal mandates in preventing reputational harm. Further, the harm that occurs from exposure on these sites is often more attributable to overzealous dissemination by professional mass media outlets than to the frequently caricatured “internet mobs” engaging in speculation and criticism on Reddit.

Chapter 1

Why and How Has US Law Typically Regulated Reputational Information?

The value of an individual's reputation has long been recognized. Cassio's lament in *Othello* captures the nature of its value: to him, a damaged reputation is worse than being equivalently robbed of material wealth alone because reputation is both a determinant of one's potential dealings in society as well as a core component of one's dignity. Furthermore, robbing a person of his material wealth involves an obvious, tangible transfer from perpetrator to victim; robbing someone of his reputation represents a more insidious form of harm.

The social function of reputation has received much attention from a diverse range of commentators. Evolutionary biologists, sociologists, and economists have written about reputation as a sort of fundamental component of human social organization. While the objects of study may be different, a central refrain is that reputation helps to sort the trustworthy from the untrustworthy for purposes of coordination. Humans use these judgments to make decisions about collaboration with others: for instance, "an individual's reputation provides 'a basis for inducing others to engage in market or nonmarket transactions' with the individual."¹¹ Efforts to protect reputation are therefore fundamentally predicated on a need to regulate *information* about individuals. Regulation of reputational information — legal or otherwise — typically has

¹¹ John C. Martin, "The Role of Retraction in Defamation Suits." *University of Chicago Law Review* 1993.1 (1993), 304.

two related aims. Punishing and discouraging the propagation of bad reputational information — like deliberate lies or reckless gossip — both provides redress for individuals and in turn helps certify that the rest of the information available is trustworthy. Such systems for policing reputational information and for protecting individual reputations from being unduly maligned are thus critical for modern liberal societies in which we must collaborate with strangers and make decisions based on second-hand (i.e. not directly observed) information.

If protecting reputation fundamentally involves making judgments about the value and visibility of information, then who should be responsible for such decisions? Should disputes over reputational information involve direct negotiation between parties, negotiation facilitated by a private third party entity, or a decision rendered by an agent of the state? Much of the resolution in everyday life is informal: it is through reputation mechanisms such as gossip, peer mediation, and broadcast (i.e. one-to-many) publicity that information about individuals is often circulated, vetted for accuracy and credibility, and countered. This is sensible, as the machinery of the state is expensive to engage (thus sometimes making private resolution the only cost-justified solution) and governments traditionally relinquish some private domain into which public rules do not directly penetrate (even if, again, this might only be so because enforcement costs would be prohibitive). Yet informal systems alone may not fully deter or compensate for the malicious or reckless dissemination of reputational information, and therefore the civil law in many countries has long sought to separate innocent or productive speech from

injurious and actionable assertions in order to protect the reputational interests of citizens. Further, informal resolution often leaves little public record, thus potentially making it less valuable as an informational signal to future collaborators.¹²

The general rationale for creating some system of formal sanction for reputational harm can be linked to the core responsibilities of the state in liberal societies. First and foremost, commitments to public order and the rule of law require some formalized alternative to the honor killings and clan warfare that might otherwise erupt over reputational disputes. Beyond mitigating the general disturbance of public order, law attempts to assure that socially weak targets of speech nonetheless have some protection when they are unfairly maligned. Rather than, say, criminalizing lying, however, the civil law in America allows citizens to vindicate perceived injuries by engaging the legal process themselves as a tool of their own defense. Unsurprisingly, though, the law has not always drawn the line between non-actionable criticism and actionable reputational assault in exactly the same place.

In the US and many common law countries around the world, the area of law traditionally associated with regulating speech that threatens reputational harm is the tort of defamation. Slander is spoken defamation; libel is written defamation. In practice, most litigation and consequently most debates in modern US defamation law have concerned libel. Defamation is the product of centuries of common law evolution, and for much of its history imposed a strict liability standard, meaning essentially that anyone

¹² See Lior Jacob Strahilovitz, “Less Regulation, More Reputation” in *The Reputation Society*, eds. Masum and Tovey. Cambridge: MIT Press (2011), pp. 66-67.

found to have made defamatory statements was subject to liability regardless of whether it was done purposefully, recklessly, or accidentally.

The common law typically required four criteria to be met in a successful defamation action: (1) a false statement of fact (i.e. one that is neither true nor an opinion which cannot be proven true or false) that (2) refers to or “concerns” the plaintiff, and (3) was published to a third party with (4) the effect of causing harm to the subject of the statement. Along with added considerations of fault (discussed below), each of these elements generally must still be demonstrated to win a libel judgment today. The strict liability standard has been defended as a kind of informational warranty. In the view of legal scholar Richard Epstein, for instance, strict liability “bonded” the speaker and thus increased trust in his or her assertions without requiring the audience to undertake extensive examination of each statement.¹³ Such a principle extended to the press as well: not only would citizens feel secure knowing that there was a remedy if a newspaper were spreading certifiably false information, but the news-consuming public could trust that any information that made it into the newspaper had been thoroughly vetted in order to avoid exposure to crippling liability.¹⁴

In justifying the state's interest in allowing compensation for defamation as a civil injury, commentators and judges have often invoked some combination of material and dignitary interests. The material interests involve the actual consequences of a so-called

¹³ Richard A. Epstein, “Was NY Times v. Sullivan Wrong?” *University of Chicago Law Review* 53.3 (1986), 813.

¹⁴ Epstein, “Sullivan,” 813.

"damaged reputation": the victim might lose his job or have a hard time finding another one, be shunned by his friends, and be subsequently dogged by suspicion in whatever future dealings. This is not, however, the only kind of harm that defamation law has contemplated over time. In fact, a significant amount of the state's interest in protecting reputation seems to be aimed at assuaging the psychological effects of being falsely associated with some kind of perfidious behavior or condition. Writings on libel law often seem to posit with varying degrees of explicitness that the guarantees of a liberal society make a person's reputation a sacrosanct part of his very status as a subject.

The dual nature of the harm which defamation seeks to redress is perhaps captured in the way damages can be apportioned in defamation cases. While compensatory or "actual" damages are concerned with repairing demonstrated injury and punitive damages seek to heap extra punishment on the speaker for the outrageousness of his speech, a category called "presumed" damages reaches the perhaps elusive nature of the putative defamatory injury. Alongside the nebulous nature of presumed damages, there is also the fact that certain classes of statements -- such as those alleging serious criminal activity or loathsome diseases -- are assumed to harm the plaintiff's reputation. This is called libel per se.

At trial in a case determined (as a matter of law) to involve libel per se, the actual damages are usually "presumed" to flow from the nature of the statements themselves (though this presumption is rebuttable in some states). How are the damages described? Here is the characterization in Illinois law: "presumed damages are defined as personal

humiliation, embarrassment, injury to reputation and standing in the community, mental suffering, and anguish and anxiety.”¹⁵ That list includes five terms that describe feelings or psychological states compared to just the one material factor of "standing in the community." In practice, therefore, defamation law essentially addresses a combination of demonstrable loss and presumed psychological indignity that itself sometimes rests on interpretive assumptions about how particular statements will tend to resonate with recipients and thus affect the plaintiff.

The common law’s strict liability standard and the attendant system of awarding damages have, however, been gradually softened over the years by the creation of constitutional defenses against defamation claims. In short, many realized over time that it is not uncommon for a speaker or publisher to commit accidental factual errors in reporting the news or espousing an opinion that relies on implied facts. In other words, strict liability did encourage speakers to exercise caution about the truth of their statements — but such caution could be excessive.

Further, a libel law that too generously protects plaintiffs becomes a tool for the subjects of otherwise legitimate criticism to muzzle their critics by exploiting the presence of incidental errors. The Supreme Court addressed such concerns in the 1964 *NY Times v. Sullivan* case, which involved a libel judgment imposed by an Alabama trial court for minor factual mistakes in an editorial advertisement decrying the treatment of

¹⁵ Charles E. Harris II, “Even Presumed Damages Must Be Proven,” 2. https://www.mayerbrown.com/Files/Publication/1d08db7c-5380-475a-9ce4-e780095606a6/Presentation/PublicationAttachment/17af5d1b-5fa0-4ebe-b45c-df4c11147287/ARTICLE-Harris_Presumed_Damages_0810.pdf (accessed 3/22/2016).

civil rights protestors by the Montgomery police. The Court in *Sullivan* formally applied constitutional protection to libelous statements for the first time by limiting the further circumstances in which public official plaintiffs could recover different types of damages for defamation. In the course of doing so, *Sullivan* and its progeny have articulated many of the central free speech and tort concerns that arise in the legal regulation of reputational information.

In applying the First Amendment to libel law, the Court was not expressing approval of libelous statements themselves. The Court had affirmed in *Chaplinsky v. New Hampshire* that libelous statements themselves were part of a category that “by their very utterance, inflict injury or tend to incite an immediate breach of the peace...[and] are no essential part of any exposition of ideas.”¹⁶ Rather, it was attempting to limit the anticipated indirect effect of the stringent common law libel standards on non-libelous speech. Before *Sullivan*, the burden of proof had been on the defendant to prove that what he or she had written was true. The problem, the Court reasoned, is that speakers who are otherwise convinced of their certitude may nonetheless refrain from speaking because they are unsure of whether they can absolutely prove a statement to be true. *Sullivan* thus reversed the burden to instead force the plaintiff to prove that the statements were false.

More importantly, the Court questioned the wisdom of punishing incidental falsehoods so mercilessly according to the strict liability standard. As Justice Brennan reasoned, people often resort to inflammatory language or hyperbole when they feel

¹⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568; 572.

passionate about something, and it is possible in the course of robust debate that some statements will be made erroneously without the speaker intending any distortion. This is especially true of a news organization clamoring to report the news as quickly as possible.¹⁷ Too unforgiving a standard for defamation would create chilling effects because some speakers would judge it too costly to risk liability for incidental inaccuracies or caustic statements that fell into ambiguous territory between fact and opinion. Public discourse overall would suffer, as the roster of participants and the vehemence with which they participate would be enervated.¹⁸ Perhaps this could be tolerated for gossip discussions of those whose affairs warranted no scrutiny from the public (whom the Court would subsequently call “private figures”), but it would be incompatible with the spirit of the First Amendment and the requirements of a democratic society if applied to public officials and those who had willingly sought the public’s attention (in subsequent cases called “public figures”).

Recovery for defamation was thus only allowed if the plaintiff could prove that the false statements were made either deliberately or so recklessly that they flagrantly flouted the conventions of ordinary journalistic due diligence. They called this the “actual malice” standard. The overall impetus for the *Sullivan* ruling was that it was particularly

¹⁷ The Court considered this situation explicitly in *Associated Press v. Walker* (1967), arguing that falsehoods uttered in the course of pursuing “hot news” were less likely to be held defamatory.

¹⁸ Justice Brennan’s opinion drew on James Madison’s notion that “some abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press” in order to argue (citing *NAACP v. Button*) that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need...to survive.’” 376 U.S. 254; 272.

important to encourage robust discussion about particular topics and particular people, and that the rules had to ensure that speakers would participate freely enough to make the public conversation "uninhibited, robust, and wide-open."

In a theoretical sense, the *Sullivan* case and subsequent revisions of the constitutional limitations on defamation law were therefore grounded in what is usually described as the "marketplace" theory of free speech. The seminal articulation of this framework in the larger context of a theory of liberalism comes from John Stuart Mill.¹⁹ The marketplace theory was in turn embraced by the judges who inaugurated modern free speech jurisprudence like Louis Brandeis and Oliver Wendell Holmes.²⁰ Subsequent theorists have elaborated on the values embodied by a liberal model of free speech and critiqued the theory's idealized assumptions about the operation of this "marketplace."

In this framework, the goal of any legal guarantee of freedom of expression is to encourage the greatest volume of speech so that ideas can compete with one another in the search for truth. The marketplace perspective assumes, following Mill, that the only speech worth curtailing would be directly injurious (and therefore sanctionable under the

¹⁹ The following gloss is derived from Mill, *On Liberty* Ch. 1 and 2.

²⁰ As Holmes wrote in his *Abrams v United States* dissent, the fact that humans are capable of changing their minds means above all else that "the ultimate good desired is better reached by free trade in ideas," and therefore "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616; 630.

Brandeis' concurrence in *Whitney v. California* perhaps even more eloquently laid out the tenets of the marketplace theory in a judicial context: instead of allowing the government to shut down discussion of topics deemed "dangerous," the framers believed that "the path to safety lies in the opportunity to discuss freely supposed grievances and proposed remedies," which was possible because "believing in the power of reason as applied through public discussion, they eschewed silence coerced by law." 274 U.S. 375-376.

"harm principle") or that which is factually false. In the typical marketplace formulation, "ideas" can be argued with but not proven true or false per se; as the Court would say in dicta in the *Gertz v. Welch* case, "there is no such thing as a false ideas." The assumption, then, is that the most democratically productive way to deal with ideas deemed noxious or even dangerous is to make sure that they circulate in open conflict with whatever ideas are accepted as consensus. If unpopular or minority opinions are simply censored, their adherents will not disappear; they will simply "smolder" underground and be clung to with more dogmatic fervor. Ideas rejected in one age are accepted in another. The only thing that will minimize the tyrannical potential of a majority that is convinced of its certitude (on, say, the issue of racial equality) is the protection of dissent. Likewise, ideas that are worth rejecting can only be rationally dispensed with when they have had their fair chance to compete. Rejecting an idea because it seems dissonant with majority opinion is simply adherence to dogma, not rational belief.

Mill himself and probably most marketplace theorists would not actually contend that some transcendent kind of ultimate, unassailable "truth" could be reached through free competition of ideas. It remains undeniable, however, that the marketplace framework is inherently predicated on the idea that free speech functions as a vehicle for members of a society to decide what ideas to accept and what ideas to reject. Viewing the exchange of ideas according to the rough model that governs any other exchange of goods in a market-based society is the best (though still imperfect) way to achieve this.

First Amendment jurisprudence is “marketplace”-oriented simply in the sense that speech is not regulated according to a kind of “planned economy” model.

The decision in *Sullivan* was thus emblematic of the vision for the First Amendment that prioritizes maximizing the range of viewpoints available to the public in order to stimulate the search for truth. More specifically, though, the ultimate goal of protecting speech is not simply to defend the liberty of the speaker; it is to make sure that the public discourse is enriched for listeners. As such, we must remember that the *Sullivan* case was grounded in the specific understanding of the marketplace of ideas espoused by Alexander Meiklejohn. Meiklejohn’s “town meeting” analogy for understanding the purpose of the First Amendment emphasizes the need to ensure a broad variety of voices in any given conversation. Such diversity is supposed ensure not that everyone will have a chance to say anything that he or she wants, but that everything “worth being said” will be heard, and thus is oriented toward benefitting listeners as much as speakers.²¹ As Harry Kalven and others have pointed out, the *Sullivan* opinion evinced a particular vision in which the purpose of the First Amendment is to encourage the citizen critic of government for the benefit of all observers, not just the for the liberty interests of the speaker²². In other words, we must protect the incidental false statement about a public figure because it is necessary to ensure that the public *hears* a robust enough discussion of ideas (and thus can more effectively govern itself).

²¹ See Meiklejohn, *Political Freedom*, 24-27.

²² Harry Kalven, *A Worthy Tradition*, 209.

The *Sullivan* case also captures how libel law is consistently shaped in accordance with the media environment in which the disputes take place. *Sullivan* actually provides a kind of counterpoint to more contemporary situations because it so thoroughly reflected the free speech concerns particular to the mass media landscape of the second half of the twentieth century. It is widely remarked that the civil rights context created the real urgency for the Court to curtail the common law rules because southern officials were using them to effectively shut down national coverage of civil rights struggles in the south.²³ The presumption, then, was that wider public awareness of these issues hinged significantly on the fate of a few publications.

Further, the circumstances surrounding the publication of the statements were more or less transparent. The speakers were in no way mysterious, as the organization responsible for running the ad had signed its name and made its address available to receive donations. There were a handful of editors at the paper to whom police commissioner Sullivan could appeal directly for a retraction (he was refused). While there was some argument over whether the ad would be understood to refer to Sullivan in the first place, it was easy to figure out roughly how many people would have been exposed to the ad based on how many copies of the paper circulated in Alabama (not many, though this hardly mattered in a case of libel per se). Finally, it was easy to see that Sullivan was by basically any definition a public official for all purposes and thus would be subject to the new actual malice rule. He may have sought defamation through a libel

²³ See Kermit Hall and Melvin Urofsky, *New York Times v. Sullivan: Civil Rights, Libel Law, and the Free Press*. Lawrence: University Press of Kansas (2011), 182.

lawsuit, but he could just as easily have commanded the public's attention through publicity endeavors of his own. The relative ease of apprehending these variables thus makes the case a paradigmatic reputational dispute for a public sphere dominated by mass media.

Nonetheless, this last question of exactly which plaintiffs should have to surmount the actual malice hurdle became muddled almost immediately after *Sullivan*. The Court expanded the standard to public figures in *Curtis v. Butts* (1967) and any speech involving an issue of public importance in *Rosenbloom v. Metromedia* (1970) as part of its effort to increase the "robustness" of public debate. In *Gertz v. Welch* (1974), the Court attempted to resolve nearly a decade of oscillation on the question of which plaintiffs would have to meet the actual malice standard.

While the tests in the interim cases may have been different that the one ultimately settled on in *Gertz*, each grappled with the affordances of the marketplace of ideas for redressing misstatements of fact through reply or correction rather than libel judgments. As Justice Warren wrote in his *Butts* concurrence defending the requirement of actual malice for public figures, for instance, "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."²⁴ They already have an outsized megaphone, so therefore it is even more important to the diversity of public voices that they not be allowed to silence critics easily through defamation law. Though Justice

²⁴ *Curtis v. Butts*, 388 U.S. 164.

Brennan's majority opinion in *Rosenbloom* rejected any test that weighed a plaintiff's access to counterspeech in favor of one based on the substantive public importance of the speech in question, his reasoning nonetheless reinforced the underlying idea that the point of the actual malice test was to ensure that those who had sought the public eye and commanded public attention could not shut down public discussion of them because of a few incidental falsehoods or exaggerations.

The rationale in *Gertz* offered the most direct articulation of the connection between the speech marketplace and self-help in libel law. In doctrinal terms, *Gertz* had three main effects. First, it replaced the *Rosenbloom* test that had briefly applied the actual malice standard to any speech of "public concern" in favor of one that reverted to the previous public/private figure axis. It also decreed that even private plaintiffs would have to demonstrate at least negligence — meaning the speaker must have disregarded ordinary due diligence in evaluating the truth of a statement. Finally, it forbade punitive and presumed damages for anyone without a showing of actual malice.²⁵ In dicta, however, Justice Powell additionally articulated the underlying spirit of the Court's approach to libel law: "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."²⁶ While the actual legal test does not technically require plaintiffs to show that they tried to pursue self-help first, the availability of self-

²⁵ *Gertz v. Welch*, 418 U.S. 323.

²⁶ *Gertz*, 418 U.S. 346

help (or “access to the means of corrective counterspeech”) is a factor weighed in determining whether a plaintiff is a public or private figure as a matter of law.

Is actual correction of the record via reply a wholly satisfactory alternative for plaintiffs or even for defendants? The Court in *Gertz* seemed to assume that a defamation lawsuit could be justified basically as a substitute for self-help when it was unavailable. As Justice Powell and the majority saw it, this would often be the case for private persons and seldom the case for public figures and officials. In the following years there was yet more debate about who exactly constituted a public figure, with the courts eventually settling on a test similar to that from *Gertz* in *Waldbaum v. Fairchild Publications* (1980).²⁷ The more material question, however, was whether the Court’s assumptions about corrective counterspeech would square with the subsequent developments in libel litigation and attitudes about reputation.

The consensus by the middle of the 1980s seemed to be that despite the Court’s efforts to be more accommodating to the press and to clarify the tests it would use for all plaintiffs, something in defamation law was still defective. As a number of commentators suggested, the rules seemed to have offered little reprieve for the press while encouraging even more arguably frivolous lawsuits than before — lawsuits which, with the aid of sympathetic juries, sometimes still returned flabbergasting damage awards for people who hardly seemed to have suffered any reputational damage. Richard Epstein, for

²⁷ The D.C. Circuit clarified that a plaintiff was a limited-purpose public figure (the category of public figure that had caused the most debate) if he or she had or sought “a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.” 27 F.2d 1287 (D.C. Cir.), cert. denied.

instance, noted that the period of “stable tranquility [which] should have ensued” following the clarification of the constitutional rules had never come, and that instead “the onslaught of defamation actions is greater in number and severity than it was in the ‘bad old days’ of common law libel.”²⁸ Further, the actual malice standard that had been designed to protect the press could also become a burden, as the process of deciding whether a journalist knew or should know whether a statement was false sometimes led to much more extensive and invasive discovery before trial. Was something wrong with the Court’s conception of how to protect speakers or of when and why people sue? As journalist Anthony Lewis exasperatedly put it, “what [was] happening?”²⁹

Several scholars set out to get to the bottom of things by studying (in the words of one title) “what plaintiffs want and what plaintiffs get.” Alongside these studies came polemics about the excesses of libel law (and the tort system in general) and proposals for reform. Randall P. Bezanson developed one of the more comprehensive studies of plaintiff motivations. In an influential 1986 article, Bezanson wrote that “the principal object of the lawsuit for most plaintiffs is not to obtain monetary relief for financial harm. Instead, the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance.”³⁰ Going to court can be gratifying for plaintiffs, but this is because it happens to be the most visible and symbolically important means of speaking

²⁸ Epstein, “Sullivan,” 783.

²⁹ Anthony Lewis, “The Sullivan Case.” *The New Yorker* 11/5/1984, 87.

³⁰ Randall Bezanson, “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get,” *California Law Review* 74.3 (1986), 791.

up for oneself, not because it is inherently the most useful: “To [plaintiffs], the libel suit represents an official engagement of the judicial system on their behalf, and the act of suing represents a legitimation of their claims of falsehood. Indeed, *many plaintiffs may believe they have no other means of recourse*, and therefore feel that litigation is the only way to set the record straight” (italics added).³¹ This perhaps explains the attractiveness of libel suits despite the low success rate, which at the time was found to be between 5 and 10 percent in cases involving media defendants.³²

The idea that what plaintiffs truly want is public exoneration (perhaps coupled with shaming of the alleged defamer) achieved through a visible and official determination of truth or falsity was encouraging for reform in the spirit of the “market-failure” critiques. In this vein, Rodney Smolla and other libel reform advocates pushed to multiply the hurdles that plaintiffs would have to clear in order to proceed to a trial. Instead, such proposals substituted more opportunities to effectively settle the dispute through negotiation with the speaker for public correction or through a declaratory judgment from a court on the issue of truth or falsity alone. First, as Smolla wrote, it was important to come to terms with the fact that “the traditional suit for money damages has proven an exceptionally poor vehicle for meaningful reputational redress,” and this is because “they tend to drag on interminably, are enormously costly for both sides, and

³¹ Bezanson, “Libel Suit,” 791.

³² Kathy Roberts Forde, *Literary Journalism on Trial: Masson V. New Yorker and the First Amendment*. Amherst: UMass Press (2008), 122-23.

very rarely end in a clear-cut resolution of what ought to be the heart of the matter: a determination of the truth or falsity of what was published.”³³

More importantly, perhaps, Smolla suspected that there was a cultural and market dimension to the continued fervor for libel lawsuits. He postulated that “the more concerned we become about ourselves, the more thin-skinned we become,” and that this is magnified when mass media dominate the marketplace because “when there were more newspapers competing for readers...people cared less about what one of them said.”³⁴ In turn, such preoccupations evinced an increasing emphasis on the sort of tacit psychological dimension of defamation law at the expense of more material reputational consideration: the results “suggested that juries were compensating psychological injury rather than verifiable damage to reputation.”³⁵ The legal analysis here is therefore ultimately predicated on a kind of media theory that posits a connection between the market conditions, perceptions of media credibility, and sensitivity to the messages disseminated. If that kind of compensation is indeed the true function of defamation law, however, then it is somewhat difficult to see why it should continue to exist as a cause of action in the first place given the existence of other torts that specifically address emotional distress.

³³ Rodney Smolla, “The Annenberg Libel Reform Proposal: The Case for Enactment,” *William and Mary Law Review* 31.1 (1989), 45; 31.

³⁴ Lewis 87.

³⁵ Forde 122.

In response, Smolla advanced a libel reform proposal in the mid-1980s that sought to redirect the machinery of defamation law toward this kind of efficient correction of the record and away from tortuous jury trials. Smolla proposed a three-pronged approach focusing on the core factual resolution that should, after all, be the crux of the average reputational dispute. The first prong is a “forceful retraction and reply mechanism” that would preclude a lawsuit when executed within particular parameters; the second is a declaratory judgment action to decide whether the statement in question is true or false if the defendant fails to honor either the request for reply or retraction; and, finally, a suit for damages would be available in the event that both of these options fail, though only actual damages would be recoverable.³⁶ Smolla’s group failed to dramatically overhaul libel law, but the proposal sparked a substantive conversation about various methods of delivering “justice” in a reputational dispute and arguably helped to catalyze the creation of statutory retraction mechanisms in several states.³⁷

The substance of Smolla’s reform proposal may seem modest and sensible enough, but it still prompted a number of objections. The first concerned the efficacy of reply mechanisms and the value of retractions. Simply put, there is a good deal of reasonable assumption and some actual evidence that corrections can *never* truly vindicate a plaintiff who has been defamed if we think of vindication as the full undoing

³⁶ Smolla, “Annenberg Proposal” 32-34.

³⁷ As the Digital Media Law Project explains, “A growing number of states have laws -- both statutory and case law -- that require that a plaintiff must first request a retraction before they can recover certain types of damages in a defamation lawsuit.” A list of statutes by state with descriptions is available here: <http://www.dmlp.org/legal-guide/state-law-retractions>.

of the original statement's effects. Beyond the issue of efficacy, there are also those who caution against assigning primacy to correction as the motivating factor in most defamation litigation.

Justice Powell's statement that "the first remedy of any defamation victim is self-help" is perhaps not even the most resonant folk dictum from the post-*Sullivan* libel reform conversation. As Justice Brennan and others have often remarked, faith in the power of self-help is sometimes attenuated by the suspicion that "the truth rarely catches up with a lie." In *Rosenbloom*, for instance, Brennan argued that it was "the unpredictable event of the media's continuing interest in the story" that would always make the most difference in the visibility and framing of a particular assertion, not the inherent ability of certain speakers to rebut the allegedly defamatory statements.³⁸ Several commentators have thus tried to operationalize this skepticism of the efficacy of counterspeech in more formal terms, both theoretically and empirically.

It is easy to point out circumstances in which self-help alone should probably not be expected to fully undo the harm of defamation. Richard Posner has described (in the spirit of the "market failure" critiques) how "unequal access to the marketplace of ideas makes it difficult to leave the truth to the marketplace," which is especially a problem when a handful of large media companies possess the largest megaphones. As Posner once asked, "what happens if Time Magazine libels?"³⁹

³⁸ *Rosenbloom*, 403 U.S. 46.

³⁹ quoted in Martin, "Retraction Statutes," 305.

A study by communication law scholar Clay Calvert's tested three hypotheses regarding the reduction of negative reputational conclusions that could be achieved through different types of denials by the hypothetical subject of the statements. The study did in fact find a negative relationship between exposure to statements of denial and negative reputational conclusions.⁴⁰ The caveat, however, seems to be that this outcome is somewhat dependent on placement of statements of denial *within the same article* and is also limited to statements concerning professional malfeasance (rather than, say, sexual impropriety). These conditions will not always be met – and in fact might be met rarely. Proponents of reform that enhances counterspeech contend, therefore, that it is necessary to leverage the original forum in which the defamation was allegedly published in order to mitigate the damage — in other words, to “giv[e] [the plaintiff] Time Magazine’s voice.”⁴¹

Retractions issued in this manner are, however, no panacea. In the words of one court, “[r]etractions are often dilatory, offensive and ineffective. The reluctance of the libeler to make a proper retraction promptly, or if made, to couch it in proper language, results in aggravating the injury resulting from the libel and increasing the harm.”⁴² This statement thus captures a number of core objections to the idea that rebuttal and retraction opportunities are the proper cure for reputational harm. Not only might they not change

⁴⁰ Clay Calvert, “Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations.” *Pacific Law Journal* Vol. 26 (1993), pp. 957-58.

⁴¹ Martin, “Retraction Statutes,” 305.

⁴² Martin 305.

anyone's mind, but they might exacerbate the problem by either intensifying the association between the plaintiff and the problematic statements or causing a backlash against the plaintiff for complaining in the first place.

Bezanson's inclusion of "vengeance" as a common motivation in the study cited earlier hinted that there was perhaps a dimension to reputational vindication that had nothing to do with correcting the record and much to do with achieving a kind of catharsis by inflicting a commensurate level of discomfort on the alleged defamer. The idea that some defamation lawsuits are vengeful rather than merely compensatory is perhaps most visible in a few higher profile incidents from the period. Donald Gillmor cites the example of Wayne Newton as the quintessence of this phenomenon. Newton won a huge defamation judgment against NBC even though he had hardly become a pariah following the alleged libel, winning numerous awards and enjoying success with his casino business.⁴³

Even the offer of retraction that precludes a trial might not deter plaintiffs from suing because they might rightly suspect that media organizations are loathe to issue retractions and admit wrongdoing. Referring to a similarly high-profile dispute involving Ariel Sharon,⁴⁴ Richard Epstein argues that "[i]t is an easy guess that Time magazine

⁴³ Donald Gillmor, *Power, Publicity, and the Abuse of Libel Law*. New York: Oxford University Press, 1992.

⁴⁴ The lawsuit concerned a 1983 *Time* article that Sharon claimed libeled him by insinuating that he encouraged a massacre of Palestinian refugees by elements within the Lebanese government. It was settled in January of 1986 for an undisclosed sum, but not without Time having admitted during Israeli court proceedings that some of its coverage had been erroneous. Thomas L. Friedman, "Time Magazine and Sharon Settle the Libel Suit He Filed In Israel," *NY Times* Jan 23 1986.

would have preferred a substantial monetary payment to Sharon, without any admission of falsehood, than a verdict which left its own reputation for accurate and reliable reporting tarnished.”⁴⁵ Such a perspective suggests that it might be naive to expect news organizations or other prominent speakers to voluntarily forego litigation or private settlement by relying more heavily on offers of correction. From the perspective of plaintiffs, conversely, it might therefore seem equally naive to expect that the publication’s proffering of whatever it sees as an adequate “factual” correction will be satisfactory. Instead, it could simply be that plaintiffs are often incensed at being maligned by the speaker — regardless of whether the statements are “fact” or “opinion” as a matter of law — and seek some sort of vitriolic retribution.

Building from these direct considerations of plaintiff and defendant priorities, the value of corrective counterspeech for the marketplace of ideas must also be considered. To the extent that they encourage collaboration between parties and public negotiation of the issues in question (even if it is conducted in an acrimonious fashion), self-help frameworks and reforms emphasizing rebuttal and retraction can perhaps be justified in terms of their overall social benefit. This position is intelligible if we consider the value that has been attached to such scenarios by the free speech theorists Vincent Blasi and Donald Downs.

Blasi sees the resolution of reputational disputes through social rather than purely legal channels as a means of enhancing the legitimacy of the resulting sanctions and the

⁴⁵ Epstein, “Sullivan,” 814.

behavioral limits they reinforce. If these limits evolve organically through social mechanisms like approval, confrontation, and shaming, he reasons, then they are more likely to become widely accepted. He asserts this by invoking Milton's characterization of the power of social resolutions via unfettered confrontation: "[i]nformal, nonofficial sanctions and judgments," Milton recognized, "will always provide the most important 'bonds and ligaments that hold a society together.'" He likewise advanced a conception of redress redolent of the marketplace theory: "[Those] who assault the sensibilities of the public will be reigned in when their tactics cause audiences to recoil and their opponents to succeed in discrediting them."⁴⁶ Richard Epstein also positions these "bonds and ligaments" as ancillary enforcers of standards of conduct even within developed legal systems. As he writes:

The basic rules of primary conduct (i.e., those that arose naturally to regulate conduct between ordinary individuals without interference from the law) that arose in a regime of pure self-help offer the best structure for individual rights and duties even after the creation of a viable public force.

The law, in this view, should therefore encourage such direct social negotiation when possible.

Elsewhere, Blasi has argued more specifically that the encouragement of this kind of "nonofficial sanction" represents a core function of the First Amendment and that such social resolutions provide a flexibility which restrictive statutes cannot:

Limits are not fixed essences to be found and enforced. They are ongoing judgments, made in response to the novel mix of threats, needs, and

⁴⁶ David Koehler, "Self Help, the Media, and the First Amendment." *Hofstra Law Review* vol. 35 (2007), 1284.

aspirations of a particular time and place. If a free speech tradition does indeed help citizens to confront problems, retain perspective, and exercise judgment in a changing environment, in no project are those skills more valuable than that of enforcing the tacit, uncodified standards of behavior that make for a resilient social order.⁴⁷

Such a perspective would thus seem to demand an expansive interpretation of the First Amendment which might mandate that policy be designed to actively facilitate the social discovery of such “limits.” Policies mandating right of reply and retraction negotiations would seem to accord with this approach because they mandate active participant interaction before opening the judicial process to them.

This free speech ethos can in turn help instill in the citizen a kind of social fortitude and willingness to confront and question the attitudes and ideas that one encounters — or what Blasi calls “good character.” For Blasi, this is an integral component of democratic citizenship: “a culture that prizes and protects expressive liberty nurtures in its members certain character traits such as inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil.”⁴⁸ In the context of disputes over statements that affect reputation, some degree of confrontation can thus be seen as positive: “The resulting environment, in which dissent is both an option and an inescapable reality, is the principal source of the characterological effect.”⁴⁹

⁴⁷ Vincent Blasi, “Free Speech and Good Character.” *UCLA Law Review* vol. 46 (1999), 1581.

⁴⁸ Blasi, “Good Character” 1569.

⁴⁹ Blasi, “Good Character” 1569; 1572.

This concept of “good character” resonates with Donald Downs’ analysis of the social response to the 1978 controversy over the neo-nazi NSPA’s plan to hold one of their trademark inflammatory rallies in the Jewish suburb of Skokie, IL (home to a high concentration of holocaust survivors). Federal courts twice affirmed the right of the NSPA to demonstrate, but the NSPA eventually called off the rally due to threats of violent retaliation by survivors. The legal conflict reinforced the “content neutrality” doctrine that speech in the public forum (as opposed to speech made to a “captive audience”) generally cannot be abridged based on its perceived assaultive content. The larger significance of Downs’ argument concerns the social and political effects of the controversy and the planned counter-demonstration to the nazi rally at Skokie. Specifically, Downs analyzes the conflagration in terms of two conceptual pillars of liberal democratic society: republican virtue and community security.⁵⁰

Republican virtue describes the idea that it is important in a democracy for communities to be self-reliant in managing problems and confronting problematic forces within their own ranks. Because of our republican form of democratic representation and the corresponding need for citizens to play an active role in pursuing the priorities and values of their communities, it is critical for citizens to engage one another in dialogue and confront the difficult social choices about which they must deliberate rather than shirking them. The emphasis on deliberation and confrontation in the marketplace theory of free speech is implicitly directed toward promulgating republican virtue. Likewise, the

⁵⁰ This overview of the concepts is drawn primarily from Downs, *Nazis In Skokie*, Ch.

priorities of the republican virtue framework resonate with Blasi's notion that confrontation with and protection of dissent encourages the "good character" that a democratic citizenry must develop.

Many prioritized republican virtue in the conflagration at Skokie. The ACLU (who represented the NSPA) most consistently advanced a marketplace-tinged vision of the First Amendment in which discord and cacophony (even if the ideas expressed are highly offensive or threatening) are signs of health in the public forum. In particular, proponents of this position pointed to the fact that the public argument about the proposed march presented an opportunity for citizens to confront the existence of hate-mongers like the NSPA and to publicly demonstrate rejection of their anti-semitism. For instance, an ACLU lawyer argued that "[t]he best consequence of the Nazis' proposal to march in Skokie is that it produced more speech...[i]t stimulated more discussion of the evils of Nazism."⁵¹ Perhaps more importantly, republican virtue can be seen as a product of the direct confrontation between the survivors and the NSPA: because survivors often described how the conflict had brought them together to be "strong" rather than "silent", Downs argues that the public response of the community to unify in resistance to Collin and the NSPA produced "ends commensurate with the republican virtue function of free speech."⁵²

Republican virtue is, however, only half of the picture. Downs ultimately concludes that the Skokie situation undermined what he calls "community security" and

⁵¹ Downs, *Nazis In Skokie*, 112.

⁵² Downs, *Nazis In Skokie*, 51; 67.

produced greater drawbacks than it did benefits in terms of republican virtue. As Downs writes, community security represents the principle that "one of the most basic and important functions of community and government is to protect its citizens from assaultive speech and marked incivility."⁵³ While the more outspoken survivors may have relished taking on the NSPA, others felt targeted and traumatized by the prospect of Nazis again marching through their community.⁵⁴ The provision of community security is ultimately a factor in determining the democratic legitimacy of the state, as "a community that does not protect its citizens from unjustified psychological assaults...is not well ordered and cannot claim legitimacy."⁵⁵ Community security is not a luxury that must be compromised when the demands of republican virtue require confrontation; it is a "democratic principle that is coeval with free speech" and thus sometimes deserves to be balanced as a bona fide *right* opposite free speech in such situations.⁵⁶

An emphasis on community security stands in contrast with the logic of the Supreme Court's landmark libel jurisprudence. In this view, an overemphasis on republican virtue ignores the psychological effect of being subject to false or even demeaning speech. The community security mandate thus tracks thematically with the kinds of tacit psychological and dignitary protections that are lumped in with material injury in some state libel law. It also reveals that there is a different kind of free speech

⁵³ Downs 153.

⁵⁴ Downs 90-91.

⁵⁵ Downs 17.

⁵⁶ Downs 119.

interest that is pursued through such protections: in order for citizens to participate in the marketplace of ideas and conduct themselves in some public capacity, they must feel reasonably secure that they will be protected against undue assault in this domain.

Focusing on community security also illuminates an adjacent objection to the emphasis on counterspeech and “republican virtue.” The traditional objection is that counterspeech will rarely neutralize the alleged libel or vindicate plaintiffs’ desire for revenge. Downs, on the other hand, points out how the common admonishment in the free speech tradition to cure bad speech with more speech is sometimes more likely to ignite violent conflict which is not “speech” at all. It is important to remember that the ultimate decision to abandon the march in Skokie was prompted by the threat of “massive retaliation.” Downs sees this as the perfectly predictable outcome of a free speech framework in which those who feel assaulted or targeted must “take the law into their own hands” whenever they cannot demonstrate that they face imminent violence to justify state intervention.⁵⁷

To Downs, such an outcome both undermines the rule of law and forces both speakers and listeners to be willing to engage in an escalated, possibly violent conflict. For some, this undermines the value of counterspeech: one legal scholar cautions, for instance, that “a defamed party only cautiously should resort to [rebuttal]...[p]rotracted counterattacks enhance the possibility of breaches of the peace.”⁵⁸ For Downs, such a

⁵⁷ Downs 92.

⁵⁸ Douglas Ivor Brandon et. al., “Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society.” *Vanderbilt Law Review* Vol. 37 (1984), 857.

calculus therefore ultimately suggests that this kind of facile encouragement of self-help through counterspeech represents “one of the worst lessons that the law can teach.”⁵⁹

Conclusion:

To recap, this section has outlined why reputational information is important, how it has been regulated by US law, and how this framework illustrates core debates in free speech theory. Specifically, societies have perennially recognized that the regulation of reputational information is integral to facilitating social coordination, enabling material exchange with strangers, protecting dignity, and affirming the state’s protective legitimacy. As was described throughout the text, the proper framework for regulating reputational information is formulated in the context of particular speech environments. False statements have little value in the marketplace of ideas, but incidental falsehoods are an inevitable part of vigorous debate; the Supreme Court has thus chosen to limit defamation law to those falsehoods that are reckless or deliberate. Overall, there has always been something of a tension between the material and dignitary goals of defamation law and an ambiguity about what exactly qualifies as the requisite “harm” to deserve legal compensation.

The modern constitutional framework for balancing reputation and free speech in defamation law was calibrated for an environment dominated by mass media. Many seminal policy and theoretical perspectives implicitly (and sometimes explicitly) were conceived with mass media in mind. Mass media were easy targets for lawsuits, and public figures could easily command attention from them in ways that ordinary citizens

⁵⁹ Downs 92.

could not. It was therefore thought to be necessary that defamation law leave “breathing space” to speak about those who already enjoy ample means of commanding public attention.

The spirit and letter of contemporary defamation law holds that counterspeech is the preferred mechanism for responding to both noxious ideas and to outright falsehoods when the subject has the means. Defamation law should only apply in the narrow set of cases that cannot be resolved adequately through corrective counterspeech. In many such cases, correction or admission of wrongdoing is all that is sought; jury trials for monetary damages appear superfluous in many reputational disputes.

Such an orientation comports with the overall goals of the marketplace theory of free speech by emphasizing “republican virtue” and the salutary democratic and social effects of public discussion. At the same time, this framework requires that several circumstantial prerequisites be met: the audience must be replicable and the publication traceable, the defendant must be locatable and willing to negotiate publicly rather than privately, the plaintiff must be satisfied with mere correction of the record, and a confrontation between plaintiff and defendant must be unlikely to simply scare the plaintiff into reticence.

The following chapter will trace how the interactive speech platforms of the internet afford greater opportunities for counterspeech (and indeed speech of any kind) yet also facilitate personal exposure of private figures to an unprecedented degree when combined with the information organizing architecture of search engines. With these

conditions in mind, the chapter then introduces several contemporary perspectives on the need to strike a new regulatory balance between free speech and reputation.

Chapter 2

Perspectives On the Information Dynamics and Speech Affordances of the Web

As part of its coverage of the restructuring that has swept the print media industries in recent years, a *New York Observer* article from 2010 queried whether we had finally reached “the end of libel.” It cited as evidence several quotations from mass media lawyers about the decline of lawsuits against media companies in recent years, focusing specifically on one lawyer who had left *Time* because, simply, there were “no more lawsuits.”⁶⁰ While the Media Law Resource Center’s case digests list 266 libel trials in the 1980s, that number drops to 124 for the 2000s. In 2009 there were a total of 9 libel lawsuits against the press.⁶¹ More substantively, the piece concluded speculatively that perhaps the underlying concerns in defamation law had simply lost potency because of the structure of information exchange on the internet. Robin Bierstedt, the former general counsel for *Time*, opined in this vein that because “[t]here’s so much more out there... [p]eople will feel less offended by that one newspaper or magazine sitting around.”⁶²

Though certainly not intentional, this perspective is strikingly reminiscent of the logic of Rodney Smolla’s cultural argument from the last chapter about the post-*Sullivan* increase of libel lawsuits. Recall that Smolla posited an inverse relationship between the number of circulating publications and the propensity to file a libel lawsuit based on the

⁶⁰ John Koblin, “The End of Libel?” *New York Observer* 6/9/2010. <http://observer.com/2010/06/the-end-of-libel/> (accessed 3/15/2016).

⁶¹ Koblin, “The End of Libel?”

⁶² Koblin, “The End of Libel?”

contents of one of those publications. Naturally, then, the dizzying array of sources of information on the web should be expected to dilute the power of any one of them to harm reputation or even arouse ire with distasteful speech regardless of its veracity.

But this formulation is misleading. While lawsuits against *traditional mass media outlets* may well be declining, it is manifestly not the case that reputational disputes in general have waned with them or that their intensity has dissipated. They have merely changed forms. While it is indeed a meaningful change if a major agenda-setter like *Time* or the *Washington Post* (outlets that still command a huge amount of traffic on the web and sometimes influence the coverage in other publications) has seen a decline in lawsuits on the web, this is not tantamount to a disappearance of even libel lawsuits, much less concern about reputation. Message boards, social media, article comments, third-party review platforms, and self-publishing tools like blogs offer myriad opportunities for publication of questionable assertions. Each has quickly been implicated in both lawsuits and informal conflict after reaching a critical mass of users.

If the structure of information environment has changed, then assumptions that drove the Supreme Court's libel jurisprudence during the middle of the twentieth century might not hold in the digital age. The provision of civil remedies for combating defamatory falsehoods was at least implicitly predicated on the assumption that the ordinary person had little ability to rebut them in a sufficiently public fashion; the law was there to supplement what the market could not correct. What kind of legal redress is still necessary when these tools for rebuttal are theoretically much more robust and

widely accessible? Is some version of Smolla’s cultural hypothesis applicable to particular sources of information on the internet? On the other hand, speech thought to be outside the ambit of tort law might in fact be harmful to reputation when it can be disseminated more widely. Continuing our commitment to an “uninhibited, robust, and wide-open” marketplace of ideas might mean tolerating consequences for individuals (and perhaps a corresponding imperative to help oneself) that had not been contemplated in previous speech environments.

This chapter provides an overview of how media and legal scholars have interpreted what is novel about the structure and uses of networked digital technologies. It correspondingly introduces some of the major policy positions advocated in response to this novelty. This discussion first addresses the affordances of the internet for publishing and the kind of mediated personal profile that it produces. Second, it addresses perceptions of speech on different web platforms: how do people process different kinds of information in different contexts, and how do both speakers and subjects of speech conceive of the effects of speech — and even the idea of “free speech” itself — on the internet? Finally, these features are examined in terms of how they could reconfigure the application of tort law and First Amendment protection.

Optimistic Perspectives on the Online Marketplace of Ideas:

The central premise of many assessments of the digital revolution is that widespread use of networked computers is an empowering force for decentralizing “control” over information. For instance, Andrew Shapiro’s *The Control Revolution* [sic]

framed the promise of the internet in these terms. Shapiro asserted that “[w]hat was once a privilege of large organizations — control over information flows — has been decentralized and distributed...[i]nterconnected and in everybody's hands.”⁶³ This decentralization is more specifically manifest for Shapiro in the degree to which users can direct their own inquiry and seek out information instead of passively receiving it. It does not take deep reflection to understand why many would see more recent developments like the proliferation of social media platforms as at least a superficial extension of this phenomenon, as users are theoretically more empowered to share and discuss information or feelings directly with relatively little friction.

Further, the sheer volume of available opportunities for expression is larger. As *Wired* editor and technologist Chris Anderson has long argued, the maturation of online commerce and information sharing in the early 2000s suggested that demand on the internet (whether cultural or commercial) generally reflects the “long tail” statistical principle. By this Anderson means a shift away from “a focus on a relatively small number of ‘hits’ (mainstream products and markets) at the head of the demand curve and toward a huge number of niches in the tail.”⁶⁴ This principle implies a fragmentation of audiences to be sure, but it carries a largely celebratory inflection because it represents a technological environment in which a greater diversity of ideas and products can theoretically flourish.

⁶³ Felix Stadler, “The Control Revolution (review).” <http://felix.openflows.com/html/controlrev.html> (accessed 2/1/2016).

⁶⁴ Chris Anderson, “Long Tail In a Nutshell.” http://www.longtail.com/the_long_tail/about.html (accessed 2/1/2016).

Legal observers have often joined the chorus of celebratory commentary that heralds the expansion of the marketplace of ideas on the internet. In the nomenclature of free speech theory, it is indisputable that the web lowers the costs of entry into the marketplace of ideas for speakers of limited means. If barriers to entry are low enough and all speech has the ability to compete unimpeded with other speech, then traditional justifications for intervening to correct the failures in the marketplace of ideas become questionable. In an extreme extension of this logic, the decline of the mass media as the gatekeepers for published ideas might essentially make libel law mostly archaic, as the market would theoretically be able to correct whatever distortions of the ideascapes on its own.

A quintessentially optimistic legal perspective on how the marketplace of ideas would change as access to the internet broadened in the mid-1990s was that of Eugene Volokh. Volokh contrasted the affordances of the internet for “cheap speech” with the assumedly “expensive” speech characteristic of the mass media environment for most of the twentieth century. The clearest change would involve the ease of distributing ideas on the Internet compared to the mass media: “Cheap speech will mean that far more speakers — rich and poor, popular and not, banal and avant garde — will be able to make their work available to all.”⁶⁵ The result, he claimed, would be that “the new media order that these technologies will bring will be much more democratic and diverse than the environment we see now [in 1995].”⁶⁶

⁶⁵ Eugene Volokh, “Cheap Speech and What It Will Do.” *Yale Law Journal* 104.7 (1995), 1807.

⁶⁶ Volokh 1806-7.

Volokh's article resembles a "market utopian" argument, yet his optimism was not unequivocal. In particular, Volokh acknowledged that the "idealized premises" on which the marketplace approach to free speech are founded – e.g. "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market" – sometimes simply do not describe the way the marketplace actually works.⁶⁷ Volokh also conceded that low barriers of entry for speech do not necessarily lead to more useful or better speech. This is in part because the cheap speech he envisioned would in effect marginalize the traditional role of editorial intermediaries: "The new technologies will give some untrustworthy speakers a forum that responsible editors would deny them, and some people will end up misinformed by these speakers."⁶⁸ Thus, the overall contention was simply that the online marketplace would be a net improvement over that of the mass media era: "this idealized world — where money is no barrier to speaking; where it's easy to avert eyes from offensive speech...is much closer to the electronic media world of the future than it is to...the present."⁶⁹

Another of the optimistic information phenomena that is most readily associated with the internet is the "wisdom of crowds" hypothesis. Business journalist James Surowiecki's 2005 book of that name extrapolated from the famous Condorcet jury theorem to assert the predictive and corrective power of large aggregations of individual judgments. The Condorcet jury theorem essentially asserted that the correctness of an

⁶⁷ Volokh 1846.

⁶⁸ Volokh 1838.

⁶⁹ Volokh 1848.

aggregate “vote” increases in proportion to the number of “voters” when they have a greater than 50% (i.e. better than random) chance of voting correctly and as long as the final decision is based on the will of the majority.⁷⁰ Two significant examples cited in the book include the stock market’s “prediction” (via falling stock price) of the company (out of four involved) who would be found most responsible for the Challenger disaster in 1986 and the consistency with which the audience in “Who Wants To Be A Millionaire” outperformed the “expert” consulted on a particular question.⁷¹

In the internet context, this translates to the “wisdom of crowds” in the sense that accumulating larger aggregates of people with no particular expertise or connection to one another (in fact their independence is a prerequisite) produces better judgments (in terms of accurate prediction of some final outcome or satisfaction of some answer desired) than smaller ones do.⁷² Surowiecki describes the “weighted averages” of quality and volume of links to a page that Google’s PageRank algorithm uses to determine the order of search results — or “which page contains the most useful information” — as “built on the wisdom of crowds.”⁷³ Others have cited the Intrade online betting market as an example, as it has consistently outperformed many polling organizations in predicting the outcome of elections.⁷⁴

⁷⁰ Cass Sunstein, *Infotopia*, 25.

⁷¹ James Surowiecki, *The Wisdom of Crowds*, 8-9; 4.

⁷² Surowiecki lays out the following four conditions that must be met for the wisdom of crowds phenomenon to be possible: diversity of opinion, independence, decentralization, and aggregation (10).

⁷³ Surowiecki 16-17.

⁷⁴ Charles Riley, “Betting on Politics — and Getting It Right,” *CNN Money* 11/16/2011.

What about the attitudes with which readers approach the information credibility of online sources? Studies by Communication scholar Miriam Metzger have indicated that there is a sizable group of somewhat more sophisticated information seekers who routinely make judgments about how much stock to put in any piece of information based on their knowledge of the source: “savvy users view the Internet as a credible source even as they recognize its limitations relative to other media and, accordingly, tend to verify the information they do glean from it more rigorously.”⁷⁵ Such a tendency underscores one of the unique informational features of the web: “...users assume a great deal of responsibility...[and] they have the power to easily avoid sites they deem to be lower in credibility and frequent those they view as credible.”⁷⁶ Readers are generally sensitive to judgments about credibility; misinformation will not be reflexively parroted ad infinitum. Such an orientation is imperative: in another article, Metzger ultimately casts “higher-level processing of information, which implies being selective about information, making informed judgments about content, and evaluating the impact of that information appropriately” as the centerpiece of digital literacy.⁷⁷

Skepticism and Newfound Reputational Precariousness:

While the architecture of the internet indeed offers great potential for a high volume of collaboration and sharing among widely dispersed groups, it also affords new possibilities for concentration and insularity. The opportunity to filter information into

⁷⁵ Metzger and Flanigan, “Perceptions of Internet Information Credibility.” *Journalism and Mass Communication Quarterly* 77.3 (2000), 532.

⁷⁶ Metzger and Flanigan 532.

⁷⁷ Metzger et. al. 282.

something like a “daily me” digest (as Nicholas Negroponte dubbed it in a 1995 book) that is restricted to pre-selected interests complicates the valorization of “cheap speech” and the “long tail.” To Cass Sunstein, therefore, the success of the online marketplace of ideas hinges on the tension between “the growing power of consumers to filter what they see” and “the unplanned, unanticipated encounters [that] are central to democracy itself.”⁷⁸ Indeed, this vision of the web to some degree represents “the web’s current stage of development (web 3.0) which involves tailoring our online experiences to our particular habits and tastes.”⁷⁹ Speakers may technically start with the same opportunity to reach an audience, but this opportunity surely disappears once a prospective reader willfully blinds him or herself to the existence of a source.

Further, it would be naive to assert that all forums compete on an equal playing field on the internet. Switching costs on social networks are high because of their pronounced network effects. Users of a network platform like Facebook gain a richer experience in proportion with the increase in other people using the platform. They would have to start over again (barring a mass migration) if they were to seek their main social networking from a different “supplier” and thus have little incentive to switch (assuming the platforms in question offer more or less the same capabilities).⁸⁰ Further, the primacy

⁷⁸ Cass Sunstein, *Republic.com 2.0*, 22.

⁷⁹ Danielle Citron, *Hate Crimes In Cyberspace*, 13.

⁸⁰ A concise explanation of both switching costs and network effects is offered by economics professor Paul Klemperer: network effects “arise where current users of a good gain when additional users adopt it (classic examples are telephones and faxes)” (1). Switching costs simply refer to a situation “when transactions, learning, or pecuniary costs are incurred by a user who changes suppliers” (8). Paul Klemperer, “Network Effects and Switching Costs,” available at <http://www.nuff.ox.ac.uk/users/klemperer/NewPalgrave.pdf> (accessed 3/23/2016).

of search in the discovery of information seems to encourage further concentration in the range of sources that are consulted. While not a complete representation of how people use search engines in seeking information, a recent study showed that almost half of all webpage visits come through “natural” (i.e. not paid) search engine results.⁸¹ Within these searches, a 2013 study found that the top two positions in Google search rankings were selected in the majority of cases (though the study does not detail how many of the other results were then subsequently selected when people navigate back and forth from the results list).⁸² Search engines may return millions of hits for a query such as “gay marriage” or “job interview tips,” but the reality seems to be that people are reluctant to actually rummage through more than a few of them. One may surely compete to have one’s link listed at the top of results for some keyword,⁸³ but in essence the structure is not radically different from the one in which major networks or newspapers had disproportionate visibility.

In this spirit, Corey Omer has argued that large information intermediaries are in fact no less influential online than in mass media. Omer rejects the argument that the

⁸¹ Nathan Safran, 310 Million Visits: Nearly Half of All Web Site Traffic Comes From Natural Search. “ <http://www.conductor.com/blog/2013/06/data-310-million-visits-nearly-half-of-all-web-site-traffic-comes-from-natural-search/> (accessed 2/1/2016).

⁸² “The Value of Google Result Positioning.” <https://chitika.com/google-positioning-value> (accessed 2/1/2016).

⁸³ Here is a general explanation (addressed to website proprietors) of how Google and presumably other search engines produce their results: “Google promotes pages it thinks are authority pages to the top of its rankings. It’s your job to create authority pages. In simple terms this involves writing content and building links. So in simple terms SEO [search engine optimization] involves writing pages that use keywords, words people use in searches, and securing links from other pages to show how important your page is compared to others.” <https://www.redevolution.com/what-is-seo/> (accessed 11/28/2014).

internet would be a “harbinger of disintermediation,” in which “the constraints imposed by [traditional intermediary] gatekeepers upon an individual's access to commerce, culture, and information” would be virtually eliminated. As he writes:

...the sounding of the death knell for intermediaries proved premature. They did not disappear. Rather, ‘[w]e simply swapped one set of middlemen for another.’ The Internet became a newfangled ‘intermediated information exchange,’ and while many of the traditional intermediaries did falter, a new guard quickly positioned itself at the chokepoints of cyberspace.⁸⁴

The Condorcet jury theorem likewise comes with a caveat: when the participants are more likely to be wrong than right, then “the likelihood that the group’s majority will decide correctly falls to zero as the size of the group increases.”⁸⁵ In practice, this means that a crowd reaction was effectively not random. Instead, perhaps, ingrained biases or exposure to some misleading or otherwise exaggerated bit of information in the early stages of a controversy or deliberation can end up producing a drastically distorted outcome as the group grows in size and the influence of this piece of information (what Sunstein calls the “anchor”) is magnified.⁸⁶

The architecture of the internet can catalyze this powerful effect in what Sunstein has elsewhere called “cascades.” The phenomenon of information cascades is especially pronounced on the internet because of the speed with which information can be shared (Sunstein’s analysis in Republic.com essentially anticipates the now ubiquitous

⁸⁴ Corey Omer, “Intermediary Liability for Harmful Speech: Lessons from Abroad,” 28 *Harv. J. Law & Tec* 293-94.

⁸⁵ Sunstein, *Infotopia*, 28.

⁸⁶ Sunstein, *Infotopia*, 34-35.

neologism of something “going viral”). As he describes it, an information cascade occurs when “people cease relying on their private information or opinions [and] decide instead on the basis of the signals conveyed by others.”⁸⁷ Further, information cascades can themselves be predicated on “reputational cascades,” in which people effectively ignore their own intuitions and “go along with the crowd in order to maintain the good opinion of others.”⁸⁸

Cascades can in turn reinforce group polarization rather than dialogue. Group polarization refers to the tendency of beliefs to become more extreme over time when reinforced by consonant perspectives within a group. A corollary of polarization which has received more attention in the past several years is the frequency with which exposure to conflicting information actually emboldens people in their beliefs rather than prompting reconsideration — dubbed the “backfire effect.”⁸⁹ According to Sunstein, the prevalence of group polarization “rais[es] questions about the idea that ‘more speech’ is necessarily an adequate remedy for bad speech.”⁹⁰

While internet readers might indeed embrace a newfound responsibility to vet information sources, what if such effort to verify information eventually feels onerous or futile? An orientation in which one reverts to a kind of skeptical detachment with regard to the medium as a whole might appear sympathetic or even rational in such

⁸⁷ Sunstein, *Republic 2.0*, 84.

⁸⁸ Sunstein, *Republic 2.0*, 85.

⁸⁹ Brendan Nyhan and Jason Reifler, “When Corrections Fail: The Persistence of Political Misperceptions,” 3.

⁹⁰ Sunstein, *Republic 2.0*, 78.

circumstances. Consider the following comment on a recent story on Glenn Greenwald's website *The Intercept*:

Reading these comments is fascinating. We have an intersection of

- 1 People trying to get out the truth or find it
- 2 Paranoid lunatics basking in justifications for their paranoid world view
- 3 Government agents posing as 1 and 2
- 4 Anarchists posing as 3
- 5 Government agents posing as 4
- 6 The rest of us
- 7 Lunatics and government agents posing as the rest of us

If the effort is to neutralize the internet as a force to mitigate government power, the strategy is working. How can it not? Truffers [sic], pseudo-truffers, lunatics, pseudo-lunatics, anarchists, pseudo-anarchists. The MSM is owned by the government, now so is the internet. Next we will find out that Greenwald is a CIA agent, who's actually a double agent working for Putin, who is working for the Chinese. Then we'll find out that the CIA spread that rumor and falsified the information to defange Greenwald.

Who wants pizza?⁹¹

The feeling of futility embodied in the “who wants pizza?” ethos captures the kind of informational fog that seems — anecdotally at least — to pervade precisely the web platforms that would otherwise be lauded as the apotheosis of the marketplace of ideas. If this is true of a highly literate blog like Greenwald's, what can we expect for the vetting of personal reputational information on gossip-oriented venue?

As even a champion of skepticism like legal scholar Vincent Blasi has cautioned, such informational nihilism can defeat the ostensible goals of fostering healthy skepticism in the free speech tradition: “promiscuous distrust and critique could lead to cynical disengagement from collective endeavors, the postmodern equivalent of medieval

⁹¹ Comment from Dlogenes. Glenn Greenwald, “How Covert Agents Infiltrate the Internet to Manipulate, Deceive, and Destroy Reputations.” *The Intercept* 2/24/2014. <https://theintercept.com/2014/02/24/jtrig-manipulation/> (accessed 3/15/2016).

quietism.”⁹² When the default assumption is that statements within a certain forum *must* have some ulterior motive, it is perhaps all too easy to simply become complacent and detached. Additionally, it could possibly reinforce a kind of associational logic by which the reader might actually assume that any assertion publicly attached to a person is as likely as not to be credible — because who can really tell anyway?

The possibility of the kind of hyper-skepticism outlined above makes it complicated to judge what kinds of statements in different web forums will truly harm reputation. While the internet is far from a perfect match for the kind of naive vision of the marketplace of ideas, one positive product of a pervasively skeptical orientation could be that some false or otherwise misleading statements are simply not worth any attempt at rebutting. At least one court has considered whether the tenor of much discussion on the internet might in fact diminish the likelihood that many statements can be perceived as “factual” in the first place for the purpose of evaluating their potential for defamatory harm.⁹³ Further, as Law Professor Susan Crawford mused in a news article on online defamation, “judges will be skeptical that a single, four-line (posting in a) blog has actually damaged anyone.”⁹⁴

⁹² Blasi, “Free Speech and Good Character,” 1577.

⁹³ A New York Superior Court decision from 2014 asserted that “since statements offered on the Internet are ‘often the repository of a wide range of casual, emotive, and imprecise speech,’ courts should not necessarily attribute the same imprimatur of credence to the statements that is likely accorded to statements made in other contexts.” *Nanoviricedes v. Seeking Alpha*,

⁹⁴ Laura Parker, “Courts Are Asked to Crack Down on Bloggers, Websites.” *USA TODAY* 10/2/2006.

Perhaps inflammatory or even false assertions in certain online speech contexts are less likely to be taken seriously in some circumstances and thus have less potential to do reputational harm. On the other hand, the plain truth is that there is still a great deal of energy expended to rebut or challenge the veracity of statements and assertions on every speech platform that the web offers. A discerning approach to what kinds of information are credible on the web is not synonymous with indifference to considerations of truth and falsity, much less to pointed criticism.

Siva Vaidhyanathan has provided a useful framework for characterizing what is novel about reputational concerns in the digital age. Specifically, Vaidhyanathan argues that an individual is subject to increased public scrutiny in the digital environment: he calls this the “person to public” interface of the web. In Vaidhyanathan’s telling, the affordances of the web for connection and discovery also result in greater personal exposure. As he writes, “[a]t this interface, which is now located largely online, people have found their lives exposed, their names and faces ridiculed, and their well-being harmed immeasurably by the rapid proliferation of images, the asocial nature of much ostensibly ‘social’ web behavior, and the permanence of the digital record.”⁹⁵

Some of these factors are perhaps intuitive and not unique to the internet. People have been ridiculed and gossiped about in schools, on playing fields, at work, and in both private correspondence and the print and broadcast media for a long time. More specifically, then, it is how Vaidhyanathan describes the contrast with offline modes of

⁹⁵ Siva Vaidhyanathan, *The Googlization of Everything*, 95.

sociality that makes the framework illuminating. The contention, essentially, is that the way in which the web is used has broken down boundaries that we used to enjoy between different social and informational domains: “Whereas in our real social lives we have learned to manage our reputations, the online environments in which we work and play have broken down the barriers that separate the different social contexts in which we move.”⁹⁶ The consequence, ultimately, is a kind of integration of both experience (e.g. a co-worker can easily become an online stalker) and informational revelation that erases the distinction between public and private for both legal and social purposes.⁹⁷

Others have more bluntly described how the interactive platforms of web form an all-encompassing reputation system. A group of Phoenix-area lawyers, for instance, characterize the world of digital media as “one in which name calling is so easy.” They assert a clear trajectory in which the medium in question has determined the kinds of vulnerabilities to reputational harm: “The progression from newspapers to radio and television, to the Internet, and, currently, to social media has increased the ease of name-calling and reputation-bashing. Each of these communication mediums has uniquely influenced the nature of defamation.”⁹⁸ The low barriers to entry for speech on the web simply increase the volume and visibility of “reputation bashing.”

⁹⁶ Vaidhyanathan 95.

⁹⁷ Vaidhyanathan 95-96.

⁹⁸ Kraig J. Marton, Nikki Wilk, and Laura Rogal, “Protecting One’s Reputation: How To Clear a Name in a World Where Name Calling Is So Easy.” *4 Phoenix L. Rev.* 56 (Fall 2010). N.B.: Surreally, these attorneys work for the firm that represents the gripe site Ripoff Report.

Adjacently, law professor Daniel Solove has analyzed the restructuring of gossip online. “Before the internet,” Solove writes, “gossip would spread by word of mouth and remain within the boundaries of the social circle.”⁹⁹ The issue for Solove is not the fact that the social circle is effectively wider on the internet; it is that the interpretive dynamics of the social circle change when discrete bits of information are encountered by strangers who have no overall contextual knowledge of the subject of the statements. As he puts it, “[i]n the small village...disreputable information would be judged within the context of a person’s entire life,” whereas “[n]ow, people are judged out of context based on information fragments found online.”¹⁰⁰ In other words, the structure of information exchange and discovery on the internet makes it more likely that users will be either unable or unlikely to understand the figurative asterisks that may otherwise accompany a particular statement or description. Solove sees this as a central informational trait of “generation Google.”¹⁰¹

Further, Solove sees a qualitative difference in the reputational consequences of online speech. This is due to the relative permanence of content on the web that is not deliberately deleted or otherwise rendered less visible through changes in search engine indexing. He again contrasts the social world prior to the internet in which “[g]ossip used to travel in local circles...and would be forgotten with time” with the digital networks on

⁹⁹ Daniel J. Solove, “Speech, Privacy, and Reputation on the Internet.” *The Offensive Internet*, Nussbaum and Levmore, eds. Cambridge: Harvard UP (2010), 16.

¹⁰⁰ Solove 17.

¹⁰¹ Solove 16.

which “gossip is no longer ephemeral.”¹⁰² The comparison is the same with the social practice of shaming, as it was “once localized and fleeting, [but] shaming online creates a permanent record of people’s past transgressions — a digital scarlet letter.”¹⁰³ Such a characterization may sound hyperbolic, but it is understandable if we consider the way in which search engine links indexed to a person’s name can play such a profound role in dictating (and some would argue distorting) the public informational profile for that person.

What is the “Free Speech” of the Internet Worth?:

The perception that reputation is more precarious because of the multiplication of open speech platforms and their aggregation through search engines seems to correspond with changing attitudes about the principle of “free speech” itself. Contemporary sentiments about free speech and reputation often diverge in confusing ways. A common refrain in both right and left wing media today is that free speech is an endangered value in American society. In some ways, this panic recapitulates debates over “political correctness.” Anxiety over the prospect of a new incursion of political correctness is perhaps most visible when unpopular viewpoints and irreverent forms of expression are “censored” in well-meaning but misguided attempts to engineer an inclusive and civil

¹⁰² Solove 16.

¹⁰³ Solove 16.

social environment on college campuses.¹⁰⁴ Sometimes such “censorship” is lamented by self-described liberal professors who themselves claim to feel hamstrung by the fear of offending any of their students.¹⁰⁵ When even political liberals express frustration with such sentiments in the media, conservatives are quick to declare their victimhood at the expense of “politically correct” culture to be vindicated.¹⁰⁶

Yet these same commentators’ sense of persecution sometimes seems entirely disconnected from adjacent commentary about the internet. In this other register, the internet is a wild west of unaccountable speech, a place that pundits indignantly describe as one in which you can say anything about anyone and not get punished. Consider recent remarks by Bill O’Reilly on the matter: “It’s clear to anyone with eyes and a brain that the internet has become a superhighway of defamation. Anything goes. No accountability. We all know that.” As he continued, the fact that “75 percent” of information on the

¹⁰⁴ Charles Lipson characterized what he sees as the shortsightedness of such attempts in the *Chicago Tribune*: “The school [Swarthmore] proudly announces that it will remove any signs with “uncivil expression.” Who decides what’s “uncivil”? Why high-ranking school officials do, of course. They also define “harassment” as any unwelcome conduct. So, if you happen to think something is unwelcome — anything at all — then you’ve been harassed. There is more free speech on a Saturday morning cartoon show.” http://articles.chicagotribune.com/2014-03-25/opinion/ct-oped-speech-0325-20140325_1_free-speech-college-campuses-swarthmore

¹⁰⁵ This sentiment was captured in even the title of a controversial article in Vox from June 2015: “I’m a liberal professor, and my liberal students terrify me.” <http://www.vox.com/2015/6/3/8706323/college-professor-afraid> (accessed 10/14/2015).

¹⁰⁶ e.g. the Fox News reposting of the above Vox article published under the section heading “disgrace on campus.” <http://nation.foxnews.com/2015/06/07/vox-im-liberal-professor-and-my-liberal-students-terrify-me> (accessed 10/14/2015).

Or, as a response on the conservative web site Newsbusters sneered, “[o]f course for anyone paying a speck of attention to the free speech environments of American campuses, this is nothing new.” <http://newsbusters.org/blogs/laura-flint/2015/06/06/shocking-vox-im-liberal-professor-and-my-liberal-students-terrify-me> (accessed 10/14/2015).

Internet is "flat out false, lies, defamation and slander" indicates a kind of regressive social consensus that "[t]he truth really doesn't matter anymore."¹⁰⁷ In this formulation, "free speech" is out of control and its exercise on the web has resulted in a kind of nihilism that substitutes personal attack and invective for factual debate.

In the above quotation, O'Reilly casts the issue mostly in terms of a kind of degenerate cultural attitude. Yet statements of this variety also express an old concern in which the incivility that results from too permissive a speech marketplace creates a situation in which dialogue is lost to the violent cacophony that results from the lack of punishment for abuse of liberty. In other words, this is a contemporary iteration of what Justice Robert Jackson described as the danger of "transforming the First Amendment into a suicide pact."¹⁰⁸

Others worry that the kinds of personal attacks which can spread virally online and can be perpetrated (semi-) anonymously have the effect of silencing minority points of view and putting their victims at a disadvantage in their life pursuits. This concern implicates the value of "community security" that Downs described in *Nazis In Skokie*. To these critics, "free speech" is a somewhat hollow concept because it is deployed in defense of a brand of misogyny that in fact weakens the marketplace of ideas. Feminist bloggers describe the disturbing regularity with which they are bombarded by the most

¹⁰⁷ Oliver Willis, "Bill O'Reilly Is Still Attacking Reporting On His Tall Tales, But With Bluster About 'The Collapse Of Liberal Media.'" *Media Matters Blog* 3/6/2015. mediamatters.org/blog/2015/03/06/bill-oreilly-is-still-attacking-reporting-on-hi/202793 (accessed 3/23/2016).

¹⁰⁸ Jackson famously put it this way in his dissent in *Terminiello*: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago* 337 U.S. 36 (1949).

violently sexist comments imaginable — often accompanied by threats.¹⁰⁹ The website Jezebel, for instance, begged its parent company Gawker in August 2014 to figure out some better way to deal with troll comments consisting of “gory images of bloody injuries emblazoned with the Jezebel logo,” likening the efforts to manually delete these comments as they come in to “playing whack-a-mole with a sociopathic Hydra.”¹¹⁰

The cumulative effect of this kind of harassment for some is to simply cease accepting comments or even participating in public discussion at all, which is a terrible outcome within any liberal speech regime in its representation of a kind of “tyranny of the majority.” It represent a failure of community security. Yet such situations involve speech that intimidates; they have little to do with reputation. Regardless, is not every day that one finds feminist *Slate* writers (or law professors) and Bill O’Reilly voicing similar laments.

Another disturbing set of examples exists where ostensibly ordinary disagreement or a fleeting indiscretion captured on social media descends into hyperbolic hysteria. Some seize on these examples to claim that “free speech” is often simply a cover for a kind of boorish schadenfreude and mob-like behavior. British Journalist Jon Ronson, for instance, has endeavored to re-humanize some of the targets of this viral backlash, arguing that their “public shaming” creates situations in which we “refuse to let them

¹⁰⁹ See Amanda Hess, “Why Women Aren’t Welcome on the Internet.” <http://www.psmag.com/health-and-behavior/women-arent-welcome-internet-72170> (accessed 12/22/2015).

¹¹⁰ Amanda Hess, “Jezebel Staff Goes After Gawker for Ignoring Sexist Comments and Rape GIFs.” http://www.slate.com/blogs/xx_factor/2014/08/11/jezebel_to_gawker_media_do_something_about_the_violent_rape_gifs_in_our.html (accessed 12/22/2015).

back into the world.”¹¹¹ Commentators like Ronson surely identify disturbing cultural phenomena in many cases. Why is there this level of zeal in our society for expressing collective rage at relatively insignificant targets who are momentarily elevated to the status of some kind of placeholder or representative of something to be condemned? Do we forget that they are real human beings and not merely symbols? Ronson argues that we can reliably separate “moral” disagreement¹¹² from illicit shaming and seems to cast shaming as a largely regressive social force overall. Further, it suggests that those targeted in this manner are permanently tarnished; their Google results have led to them being ostracized. As Ronson puts it, we have “reduc[ed] [them] to the worst thing they ever did.”¹¹³

Enduring critical speech of any sort is sometimes cast as tantamount to suffering. The response of Sarah A. Chrisman to the vehement critiques of her summer 2015 Vox story about simulating a Victorian-era lifestyle is instructive in this regard. The story undoubtedly generated a plethora of Twitter sniping. At the same time, even much of the cruder dismissal was attached to genuinely thoughtful analyses of the myopic self-congratulation on display in Chrisman’s article.¹¹⁴ These responses did not impugn her reputation or simply express vitriol; they criticized her ideas. It is impossible to know

¹¹¹Jason Newman, “Jon Ronson: Why We Should Forgive Infamous Tweeter Justine Sacco.” *Rolling Stone* 3/31/2015. <http://www.rollingstone.com/culture/features/jon-ronson-why-we-should-forgive-infamous-tweeter-justine-sacco-20150331> (accessed 3/23/2016).

¹¹² As quoted in the above interview, Ronson claims that part of his impetus for telling the stories of the people affected is that he “wants people to be more moral.”

¹¹³ Newman, “Why We Should Forgive Justine Sacco.”

¹¹⁴ See e.g. this profane but exquisitely argued piece: <http://theconcourse.deadspin.com/to-hell-with-voxs-victorian-living-idiots-1729873090> (accessed 10/14/2015).

exactly which critical perspectives Chrisman herself would have confronted, but the tenor of her reaction was revealing. There was no pretense of engaging with the substance of the criticism; instead, she emphasized how much she had suffered (as she did in the piece itself via discussion of the common public reactions to her and her husband's appearance). It is perhaps not surprising, then, that her Facebook author page has now been scrubbed clean of even any *reference* to the controversy her article stirred in the few days following its publication.

Such attitudes indicate a pronounced shift in the relationship between the cultural status of "free speech" in American society and the protection of marginal viewpoints and socially unpopular individuals. Defense of "free speech" in the United States was once primarily identified with social liberals promoting a refuge for political dissenters and eccentric or even anti-social forms of expression; now "free speech" is commonly invoked as a threat to personal and psychological security within an identity-based political framework. The contemporary discourse around reputation suggests that the proliferation of speech platforms on the web is processed more often than not in terms of its affordance of personal validation rather than its affordance of expressive liberty or civic dialogue.

Others present a more straightforward argument about the expansion of speech platforms on the web: much of the speech that circulates online is simply not very valuable. As legal scholar Brian Leiter has argued, Google's search results algorithm elevates speech that may be the most controversial or in some way linked to highly

trafficked sites but that hardly seems like the most relevant or reliable profile of a person in any informational sense. As he puts it (referring to the case of AutoAdmit, a prominent law school message board that became dominated by virulently sexist and racist flaming), “the idea that the ‘most relevant and reliable results’ about a female student at Yale law school consist of the anonymous rantings of misogynistic sociopaths would be amusing if real people were not involved.”¹¹⁵ Similarly, Solove dismisses the idea that the proliferation of such speech should be counted as a social good that the web enables simply because it involves more speech about people, and thus more information: “personal information taken out of context often does not foster a more accurate impression of other people.”¹¹⁶

These objections ultimately channel the underlying spirit of Warren and Brandeis’ original call in the late nineteenth century for a tort that would discourage the spreading of salacious gossip — even if it was substantially true or so fanciful and speculative that it probably would not be evaluated in terms of its veracity. While such speech may have prurient appeal for the listener and provide some thrill for for the speaker, these are hardly the highest aspirations of the First Amendment. As they wrote, gossip has a tendency to distort the marketplace of ideas and pervert the public’s judgment: “When personal gossip attains the dignity of print, and crowds the space available for matters of

¹¹⁵ Brian Leiter, “Cyber Cesspools” in *The Offensive Internet*, eds. Nussbaum and Levmore, 162.

¹¹⁶ Solove, “Speech, Privacy, and Reputation on the Internet,” 13.

real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.”¹¹⁷

In general, then, this group of critics is ultimately arguing that much of the speech that is exchanged in what Leiter calls “cyber cesspools” like AutoAdmit is simply not very important to protect. Yet at this point we have also travelled some distance from the domain of the reputationally damaging lie or revelation. The debate about whether “cyber cesspools” deserve to be recognized as legitimate contributors to the marketplace of ideas thus ultimately hinges on one’s belief about the value of the speech and the proper framework for evaluating it as much as one’s conception of how it impacts reputation. As such, it implicates competing ideas about the purpose of the First Amendment and the instances in which speech may be punished when it constitutes incendiary opinion (i.e. personal attack or a scurrilous rumor — even if one that is not ascertainably “true” or “false”) or rhetorical hyperbole. While some see the proliferation of outlets and the lowering of entry costs as an opportunity for assertions — however worthless — to do battle with one another or for those who are so inclined to find a repository for venting antisocial emotions, others question the value of allowing particularly crude and insulting assertions to circulate either in “competition” with other ideas or for their own sake as expressions of liberty. The reform-minded commentators discussed in this section seem to conclude that the expansion in the potential reputational harm that can be done even by

¹¹⁷ Samuel Warren and Louis D. Brandeis, “The Right to Privacy.” *Harvard Law Review* Vol. 4 (1890), 195

non-false assertions is not outweighed by the speech interests since the speech is of low value.

Complicating the Discourse Regarding Free Speech and Reputation:

How should we evaluate the perspectives on critical speech and its reflection on the marketplace of ideas? To begin, the conception of shaming employed by someone like Ronson seems to ignore several features of both public discussion and reputational harm. The most high profile “shaming” incidents might not have much in common with the humdrum ways in which we are all subject to somewhat greater personal exposure on the web. The ugly excesses of mob justice — cases where the vitriol clearly seems disproportionate to whatever original transgression — are hardly representative of the vast majority of acrimonious interactions over digital media or disputes over a piece of information.

Such incidents should not be taken to indicate that *all* shaming situations can be split into bloodthirsty perpetrators and unfairly ostracized victims. In fact, Ronson himself has offered an anecdote that demonstrates how he deployed “online shaming” to convince a group of artists to stop impersonating him on Twitter.¹¹⁸ While Ronson succeeds at appearing a bit querulous in this anecdote, it does not appear to demonstrate anything universally depraved about *all* shaming as a social mechanism in itself. The upshot of the episode is merely that he used the marketplace of ideas to gin up sentiment against the artists impersonating him on Twitter — thus ultimately convincing them to

¹¹⁸ Jon Ronson, “Overnight, everything I loved was gone’: the internet shaming of Lindsey Stone.” *The Guardian* 2/21/2015. <https://www.theguardian.com/technology/2015/feb/21/internet-shaming-lindsey-stone-jon-ronson> (accessed 4/24/2016).

take down the account. One might think it unfortunate that the artists capitulated, but it would be simply strange for Ronson to try to argue that this somehow represents an undesirable outcome because of how it was achieved. It thus remains difficult to determine where to draw the line between the excessive, even sadistic vitriol directed at strangers for what are ultimately minor transgressions and the mobilization of popular sentiment that in some sense undergirds many attempts at ordinary persuasion in the marketplace of ideas.

Many reputational disputes do not have clearly skewed power dynamics. There is a striking diversity in the range of circumstances in which some party engages in critical speech that could theoretically bring “shame” upon its target. The personal suffering experienced by some of the targets of widespread online shaming should not be trivialized. At the same time, we must also be able to preserve the role that public opprobrium can play in wrestling with group norms and communicating shared values. Perhaps some participants in the discussion (or those who simply share viral videos) are mostly drawn in by a prurient fascination with someone else’s misfortune. This does not diminish the fact that commentary on viral videos produces an incredible range of arguments and can even bring an important topic to the foreground of popular discussion when it had been previously marginalized or ignored.

Additionally, the overarching operative conceptions of injury and victimhood that are invoked in these debates must be critically examined rather than unquestioningly accepted as self-evident. There is great disagreement about the effects of different genres

of online speech. In many ways, the debate over how to understand and remedy reputationally consequential speech on internet platforms revolves around a threshold debate about the legitimacy of different injuries and the remedies they justify. Specifically, as the Victorian enthusiast Chrisman and others demonstrate, “reputational” harm encompasses a range of dignitary harms as well as informational harms. Much of the dialogue that suffuses reputational disputes online suggests, for instance, that even those subject to relatively benign or substantive criticism often reflexively reach for the language of persecution in defense against the supposed antagonists. Any call to uniformly protect citizens against “reputational” harm inevitably misses the variability in how the concept is deployed.

Consider the following comment on a story detailing the aforementioned UConn student Luke Gatti’s first run-in with the law when he was a student at UMass (in a blog about civic affairs in Amherst, MA that typically receives monthly views in the low thousands — i.e. hardly *Buzzfeed*):

There is a disgusting and well coordinated attack on this individual. This young man is a exceptional student [sic] and has never had previous trouble with the law. These are allegations and NOT facts. The real criminality in this case is the coordinated cyber bullying effort that is being fueled by lies.¹¹⁹

It is entirely possible that Gatti is indeed a good student and a nice person most of the time. Further, the statement is at least superficially fixated on the issue of factual accuracy (though the claim that “these are allegations and NOT facts” is nonsensical in

¹¹⁹ Larry Kelley, “Repeat Party Offender.” <http://onlyintherepublicofamherst.blogspot.com/2014/09/repeat-party-offender.html> (accessed 3/23/2016).

the context of the original post, which simply explains his charges). Given the milieu and the story involved, however, it is hard not to also view this an audacious and perplexing appropriation of the language of group persecution that reveals a crucial dimension of current reputational discourse.

This commenter may truly think the post is unfair. Most likely, however, the commenter is demonstrating a discursive awareness: he or she *knows that this is a rhetorical strategy through which one can invalidate criticism* and is borrowing the language of cyberbullying without real consideration of the meaning of the words. The post in question is not a fanciful hatchet piece dreamt up by a jilted ex-lover; it is a prosaic post that does little more than summarize a court appearance. The snarkiest statement it contains is that Gatti is due back on October 15 — “unless, of course, he gets arrested again.” The sentiment expressed in the commenter’s formulation is, however, pervasive in the cases examined in this project. Its ubiquity is a powerful indication that an overeagerness to validate the subjective responses of those targeted by critical speech can easily be repurposed as a cynical trump card for stifling truly civil criticism and factual reporting in which there is arguably a public interest.

These exaggerated invocations of reputational harm have already produced a backlash. A derisive neologistic vocabulary has developed around the public display of taking offense or expressing sensitivity to the effects of speech. Appellations such as “social justice warrior” reveal a kind of weary perception that all attempts to police hateful speech in the interest of a more egalitarian society are somehow merely self-

interest or narcissism masquerading as political activism.¹²⁰ This approach can produce a disorienting looking-glass quality in which, for instance, the women who were verifiably stalked and harassed with threatening messages during the “Gamergate” episode of 2014 can be written off by skeptics as a “bunch of SJWs” who are probably just trying to stir outrage to increase their own activist reputation — which increases in direct proportion with the perceived degree of both their self-righteousness and the psychological injury they have suffered.¹²¹ These perceptions embody a particularly regressive converse of those that assume undue reputational injury inheres in all shaming or even personal criticism. They both embody a kind of reputational cynicism that undermines the libertarian and civic values associated with free speech and “republican virtue” in a democratic society.

¹²⁰ See e.g. <http://knowyourmeme.com/memes/social-justice-warrior>
 The suspicion that social justice criticism is ultimately driven by more mercenary motives is on display in the following comment about a *Washington Post* article criticizing comedian Amy Schumer for racial insensitivity: “[The author] was just trying to pile on and get a few clicks for herself. Faking outrage is a big business these days...how do you think Gawker and Salon stay in business?”
<https://www.washingtonpost.com/posteverything/wp/2015/07/06/dont-believe-her-defenders-amy-schumers-jokes-are-racist/> (accessed 11/8/2015).

¹²¹ A post-mortem on the controversy in Salon, for instance, described how “[a] recurring theme of the Gamergate movement is that it’s not about harassment or misogyny, and that the harassers are a minor fringe in the movement, or even false flag conspiracies by anti-Gamergate trolls.”

The popular conservative provocateur Milo Yiannopoulos of *Breitbart* appears especially sympathetic to the view that those targeted are probably exaggerating for personal gain. A post of his commented, for instance, that “[a]n army of sociopathic feminist programmers and campaigners, abetted by achingly politically correct American tech bloggers, are terrorising the entire community – lying, bullying and manipulating their way around the internet for profit and attention.”

See Zaid Jilani, “Gamergate’s Fickle Hero,” *Salon* October 28, 2014. http://www.salon.com/2014/10/28/gamergates_fickle_hero_the_dark_opportunism_of_breitbarts_milo_yiannopoulos/ (accessed 10/14/2015).

What about the idea that speech on “cyber-cesspools” should be easier to regulate because it is not very valuable? Such a perspective is tempting given the alarming results that such speech can sometimes produce. It is also problematic both from a First Amendment perspective and when we consider the cultural values associated with free speech. This is true for the fundamental reason that it would appear to single out certain kinds of speech for exclusion based on their putatively “offensive” content — in other words, according to the subjective reactions of the viewer or listener. Law professors like Leiter are certainly aware of this, but it seems to get glossed over in the rush to remedy the terrible things being written on internet forums.

As discussed in the previous chapter with reference to the “Nazis in Skokie” conflict, the Court has consistently rejected this approach over the past several decades. In several important cases¹²² involving attempts to punish what was formulated as “offensive” or even ideationally “assaultive” speech (such as racially-motivated hate speech), the Court has consistently identified a less restrictive solution: as long as they are not captive to the speech, those offended or insulted can simply disengage with the speech. Further, there is a fundamental vagueness objection to drawing bright lines between speech that is “worthless” because it represents mere pathos and speech that attempts to advance ideas — however ugly: would one always be able to predict whether his or her impassioned speech would not cross the line into a kind of “pure” emotive register rather than an ideational one?

¹²² E.g. *Cohen v. California*; *NSPA v. Skokie*; *RAV v. St. Paul*.

Finally, there is an objection rooted in the marketplace theory that reinforces the salutary power of confronting speech like that which is found in “cyber-cesspools” through the marketplace of ideas. Mill warned that censored ideas would “smolder” underground instead of being eradicated. Worse, they would become more unhinged and likely to be held dogmatically with a more aggressive or violent fervor because the restriction would stimulate a feeling of persecution and righteous victimhood. Perhaps most importantly, by forcing such speech to smolder underground — or relegating it to the “black marketplace” of ideas, as the Cato Institute’s Trevor Burrus has termed it — we remove the possibility that it can be confronted and denounced in the open.¹²³ If we take at least the fleeting expression of ugly attitudes of some sort as a relative given in any society, then this perhaps signifies the removal of one of the best weapons for ameliorating such attitudes and keeping them from hardening into dogmatic or (subjectively) self-preserving prejudice. At the very least, it allows us to identify their proponents.¹²⁴

One might object that the sheer volume of derogatory and insulting speech produced on forums like AutoAdmit *do* thrust the subject into a captive situation: when trolls pop up wherever he or she attempts to engage publicly on the web, then it is as if the mediated identity of that person has been completely overtaken. This may well describe a real situation, but at this point the justification for punishment effectively

¹²³ Trevor Burrus, “Why Offensive Speech Is Valuable.” *Forbes* 3/23/2015. <http://www.cato.org/publications/commentary/why-offensive-speech-valuable> (accessed 3/24/2016).

¹²⁴ Or, as Burrus puts it, “I, for one, would like racists and bigots to speak freely. I want to know who not to invite to my parties.”

becomes a kind of harassing conduct for which the internet has indeed provided novel tools. In other words, we are no longer punishing speech because of its substantive content — “worthless” or not; we are punishing it as harassing action that goes beyond mere speech.

Efforts at Regulation:

Even if we do endeavor to discourage or punish the “worthless” speech that proliferates through the communicative tools of the web, however, it is not clear how we should go about doing so. To some degree, Congress and the Supreme Court have been searching for the proper approach to regulating speech on the internet that has the putative capacity to harm, insult, or corrupt since its inception. In the seminal *Reno v. ACLU* (1997) case, the Court struck down provisions requiring website operators and users of interactive forums to ensure that they did not “initiat[e] any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age” under threat of criminal sanction.¹²⁵ Justice Stevens’ opinion took issue with the burdens this kind of requirement would impose on both websites and users (outlined in the “safe harbor” provisions of that same section of the statute): they could use credit card verification as a proxy for age, for instance, but this would impose unreasonable costs on websites for which commercial transactions were otherwise irrelevant and would effectively ban web users who did not own credit cards.

¹²⁵ From 47 U.S. 223, quoted in *Reno v. ACLU* (1997).

In essence, the Court reasoned that a form of self-help on the part of the user would be a much less restrictive manner of ensuring that minors did not access adult materials if this was indeed the outcome desired. Parents could monitor their children's internet use, or they could install commercially available filtering software themselves rather than burdening all intermediaries. The *Reno* case therefore saw the Court embracing a vision for speech on the internet in which users and the proprietors of web services would be largely left to manage the flow of available content for themselves.

Another part of the CDA did not receive any constitutional challenge but would prove arguably more consequential for the regulation of speech online.¹²⁶ Section 230 decreed that providers of what was categorized as "interactive computer services" (which encompasses both the providers of internet service like Comcast but also web applications like search engines or a user-generated content platform like YouTube) be granted limited liability protections for speech by third parties. Section 230 stipulates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹²⁷ In other words, hosts of third party speech are by default merely conduits who provide a platform for speech. It does not, of course, mean that they are not speakers themselves in

¹²⁶ In fact, it was originally conceived as a constitutionally unproblematic alternative to the more stringent speech restrictions in section 223 and elsewhere: "Cox-Wyden was envisioned as a more effective alternative to the original provisions because it (1) was likely constitutional and (2) would provide a more direct means - self-regulation - of preventing children from accessing inappropriate material. The goal of protecting children, of course, remained broadly similar to that reflected in Senator Exon's proposal." David Lukmire, "Can the Courts Tame the Communications Decency Act?" *NYU Annual Survey of American Law* Vol. 66 (2010), 379.

¹²⁷ 47 U.S.C. 230(c)(1).

any capacity or that they are free of other statutorily-imposed liabilities (like distribution of copyrighted content). This default only holds as long as the editorial or design parameters of the platform do not play such an integral role in actively “developing” the content submitted by third parties that they have effectively published it.¹²⁸

Section 230 was actually conceived as a means of encouraging web intermediaries to take an active role in monitoring or filtering content by freeing them from liability as speakers if they chose to do so. Subsection (c)(2) exempts providers or users from civil liability for any attempt to block or filter content found to be objectionable regardless of whether it may be well within the ordinary ambit of First Amendment protection.¹²⁹ The idea, therefore, was that the safe harbor provision would obviate the need for more intrusive government regulation of speech on the internet by giving content providers

¹²⁸ This is a general paraphrase of the holding in *Fair Housing Council of Greater San Fernando Valley v. Roommates.com LLC*, 489 F.3d 921 (9th Cir., April 3, 2008). Roommates.com attempts to match prospective roommates using their answers to a detailed questionnaire about housing preferences. The FHC contended that Roommates’ questions about race and gender preferences were discriminatory under the terms of the Fair Housing Act, but Roommates asserted immunity under Section 230 from liability as the publisher of the content on the site (whether it was discriminatory within the meaning of the FHA or not). The 9th Circuit ruled that 230 did not apply and remanded to the district court regarding the allegedly discriminatory questions. The *Roommates* decision has thus been described as the first major case spelling out a situation in which a putatively passive forum for facilitating exchanges between users can lose its Section 230 immunity when it effectively participates too much in the “development” of the content (even though the actual text is still submitted by users) to contend that it is merely a conduit.

See also *FTC v. Accusearch* (2009), in which the Tenth Circuit applied a similar framework.

¹²⁹ The text reads:

“No provider or user of an interactive computer service shall be held liable on account of—
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”

incentives to police their own platforms — or to be “good samaritans,” as the section’s unofficial title put it.

According to some critics, the interpretation of Section 230 in the courts has actually fomented the opposite approach. The seminal interpretation of the scope of Section 230 came in a 1996 Fourth Circuit case called *Zeran v. America Online*. This interpretation foreclosed not only the treatment of interactive computer services as the publishers of third-party statements (which is plainly indicated in the text) but as *distributors* as well. Distributors can generally be held liable for content that they help to circulate if they know or have reason to know that it is tortious or illegal in some way. In *Zeran*’s case, this meant that America Online¹³⁰ could not be held liable for an anonymous user’s flagrant impersonation of Zeran on AOL chat rooms. This impersonation was allegedly harming Zeran, as it included Zeran’s home address and phone number and instructed readers to “call Ken” if they were interested in inflammatory shirts mocking the 1995 Oklahoma City bombing. The court reached this conclusion even though AOL had failed to remove the posts once notified that the posts were false and that Zeran was receiving a high volume of threatening phone calls.¹³¹

The prevalence of anonymity on the internet makes this decision particularly problematic for some. As the *Zeran* court saw it, the proper method of redress in this kind

¹³⁰America Online in its heyday was unlike most of the internet companies that we encounter today in that it provided both the internet service itself (the transmission of packets of data over the last mile to the customer), as well as many of the actual platforms on which users could interact or seek third party content once they were connected to the internet — e.g. chat rooms and the AOL-administered “channels” for news, sports, weather, and the like. Most of the contemporary internet companies do one or the other but not both.

¹³¹ *Zeran v. AOL*, 129 F.3d 327 (cert. denied).

of situation was to find the speaker and either pursue self-help measures (such as convincing him or her to remove the posts voluntarily) or to sue him or her for defamation in the absence of cooperation. The problem, obviously, is that many potential defendants are difficult to find because so many venues for this kind of speech on the internet afford mostly anonymous activity. The *Zeran* interpretation of Section 230 thus complicates what many see as the imperative to engage in self-help regarding perceived injuries resulting from online speech. The legal hurdles that one faces in trying to discover the identity of an anonymous poster from an ISP are formidable, as one would have to file multiple subpoenas to get the information from ISPs and might have a difficult time identifying the proper jurisdiction for suing anonymous “John Does.” Law professor William Frievoegel thus wonders whether such a regime effectively “fosters indecency” and distorts the original impetus for Section 230 in the first place, which was to encourage website operators and ISPs to be *proactive* in addressing harm that might be occurring over their platforms. Instead, it appears that websites more often than not use section 230 as an excuse to abdicate any responsibility for involvement in monitoring and regulating the content that they in some way facilitate.

Referring to the AutoAdmit saga discussed earlier, Frievoegel’s article describes what was required for one of the targets to actually pursue self-help: “Section 230 barred a successful suit against AutoAdmit.com, but the women had a strong enough case to persuade a court to strip away the anonymous mask of the defamers...[t]hey eventually

identified eight of the defamers and obtained settlements from them.”¹³² The fact that this victim of the AutoAdmit trolls was able to pursue legal action against the perpetrators without wielding some kind of takedown mandate against the platform is auspicious for those who see lifting Section 230’s safe harbor as a threat to free speech. At the same time, it is difficult to ignore how the tenacity required to pursue this kind of legal action is in turn reminiscent of Downs’ objection to the overemphasis on republican virtue in the Skokie situation. Perhaps a legal regime in which it is often only the most self-confident, socially assertive, and (probably) resource-rich who can effectively confront offensive or even false speech needs to be rethought.

Regardless of the hurdles to legal redress or the shortcomings of the marketplace of ideas in managing reputational information, it is simply not evident that there is a comprehensive legislative or judicial fix that would provide certain recourse without trampling the marketplace of ideas and overburdening information intermediaries. As Freivogel asserts, for instance, even more creative solutions like instituting a notice and takedown system for defamatory or otherwise objectionable content “are not up to the reality of the Internet with its millions of postings every day.”¹³³ This is true because “[a] notice-and-takedown procedure likely would result in sites taking down every piece of content about which a complaint is filed -- whether that content was objectionable or not. It simply would be too hard to review the validity of all of the complaints.”¹³⁴

¹³² William Freivogel, “Does the CDA Foster Indecency?” *Communication Law and Policy* 16.1 (2011), 41.

¹³³ Freivogel, “CDA,” 46.

¹³⁴ Freivogel 46.

Correspondingly, a recent editorial in *TechCrunch* underscored the importance of Section 230 by rhetorically asking the following:

[i]magine an Internet without social media, consumer reviews and user forums...[t]he interactive nature of the Internet is precisely what has allowed it to thrive and evolve over the past 20 years...misinterpretation of [the scope of 230 protection] could slow — or even reverse — this progress.¹³⁵

More promising is Frank Pasquale’s ingenious proposal modeled on the Fair Credit Reporting Act, but it too is no panacea. Pasquale’s model would offer those who feel wronged by a particular statement the chance to provide a linked rebuttal that would appear next to particular search results. Pasquale puts it this way: those who feel “harmed by search engine results” would be given “a right not to suppress the results, but merely to add an asterisk to the hyperlink directing web users to them, which would lead to the complainant’s own comment on the objectionable result.”¹³⁶ In other words, it is essentially a right of reply for individual links and as such nominally presents a counterspeech solution — just one that is legally mandated. At the same time, the objections are obvious: who will decide which statements qualify? Would anybody read these rebuttals? If US law largely treats a search engine like Google as a speaker that

¹³⁵ Jeff Koseff, “Can Decency Be Legislated?” <http://techcrunch.com/2015/10/08/the-communications-decency-act/> (accessed 10/11/2015).

¹³⁶ Frank Pasquale, “Rankings, Reductionism, and Responsibility.” Seton Hall Public Law Research Paper No. 888327 (2006). Available at SSRN: <http://ssrn.com/abstract=888327>.

performs an editorial function in organizing and indexing search results, wouldn't this imposition simply be unconstitutional compelled speech?¹³⁷

If Google's and the European Commission's recent experience implementing the so-called "right to be forgotten" law in Europe¹³⁸ is any indication, a system that gives the subjects of speech a legal lever to compel intermediaries to render speech invisible is bound to be abused by those objecting to unflattering but perhaps true or otherwise non-actionable speech.¹³⁹ Such abuse can profoundly affect the diversity of perspectives in the marketplace of ideas: as eminent US law professor Jonathan Zittrain commented after the EU court ruling, "those who were determined to shape their online personas could in essence have veto power over what they wanted people to know."¹⁴⁰ Because the ruling suggests that companies "'as a general rule' should place the right to privacy over the right of the public to find information," undoubtedly some of the requests are granted

¹³⁷ Eugene Volokh has outlined this argument formally in a paper commissioned by Google: Eugene Volokh, "First Amendment Protection for Search Engine Search Results," April 20, 2012. Available at <http://volokh.com/2012/05/09/first-amendment-protection-for-search-engine-search-results/> (accessed 2/1/2016).

¹³⁸ A 2014 European Court of Justice ruling that affirmed that an existing EU statute required Google and other intermediaries to comply with individuals' requests for certain pages to be de-indexed from search results because those companies "pla[y] an active role as data controllers" rather than acting as "simply dumb pipes" and thus must comply with EU-wide privacy protection laws. This is therefore essentially the opposite characterization of such companies evinced in US, where their status as speakers generally precludes the kind of takedown mandates at the heart of any "right to be forgotten." David Streitfeld, "European Court Lets Users Erase Records on Web." *New York Times* May 13, 2014.

¹³⁹ As summarized in *Ars Technica*, "the leading reasons for seeking information removal include 31 percent who wish to have fraud or scam incidents removed, 20 percent who wish to have violent or serious crime arrests removed, and 12 percent who wish to have child pornography arrests removed." Joe Silver, "Google inundated with 'right to be forgotten' requests," *Ars Technica* June 2, 2014. <http://arstechnica.com/tech-policy/2014/06/google-inundated-with-right-to-be-forgotten-requests/>

¹⁴⁰ Streitfeld, "European Court Lets Users Erase Records on Web."

despite a plausible case that could be made for the continued informational relevance of the linked content.¹⁴¹

Even if some of this speech may well be mostly irrelevant in forming an up-to-date professional or personality profile of a person (such as a bankruptcy from 20 years prior), perhaps we can place more trust in consumers of information to make more judicious decisions with such information. Would it not be unproductively timorous for a prospective collaborator to pass on an otherwise sound opportunity because of a 20 year old bankruptcy (which in itself is hardly remarkable)? In a sense, a free speech regime that prioritizes protecting all speech short of deliberate and non-trivial lies or the malicious exposure of private information in the marketplace framework would seem predicated on the assumption that observers will generally seek out enough overall information to make the required judgment about how much to weigh any one particular piece for themselves.

Ultimately, it seems no more wise to expect any expansion of tort law provisions, takedown privileges, or right of reply mandates to perfectly balance speech and reputation in the contemporary technological environment than it would to entrust the task entirely to a mythical marketplace of ideas in which all assertions compete equally to eventually reveal “truth.” At the same time, prioritizing self-help and marketplace mechanisms at least has the advantage of not creating levers for the surreptitious removal of discussion and information without any public deliberation. The information which

¹⁴¹ Streitfeld, “European Court Lets Users Erase Records on Web.”

shapes a person's reputation may indeed often appear on the web without the full context of a person's life, but a truly interested reader involved in forming a sufficiently important impression (i.e. one that would be reputationally consequential for the subject) might at least be trusted to inquire further. The question remains, then: what might some of supplementary efforts look like when it comes to filtering, sanctioning, or reinforcing different pieces of reputational information? How are the intermediaries, lawyers, technology professionals, and subjects of speech themselves actually going about negotiating these disputes given the remoteness of many of the desired legal remedies?

Going forward, we can generate a more comprehensive picture of how "regulation" of reputationally consequent speech works on different interactive platforms if we apply Lawrence Lessig's framework from *Code*. For Lessig, "regulation" happens along four axes: these are law, norms, the market, and what he calls code (basically technical architecture). There is a clear interaction between the four regarding speech that affects reputation on the web. The code of the web affects the visibility of certain statements through the architecture of particular speech forums and through search engine optimization techniques and "Google bombing."¹⁴² It also determines what is known about the speakers. Further, in a large sense it is the platforms themselves that can most directly obviate reputational harm through architectural modifications or through imposing their own will as content distributors. Norms regulate when different kinds of

¹⁴² From Wikipedia entry for "Google Bomb": "The terms Google bomb and Googlewashing refer to the practice of causing a web page to rank highly in search engine results for unrelated or off-topic search terms by linking heavily. In contrast, search engine optimization (SEO) is the practice of improving the search engine listings of web pages for *relevant* search terms." https://en.wikipedia.org/wiki/Google_bomb (accessed 5/30/2016).

speech and different responses to it are appropriate and how they will be received. One of the most relevant normative phenomena regarding reputation, for instance, is colloquially known as the “Streisand effect,” where complaints about critical speech generate greater backlash and simply amplify the original claims.¹⁴³ Further, norms of reception can influence perceptions of credibility and factuality regarding speech on different platforms. A news article is likely to be interpreted in a factual register; a hyperbolically vitriolic personal blog less so. The market amplifies or buries certain statements because of the relative market share of the forum on which they appear: is the website popular or obscure? The market can also be leveraged as a means of signaling disapproval and compelling change (e.g. through pressure on advertisers).

Conclusion:

The voices in this chapter have largely identified three central components of how the web has affected the balance between free speech and reputation. The first of these is the ubiquitous implication that the scope and visibility of information on the web creates novel opportunities for reputational harm and dilutes responsibility for that harm. It also sometimes includes the corresponding assumption that these new situations blur the distinction between harm to dignity and harm to material interests. The second factor is the conflation of personal and professional activity on digital media platforms in the construction of a person’s reputational profile. Discussions of reputation in this register

¹⁴³ When applied to conflicts over speech online, the assumption is, as one Gawker commenter succinctly put it, that “rule #1 of netiquette is: If you try to fight the Internet, you will always lose. Even if you win.” Comment by user “Snugbug.” Hamilton Nolan, “Skank Blogger Ordered to Say That To Her Face.” *Gawker* 8/18/2009. <http://gawker.com/5339833/skankblogger-ordered-to-say-that-to-her-face> (accessed 3/3/2016).

suggest that there is no “private” zone of mediated activity that can be separated from a person’s professional life or between the person’s social domains. Thirdly, it seems clear that the mediated modes through which people socialize and encounter information have catalyzed debates over key information norms. There is ongoing debate in society about the distinctions between legitimate and illegitimate criticism, valuable and “worthless” speech, ethical and unethical sharing of information, and even what counts as a “serious” and a jocular assertion.

Viewing reputational disputes through Lessig’s expanded framework for analyzing “regulation” allows greater insight into the ways in which speech and reputation interact. Even if existing tort law fails to provide remedies in some arguably sympathetic situations, there are many other factors that influence the likely impact of the speech and how it can be managed. We might well decide that it is worth sacrificing some hurtful but not nominally false or unduly revelatory speech — and risk chilling or enabling suppression of more benign critical speech — in order to address the enlarged scope of reputational precariousness. Regardless, any legal mechanism is unlikely to provide complete redress. In lieu of a perfectly comprehensive solution, how much can novel “counterspeech” measures contribute to the balancing of speech and reputation?

Chapter 3

Facilitating Rebuttal Or Peddling the Magic Wand? The Rise of Reputation

Management and the Reputational Imperative

As the last two chapters have demonstrated, the internet has modified longstanding societal concerns about reputation and the proper legal framework for protecting it. Further, the uses of networked digital technologies and the evolution of the internet as a communication tool have certainly had an impact on how people approach and access information and how they are both voluntarily and involuntarily presented to others. In turn, technological change has prompted fresh concerns about how to rectify unwanted exposure — whether the information in question is false, uncomfortably intimate but substantially true, insulting but not factual in nature, or simply unflattering.

The task of this chapter is therefore to address the ascendant conceptions of how to *manage* reputational concerns. With the foundational legal, social, and informational debates established, this chapter introduces the so-called “reputation management” industry and its intersection with the legal profession. The practical work of reputation management constitutes a branch of the tech industry in its own right, and it is thus largely opaque to the author at the most technical level. It is thus explained here only to the degree that it is intended to establish a foundation for the social and cultural analysis.

The primary analytic goal of the chapter is to trace an overarching ethos from various industry and news media discussions of reputation management. This ethos entails both a distinct method of categorizing speech according its potential for

reputational harm as well as the apparent consensus that individuals in a digital networked society face a “reputational imperative.” The second layer of analysis tries to situate the tenets of the “self-help” emphasis from free speech law within the reputational calculus that is native to the current networked digital environment. The chapter ultimately suggests that a new kind of reputational zeitgeist has emerged. This zeitgeist carries fundamental assumptions about how “reputation” functions as a social phenomenon, implicitly advances a particular set of simultaneously optimistic and cynical postulates about the marketplace of ideas, and posits a kind of neoliberal obligation to engage in specific forms of “management” of particular sources of reputational information online.

More specifically, the chapter argues that the urgent, even alarmist ways in which reputation and reputation management are often discussed contain multifaceted — and one might say paradoxical — implications for the regulation of speech on the web. In one sense novel reputation management services present a means of facilitating dialogue over the value and impact of particular speech and in fact largely rely on counterspeech means (such as the creation of additional promotional content) to remedy whatever speech has been deemed “objectionable.” Failing to recognize that such remedies are available outside of tort lawsuits or expanded liability for third party content hosts could thus lead us toward an overzealous legal reform agenda that stifles critical speech and undermines

the range of perspectives competing in the marketplace of ideas.¹⁴⁴ This suggests that reputation management endeavors in some ways fulfill a role long advocated by critics who have sought alternatives to tort lawsuits or who have emphasized the salutary power of counterspeech in redressing reputational harm.¹⁴⁵

In another sense, however, novel reputation management endeavors contribute to a kind of hysteria about reputation and the reputational consequences of critical speech on the web. They do so by propagating a reductive and at times censorial mentality that treats the removal of any unwelcome or possibly “negative” speech about oneself as both a necessity and an entitlement. Further, they could inspire a kind of sanitized, conservative approach to presenting ourselves online that threatens to undermine the expressive affordances of the web. Such an effect would undermine the “liberty” interest in self-development recognized as an important goal of speech protection by scholars such as C. Edwin Baker.¹⁴⁶ The new reputational zeitgeist represented by reputation management thus simultaneously illustrates how private action rather than government

¹⁴⁴ The objection could again be raised that reputation management substitutes private action for state action and thus represents another kind of neoliberal “outsourcing” of public functions to private enterprise — which inevitably favors those of greater resources. The response to this objection is that the legal system is hardly free and itself already favors those with greater resources.

¹⁴⁵ Recall these central perspectives from chapter one: Randall Bezanson, “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get,” *California Law Review* 74.3 (1986) (arguing that people often sue simply to achieve some public vindication rather than to win recuperative money damages); Rodney Smolla, “The Annenberg Libel Reform Proposal: The Case for Enactment,” *William and Mary Law Review* 31.1 (1989) (arguing for expanded judicial alternatives that center on establishing the truth and falsity of statements).

¹⁴⁶ See Baker, *Human Liberty and Freedom of Speech*, Oxford: Oxford University Press (1992), pp. 2-3.

ensorship sometimes represents the more relevant threat to free speech in the digital age.¹⁴⁷

Reputation Management Services: How They Frame the Problem and Provide Solutions

Vaidhyathan's portrait of the "person to public" interface that is mediated by Google search foreshadowed the ethos that prevails in many contemporary discussions of managing reputation. In Vaidhyathan's telling, the affordances of the web for connection and discovery also result in greater personal exposure.¹⁴⁸ As Alice Marwick asserts, therefore, those who participate in social platforms likewise "learn that 'successful' social media use requires self-monitoring and censorship — one must always be mindful of the internet audience."¹⁴⁹ One recent news article characterized the overall phenomenon this way: "In the age of social media, individuals are finding themselves in the spotlight, and a viral video can change a reputation overnight."¹⁵⁰ The attorneys at

¹⁴⁷ Law professor Dawn Nunziato captures this general paradox, arguing that "[m]ore than at any time in our history, a small number of private entities enjoy unfettered control over what speech to facilitate — and what speech to restrict or disfavor — within our most important medium for expression." Dawn Nunziato, *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age*, xiii.

¹⁴⁸ As quoted in the previous chapter, he writes that "[a]t this interface, which is now located largely online, people have found their lives exposed, their names and faces ridiculed, and their well-being harmed immeasurably by the rapid proliferation of images, the asocial nature of much ostensibly 'social' web behavior, and the permanence of the digital record." Siva Vaidhyathan, *The Googlization of Everything* (Berkeley: UC Press, 2011), 95.

¹⁴⁹ Alice Marwick, *Status Update: Celebrity, Publicity, and Branding in the Social Media Age*. New Haven: Yale University Press (2014), 279.

¹⁵⁰ Kelly Eckerman, "Embattled Mizzou professor hires firm to help manage online reputation." <http://www.kmbc.com/news/embattled-mizzou-professor-hires-firm-to-help-manage-online-reputation/38005216> (accessed 2/29/2016).

Cyber Investigation Services frame the overall state of affairs similarly in terms of the somewhat hackneyed concept of the personal brand:

[T]hese days your own name is a brand – even if you’re not selling anything under it. As such, your name must be protected in much the same way as a business. Take a look at this from the perspective of anyone who has any reason to do a little bit of research about you.¹⁵¹

The imperative to present oneself as a “brand” has catalyzed demand for a novel kind of public relations service called “reputation management.”

The dominant service provided by reputation management professionals is the work of influencing and subsequently monitoring the information and statements about a client that are visible through search, social media, and other web spaces. From what can be gleaned through publicly available information and descriptions from practitioners, this primarily involves three interrelated efforts: monitoring of search engine results pages (SERPs) for a person’s name; adjustment of the code and text of original web content to achieve better treatment by different search algorithms (essentially the general endeavor of search engine optimization); and negotiation with the hosts of particular unwanted content.

For, say, a company like Walmart, this can mean attempting to push a website about the grievances of ex-employees down in the list of search results or garnering favorable treatment in highly visible publications. It is thus in some ways not terribly distinct from the kind of public relations in which businesses ordinarily engage. Different companies also sell software that helps businesses monitor what customers are saying about their

¹⁵¹ Bruce Anderson and Chris Anderson [sic], *Winning the War On Internet Defamation*. Valrico, FL: CIS Publishing (2012), 22.

experiences, build more comprehensive profiles of these customers, and market to them in specific ways.¹⁵²

For an individual, the endeavor is more novel. It might mean attempting to bury unflattering news stories or embarrassing or false statements on social media, blogs, or discussion forums. Much has been written recently about growing endeavors to combine scores of social media influence into aggregate “trustworthiness” metrics that companies can use to assess the terms on which they will provide service to individuals.¹⁵³ For the average person seeking to manage his or her “online reputation,” though, it seems that the focus currently revolves primarily around the collection of written text that is visible in the results for a search of one’s name. For instance, *Guardian* reporter Tim Lewis wrote about receiving a kind of crash course tutorial in the process of reputation management from Michael Fertik, CEO of reputation.com, in which Fertik indeed “begins by Googling [his] name – you should always start with self-Googleing – and finds an underwhelming, near-invisible set of results.”

The lack of distinction between “embarrassing” or “unflattering” and “false” in the preceding description of the content that reputation management targets is not accidental.

¹⁵² The company Revinat, for instance, offers a “guest engagement platform” for hotel clients called InGuest. Revinat describes its general reputation service as one that will “hel[p] you capture, measure, and optimize the guest experience by bringing together all online reviews and social media mentions into a single, integrated view.” http://info.revinat.com/promo_inguest.html; <https://www.revinat.com/products/reputation/> (accessed 11/5/2015).

¹⁵³ See especially Michael Fertik, *The Reputation Economy*, chapter 3. For one commercial example, the company Deemly “aims to fix [the problem of reviews and ratings being confined to individual sites] by enabling users to consolidate all of their scores into one reliable, shareable ‘trustworthiness’ rating.” Deemly, “Online ratings turned into one reputation score.” <http://www.springwise.com/online-ratings-one-reputation-score/> (accessed 3/20/2016).

Indeed, it is hard not to notice that much of the discussion about reputation conducted in this commercial sphere treats the above categories as fungible members of an all-encompassing category of “negative” content that pertains to an individual or company. In a way, such a fragile formulation of reputation represents the natural outgrowth of an overall ethos that has developed alongside a dominant style of self-presentation on social media. As Vox culture editor Todd VanDerWerff wrote in a recent analysis, “[y]our social media feed is a curation of things you want people to know about you. Inconvenient truths, negative views, or anything too dark will be pushed aside.”¹⁵⁴

Some statements from promotional reputation management literature depict this attitude. In a recent press release, for example, the company Overnight Reputation characterized the threat this way: “The presence of any negative information online is potentially damaging to any business, and the fact that YouTube is frequently accessed is particularly dangerous to businesses across all industries.”¹⁵⁵ The degree to which the information in question is or is not true is, unsurprisingly, at times not exactly the foremost consideration in the industry. For instance, the following comment about effective reputation management from a professional’s blog frames truth as an incidental consideration: “with any company’s social media platforms, you can glean insight [into] its business from the nature of customer complaints as well as how they are handled.

¹⁵⁴ Todd VanDerWerff, “2015 Is The Year the Old Internet Finally Died,” *Vox*, October 30, 2015. <http://www.vox.com/2015/8/6/9099357/internet-dead-end> (accessed 10/31/2015).

¹⁵⁵ Overnight Reputation, “Businesses with Negative YouTube Reviews Turn to Overnight Reputation for New Online Reputation Management Services. *Digital Journal* 9/25/2014 (accessed 3/23/2016).

Nonetheless, one should assume that the most aggressive rants have probably been moved to some digital planet far away, *however justified they may be*” (italics added).¹⁵⁶ Likewise, a similarly confusing substitution of “false” with “unflattering” is on display in the following description of the relative risks of different approaches to dealing with critical content on consumer review sites: “The danger of going the legal route is if the review is posted anonymously there’s no way of knowing who to sue, and...[i]f it’s a legit review there’s also the danger of losing the case because the claims were honest.”¹⁵⁷ The question, obviously, is why we are using the language of rectifying injury at all in cases like this if “it’s a legit review.”

A company called Profile Defender likewise lumps together “negative reviews that are either outwardly false or misleading” as the targets of their “sophisticated techniques [that] allow our clients to get rid of their unwanted listings.”¹⁵⁸ Another company called Torati Consulting goes even further, describing their service as “help[ing] people and businesses repair unflattering, defamatory or otherwise damaging search results.”¹⁵⁹ Whether “unflattering” or “defamatory,” the remedy and the urgency with which it must

¹⁵⁶ Shannon Wilkinson, “Reputation Capital: Why Whole Foods Still Works.” <http://reputation-communications.com/you-online/articles/reputation-capital-why-whole-foods-works/> (accessed 3/20/2016).

¹⁵⁷ John Rampton, “Interview with Pierre Zarokian.” *Search Engine Journal* 1/6/2014. <http://www.searchenginejournal.com/how-to-outrank-ripoff-report-interview-with-pierre-zarokian/84831/> (accessed 11/24/2015).

¹⁵⁸ “Yelp.com Cracked - Profile Defenders: A Company That Can Actually Get Rid of Your Negative Listings and Reviews.” *Yahoo Finance* 5/31/2012. <http://finance.yahoo.com/news/yelp-com-cracked-profile-defenders-153000054.html> (accessed 11/24/2015).

¹⁵⁹ Torati Consulting, “Public Relations Firm Established to Offer Innovative Online Reputation Repair Services. *PR Urgent* 3/5/2015. <http://www.prurgent.com/2015-03-05/presrelease378040.htm> (accessed 1/4/2016).

be pursued are the same. With noticeable consistency, therefore, such pitches use “defamation” as a kind of legitimizing foundation from which they then pivot to the further targeting of all kinds of other unwelcome speech.

The most prominent reputation management company, Reputation.com (formerly Reputation Defender), presents a nuanced narrative about the unique nature of discourse on the internet when it appeals to websites and speakers for content removal on behalf of clients. The rhetorical thrust of its proposition is affective as much as rational. An email sent on behalf of clients, for instance, takes time to establish that the content in question might be objectionable for causing a variety of injuries that fit ambiguously within the traditional concerns of the reputation-related torts: Reputation Defender intervenes when the client feels “hurt, ashamed, or ‘invaded’ by the content about them on those sites [such as the one being contacted in this email].” More important, perhaps, is the emotional appeal to the recipient to consider the ways in which “the Internet is sometimes unnecessarily hurtful to the privacy and reputations of everyday people.” In a sense, the recipient is being flattered as someone who is fundamentally decent and wants to do the right thing — and should therefore consider taking down or altering the content that precipitated the concern from the client in the first place.¹⁶⁰

The email inquiry quoted above also enumerates some of the life obstacles that the content being targeted might cause. “When people apply for jobs, apply for college or

¹⁶⁰ The text of the introductory email is taken from a blog about faculty issues concerning an academic in Ireland named Stuart Neilson who was contacted by Reputation Defender in January 2007: <http://bulliedacademics.blogspot.com/2007/01/reputation-defender-to-consider-bullied.html> (accessed 9/23/2015).

graduate school, apply for loans, begin dating, or seek to do any number of other things with their lives,” the email explains, “hurtful content about them on the Internet can have a negative impact on their opportunities.” At this level of generality, it would be difficult to argue with such a statement. Further, it is an instructive window on the (now familiar) operative conception of an individual’s mediated public profile that prevails within this milieu. But to what situations does this warning actually refer? Is the implication that *any* “negative impact on [the client’s] opportunities” is somehow unwarranted to the degree that it would actually be unethical for the speaker or host to refuse removal? Assuming that such a contention is not in fact absolute, how are we to distinguish between those cases in which removal is in fact morally (if not legally) warranted and those in which it is not? Reputation Defender does not say. The impression that the recipient could be left with, therefore, is that there has been little consideration for whether the criticism represents valuable speech or simply a nuisance that deserves to be summarily disposed of because of its “negative impact on opportunities.”

The particular episode that resulted in public posting of the email inquiry quoted here also provides a window on how reputation management appeals can backfire. Those making requests for the removal or alteration of content must be careful not to provoke the speaker into doubling down and becoming more intransigent because he or she feels stifled in some way. This possibility helps to explain the kind of pathos displayed in the introductory letter from Reputation Defender: the content host must be convinced that they are affirming their own positive qualities and participating in a constructive

enterprise (or just doing someone a favor) rather than being threatened or hectored. Still, such reception of the message is not guaranteed. In the episode discussed above, the poster in fact decided to post the emails out of indignation over the characterization of his experiences, which he disputed on the grounds that they were not in fact “outdated and a settled issue” as claimed by the Reputation Defender client.¹⁶¹ As Reputation CEO Michael Fertik commented in a Wall Street Journal article that touched on this incident, these kinds of outcomes “are rare” but that they can indeed sometimes “merely generat[e] additional publicity” rather than obscure the content or neutralize its perceived effects.¹⁶²

None of this is meant to suggest that there is something illicit about trying to manipulate one’s public image or even paying money to have someone do it for you; indeed, we attempt to manicure social perceptions of ourselves routinely. It is important to acknowledge from the outset, however, that according to its own formulations, much of the content that reputation management seeks to bury is not deemed objectionable because it is false, threatening, or even deeply private; it is merely embarrassing or unflattering — a bad review, a fleeting indiscretion or piece of old information that the subject feels should no longer define his or her mediated public presence.

Michael Fertik has described the impetus for the service in terms of the sometimes disproportionate visibility of a single incident in SERPs: “I don’t like the idea that kids

¹⁶¹ Comment by Stuart Nielsen, <http://bulliedacademics.blogspot.com/2007/01/reputation-defender-to-consider-bullied.html>

¹⁶² Andrew Lavalley, “Firms Tidy Up Clients’ Bad Reputations.” *Wall Street Journal* 6/13/2007. http://www.wsj.com/public/article/SB118169502070033315-3PzMHMibLz_n4N_IOACv2SSbVIQ_20070712.html?mod=tff_main_tff_top (accessed 3/23/2016).

and teenagers might suffer lifelong harm because of momentary mistakes.”¹⁶³ Reputation management thus appears to address real concerns, yet much of its literature also displays a kind of slippage that applies the same indignation and assumption of injury to concerns about “false” or “defamatory” content as it does to material which is either merely offensive or even legitimate true criticism. As in the email to Nielsen above, the appeal was not to recognize and correct an error; it was to acquiesce to a takedown request because the client considered the material to be “outdated” and because he “fe[el] that it is invasive of both your and his privacy.”¹⁶⁴ Further, the recipient of this letter is enlisted in the drive to “help make the internet a more civil place” by acceding to the request. This is indeed a worthwhile cause, but it is clear that not every case is going to involve a client who is being unfairly dogged by some kind of allegations that unfairly malign or intimidate him or her. In fact, sometimes they might well involve statements that concern an issue (in this case a behavioral grievance from an ex-colleague) that is far from resolved.

There are several free speech implications of this framing. First, it establishes that the underlying mandate of reputation management is to essentially limit the amount of information available for third parties to draw from. This role of public relations seems to be a rather obvious dimension of the actual speech landscape as it exists in society that is worth emphasizing: there are many people who are paid lots of money to make sure that

¹⁶³ Scott Gilbertson, “Delete Your Bad Web Rep.” *Wired* 11/2006. <http://archive.wired.com/science/discoveries/news/2006/11/72063> (accessed 1/4/2016).

¹⁶⁴ Quoting Reputation Defender email, <http://bulliedacademics.blogspot.com/2007/01/reputation-defender-to-consider-bullied.html> (accessed 3/23/2016).

some statements (or even thoughts) cannot influence the marketplace of ideas in the first place. In practice, the narrow range of expressions that the law may permissibly limit is likely dwarfed by the impact of public relations and other professional manipulations of speech visibility on the overall volume and diversity of expression circulating in the marketplace. Successful reputation management by design attenuates some of the marketplace expansion facilitated by the “cheap speech” of the web.

In addition to foregrounding the "positive or negative" binary in the assessment of reputational information, the logic of reputation management often seems to flatten distinctions regarding the “informational” substance of different statements and the ways in which they are likely to be interpreted as either fact or opinion. On one hand, a default assumption that most online commentary is motivated by some sort of personal bias could decrease its likelihood of causing reputational harm. On the other hand, if readers eschew considerations of truth in interpreting what they read then even an outlandish statement with a perceived negative ring is just as “credible” as a substantiated factual allegation. A broader range of commentary thus sees these interpretive conventions as cause for alarm. In extreme iterations of this schema, in other words, the unhinged diatribe about someone’s physical attributes registers as a reputational "threat" in the same way that, say, a newspaper article that mentions a decades-old bankruptcy would.

This approach likewise glosses over matters of venue and the channels through which information is spread. These two interrelated factors that are in fact fundamental to the impact of a statement. In at least some cases, for instance, a statement can be easily

disregarded as “information” because of perhaps the ad hominem or vituperative manner in which it is presented. In others, it might even be given little weight in the formation of judgments simply because it is old.

The following example helps to illustrate that this distrust of the reader’s ability to interpret and contextualize different kinds of statements can sometimes produce questionable efforts to displace content. A search engine optimization website recently puzzled over the shoddy reputation management efforts of a fellow public relations professional not just because their “production value” might have been low, but because they almost seemed unnecessary. The public relations professional in question, Neil Dhillon, had been convicted in 1989 of “assaulting a female bank employee in Virginia” and reportedly had “used racial slurs in the incident.” Articles mentioning his conviction still turn up on page one of his Google search results. What perplexed the author of this post is why Dhillon saw a need to try to bury these articles by using what he called “cheap” search engine optimization tactics: specifically, Dhillon was clearly “employing an online reputation management (ORM) company to hide negatives on Google” by utilizing self-publishing platforms to create content that linked to other preferred self-created websites. Dhillon had apologized at the time, the article notes, saying that he “believe[s] this is not the measure of who [he is].” But Dhillon was perhaps obsessing over an argument that he had, in a sense, already won: “We tend to agree [that this is not a measure of who he is], and we chalk this one up to youthful indiscretion.” An author on a professional public relations blog therefore recognized that Dhillon’s activities in the

subsequent 25 years might mitigate his conviction; could other readers not be expected to as well?¹⁶⁵

Reputation management thus seems to address an overall paranoia that people in the digital age have lost control of the ways in which they are perceived. As the preceding discussion of Vaidyanathan and online “visibility” established, there is indeed a kind of compulsory exposure which seems to come with mere use of public platforms on the internet and with activity in some professional sphere. In some cases, this exposure is even attributed to forces beyond one’s own conduct.

As the founder of a public relations company called BrandYourself allegedly found, sometimes even the mere existence of a “criminal” with the same name can make it difficult to find a job.¹⁶⁶ An article profiling this company on the Huffington Post stated that the company “was launched after co-founder Pete Kistler couldn't get an internship during college because he was being mistaken for a criminal who shares his name.” Perhaps this did impede his search; at the same time, it is convenient to use a statement like this as a hook for one’s company when it would be difficult at this stage to actually verify. How did Kistler determine that this is why he “couldn’t get an internship?” Why would any human performing a web search not be able to tell the difference between an upwardly mobile college student and the so-called “criminal?” Prior to the advent of

¹⁶⁵ Richard D. Pace, “Neil Dhillon of MWW PR Group: 20 Year Old Assault Conviction & Cheap SEO Tactics.” <http://everything-pr.com/neil-dhillon-of-mww-public-relations/72019/> (accessed 11/1/2015).

¹⁶⁶ Sandy Abrams, “Have You Taken Control of Your Online Reputation?” *Huffington Post* 3/31/2015. http://www.huffingtonpost.com/sandy-abrams/why-you-need-to-take-cont_1_b_6941316.html (accessed 8/6/2015).

companies like Kistler's, was the average adult unaware that different individuals could in fact share the same name? Were the prospective employer to perform a third party background check, wouldn't it be conducted using Kistler's Social Security number? Would Kistler not have had recourse under the Fair Credit Reporting Act if his background check were conducted so sloppily that it could not distinguish him from the "criminal?"¹⁶⁷ Once he was made privy to the fact that the decision to turn him down was based on his criminal record (assuming this happened, since Kistler knows this is why he didn't get any jobs), wouldn't he most likely then be in a position to distinguish himself from the criminal Pete Kistler?

Regardless, the company frames its function this way:

The thesis of our company is to have people understand that we live our whole lives online now and we should all have control over what's out there. You don't want random surprises from social platforms. We create tools and services that put people back in control of their online reputation. People need to know that this isn't just a service for people who have a negative result but it matters for everybody. If you don't define yourself you will be defined by someone else. You are being looked up, negative results hurt you but positive results help you.¹⁶⁸

¹⁶⁷ The FCRA "sets a national standard that employers must follow in employment screening." More to the point in this case, "if the employer uses information from the consumer report for an "adverse action" they must "must give the applicant...a copy of the report and an explanation of the consumer's rights under the FCRA" as well as, among other things, "a notice that the individual has the right to dispute the accuracy or completeness of any of the information in the report."
 "Employment Background Checks: A Job Seeker's Guide." *Privacy Rights Clearinghouse* 5/2016.
<https://www.privacyrights.org/employment-background-checks-jobseekers-guide#2> (accessed 5/29/2016).

¹⁶⁸ Abrams, "Online Reputation."

In addition to reinforcing the positive and negative binary characterizing reputational harm, this statement is explicitly pitched in terms of restoring a kind of control over one's social impressions that has allegedly been stripped in the digital age. The consequence of not doing so, according to this logic, is relinquishing control of your social profile and allowing others to define you — a prospect which is presented as both intolerable and possible to vanquish with the right reputation management.

Reputation management rhetoric thus largely asserts that an almost pre-emptive “management” of one's digital presence is imperative. Another strategist at BrandYourself has likened the logic of reputation management to that of brushing your teeth: “Brushing your teeth is an insurance policy against all those negative outcomes [like cavities]...ORM can be just as effective -- even more so -- when it's done preventatively. By building up your reputation now, you're able to lay a strong foundation before anything negative has a chance to dominate your search results.”¹⁶⁹ One service pitched to police officers called “Cop PRotect” prepares one's preferred media materials ahead of time in the event that “a call goes sideways.” A press release underscores how essential it is to be prepared to defend one's reputation in such an event because “[e]veryone has a smart phone with a camera ready and waiting to film ‘police

¹⁶⁹ Ryan Erskine, “Why Online Reputation Management Is Like Brushing Your Teeth.” <http://www.entrepreneur.com/article/253201> (accessed 12/28/2015).

action' and thus "[i]n today's climate of suspicion, it's important to be prepared to defend your reputation."¹⁷⁰

The attorneys at Cyber Investigation Services offer a cautionary tale about the necessity of staying vigilant about one's name search results. They write of a "CEO" who lost control of his online reputation through mere obliviousness:

Because the CEO was not in the habit of spending much time looking at his online presence, this was not uncovered until potential banking partners discovered it while performing due diligence. Even though the remarks themselves seemed to be so far from reality that the person who wrote them was suspected to be of unsound mind, the sheer existence of these two blogs were considered unacceptable in the button-down financial world and the deal was scrapped.¹⁷¹

A similar conception is evident in the appeals contained in another otherwise unremarkable advertisement for reputation management services. "If you fail to take charge of and define yourself, then others (including your enemies) will and you've lost by default," the ad warns. It would be foolish to wait until an overt crisis presents itself (although the implication seems to be that one eventually would) because "you aren't hearing even a tiniest fraction of the negative fallout and consequences (no one tells you those; they form an impression and simply move on to the next suitors/suitresses, candidate/candidates, etc)."¹⁷²

¹⁷⁰ PoliceOne BrandFocus Staff, "Cop PRotect tells your story, even when you can't." <https://www.policeone.com/police-products/communications/articles/63362006-Cop-PRotect-tells-your-story-even-when-you-cant/> (accessed 1/17/2016).

¹⁷¹ Anderson and Anderson, "Winning the War on Internet Defamation," 14.

¹⁷² <http://austin.craigslist.org/cps/5324514550.html> (accessed 11/22/2015; screen capture saved).

More nuanced discussions of reputation strategy do acknowledge that some statements, while offensive or seeming to state “facts” in a loose sense, should be judged within their informational context and thus may not be cause for alarm even if we take the idea that “you are being looked up, negative results hurt you but positive results help you” as given. For instance, Michael Fertik stated in a 2014 interview with the *New York Times* (regarding customer reviews of businesses) that “some of this stuff is written for an audience of one: you. Unless it’s very visible, it’s not worth a response.”¹⁷³ Nonetheless, the overall impression created by the industry discourse is of a world in which “negative” information represents a cohesive category to be suppressed. What is of course unstated but implied, therefore, is that it must be suppressed because we cannot trust readers to draw fair assessments of its validity or applicability.

The routine conflation of “negative” or “derogatory” information with “reputational threat” appears to complement the ways in which some legal scholars conceive of the “reputational” dimension of cyber-harassment. Danielle Citron discusses an example from a conflagration on the law school message board AutoAdmit (which Brian Leiter has termed a “cyber-cesspool”) that also exemplifies this kind of slippage between different constructions of how speech becomes threatening and injurious. Someone connected with the forum sent disparaging messages to the partners at the California law firm employing a particular law student who had been discussed in ugly and abusive terms on the forum. The emails were less vulgar: they claimed that the

¹⁷³ “Dealing With Online Reviews,” *New York Times* 3/2014.

student was “barely literate” and “lacked high character,” and they encouraged the partners to explore the student’s past (presumably using AutoAdmit as a guide). Citron frames this as an incident that confirms how threatening the reputation-maligning machinery of the internet can be.

On one hand, it is indeed an unambiguous example of deplorable, harassing behavior. It would be unreasonable to expect someone in the position of the law student to not feel targeted or threatened by it and to try to fight back against the posters. It also would be foolish to deny that it is more specifically a manifestation of the viciously misogynist tenor of much online harassment. At the same time, Citron’s own work would appear to demonstrate that the reputational consequence was not terribly grave. The employer was confronted with statements of opinion and rhetorical hyperbole delivered without sources or context, not documentable facts. In fact, the employer’s response (documented in Citron’s book) was to immediately assure the law student that her employment would not be affected by the statements.¹⁷⁴ This is perhaps not surprising, because a random email accusing the law student being “barely literate” likely registered as impotent hyperbole. Would a powerful law firm ordinarily accept at face value the notion that elite law schools periodically slip up and admit people who cannot read and write beyond an elementary school level? It is difficult, then, to see why an incident like this would represent much of a *reputational* threat at all.

¹⁷⁴ Danielle Citron, *Hate Crimes in Cyberspace*. Cambridge: Harvard University Press (2014), 42-43.

This is only true, however, when we conceive of “reputation” as an informational phenomenon; the law student undoubtedly suffered the indignity of having to defend (however briefly) against vituperative and sexist characterizations. Categorizing this as “reputational” harm that is deserving of a remedy, therefore, would require that we emphasize a dimension of reputation that is more concerned with controlling what is said about oneself overall rather than on material harm to one’s life prospects or standing in his or her community. It could only be unpleasant to know that discussions of this nature persisted on a public internet forum and might turn up when one’s name was typed into a search engine. Perhaps the torts that address emotional harm might be a closer match as far as legal action is concerned. On the other hand, it would appear that little material harm to reputation resulted. Such incidents suggest a kind of slippage between material harm to reputation and conceptions of emotional harm or embarrassment in contemporary discussions of reputational threat.

One might also object that this law firm was unusually progressive in its response and that many employees would not be so lucky. This objection takes quite a dim view of employers’ gullibility. Even discounting the particular outcome in the AutoAdmit case, it is not clear why we should expect that any ordinarily responsible person in a position of authority would trade his or her company’s own legwork in vetting a candidate and assessing her performance for the discussion on a forum like AutoAdmit. This view nonetheless persists. An article that queries whether Section 230 “fosters indecency,” for instance, casually assumes that the 16 employers who turned down one of the women

discussed on AutoAdmit did so because “the firms had searched her name using Google and come up with the AutoAdmit postings such as “Stupid Bitch to Attend Yale Law.”¹⁷⁵

The author might have paused to consider the truly incredible implications of this assumption: did it indicate character failings on the *law student's* part that people on a misogynistic internet forum called her this? Is the problem that the firms suddenly realized she had been masquerading as “smart” when in fact she had been fraudulently attending Yale Law as a “stupid” person the whole time? It is, sadly, likely that employers do sometimes instinctively move on after detecting a whiff of controversy about a person through web search because they fear that controversy might follow that person to the company. But the sources and assertions themselves must matter a little bit. If it is somehow true that prestigious law firms are *exclusively* turning to “cyber cesspools” in order to evaluate job candidates then one might submit that this is the real scandal.

In turn, a policy regime in which the subject of speech could truly guarantee that *no* reader — however gullible or misguided — could possibly misuse questionable information in forming impressions of him or her would require what former Slate media columnist Jack Shafer has described as “a vaccine against stupidity” — in other words, the illusory power to actively control all possible interpretations and uses of a particular

¹⁷⁵ William Freivogel, “Does the Communications Decency Act Foster Indecency?” *Communications Law and Policy* 16.1 (2011), 41.

piece of content.¹⁷⁶ No framework for protecting reputation can be extended this far in a society even nominally dedicated to free speech.

There is also a more humanistic implication that is possible to draw from the way in which reputational information is depicted in many industry discussions of reputation management. The admonishment to be vigilant in sanitizing one's public image because of prospective harm often seems to also carry with it a fairly narrow understanding of what it means to have a "good" reputation. First, the unstated assumption underlying such admonishments is that there is no separation between the self that is discussed and represented in any of the disparate platforms of the internet and the self that works, socializes, and pursues hobbies in the physical world. As a recent *Forbes* article put it, "[y]our online reputation is your reputation. People are using the first impression they have of you from the Internet to decide whether they connect with you and how they act toward you when they do."¹⁷⁷ The characterization of what is at stake thus tends to take on the tone of an urgent warning: "do you know what people are saying about you and who can see it?" Jack Shafer's aforementioned article also recognizes the prevalence and dubiousness of such a construction of reputation:

¹⁷⁶ The article discusses a NYT public editor column by Clark Hoyt that addresses the fact that "[r]oughly one person a day approaches the *Times* to complain about how his or her life might be unnecessarily complicated by an old *Times* story unearthed by a Web search." Jack Shafer, "Don't Blame the New York Times for Your Bad Reputation." *Slate* 8/27/2007. http://www.slate.com/articles/news_and_politics/press_box/2007/08/blaming_the_times_for_your_bad_reputation.html

¹⁷⁷ Michael Simmons, "How to Bulletproof Your Reputation." *Forbes* 8/11/2014. <http://www.forbes.com/sites/michaelsimmons/2014/08/11/how-to-bulletproof-your-reputation-in-the-digital-age/#59a46e633b5b> (accessed 5/29/2016).

One of the flaws in [NYT Public Editor] Hoyt's thinking is his belief that one's reputation is a possession—like a car or a tennis racket—when one's reputation actually resides in the minds of others. A person can have as many reputations as people who know him or know of him. Positing that the top link in a Google search of a name equals somebody's reputation is silly, and Hoyt's column only encourages that notion.

Regardless, taking seriously the proposition that search engine results dictate reputation appears indicative of general concern about the impressions created by such results: as a recent Pew study found, those who had taken some steps to monitor their digital footprint (like searching their name regularly) were more likely to express concern about reputational information.¹⁷⁸ The injunction to be vigilant in monitoring such discussion is a kind of social zeitgeist that we therefore might call the “reputational imperative.”

This kind of imperative arguably contributes to a particularly one-dimensional and at times bizarrely reductive understanding of what makes a person's reputational profile both “good” and even knowable in the first place. The CEO of Klout, a company that develops metrics to rate the social influence of social media users, has described reputation-building tactics in terms of a kind of authenticity formula: “You can control your reputation. The top ways to build your online reputation are to keep make sure your profile reflects who you are and is up-to-date, to be authentic in how you portray yourself, and to be consistent.”¹⁷⁹ This echoes the ethnographic work of Alice Marwick, who shows that Silicon Valley professionals are in fact enamored of a kind of insipid

¹⁷⁸ Mary Madden Smith and Aaron Smith, “Reputation Management and Social Media” (survey), Pew Research Center, May 2010.

¹⁷⁹ Simmons, “How to Bulletproof Your Reputation.”

construction of “being authentic” on social media — a standard which of course hinges on a particular set of highly contrived and in fact self-restrictive conventions.¹⁸⁰

On one hand, a generous response might assume that imploring users to be “authentic” and aggressive in defending their digital reputations creates an unassailable “brand.” In doing so, the logic goes, they are effectively impervious to the kind of cultural “tyranny of the majority” situation in which they feel the need to capitulate to perceived prevailing opinion at the risk of being called “embarrassing” things on the internet. This would theoretically be a positive speech outcome in the marketplace framework, as those who had taken the time to solidify such “brands” would make the range of visible perspectives and personalities more heterogeneous. On the other, this is a rather superficial way to think about the affordances of an expressive medium and the expression of self: what if you don’t exactly know “who you are” or how exactly to “be authentic in how you portray yourself?” What if these conceptions change? Who else (such as advertisers) might be invested in encouraging such a conception of the static “authentic” self?

The evidence describing how employers do consider an applicant’s web presence in hiring decisions can be maddeningly vague. Some of the most alarmist writing is also the shortest on specifics about how employers make these assessments or how much they ultimately factor into decisions. “Unemployment is at astonishing highs and it’s tough to find a job right now,” writes one reputation guru named Andy Beal, and thus it is more

¹⁸⁰ See Marwick, *Status Update*, pp. 183-199.

important than ever to be vigilant and acknowledge the degree to which “Online Reputation Management [sic] is important to your personal brand.” This is because “not only are they looking, but 78% of recruiters research a candidate online and 35% actually reject a candidate based on this.”¹⁸¹ It would be interesting to know more about these decisions; unfortunately, however, the post neglects to explain how the rejections in question can be dispositively linked to whatever searches were performed or even what the employers were objecting to.

Some of the resulting advice seems like it might overcompensate for whatever negative repercussions of a neglected “online reputation” are indeed possible. As one reputation management blog asserts, for instance:

Employers would prefer to see photos of involvement with local charities or pictures with family, indications that they are well-rounded, responsible members of society. When applicants post pictures of [other] inappropriate actions, managers typically get turned off and question their capability of working for their company. Facebook has become a part of our culture, so now, more than ever, people are being held accountable for the way they represent themselves in their profiles.¹⁸²

¹⁸¹ Visible Factors, “Online Reputation Management DOES Matter.” <http://www.marketingpilgrim.com/2008/01/why-your-google-reputation-can-hurt-your-career.html> (accessed 1/4/2016).

¹⁸² Emily Russo, “How Employers Use Social Media to Hire Employees.” <http://causechatter.com/2013/04/11/how-employers-use-social-media-to-hire-employees/> (accessed 1/6/2016).

It is of course sensible to avoid plastering the internet with photos of debauchery or racist rants if one does not want to be identified with such behavior or sentiments.¹⁸³ We may think it prudish for employers to factor such impressions into their assessments, but this is largely their prerogative when the material is publicly accessible. It is at the very least difficult to enumerate the kinds of public expression that should and should not be fodder for an employment decision.

The above quotation, however, seems to suggest a more comprehensive sanitizing of one's public presence. Couldn't it be a bit excessive to assume that one must systematically prune one's public web footprint until all that is left is a banal, generic series of grip-and-grins and pet pictures (and one that is virtually indistinguishable from those of other candidates) in order to avoid permanent unemployment? Pursued to such an extreme, these overall formulations of the role of "online reputation" and the imperative to manage it start to themselves seem antithetical to the goals of experimental self-development and liberty of expression that are valued in the free speech tradition. Thus, the approach to managing one's presence in the public forum that is idealized in this kind of newfangled self-help might well offer more effective reputation manicuring, but in a way it actually contradicts some of the salutary effects that are assumed to come with pursuing "self-help" in order to vindicate one's reputation. In this formulation —

¹⁸³ A now classic story that is used as a kind of reputational cautionary tale, for instance, involved a university that allegedly factored a halloween photograph of a student with the caption "drunken pirate" into its decision to deny her a professional degree. See e.g. Brian Krebs, "Court Rules Against Teacher in MySpace 'Drunken Pirate' Case," *Washington Post* 12/3/2008. http://voices.washingtonpost.com/securityfix/2008/12/court_rules_against_teacher_in.html (accessed 4/16/2016).

contrary to the approach encouraged by the proponents of social media “authenticity” — one essentially trades a narrow form of professionally-oriented marketability for any uncalculated expressions of personality.

Such a paranoid and ultimately self-stifling conception of how to manage reputation prompts several possible responses. First, we might take it as an indication that more robust legal mechanisms are necessary to give the subjects of speech more control over what others say and reveal about them on internet forums. There is a version of this argument that is more palatable in terms of free speech than might first appear. As Julie Cohen has written, privacy rights are not simply restrictive of what other people can expose; in doing so, they preserve a kind of productive space for self-fashioning that eschews precisely the kind of myopic conception of subjectivity as a fixed essence that is espoused by those like the proponent of social media “authenticity” quoted above.¹⁸⁴ Such a position overlaps in spirit with Helen Nissenbaum’s advocacy of privacy as “contextual integrity,” which emphasizes fidelity to the contextual informational norms within which a particular piece of information or sentiment is shared (such as the confidence of a private conversation).¹⁸⁵ In other words, true expressive liberty requires that people feel secure that when they share something appropriate for one context, it will not subsequently be used against them in a different one.

¹⁸⁴ Cohen writes: “Privacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.” Julie Cohen, “What Is Privacy For?” 126 *Harvard Law Review* 1905 (2013).

¹⁸⁵ See Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Palo Alto: Stanford UP, 2009).

Another response, however, would be that in taking extra steps to protect this kind of self-development via the law specifically, we inevitably compromise the liberty interests — and thus another kind of “self-development” — of the speakers in question and the viewers of the information. The speakers may be other humans saying things about someone or searching for information, or they may be “speakers” in the sense that Google is a “speaker” that organizes and displays content in an editorial fashion. The viewers may be employers or not; the point is simply that any expansion of rights to control what is said and displayed about a person inevitably affects expressive privileges and marketplace benefits as well. Finally, any such mechanism could of course be used to whitewash critical speech or testimony regarding misconduct that might well represent issues of public concern.

The combination of this liberty interest and the marketplace or informational interests seems to require that we at least entertain the possibility of some other adjustment or remedy. Might it be possible to exercise caution about what we share without completely sacrificing spontaneity and experimental self-fashioning? Can we not trust that someone will be given the chance to explain an ill-advised tweet or unfair characterization by a third party? Could traces of “negative” personal informational become ubiquitous and universal enough that we are forced to acknowledge that *everyone* has made mistakes or angered someone and thus deserves skepticism only in egregious or topically relevant cases? Putting these all together, couldn't the substitution of less paranoid conceptions of the imperative to protect one's “online reputation” be just as

potent in diminishing the likelihood that people will self-censor in their online or offline expression?

Overall, then, it is indeed important to acknowledge the possibility that some speakers will hesitate because of concerns about more widespread exposure than might have once been technologically possible. The risk of widespread exposure undoubtedly chills some expression that unfortunately might actually be unlikely to warrant or receive any critical response. At the same time, there are countervailing expressive and informational concerns as well. Further, it is additionally unclear why we should automatically view much of the judiciousness we ordinarily exercise in presenting different facets of ourselves to the public as tantamount to capitulating to a societal pressure to conform to some kind of anodyne ideal online persona.

Finally, it is crucial to note that personal reputational monitoring and grooming themselves do not operate in a legal vacuum. Numerous sources suggest ways in which reputation management companies are either complemented by or work directly with lawyers who specialize in “online defamation” to bolster various efforts to influence content visibility. “Should we be surprised that two of the three presenters were attorneys at this search marketing conference?” asked a recent Marketing Land post covering a panel at the 2015 SMX search marketing conference. “Really, we shouldn’t be,” it continued, because “the more you know about online reputation issues, the more you

recognize that managing brand presence online involves a tight hybrid between marketing best practices and application of good legal precedent.”¹⁸⁶

When it comes to personal reputation management, the most common variety of legal involvement seems to come in the form of notices requesting that certain content be removed from a website and threatening legal action if the recipient refuses. In other cases, it appears that companies that foreground their expertise with reputational issues are essentially offering investigative services that are tailored to the specific factual obstacles that are characteristic of dealing with content on the internet. Cyber Investigation Services, for instance, employs a team of investigators, public relations specialists, and lawyers who promise to “identify the hidden [speakers]” using “a technique to geo-locate hidden attackers that cannot be done by attorneys because of rules set in place by the bar association [sic].” This company offers its services directly to attorneys to assist in the discovery process as well. A Long Island company called Reputation Crusader, likewise, claims that the combination of public relations and legal approaches that they offer is necessary in order to effectively deal with the offending content. It is perhaps equally revelatory that the law firm Vorys — which calls its lawyers “internet defamation removal attorneys” — cites several recent victories that include “negotiated payments by defamers to our clients” and “removed defamatory material from the internet by successfully negotiating with a client’s former customers” but no

¹⁸⁶ Chris Silver Smith, “Protecting Your Brand From Online Fraud, Infringement & Other Emerging Threats.” <http://marketingland.com/recap-smx-east-protecting-your-brand-from-online-fraud-infringement-other-threats-148087> (accessed 11/2/2015).

actual defamation judgments.¹⁸⁷ It is difficult not to again notice how commonly “defamation” is used as the hook for these claims. The details are, of course, not disclosed, but we have seen above that what starts as a complaint about material reputational harm and defamation can easily slip into related but distinct claims of injury.

Indeed, Vorys partner Whitney Gibson has cautioned against the overzealous pursuit of lawsuits for much of the content that is perceived to cause reputational harm because it is not actually tortious in the technical sense: “Customers usually base their complaints on opinion, making their complaints not actionable; also, such customer complaints typically do not cause significant damage.”¹⁸⁸ On the other hand, fake reviews from competitors are often actually false and therefore might qualify as tortious. Even so, Gibson recommends that a kind of truncated use of the law in which one simply asks a court to declare statements true or false is often a more effective solution, as it conserves resources and cuts to the heart of the matter. Armed with such a “declaratory judgment,” the aggrieved party can (either alone or working with a company like Vorys) at least attempt to convince an intermediary to remove or otherwise obscure the existence of the content in question: “If he or she can prove the relevant content is false and causing harm and the court agrees, the judge can issue a court order requiring the poster to remove the

¹⁸⁷ Vorys, “Our Experience.” <http://www.defamationremovalattorneys.com/>

¹⁸⁸ Whitney Gibson, “Five Things to Consider Before Filing an Internet Defamation Claim,” *Texas Lawyer* June 2014. <http://www.texaslawyer.com/id=1202657284301/Five-Things-to-Consider-Before-Filing-an-Internet-Defamation-Claim?slreturn=20160005030239> (accessed 1/4/2016).

relevant statements. When a lawyer presents a court order to the website, most websites will remove the offending content.”

Much has been made of the dubiousness of some of these court orders, which can be obtained without any kind of adversarial process.¹⁸⁹ Nonetheless, they represent a novel use of law as a kind of public relations tool rather than an end in itself. In this regard, the legally-oriented branch of reputation management appears to realize (at least in spirit) some of the libel reform calls for alternative procedures that focus on publicizing declarations of the truth or falsity.

Some companies offering reputation management services appear to tread in more dubious territory. The existence of a few dodgy companies or opportunistic individuals offering such services should not necessarily reflect anything about reputation management initiatives in general, but it is hard to ignore how easily the headlines write themselves: “reputation management company needs reputation management of its own!” A 2012 piece in Bloomberg Business in fact made almost precisely this quip. The piece, called “Fixing the Reputations of Reputation Managers,” detailed the reputational tribulations of several leading reputation management companies. The web search results for a firm called Reputation Changer, for instance, include links on the first page of Google results asserting that it “makes false claims,” and the results for the company

¹⁸⁹ See e.g. Eric Goldman, “When Should Search Engines Ignore Court Orders to Remove Content?” <http://www.forbes.com/sites/ericgoldman/2013/08/27/when-should-search-engines-ignore-court-orders-to-remove-search-results/>

Elixir suggest it is a “scam.” Even the autocomplete suggestions for a Google search of Reputation.com include “scam.”¹⁹⁰

While the article stops short of suggesting that the industry overall amounts to empty puffery, it does quote some voices in the industry who lament the blitheness with which some companies seem to claim they can easily “take down negative content.” As one analyst contends, “[d]oing reputation management effectively is very deliberate, and you have to work at it.”¹⁹¹ This does not stop a company like Profile Defenders from boldly proclaiming on their homepage that they can “get negative results completely erased from the internet” — a claim which is supported by a testimonial from a “Fortune 500 CEO” who was amazed that “[t]he bad result is 100% gone not just hidden [sic].”¹⁹² This kind of boast seems additionally revelatory in the way it frames the content being targeted. The service is not successful because it corrects the record; it is successful because “the bad result is 100% gone.” What nebulous conception of merely “bad” speech is operative here?

Another social media strategist suggests that companies promising quick results are misleading their prospective clients. “It takes time, persistence and hard work to push a negative result off your Google results page,” writes Claire Celsi, [and] [i]t’s

¹⁹⁰ Tom McNichol, “Fixing the Reputations of Reputation Managers.” *Bloomberg* 2/2/2012. <http://www.bloomberg.com/bw/magazine/fixing-the-reputations-of-reputation-managers-02022012.html> (accessed 10/15/2015).

¹⁹¹ McNichol, “Fixing the Reputations of Reputation Managers.”

¹⁹² <http://profiledefenders.com/index.php> (accessed 11/24/2015; screen capture available).

disingenuous (at best) to promise otherwise.”¹⁹³ Clients would do better to save their money and focus on leveraging the favorable search treatment of major social media platforms themselves. She counsels that prospective reputation management clients might often do just as well taking matters into their own hands: “Use the money you would have wasted on ‘Reputation Defender’ and...use Facebook, LinkedIn, Twitter, YouTube and your own blog to create content that accurately represents you and your business.”¹⁹⁴

Sometimes reputation management professionals simply pursue a counterproductive course of action in their attempt to vindicate their clients’ reputations. Reputation management would appear to require a professional detachment from the conflicts in which one intervenes, but some who offer the services have a difficult time staying above the fray. A recent series of articles in the blog TechDirt, for instance, chronicles the belligerence of one named Patrick Zarelli.¹⁹⁵ While Zarelli taunted the attorneys and bloggers against whom he directed his ire with claims that “what they actually know about the internet could fit into a thimble,” he apparently also “seem[ed] to think that the proper strategy to ‘manage’ [a particular client’s] ‘reputation’ was to call up a bunch of these lawyers — many of whom have built their reputations on protecting free

¹⁹³ Claire Celsi, “Don’t Fall for the ‘Reputation Defender’ Online Scams.” *PublicRelationsPrincess.com*, 11/6/2011. <http://www.publicrelationsprincess.com/2011/11/don.html> (accessed 4/16/2016).

¹⁹⁴ Celsi, “Don’t Fall for the ‘Reputation Defender’ Online Scams.”

¹⁹⁵ Mike Masnick, “Florida Bar Laughs Off Nonsensical ‘Bar Complaint’ By Reputation Management Bro Patrick Zarrelli.” *TechDirt* 10/2/2015. <https://www.techdirt.com/articles/20151201/23575332963/florida-bar-laughs-off-nonsensical-bar-complaint-reputation-management-bro-patrick-zarrelli.shtml> (accessed 12/5/2015).

speech rights — and threatening them, saying they should take down their blog posts.”¹⁹⁶ As the post noted, the result was simply that “[l]ots of people wrote about Zarrelli's fuck up, including us.” Zarelli later “threaten[ed] bar complaints against the lawyers mocking him [which were meritless and quickly dismissed].”¹⁹⁷ Such conduct suggests an imperative that those engaging in reputation management take extra care to not themselves become consumed by the same bitter drama that characterizes some of the disputes they seek to ameliorate. When they fail, it reinforces the impressions introduced above that reputation management is sometimes merely a euphemism for censorial thuggery.

Law professor Eric Goldman has supplied another kind of example of a reputation management company that makes grave but dubious threats. The company, called Infringex, sent Goldman an email containing what it called a “notice of infringement of defamation” that requested he remove content from three year old blog posts on behalf of a client (whom Goldman does not name). Goldman of course easily disregarded the notice, but he doubts that everyone receiving one would have the experience to be so sanguine: “Instead, they may perceive the notice as a serious legal threat and respond by quickly removing the identified content to avoid any further legal entanglements.”¹⁹⁸ In a way it is troubling that the company is even trying to charge for their “service.” The

¹⁹⁶ Masnick, “Florida Bar Laughs Off Complaint.”

¹⁹⁷ Masnick, “Florida Bar Laughs Off Complaint.”

¹⁹⁸ All quotations in this paragraph from Eric Goldman, “Doing Online Reputation Management? Don't Do It This Way.” <http://www.forbes.com/sites/ericgoldman/2015/05/14/doing-online-reputation-management-dont-do-it-this-way/> (accessed 10/16/2015).

person seeking removal could send a request him or herself that would be no less persuasive to anyone aware of his or her legal rights than the bogus “infringement notice” that Goldman received. Further, to Goldman, a company like Infringex represents “just one of the countless ventures in the reputation management space, an industry plagued with some serious reputation issues of its own.” Yet the existence of these companies can be attributed to a broader demand in the digital speech environment: “I’ve said before, some folks desperately want a magic wand that would allow them to remove online discussions about them at their discretion. No such magic wand exists, but plenty of businesses are happy to peddle the dream.”

Conclusion:

Whether pursued by lawyers, reputation managers, or the complainant him or herself, much of the effort expended to protect reputation revolves around trying to convince the intermediaries or hosts of the content itself to step in and offer some direct relief (or at least assistance) for the aggrieved party. Because of the prevailing interpretations of Section 230, these actors often have no obligation to do much of anything: they enjoy what legal scholar Rebecca Tushnet has called “power without responsibility.”¹⁹⁹ What Tushnet really means, presumably, is that they enjoy power without *legal* responsibility. But is the content in question impervious to all forces of regulation if we broaden the definition beyond legal causes of action? The blurring of private reputation management initiatives and the legal profession hints at the ways in

¹⁹⁹ Rebecca Tushnet, “Power Without Responsibility: Intermediaries and the First Amendment.” *The George Washington Law Review* 76.4 (2008), pp. 986-1016.

which “regulation” of reputational information in the digital speech environment must be conceived more broadly. Instead, it would seem that the reputation management industry performs many of the functions that law might otherwise (and affect an expanded range of speech in the process).

Such a function arguably encourages a kind of reputational paranoia in which any critical speech (that would often otherwise be protected by the First Amendment) is perceived as harmful and therefore intolerable. It is of course in the interest of reputation management professionals to propagate paranoia about reputational vulnerability, but the pervasiveness of the preexisting anxiety around these terms renders this more conspiratorial explanation somewhat unnecessary. “Reputation” itself appears to have become a kind of placeholder term through which anxieties about a newfound vulnerability to speech on the web and the loss of a certain kind of control over our mediated selves are expressed. To the degree that attempts to remedy this loss of control catalyze argument, self-promotion, and direct engagement with the material in question (facilitated by those providing reputation management services), they might be seen as a boon to the marketplace of ideas that emphasizes counterspeech over litigation. On the other hand, a segment of reputation management appears dedicated both to removing content (rather than rebutting it) and to convincing potential clients that a “good” reputation is tantamount to the absence of any public criticism or even personal disagreement. This conception arguably undermines the interest in both self-development

and the competition of ideas advocated in American free speech theory by fomenting excessive reticence and “peddling the dream” of a sanitized speech environment.

Chapter 4

Introduction to Reputation and Consumer Review Platforms: Yelp

This chapter turns the focus to case studies of particular platforms. As outlined previously, these case chapters analyze how parties approach disputes according to the architecture, norms, market position, and legal treatment that apply to speech on particular platforms. They do so with the concerns of the previous three chapters in mind: how does the web create a new kind of reputational vulnerability, what attitudes toward critical speech and the imperative to address it are operative in these disputes, and what kinds of remedies truly address these concerns? Finally, what are the consequences of such phenomena for the marketplace of ideas?

An important source of conflict regarding online reputation involves websites that provide a platform for third party comments or reviews about one's interactions and experiences. They collect and display third party content knowing that it may contain inaccuracies or insulting speech. Their success depends on driving traffic to their sites in order to attract advertising and thus on the policies that have been put in place to protect hosts of third party content from liability. In order to encourage participation (whether motivated by commercial interests or pro-speech convictions), they zealously guard the anonymity of their users. Such websites unsurprisingly find themselves targets of outrage and lawsuits, cast as facilitators (rather than mere conduits) of harmful speech. Because of this, some cite them as the impetus for new efforts to regulate speech on the internet. This happens primarily on three fronts: through the market via novel reputation services

and other means of mitigating review sites' popularity, through legal mechanisms (such as revision of Section 230 or novel kinds of contractual agreements), or through appeals to their operators to change their architecture and content policies.

Two basic subsets of consumer review websites will be discussed in the two chapters that follow. Each of these has or encourages particular methods for internally resolving disputes. In form and execution, these sometimes parallel the kinds of conflicts that would otherwise take place through the legal system in a tort case or an alternative dispute resolution hearing. They have rules for what can be posted, when it will be taken down, and how they will facilitate confrontation between disputants. The sites are thus distinguished in these chapters in terms of their architectural features and content policies: what kinds of third party commentary they display, how it is organized, and how they might filter or otherwise monitor what is posted.

One is the most ubiquitous consumer review website, Yelp; the other is Ripoff Report, which is perhaps the most prominent site in a broader constellation of "gripe" sites. These offer a less filtered and more colorful platform that contrasts with the relatively prosaic review sites like Yelp. This chapter establishes some of the basic features of how different kinds of review sites operate, what kinds speech they host, their place within the overall information landscape of the web, and the central questions about how these platforms resonate with free speech theory. The discussion then turns to the Yelp platform specifically.

Basic Features of Different Platforms:

Yelp employs an algorithm that attempts to screen out the most extreme reviews and to eliminate fake reviews by competitors. According to Yelp, it does so in the interest of creating a more reliable body of information that can be a boon to businesses as well as a forum for complaint. Yelp’s defense of its filter is articulated in these terms:

“Reviews that reflect perfectly legitimate experiences are sometimes filtered out by the review filter’s algorithmic processes. We agree this can be frustrating, but it’s the high cost we accept to avoid being a *laissez-faire* review site that people stop using.”²⁰⁰

Gripe sites like Ripoff Report aim to capture an arguably different facet of the consumer experience. These sites nominally disclaim any attempt to actively screen and filter out the crude or false statements from the eloquent or true statements. The colorful founder and self-described “Ed-itor” of Ripoff Report, Ed Magedson, explicitly contrasts his approach with that of other consumer sites. His own website characterizes him as someone who “has one goal in mind — to empower consumers by helping them speak out.”²⁰¹ Gripe sites therefore claim to offer an unadulterated glimpse of the unvarnished opinions and experiences of the public. Outright removal of statements is cast as theoretically unnecessary in Ripoff Report’s own descriptions because there are other “pro-speech” options. The site itself is structured to facilitate rebuttal: The original complaint on Ripoff Report is displayed above a chronological vertical list of all of the

²⁰⁰ yelp.com, “Yelp’s review filter explained.” <http://officialblog.yelp.com/2010/03/yelp-review-filter-explained.html>

²⁰¹ “Did You Know?” edmagedson.com (accessed 3/23/2016).

comments and rebuttals that have subsequently been added. The site also features an arbitration program in which outside arbitrators will review the truth of particular statements for a fee and add a note the review in question.

Legally speaking, review sites can only operate as anonymous open forums because of Section 230 of the CDA. Were they to be treated as publishers of the content that third parties submit, they would have to screen all of the posts submitted for defamatory, threatening, obscene, or otherwise illegal content. This would probably be impossible: Ripoff Report, for instance, has hosted nearly two million posts since its inception.²⁰² The sites do, however, risk being treated as “publishers” if they take a particularly active role in soliciting and editing content that is nominally submitted by third parties. This possibility has emerged following the 9th Circuit’s 2008 decision in *Fair Housing Council v. roommates.com* and the application of similar reasoning by the 10th Circuit in *FTC v. Accusearch* (2009).²⁰³ An ongoing investigation by the DA of Sac County, Iowa could provide supplementary evidence that Ripoff Report in particular

²⁰² RipoffReport.com, homepage (accessed 3/23/2016).

²⁰³ Discussed in more detail in chapter 2, these cases established that in an instance of substantial contribution to the design of potentially tortious content submitted by a third party, a website would lose the non-publisher status for that speech that it would otherwise enjoy under the safe harbor provision of Section 230.

The Tenth Circuit applied this precedent to Ripoff Report itself in ruling on a pretrial motion in *Vision Security v. Xcentric Ventures* in August of 2015 on the grounds that Ripoff Report was not acting as a “neutral publisher” of its reviews — though, as Professor Eric Goldman noted at the time, the court declined to lay out specific criteria for determining when a host of third party content was in fact “neutral.”

See Goldman, “Another Tough Section 230 Ruling For Ripoff Report–Vision Security v. Xcentric.” <http://blog.ericgoldman.org/archives/2015/09/another-tough-section-230-ruling-for-ripoff-report-vision-security-v-xcentric.htm> (accessed 3/1/2016).

takes a much more active role in shaping the content provided by some third parties — even going as far as to basically commission it itself.

Consumer review sites would also not be nearly as noteworthy were they to not command the attention they do from search engines. The sites are looked upon favorably by Google and other search algorithms, with posts appearing on the first page of keyword search results for many businesses and individuals.²⁰⁴ This matters, as a significant percentage of their traffic comes from searches.²⁰⁵ Many therefore conclude that a listing on one of these sites can be a serious problem given their search prominence. It is thus perhaps possible that a review site could amplify a false statement of fact to a degree unfathomable even with, say, the most widely seen television broadcast. Of course, this also means that true criticism and hyperbolic opinion — categories that are largely not actionable in tort law — will be just as widely visible. Perhaps this visibility makes these genres of speech less distinct in terms of their reputational harm than defamation law would ordinarily consider them to be. How should those subject to criticism on review sites react?

Responding to Speech on Review Sites — Two Fundamental Perspectives:

²⁰⁴ The reputation and defamation law specialists at the law firm Vorys explain, for instance, that “Ripoff Report ranks very high in search engines, with a domain authority of 83/100, according to Open Site Explorer. This means, for any Ripoff Report post that shows up among the first search results on Google or another search engine, it is extremely difficult to push that page lower in the search results.” <http://www.vorys.com/publications-1176.html>

²⁰⁵ Much of Ripoff Report’s traffic overall comes from web searches for individuals or businesses (fluctuating between 35 and 60 percent according to the last year of data from Amazon’s web analytics branch alexa.com).

In discussing the variety of responses to speech on consumer review platforms that is perceived to cause reputational harm, it is useful to begin with some guidance recently offered by a leading figure in the reputation management industry. In an interview in the *New York Times* during the spring of 2014, reputation.com founder Michael Fertik described his conception of the proper schematic for responding to speech on consumer review websites. “If something written about you is unambiguously false, you might want to consider a response,” answered Fertik (offering a hypothetical involving a complaint about the lasagna at a restaurant that does not in fact serve lasagna). Otherwise, “the last thing you want to do is start fighting these guys[;] you don’t want to take this personally.”²⁰⁶ Fertik compares doing so to the proverbial danger of “wrestling with a pig.”

Such a characterization introduces the core variables in analyzing the impact of speech on consumer review platforms: the degree of objective factuality of the statements, the affordances of the platform, considerations of the speaker’s intentions, and the relative visibility of different response options. Most significantly, it espouses an ethos: “you don’t want to take this personally” — implying that the contemporary digital world requires accepting that you may become a target of criticism or invective whether you directly invite it or not. As a corollary, it seems to perhaps optimistically assume that

²⁰⁶ Ian Mount, “Dealing With Online Reviews: ‘You Can’t Take This Personally.’” *NY Times* March 26, 2014. http://www.nytimes.com/2014/03/27/business/smallbusiness/dealing-with-online-reviews-you-cant-take-this-personally.html?_r=0 (accessed 3/17/2016).

most readers will understand that any otherwise reputable entity will still come under criticism at some point.

In the context of the interview, it appears that Fertik probably has more straightforwardly commercial enterprises in mind. Such an ethos about how to react to criticism can, however, also be extended to describe the general state of affairs regarding speech that scrutinizes individual character and behavior. It seems predicated on the idea that one need not court extraordinary attention to attract commentary; merely doing anything which could be evaluated or observed by another person makes one a candidate for review on the platforms that facilitate such speech. Ripoff Report founder Ed Magedson has echoed this formulation: “we live in information age and we will all be blogged somewhere, eventually[...]good or bad...[r]ight or wrong...[w]e will all be blogged...[w]t least here on Rip-off Report the subject of a report can respond.”²⁰⁷

These two formulations might be different in their prescription, but they also share logic in that both seem to be acknowledging a kind of omnipresent critical apparatus and its concomitant assumption of risk. In a sense, they both conceptualize obscurity as an antiquated means of preserving reputation. They therefore appear to embrace (though this is not to say they find it ideal) an extreme version of Justice Brennan’s previously-quoted warning about the expectation of being talked about in a

²⁰⁷ Editor’s Comment, Ripoff Report Complaint 683820. <http://www.ripoffreport.com/r/REDACTED/internet/REDACTED-AKA-Iron-Lady-AKA-Touchy-Feely-Creepy-Creepy-AKA-Bag-Lady-Lying-Colonialist-683820> (accessed 3/21/2016).

free society²⁰⁸ — an expectation that inheres in one’s assent to live in a society that values free speech. From this it is possible discern a corollary assumption of reputational hypervigilance and an imperative to be proactive in taking stock of one’s online reputational profile (as was introduced in last chapter’s overview of reputation management industry discourse).

At the same time, the approaches counseled have differences. Fertik appears to suggest in the interview that there is a certain breed of common online critic with whom engagement will (outside of very finite factual corrections) most likely be counterproductive. In circumstances in which criticism that one expects to be fleeting is in fact sustained or perhaps grows more problematic in its allegations, Fertik thus counsels the kind of indirect counterspeech (e.g. creating social media profiles) and search engine optimization characteristic of reputation management. Magedson, on the other hand, appears to be characterizing a kind of incitement to engage directly and rebut (via consumer review websites) any discussion of a person or business that appears. The debate going forward thus re-stages an elusive question that is familiar from libel law in the context of online content management: when is the speech in question harmful enough to warrant an extraordinary response that seeks to compel the speaker to rescind his or her speech (i.e the mobilization of law or some other authoritative mechanism), and

²⁰⁸ Recall that Brennan memorably stated in *Time v. Hill* that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.” *Time v. Hill*, 385 U.S. 388 (1967).

when, alternately, can we rely on either passivity or direct counterspeech engagement for the remedy?

Consumer Review Platforms and Overarching Free Speech Principles:

An important introductory question perhaps remains: how do such platforms comport with different principles or priorities in the American free speech tradition? First there is the question of the value of the general speech they host. Consumer review sites must be taken seriously as platforms for three genres of speech: speech that exposes malfeasance or legitimate grievance that is relevant to some audience beyond the speaker and the subject (e.g. an “issue of public concern,” not something like an obscure couple’s marital infidelity); intemperate speech that represents “blowing off steam” and is often manifest online through reciprocated “flaming” (e.g. where there is caustic disagreement but no significant power asymmetry); or hyperbolically opinionated speech through which we discover our own opinions and collectively articulate and internalize our rejection of values or behavior we find abhorrent.

The rhetoric employed by the sites may be self-servingly sanguine about the prospects for counterspeech. At the same time, they seem to cut to the heart of the material concern in defamation and privacy law: how can someone who feels aggrieved actually deal with the circulation of the offending speech in itself? The emphasis on maximizing participation and encouraging direct counterspeech for resolution would in turn make review sites a salient example of a digital speech environment that implements the maxim voiced by Justice Holmes in *Abrams v. United States* (and by many others

subsequently) that “more speech” — rather than censorship — is the proper corrective for speech that we might find loathsome or wrongheaded. By extension, it thus comports with the acknowledgement in the marketplace theory that the competition between ideas ideas will sometimes be anonymous caustic or intemperate in tone.

While some voices in these chapters emphasize the outsize impact of consumer review sites, they are also not the only sources of information that a reader is likely to encounter. Sometimes the mere fact that something is technically visible via a web search is not tantamount to it being “public” in any particularly consequential sense because few people will pause to look at it. At the risk of advocating for speech to be protected based on its impotence, one unfair review or vitriolic jab on one of these sites is probably not going to drown out the rest of an individual or company’s search engine results.²⁰⁹

Finally, while such websites are used for scrutiny about individuals that is sometimes either only obliquely related or wholly unrelated to “commerce,” the sheer volume of speech on the sites represent both a clear appetite for such a platform as well as an expanded cultural formulation of what kind of scrutiny of individuals is both necessary and appropriate. In a way it makes perfect sense that “consumer reviews” would encompass reviews of people in a post-industrial or late-capitalist economic

²⁰⁹ The Supreme Court has on at least one occasion tried to remind us that consumers are capable of such savviness. As Justice Blackmun wrote in the *Virginia Pharmacy* case, the paternalistic reasons given for opposition to drug price advertisements were misguided because they sought to protect consumers by limiting the range of available information from which they could make judgments about contrasting claims and offers. Instead, a kind of maximalist approach was more appropriate: “information is not in itself harmful...the best means to [ensure that people are well informed] is to open the channels of communication rather than to close them.” As Blackmun suggested, a central premise of the free speech tradition is that we are often more than capable of deciding for ourselves whether something constitutes worthwhile information. *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).

environment that is synonymous with the “gig economy,” personal entrepreneurship, and flexible specialization. As this logic would have it, there is simply less distinction to be made between the personal and the commercial.

Such a principle intersects with some of the sociological perspectives on the function of reputation from chapter one and the empirical research from chapter two. There is great pressure to coordinate with strangers and synthesize a vast array of information in contemporary life (a traditional function of reputation), yet we do so amidst imperfect institutional indicators of credibility and trustworthiness. Consumer review sites are in some sense a means by which we can in fact assume the kind of increased responsibility for making decisions about credibility that scholars and pundits are so eager to implore. In one sense, then, the ensuing analysis intends to demonstrate the degree to which the uses of consumer review sites represent a free speech adaptation to this technological and economic environment. This is not tantamount to an endorsement of the overall conditions, but merely an attempt to point out that these platforms represent a meaningful evolution of the meaning of the “marketplace of ideas” in the overall digital media context.

Conversely, however, some people may have little web presence or desire for one when they find themselves the subject of postings on these sites, and it sometimes appears to require extraordinary effort to rebut statements that appear on these sites or halt their proliferation once they have been posted. The idea of “rebutting” a statement on a review site is itself predicated on the assumption that people will take the time to read

whatever is written and parse sometimes arcane factual details. Existing tort law is of course applicable in instances involving false, reputationally damaging facts, yet it may be of little use in situations that either feature demeaning and upsetting but not technically factual postings or when the platform in question refuses to assist the subject in discovering the speakers or removing the speech under any circumstances. At the very least, the genres of user generated content hosted on these sites represent a mutation in the media landscape that allows one disagreement (or worse, random vendetta) to cause an otherwise well-intentioned person to have to countenance uncivil and often vicious personal attacks that technically can be viewed by anyone. There are therefore serious dignitary and material issues raised by myriad cases involving consumer review postings.

Speech on Yelp:

Yelp is routinely a first-step consultation when one seeks more information about a commercial entity. It will thus be the focus of analysis here, though many more industry-specific platforms exist that also rank high in search and present unique counterspeech affordances. Numerous studies have indicated that sites like Yelp have thus become an important part of the overall commercial ecosystem that are relied on as sources of information. One published in June 2014 by a company called Bright Local, for instance, indicated that “9 out of 10 people trust online reviews as much as personal recommendations.” A comment on this study correspondingly concluded that “online

reputation” was thus “more important than ever” given the integral role of these sites in consumer decision-making.²¹⁰

Acknowledging the growing importance of consumer review sites still leaves the task of understanding the conventions of the speech they host. The centrality of Yelp reviews in the information marketplace of the web has inspired concerns about both their reliability and their secondary uses as tools of reputational assault. Unpacking their role in the online information landscape thus has serious implications for evaluating how speech on the web is and should be regulated. Do people largely accept them as having factual value? How do readers weigh the subjective dimension of personal taste in reviewing a business or individual?

The study cited above that emphasized reliance on Yelp reviews came with a caveat: though consumers frequently consult online reviews, those surveyed also reported an increase in the average number of reviews consulted in order to generate an opinion.²¹¹ This makes intuitive sense, as a greater sample of reviews would undoubtedly offer a more representative picture of the median experience with the entity being reviewed and help to contextualize extreme reactions. The entity being reviewed and the information seeker both have an interest in maximizing the reviews available in order to represent a

²¹⁰ Kristen Ciccolini, “9 Out Of 10 People Trust Online Reviews As Much As Personal Recommendations. *KO Marketing Associates.com*. <http://www.komarketingassociates.com/industry-news/9-10-people-trust-online-reviews-much-personal-recommendations-1502/> (accessed 3/17/2016).

²¹¹ Ciccolini, “9 out of 10 People.”

more or less representative sample of consumer experiences — which constitutes “trustworthiness” on Yelp.

This empirical finding seems to indicate above all that those who consult reviews are not completely naive; they seek out a broader range of reviews before forming judgments. At the same time, reliance on a broad range of reviews therefore indicates less trust in any single review. It thus suggests that platforms like Yelp may not be particularly useful as information aggregators when the entity being evaluated has simply not received much attention. At the same time, this means it might not be particularly harmful either. While one can envision an undesirable situation in which one or two unhinged reviews that are not representative of common experience (or are simply false and motivated by malice) could create significant reputational distortions, those who are lightly-reviewed might actually find some solace in the findings quoted above, as readers are evidently not likely to put much stock in the opinions expressed in only a handful of reviews.

Far more concerning is the problem of “astroturfing” on such platforms. Astroturfing comes in positive and negative guises: just as one might pepper one’s own Yelp page with fake positive reviews, one might also create fake negative reviews on a competitor. The prevalence of fake reviews is not precisely known but considered to be significant. Yelp maintains a commitment to pseudonymity that in practice enables the same person to create multiple profiles using different email addresses without linking them to a real identity. Astroturfing therefore capitalizes on the code affordances of the

platform. In theoretical terms, this situation thus shows how the digital “marketplace of ideas” can be compromised when it is “gamed” based on its architectural properties.

Astroturfing exists because consumer reviews have a discernible impact on the success of the entity being reviewed. Some recent empirical research on the effects of changes in aggregate review ratings (expressed from one to five stars on Yelp) has demonstrated a significant positive correlation between an increase in positive star rating and an increase in business. A 2011 Harvard Business School study found, for instance, that a one star increase in average Yelp rating translated into roughly a nine percent increase in revenue.²¹²

The problem with astroturfing on consumer review sites has evidently reached significant enough proportions in the last several years that several attorneys general have begun to investigate and sanction the practice as part of their general consumer protection agendas. The New York Attorney General’s (NYAG) office has perhaps conducted the most consequential investigation, as it culminated in fines levied against 19 companies for soliciting fake reviews in late 2013. In most cases, the NYAG office found that US companies contract with companies located outside of US jurisdiction who charge fees to write either wholly fabricated reviews or to coordinate payments or other perks for actual customers in exchange for the desired coverage.²¹³ In some instances, however, the office

²¹² Michael Luca and Georgios Zervas, “Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud.” *Harvard Business School NOM Unit Working Paper* No. 14-006. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293164 (accessed 3/15/2016).

²¹³ David Streitfeld, “Give Yourself Four Stars Online? It Might Cost You.” *NY Times* 9/23/2014. <http://www.nytimes.com/2013/09/23/technology/give-yourself-4-stars-online-it-might-cost-you.html> (accessed 3/15/2016).

found that some search engine optimization companies in New York responded to fake inquiries for help combating online reviews by offering to themselves write fake reviews. Further, the investigation “revealed that SEO companies were using advanced IP spoofing techniques to hide their identities as well as setting up hundreds of bogus online profiles on consumer review websites to post the reviews” — presumably to increase the likelihood that they would evade Yelp’s filter by appearing to come from different computers.²¹⁴

Press materials released by the NYAG office and discussions in the news media suggest that a presence on Yelp is viewed as a reputational necessity. The *New York Times* captured this imperative in an article following the announcement of the fines: “[i]f you provide a service or sell a product and you are not reviewed, you might as well not exist.”²¹⁵ Given this perception about the consequences of a low profile on reputation platforms like Yelp, it is perhaps also not surprising that some business proprietors would panic and solicit fake reviews. The pressure appears especially great for smaller businesses or individual purveyors of services. Large chain stores and established brands have a foundation of credibility and visibility on which to draw in the face of an incident or simply a spike in new competition. Low initial visibility can feel especially precarious when one is then confronted with a particularly irked customer (setting aside the question of legitimacy for the moment) whose voice then dominates the review profile, and as the

²¹⁴ Jon Brodtkin, “Astroturfers shut down after flooding Yelp and Google with fake reviews.” *Ars Technica* 9/23/2013. <http://arstechnica.com/tech-policy/2013/09/astroturfers-shut-down-after-flooding-yelp-and-google-with-fake-reviews/> (accessed 3/21/2016).

²¹⁵ Streitfeld, “Four Stars.”

above-cited Harvard study demonstrates, a business is “more likely to commit review fraud when its reputation is weak, i.e., when it has few reviews, or it has recently received bad reviews.”²¹⁶

There are surely other reactions to the astroturfing issue. The above explanation could of course be proffered by unscrupulous recipients of legitimate criticism, and soliciting fake reviews is probably not the most effective approach to dealing with an unreasonable customer or an astroturfing competitor. The businesses surveyed might well have solicited fake reviews as a last resort to deal with a fundamentally unfair system that is too easily gamed. Nonetheless, it seems clear that the imperative to burnish one’s reputation on such platforms through key indicators (though inevitably crude ones) like star rating average produces a corresponding ethos that threatens to undermine the informational value of the platforms themselves. For an online information environment in which such platforms play a significant role, this would appear to be a pressing problem: a 2012 study by Gartner Analytics estimated that by the present day nearly one in five reviews would be fake.²¹⁷

In fact, the best approach for establishing “trustworthiness” paradoxically might be to allow negative reviews to linger amidst more positive ones because it indicates authenticity in an environment where disingenuous reputation manicuring is so rampant.

As one *Ars Technica* reader commented on a recent story about fake Yelp reviews, “[t]he

²¹⁶ Luca and Zervas, “Fake It Til You Make It,” 1.

²¹⁷Press Release, “Gartner Says By 2014, 10-15 Percent of Social Media Reviews to Be Fake, Paid for By Companies.” *Gartner.com* 9/17/2012. <http://www.gartner.com/newsroom/id/2161315> (accessed 3/17/2016).

biggest single filter I use to evaluate review legitimacy on an eCommerce site has always been that it has a good mix of good and bad reviews.” Sites with uniformly positive reviews “flunk the smell test because it means they're almost certainly doing some sort of review moderation.”²¹⁸ Applied more broadly, this comment optimistically represents an emergent cultural attitude that could prove far more powerful in ameliorating reputational panic than any legal mechanism: an online presence that looks too polished and unblemished is actually undesirable because it suggests inauthenticity.

Some review platforms have already taken steps to preempt government involvement. They have modified their architecture to identify and sequester comments that appear to be fabricated according to criteria employed by the websites' proprietary filtering algorithms. The visual display of filtered reviews itself represents a kind of compromise between outright removal and inclusion in the main list of reviews. Instead of either extreme, Yelp consigns them to a separate section under the heading “not recommended” (with a link to an overview of the filter algorithm) that must be affirmatively accessed by clicking a link to display the filtered reviews.

While Yelp understandably declines to reveal the exact parameters used, commentators (and probably many casual users) have discerned some fairly unsurprising patterns from observing the treatment of different kinds of reviews in large samples. Foremost of these is the tendency for extreme (one and five star) reviews to be filtered and the likelihood that reviews written by users who have little or no sustained presence

²¹⁸ Comment by user “Dan Neely” on <http://arstechnica.com/tech-policy/2013/09/astroturfers-shut-down-after-flooding-yelp-and-google-with-fake-reviews/>. Accessed 8/6/2015.

on the site will be filtered. The Harvard study found, for instance, that two through four star reviews were filtered far less frequently than they were approved and added to the main feed; the opposite was true for one and five star reviews by a large margin. As elaborated by an analysis in the publication *Marketing Land*, data from the study also indicate that 70 percent of reviews written by a user with no other reviews were filtered. Additionally, those submitted by a user lacking a profile picture are filtered 41 percent of the time.²¹⁹ The filtering endeavors of Yelp thus seem fixated on rewarding sustained participation as an indicator of reviewer authenticity. While they of course freely admit that the filter does not catch every single review that is not based on the real experience of a customer, their approach represents a significant code-based means of policing the information marketplace rather than simply waiting for regulators to identify and punish large-scale offenders after the fact.

Overall, algorithmically filtered sites like Yelp are built on an architecture that seeks to separate reliable from unreliable information (for the purpose of consumption decisions) based on discrete measurable characteristics — namely, a user’s level of commitment to using the platform and the relative extremity of his or her reactions. Because a site like Yelp employs a star rating heuristic and invites a range of assessments, it constitutes a unique discursive milieu that requires readers to reconcile ratings with written text (if they utilize the written text at all) and constantly adjust perceptions of

²¹⁹ Matt McGee, “Yelp More Likely To Filter Extreme Reviews & New Accounts [Study].” *Marketing Land* 7/30/2013. <http://marketingland.com/yelp-more-likely-to-filter-extreme-reviews-new-accounts-study-53622> (accessed 3/23/2016).

trustworthiness based on speech cues. It likewise presents particular opportunities for gaming that have quickly prompted government regulatory action given the degree to which the platforms have become integral to consumer decisions (broadly construed).

Responding To Perceived Reputational Harm On Yelp:

Several recent disputes over Yelp reviews illustrate the range of ways in which they impact reputation and are managed by their subjects. More theoretically, they illustrate the free speech implications of both different counterspeech tools and the policies of the platforms themselves. The first case involves a local San Diego lawyer named Scott McMillan who has fended off apparently fabricated reviews posted by a man whose adversary McMillan represented in a recent lawsuit. Macmillan seems to have relied significantly on direct counterspeech within the Yelp platform. His efforts also implicate the role of Yelp's own architecture in sorting and effectively diluting the impact of critical speech posted in smear attempts.

McMillan's case turn links his case to several recent incidents involving businesses or independent professionals who have become viral headline fodder. The subjects in these incidents have attracted the opprobrium of hordes of non-customers who have used Yelp as the public forum through which to register a more principled discontent (i.e. not just a personal commercial experience) and essentially shame them for some perceived transgression. Some of these incidents take on the quality of a meta-commentary in that they involve outrage over "no reviews" clauses in customer contracts themselves. Finally, such public incidents can be compared and contrasted with the

reasoning and outcome in recent lawsuits that have been filed by aggrieved Yelp review subjects to compel Yelp to reveal the poster identities corresponding with allegedly defamatory postings.

Dealing with False and Incendiary Speech By An Adversary:

Lawyer Scott McMillan has received 20 total reviews on Yelp, yet only three of them are featured on the main page for his practice. The other 17 are filtered and thus can only be viewed by clicking a small link at the bottom of the main page that reads “read 17 other reviews that are not currently recommended.” Two of the reviews are five stars and are written by reviewers who have more than one review. One of them has connected as “friends” with other Yelp users (a favorable characteristic to Yelp’s filtering algorithm). These reviews don’t offer many specifics but do offer positive commentary on McMillan’s character. One mentions some specific legal work that McMillan performed for the reviewer. The third review is for two stars, and features a displayed response from McMillan. The reviewer apparently did not appreciate McMillan’s tone when he called her back after her initial inquiry, and she did not end up hiring him. McMillan’s response essentially indicates that the reviewer has distorted some parts of her account (regarding when he called her back and what he said to her), asserting in professional language that he did not see a good fit between the two of them and thus that the decision was mutual. All in all his response appears measured and cordial without quite being contrite, and the review overall seems to convey a real but ultimately fairly insignificant exchange.

The filtered reviews are in some ways difficult to distinguish from the unfiltered reviews. While one of them is negative, the others are for five stars and provide significant textual detail about working with McMillan. Several of them were still written by reviewers who have posted other reviews; some were posted from different cities, but some were not. A casual reader might guess that the five star ratings and perhaps some hyperbolic language caused them to be filtered. Otherwise it would be difficult to conclude with certainty that they are fake, meaning that it would actually behoove the reader to include them in forming his or her overall assessment of the firm. This of course involves taking the time to read reviews in the first place; as the previously cited Harvard Business School study indicated, while some users clearly take the time to read several reviews in formulating judgments, many users of consumer review platforms simply look at the star ratings.

Were someone to indeed consider the actual text of McMillan's reviews, however, one would have to determine the veracity of a particular one star review which presents allegations of what is essentially legal incompetence and links to a recently removed Google blog that uses McMillan's name in the title. If one were to search for McMillan's name at that point, he or she would discover a similar site linked on the first page that is

filled with outrageous claims that McMillan has molested his daughter and engaged in other sordid behavior.²²⁰

McMillan has responded to this commentary in several ways. He has posted a response to the Yelp comment, and his response describes who he thinks the poster is and what motivated “her” post: the post is completely fabricated, and “she” is somehow associated with a person who has pursued a vendetta against McMillan through online harassment (and very likely physical vandalism of his and his family’s property coupled with ominous messages, though nothing has been proven conclusively) after McMillan represented the poster’s legal opponent.²²¹ McMillan’s Yelp response indicates that the man behind the post still owed McMillan the attorney fees from that case that he was ordered to pay as part of the judgment. While some of the other sites remain, McMillan was successful in convincing Google to take down the Blogger blog by presenting Google with the various court documents directing the man behind the post to not “defame, stalk, or harass people[...] directly or through the internet.” Further, documents as recent as this year detailing that person’s conditions of release from prison (for

²²⁰ An example accessed before the blog was removed: www.mcmillanlaw.us - The McMillan Law Firm: Scott McMillan Suspect in Molestation

“MCMILLAN [the caps appears to be mimicking the conventions of a court document] stated he would invite his niece, daughter of SCOTT ANTHONY MCMILLAN, over to perform “sexual favors” for money since “she will end up being a whore anyways and why not train her now” as she “was a perfect age for grooming.” MCMILLAN also indicated he and his sons (all three attorneys) would perform legal work for BOURKE as trade for sexual favors with his minor daughter.”

²²¹ This and the information that follows has been gleaned from personal communication with McMillan except in instances where the Yelp profile itself or court documents regarding the poster in question are directly referenced. While the poster’s name is easy to discover (by simply visiting McMillan’s Yelp profile) for any interested reader, McMillan suggested omitting his name from this document in order to prevent it from coming to his attention via a search of his name and provoking a menacing reaction in the event that the document is published to the web.

bankruptcy fraud) indicate that he was ordered to “not stalk and/or harass other individuals,” the meaning of which was “to include, but not [be] limited to, posting personal information of others or defaming a person's character on the internet.”²²²

McMillan thinks it likely that Google was therefore swayed by both McMillan’s persistence and the clear match between the content in question and the specific conditions for this man’s release that were ordered by the judge.

Overall, then, it appears that McMillan has somewhat successfully taken steps on his own to mitigate the possible reputational damage from the post by offering a plausible counternarrative to discredit the incendiary posting. While the mere fact that he is, as Fertik put it, “wrestling with the pig” might in some way risk either legitimizing the statements or emboldening the perpetrator, the vast majority of the other information available on McMillan and the particular substance of his actual speech response makes the incendiary posts seem anomalous as an assessment of McMillan’s performance and character.

It is further important to note that the associated websites that have not been de-published simply appear unhinged in their low-production value presentation of wild accusations and unclear references to some phantom “evidence” that is not actually provided. Ultimately, therefore, while in this case the Yelp filter seems to actually introduce uncertainty about which reviews may or may not be legitimate, McMillan’s

²²²*US v. DDC* No. 4:12CR00168-001 (S.D.TX 1/10/14).

response through direct counterspeech seems effective — especially given how marginal the source of the problematic speech is.

Importantly, McMillan was also careful to confine his response and takedown requests to particular statements that asserted false facts. In discussion, he is quick to point out that even the poster above has the right to express opinions and that an indiscriminate campaign to try to purge the web of all of this person's statements would be both legally dubious as well as counterproductive. Doing so would transform the poster into a legitimate victim of censorship who would then undoubtedly feel emboldened in pressing his case and trying to attract more attention as a "free speech" crusader. Finally, McMillan notes that he deliberately confined his counterspeech responses to the individual Yelp postings in question instead of trying to flood the web with his own assault on the poster's reputation. In his words, he tried to avoid the appearance of "protesting too much." Thus his response seems to indicate that restrained and narrowly targeted counterspeech is necessary to avoid being drawn into the kinds of conflicts that Fertik cautions against or triggering the kind of opportunistic adoption of free speech rhetoric through which aggressors end up (somewhat legitimately) portraying themselves as victims.

Dealing With Viral Protest On Yelp:

While the statements on McMillan's page mostly pertain to his professional conduct and appear to be posted by people with whom he has had at least some professional nexus, a slew of incidents indicate how Yelp business pages can become the

venue for public protest against certain principles or general behaviors. In this sense they reflect two dimensions of the role that consumer review sites play in the speech environment of the internet. Specifically, they demonstrate the shifting nature of the ways in which different speech platforms are used as “public forums” and the prevalence of particular norms regarding the appropriate expectations for how “public” behavior will be met with a newfangled kind of “public” response.

During the debate in summer 2014 about the application of Indiana’s new Religious Freedom Restoration Act (RFRA) to private businesses who opted to decline serving gays based on religious conviction, an Indiana pizza shop owner made comments to a local TV station about her opposition to gay marriage and stated that she would refuse to cater a gay wedding if asked. Apparently the clip made its way around social media to the point where the shop owner became a kind of stand-in for all supporters of the Indiana law.²²³ The Yelp page for the pizza shop was subsequently bombarded with reviews by people from around the country who opposed the policy but had probably never tried the pizza.

The speech and reputational implications of this episode are more multifaceted than they might at first appear. The issue hinges on how we conceive of the nature of the platform and its appropriate use. Yelp is a privately run, for-profit website and its foremost aim is to foster an environment where readers can find pertinent consumer

²²³ For an overview see Sam Machkovech, “Indiana pizzeria Yelp-bombed after saying no pizzas for gay weddings.” *Ars Technica* 4/1/2015. <http://arstechnica.com/business/2015/04/indiana-pizzeria-yelp-bombed-after-saying-no-pizzas-for-gay-weddings/> (accessed 3/17/2016).

information to help them make consumption decisions. It is not trying to operate a nationwide message board to facilitate robust discussion on political topics. Despite this primary purpose, however, the distinction between “relevant consumer information” and political speech is elusive here. If a consumer in Indiana were unaware of the political convictions of the shop owners and was made aware by the website then this undoubtedly could influence that consumer’s commercial decisions. The author himself would not patronize such an establishment. It would seem senseless to separate decisions to not patronize the store because of subpar pizza sauce or high prices from decisions based on the political convictions of the owners; the bottom line consideration is just whether someone wants to hand over money to the business in question.

What if platforms like Yelp have simply become part of the new “public forums” where issues are negotiated? Yelp of course has to be free to implement its own terms of service in order to meet consumer demand for a particular site experience. At the same time, it would seem important to try to preserve at least some token of the flurry of response to the pizza shop owner’s comments if the pretense of the site is to represent consumer opinion.

We must also consider the reputational impact on the pizzeria. Specifically, the core issue overall seems to revolve around the *volume* of the complaints. Even if one concedes that political preferences can easily influence commercial decisions, the business or individual being written about could still protest that it is the overwhelming scope of the reaction that is problematic. The perspective expressed in the viral

condemnation is important, but it is not the only perspective. If unmodified, the thousands of comments about the owner's views on gay marriage could have completely drowned out any other commentary about other aspects of the business (or, perhaps, even counter-perspectives offering political support). Nobody is asking to be free of criticism, the logic would go; the request is simply for a consideration of proportionality.

Yelp's filter offered one a partial solution in this regard. Immediately after the story broke and the condemnatory reviews poured in, around 800 of them were relegated to the "not recommended" section, but many of them stayed on the main page (presumably because they were from reviewers who were active all over Yelp). Two months later, it appears that the reviews exclusively concerned with the owners' statement about gay weddings have disappeared. They have not been removed from the page entirely; rather, they are now grouped in a section reserved for reviews that were "removed for violating [their] content guidelines or terms of service" (as discussed previously, the terms of service technically discourage reviews by non-customers). The reviewer name and star rating are still visible, but the text of the review is not.

Did Yelp simply filter any review that mentioned religion, gay marriage, or politics in general? The volume would seem to make it unlikely that an employee vetted each individual review to determine the likelihood that it came from a real customer. Perhaps mass quasi-removal in this fashion is the best possible solution. The main Yelp page for the business is now more or less exclusively populated by comments about the actual commercial dimension, but there is some record of the fact that a horde of people

came to the page to express their disappointment. Anyone interested in why the business has so many of these filtered reviews will find out with a cursory web search. Thus the ostensible “information” contained in the removed reviews has not exactly disappeared completely, and the debate has (if it is to exist at all) simply moved on to other forums. A search of the pizzeria’s name now reveals a Facebook page filled with generally anodyne content (e.g. announcements of specials and inspirational quotations) and a GoFundMe campaign that attracted nearly \$850,000 in crowd-funded support. If this scenario is paradigmatic, therefore, it suggests that a viral story revolving around a business might play out initially over a platform like Yelp, but a sensible balance of free speech interests and reputational concerns requires that the platform intervene to re-organize the presentation of the discussion.

There is, however, a further twist. While the reviews from non-customers that directly address the gay wedding issue may have been filtered, the 22 reviews on the main page for the pizzeria are still overwhelmingly negative and written by out of state reviewers. They follow a kind of formula, describing a miserable experience at the pizzeria while “traveling on business.” Most of the remaining reviews which have been filtered follow roughly the same pattern. It is entirely possible that most people who try the pizza find the dough to taste “like cardboard” and the sauce “straight out of a can.” At the same time, several reviews describe having made a point of stopping in while passing through the area after hearing about the social media conflagration. Some of these posters also offer slightly more personal jabs about the hygiene of the restaurant and the servers.

It is therefore difficult to rule out the possibility that many of these comments about the ostensible commercial experience itself are in fact motivated by pre-existing distaste for the place based on the political comments of the owners. The “reviewers” might have simply found a way to game the Yelp filtration criteria in order to accomplish the ultimate objective of undermining the owners for their views.

While perhaps clever and heartening for opponents of the owners’ position, this adaptation also seems to expose a wrinkle in the ability of platform architecture itself to undo the effects of a viral story once it has gained momentum. Perhaps the current commenters will tire of their crusade and their reviews will gradually be overtaken by others who are able to offer more honest assessments of their actual commercial experience. At this stage, however, it appears that only continued vigilance on the part of the business and its supporters to effectively rebut or drown out the political criticism will prevent a lopsided narrative.

This seems like a superficially good outcome in terms of the “republican virtue” emphasis in the marketplace of ideas theory. The conflict has invigorated all sides and is being negotiated through direct (if sometimes disingenuous) engagement between parties rather than by simply stifling speech. It is difficult to imagine another approach that does not simply wipe away large swaths of opinion and frustrate the expression of genuine convictions. Yet it also seems problematic that a business owner who makes one comment to a local TV station has to defend his or her livelihood against a global swarm of critics in this regard. If outside forces had not also flocked to the defense of the

pizzeria (via its crowdfunding campaigns, for example), then the overall material outcome of the story would have been much more lopsided. Ultimately, therefore, it appears that the “republican virtue” mobilized by such viral conflagrations is only possible because of sustained support and involvement from outside participants (essentially strangers) who become involved because of some kind of conceptual or ideological commitment rather than because of their own material interests.

The pizzeria episode is one of several recent conflicts that raises questions about both the free speech and reputational implications of viral condemnation via consumer review platforms. In one sense, however, it is unique in that the object of debate was clearly the expression of an external political opinion. In several others, the debate seems to have revolved more around reviewing as an exercise of free speech in itself. Specifically, they exemplify the online contours of the phenomenon known as the “Streisand effect,” where an attempt to censor some sort of unflattering speech results in a more robust critical backlash than the initial commentary would have elicited. They thus provide a window on the normative dimensions of online commenting, where public sentiment effectively dictates that the management of reputation online must not involve the use of particular censorial means.

The Windermere Cay apartment complex is one of several recent examples of a business entity that included a “no reviews” clause in its service contract. In the complex’s case, tenants agreed to refrain from posting online reviews on sites like Yelp or face a 10,000 dollar fine. While law professor Eric Goldman and others have pointed out

the dubious enforceability of such a contract provision in the first place, the complex nonetheless evidently had been using the clause for some time without it really attracting much attention from tenants (though also without any enforcement).²²⁴

Before unpacking the conflict as it unfolded, it is worth addressing some responses from the reputation management community regarding the general wisdom of trying to stifle social media discussion. The consensus seems to be that such measures are futile and counterproductive. This message is perhaps unsurprising to hear from the platforms themselves, who argue (according to an article in *Orlando Sentinel*) that “it's impossible for companies to control social-media reviews” despite claims by different services that they can “erase negative reviews from top sites.”²²⁵ Further, such an approach evidently conflicts with the logic of effective reputation management. As one professional commented in the same article, trying to stifle opinions online is futile. One must simply mount a counterspeech defense: “[y]ou either allow [the internet] to define you — or you decide that you're going to present the facts fairly,” because either way “the internet can define who you are.”²²⁶

The fallout from the “no reviews” policies would appear to vindicate this formulation. Apparently the policy had passed largely under the radar for some time until

²²⁴ Aimee Picchi, “Apartment Complex Versus Social Media: Guess Who Wins?” <http://www.cbsnews.com/news/when-a-social-media-strategy-backfires-in-a-big-way/> (accessed 3/17/2016).

²²⁵ Mary Shanklin, “Renters’ Negative Reviews Could be Costly.” <http://www.orlandosentinel.com/business/os-apartment-reviews-negative-20150310-story.html> (accessed 3/17/2016).

²²⁶ Shanklin, “Negative Reviews Could Be Costly.”

a disgruntled tenant sent it to *Ars Technica*, which promptly ran a story condemning the policy and linking it to others that had come to its attention recently — most notably those provided to a plethora of doctors and dentists by an organization called Medical Justice.²²⁷ The swift response to bombard Yelp with one star reviews for the apartment complex based on the policy therefore appears to have started with *Ars* readers (of course non-residents themselves) and then spread once other media outlets (like the two cited above) began to cover the developments on Yelp as the core story in itself.

The reviews that were left by non-residents suffered the same fate as the pizzeria reviews: those who made no pretense of describing a commercial experience with the property were relegated to the “removed for violation of terms of service” section. The main page of reviews started mid-March 2015 with a clean slate. The same reviewer adaptation may, however, have occurred in this instance as well; the sample is so small that it is hard to tell. The five remaining reviews address things like the condition and construction of the complex, prices, location, and staff demeanor instead of the lease clause. At the same time, only two of these reviewers identify Florida locations on their Yelp profiles. Thus the conflict arguably created significant uncertainty regarding the trustworthiness of the reviews even though the hype largely appears to have dissipated.

The backlash was indeed successful (if this was the goal) in pressuring the complex to rescind the lease clause. As *Ars Technica* had originally reported, the

²²⁷ Timothy B. Lee, “Doctors and dentists tell patients, “all your review are belong to us.” *Ars Technica* 5/24/2011. <http://arstechnica.com/tech-policy/2011/05/all-your-reviews-are-belong-to-us-medical-justice-vs-patient-free-speech/> (accessed 3/17/2016).

apartment complex blamed the lease clause on a “previous general partner” and quickly decided to “void it for all residents” (though again, it was likely unenforceable anyway).²²⁸ Regardless, the apartment complex defended the policy as an attempt to address a real problem: the tendency of tenants to write “unjustified and defamatory reviews” that “cripple a business.”²²⁹ If this is truly the heart of the matter, then the backlash can be understood as much as an attempt to enforce a kind of norm regarding the policing of speech online as it is about an actual policy at one apartment complex.

An Oakland resident who submitted a review in solidarity against the review policy captured the sentiment that such a policy was simply out of place in the digital speech environment: “What century do you people exist in?? I wouldn't live here if you paid me.”²³⁰ Echoing the reputation management voices quoted above, an attempt to preemptively control social media criticism is not just ineffective; it is culturally backward. If people are going to comment on something, the logic goes, you should forget about stopping them. Instead, the best approach is to engage with them and harness whatever platforms in question for your own promotion.

The wording of the complex’s gripe is itself revealing. Many might agree that “defamation” would indeed be unjustifiably harmful on Yelp; but what is an “unjustified” review? Should an apartment complex that seeks to stifle all reviews really be trusted to sort honest criticism to which it is amenable from “unjustified” criticism? The slippage is

²²⁸ Picchi, “Apartment Complex Versus Social Media.”

²²⁹ Picchi, “Apartment Complex Versus Social Media.”

²³⁰ Picchi, “Apartment Complex Versus Social Media.”

significant, and the commenter ethos seems implicitly responsive to this kind of tendency. It is perhaps no wonder, then, that the reviewers who flocked to Yelp in response to the viral story were so concerned with a situation in which someone had tried to stifle the ability to speak in the first place. In some sense, platforms like Yelp exist to combat precisely the kind of attempt to render criticism invisible that the complex pursued.

Concern over these contract clauses has reached lawmakers as well. In April 2015, Representatives Eric Swalwell (D-CA), Darrell Issa (R-CA), Brad Sherman (D-CA), and Blake Farenthold (R-TX) introduced a bill called the “Consumer Review Freedom Act” that seeks to protect speech on consumer review sites from those who would restrict them through private agreements. Specifically, the bill would “declare such non-disparagement clauses in consumer contracts unenforceable, in addition to providing authority to the Department of Justice and state attorneys general to take action against businesses that include them.”²³¹

This so-called “Yelp bill” has earned the support of a predictable roster of public interest and consumer organizations like Public Citizen and the Consumer Federation of America. Though Darryl Issa is perhaps an unfamiliar advocate for civil libertarian interests, even he seems convinced that such a bill is necessary in order to ensure that the web fulfills its promise as a platform for speech: as he argued in a press release, the bill is motivated by the fact that “[t]he mere threat of monetary penalties or fines for writing

²³¹”Swalwell, Issa, Sherman, Farenthold Introduce Bipartisan ‘Yelp’ Bill” <http://swalwell.house.gov/press-releases/swalwell-issa-sherman-farenthold-introduce-bipartisan-yelp-bill/>

honest reviews would chill the free exchange of opinions we expect to find on the Internet.”²³² Implicit in this defense, of course, is that it is necessary to defend *all* reviews from prior restraint in order to fully protect these “honest reviews” that represent the speech that is truly valued on consumer review platforms.

Defamation Litigation and Yelp:

Conflicts negotiated over the actual platform itself may have garnered much of the recent public attention, but defamation law itself has not completely dropped out of the picture. Some subjects of Yelp reviews also pursue lawsuits against posters. While some Yelp posts probably fit the speech and context requirements for legally recognized defamation, the platform itself presents a threshold hurdle in actually bringing a lawsuit and vindicating one’s reputation: nearly all posts on Yelp are anonymous to some degree. Even those with profiles only present a first name and location (and sometimes a picture), and these can only be tied to an email address by Yelp itself. In practice, therefore, Yelp must either be convinced to surrender a poster’s identity or contact information to the aggrieved party directly or they must be compelled to do so by a court. Yelp claims to receive around six subpoenas to unmask posters per month.²³³

At least one recent case has hinged on precisely this issue of when Yelp must reveal a user’s identity in furtherance of a defamation lawsuit. In 2012, the owner of a carpet cleaning business in Virginia named Joe Hadeed sued three anonymous “John

²³² “Bipartisan ‘Yelp’ Bill.”

²³³ Joe Mullin, “Court Shoots Down Carpet Cleaner’s Demand To Unmask Yelp Reviewers” <http://arstechnica.com/tech-policy/2015/04/court-shoots-down-carpet-cleaners-demand-to-unmask-yelp-reviewers/>

Doe” defendants who had posted on Yelp about his business. Hadeed suspected one of the scenarios outlined previously in which either competitors or one irrationally unsatisfied customer had created multiple fake accounts (though they were created from different IP addresses, as Yelp noted in court documents) in order to publish defamatory posts about the business and Hadeed personally. Yelp resisted the subpoena to reveal the posters, citing the First Amendment’s protection of anonymous speech except in narrow circumstances.

The two sides’ arguments present important perspectives on the value of consumer review posts as speech as well as the conceptualization of the reputational harm that such speech can cause. In Yelp’s own rationale and in briefs filed by supportive organizations, consumer review sites are presented as important pillars of the marketplace of ideas. Anonymity is an integral part of their speech function because it facilitates honest commentary. As the “journalists’ brief” (submitted by organizations like the Reporters Committee On Freedom of the Press) put it, Yelp reviews are like journalism in their function for consumers and thus the protection of the anonymity of posters should only be undermined in cases of clear and direct harm. As the Digital Media Law Project summarized in its overview of the briefs filed, not “allowing the plaintiff to compel the identity of any authors based on an unsupported allegation is...important to news organizations and other internet publishers in creating a meaningful exchange of ideas on their websites.”²³⁴ Though it is not stated directly, therefore, the assumption seems to be

²³⁴ DMLP, “Yelp v. Hadeed Carpet Cleaning.” <http://www.dmlp.org/threats/yelp-inc-v-hadeed-carpet-cleaning-inc> (accessed 3/23/2016).

that all websites that facilitate user commentary offer a similar kind of compendium of public opinion that is both useful to readers as information and promotes dialogue between posters (and sometimes authors of articles) themselves. Anonymity, it is presumed, is key to making this work because users would soften even otherwise non-tortious commentary if the threat of a lawsuit always loomed.

But what about the harm that such anonymity also might facilitate by encouraging sloppy or downright malicious postings for which the poster expects no consequences? The issue thus revolves ultimately around the threshold likelihood of harm that must be established to overcome anonymity. The issue gets particularly complicated when we consider the actual claim of “falsity” advanced by Hadeed: it was the *identities* that were falsified in the posts, Hadeed claimed, because he could not deduce any match with existing customer records. As several media accounts (and Yelp) were quick to point out, therefore, this meant that Hadeed was not really basing his claim of falsity on the substance of the posts themselves. This is somewhat confusing: on one hand, one might assume that if the identities were false then it would follow that all of the substance would be false; at the same time, asserting that the substantive claims about deceptive advertising and prices were false would undoubtedly have established more demonstrable harm and thus a better reason for the posters to be revealed. One might reasonably read this as an admission that Hadeed could not prove that these specific claims were, in fact, false regardless of his record keeping.

As Yelp therefore argued, the “parts of the reviews that Hadeed alleged were false — the identities of the reviewers — were not the parts of the reviews that could negatively impact Hadeed’s reputation.”²³⁵ This is particularly important because defamation law generally requires that the harm must flow directly from the discrete elements of the statement claimed to be false. Allowing him to compel revelation would thus create a dangerous precedent that would enable any party who had been criticized to overcome anonymity by merely arguing that some part of a statement might be false — even if not technically harmful in itself. In theory, Yelp was not denying that some demonstrably false statements could trump anonymity; they were simply asserting that the marketplace of ideas could only thrive on platforms like theirs if a considerable burden was placed on plaintiffs to make such a demonstration.

There is also a good reason to be skeptical of efforts to unmask anonymous posters when considering the true intentions of the plaintiff rather than the substantive soundness of the discrete claim of harm. Daniel Solove has written about at least one instance in which a plaintiff sought to reveal an anonymous poster under the pretense of bringing a tort lawsuit, but who then abruptly dropped the lawsuit once the poster was revealed and the plaintiff realized it could pursue redress through private means.²³⁶ Specifically, he writes of a case that began in 2003 when the Allegheny Energy Company suspected that an employee was the author of critical and racially derogatory postings on

²³⁵ DMLP, “Yelp v. Hadeed Carpet Cleaning.”

²³⁶ See Solove, *The Future of Reputation*, 148-49.

the Yahoo message board devoted to discussing the company and its stock. But when Allegheny learned the identity of the poster (who was indeed an employee named Clifton Swiger) after Yahoo complied with its subpoena, the company simply dropped its claim of tortious interference with business and fired Swiger.

Swiger's speech was indeed odious: he complained about diversity training in which employees were "force fed 'love thy nigger'" and how it was (somehow) ruining the company.²³⁷ At the same time, the subpoena had been issued under the pretense that it would assist in a lawsuit that claimed material harm suffered as a result of the postings, not so that the company could punish an employee for racist speech that violated the company's "diversity policy."²³⁸ As described by the public interest law firm Public Citizen (who represented Swiger in a claim for abuse of process that was dismissed on jurisdictional grounds), "Allegheny and its attorneys abused the processes of the courts by filing suit, not for the purpose of pursuing a legal claim, but for the purpose of learning the poster's identity so that it could fire him after more than 16 years on the job."²³⁹ Whether Swiger's racist speech should be discouraged is not the point. The case shows the tendency for plaintiffs to use claims of legal harm to facilitate extra-legal outcomes when it is too easy to compel the identity of an anonymous poster.

²³⁷ *Swiger v. Allegheny Energy Inc.*, No. 07-1706 (3rd Circuit 2008).

²³⁸ *Swiger v. Allegheny Energy*.

²³⁹ Public Citizen, "Swiger v. Allegheny Energy." <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=125> (accessed 3/17/2016).

The *Hadeed* case was itself decided in May of 2015 by the Virginia Supreme Court on purely jurisdictional grounds. Yelp’s terms of service dictate that any legal action must be initiated against the company in California. The Virginia Supreme Court therefore considered Yelp to be a “non-resident party” over which Virginia courts had no subpoena power, noting that the company “has no office in Virginia, and all its user information is kept in databases in its San Francisco headquarters.”²⁴⁰ While the outcome is thus technically favorable to those who seek to restrict the circumstances in which preliminary allegations of tortious harm can trump the right to anonymous speech, the Virginia court obviously stopped short of issuing any pronouncement about this question directly. While there is currently no report of any plan to appeal the decision or file a claim in California, the issue appears far from settled. A different set of facts in which the plaintiff comes closer to establishing how discrete defamatory statements had harmed him or her might provoke a different response in the future without presenting as great a threat to the candid speech environment of consumer review sites.

Oblique Approaches — Court Orders and Terms of Service:

The *Hadeed* case raises tangential considerations of how consumer review sites might still accommodate requests to remove material without revealing posters’ identities. Might they simply review the supposedly damaging material themselves and decide to take it down voluntarily? What if a court in fact judges certain statements to be defamatory through litigation? Can the court force the site to remove the posts in question

²⁴⁰ Mullin, “Court Shoots Down Carpet Cleaner’s Demand.”

even if the website is not a party to the litigation itself? Finally, what alternative options exist for frustrated victims who find themselves rebuffed by the platform but unable or unwilling to pursue litigation against the speaker? Do they simply have to engage in direct counterspeech as the lawyer McMillan did with this disgruntled former opponent (“wrestling with the pig”) or does the broader architecture of the web provide some other options?

Yelp does not include an explicit policy regarding the circumstances in which it will take down reviews that are alleged to contain defamatory content. While exceptions might well be made for directly negotiated removal on an ad hoc basis, it appears that most major sites that host third party content will in practice only work with those who allege defamation after the complainant has obtained a court order that declares the content to be defamatory.

Google, for instance, has a multi-step complaint submission process for each of its services (e.g. the Blogger blogging platform, the Google Plus social network, or its web search results themselves). When one selects the option “I have found content that may be defamation or libel,” one is taken to a page that explains that Google is not liable for third party content pursuant to Section 230 of the CDA. It first recommends an attempt to work directly with the poster of the allegedly defamatory material to see if he or she will consider removal or modification. If this fails and the complainant instead “pursu[es] legal action against the individual who posted the content, and that action results in a judicial determination that the material is illegal or should be removed,” then Google

instructs complainants to “send [them] the court order seeking removal.”²⁴¹ The page then provides a link to a form where one specifies the part of the court order that applies to the third party content that is hosted on a Google platform, and Google presumably then makes an independent determination about whether to actually remove the content. This is the procedure through which the lawyer McMillan was able to convince Google to remove the Blogspot blog that advanced unfounded claims of sexually abusing minors.

No appeals process for these decisions is outlined on the complaint page, but the process nonetheless appears fairly routine for those who go to the trouble to obtain a valid court order. If Google’s process is at all representative, then court orders represent a more direct way to simply have truly defamatory content removed without undertaking the full adversarial litigation process. If removal is ultimately what is sought in defense of one’s reputation (rather than punitive retribution or monetary compensation), this is in fact a more complete remedy than a court might have compelled of a newspaper in the era of *NY Times v. Sullivan*.

On the other hand, some professional legal commentators have questioned both the propriety and efficacy of these court orders. Law professor Eric Goldman has been particularly outspoken on the issue. The problem for him is twofold. First, the court order has deficiencies as a legal mechanism in itself. As Goldman writes, the process is often not fully adversarial (since the court order may be the result of an offer to settle or the recipient may not show up for the proceedings) and “companies and individuals unhappy

²⁴¹ “Removing Content From Google.” <https://support.google.com/legal/troubleshooter/1114905?hl=en#ts=1115645,3331068,1210394> (accessed 3/17/2016).

with unflattering or negative content — even if truthful — can obtain court removal orders with surprising ease.”²⁴² This “creat[es] abuse opportunities” because though “[a] ‘court order’ appears to be the official outcome of a rigorous process, [n]ot all court orders are created equal” and “courts in ex parte proceedings all too frequently rubber-stamp plaintiffs’ requests.”²⁴³

The second issue is a corollary of this tendency. Goldman writes that court orders regarding defamatory content are thus frequently overbroad in their application. For instance, they sometimes direct websites or search engines to “remove an entire post or (even worse) an entire website to redress a single allegedly defamatory statement.”²⁴⁴ As a result, Goldman speculates that “Google is paying closer attention to abuses of court orders than it used to.”²⁴⁵ Bing likewise now stipulates explicitly that it “*may* remove a displayed search result if [they] receive a valid and narrow court order indicating that a particular link has been found to be defamatory” (italics added, quoted in Goldman).

For a consumer review website like Yelp (who would be directed in this scenario to remove content that it directly hosts, not just content that it indexes for search), the problem of overbroad orders could be especially acute. It is easy to imagine situations in which one minor factual mistake in a review could become the pretext for removal of an

²⁴² Eric Goldman, “When Should Search Engines Ignore Court Orders to Remove Content?” <http://www.forbes.com/sites/ericgoldman/2013/08/27/when-should-search-engines-ignore-court-orders-to-remove-search-results/>

²⁴³ Goldman, “Court Orders.”

²⁴⁴ Goldman, “Court Orders.”

²⁴⁵ Goldman, “Court Orders.”

entire posting or even the disabling of an entire account were the site to take too deferential an approach. It is worth pointing out that such a scenario somewhat reprises a core concern that drove the Supreme Court to create more stringent requirements for libel plaintiffs in the *Sullivan* case: truthful criticism might become a casualty if speech can be suppressed because it contains incidental falsehoods. Given the dangers of overreach, Goldman's conclusion thus makes sense to extrapolate to a wide variety of entities who have control over the visibility of third party content on the web: "Truthful negative content is the most imperiled content in our ecosystem, and search engines [and presumably speech platform operators like Yelp themselves] sometimes are the only party in a position to keep it from being suppressed."²⁴⁶

Finally, a recent controversy has further indicated how the court order process can be abused. As first reported by the gripe site Pissed Consumer, there appears to be a strange concentration of court order activity regarding review site postings in Contra Costa County, CA. As TechDirt subsequently explained, the scheme works like this: a law firm or other company offering reputation management files a complaint against anonymous posters; days later, they produce a sworn affidavit from a fictitious "defendant" (likely another person in cahoots with the company) admitting guilt for the anonymous postings. The court then grants an order declaring the link in question defamatory. Yet in some of the cases reported, the link targeted does not even appear to contain the specific statements complained of initially. Instead, they sometimes target *all*

²⁴⁶ Goldman, "Court Orders."

of the postings on a particular website concerning the plaintiff. In TechDirt's example, for instance, a fictitious plaintiff called Majestic Vacations used this "Contra Costa method" to obtain a court order targeting "the entire subdomain referring to BlueGreen Resorts" rather than the single review from which the specific text complained of is taken.²⁴⁷ Google complied, de-indexing all of the Pissed Consumer pages from search results for BlueGreen Resorts.

At least one reputation management company located by TechDirt commenters seems to frame its service in a way that is consistent with the above method: the company Affordable Reputation Management specifically offers "Pissed Consumer removal," which is "a legal process that effectively removes any false and negative review of your business from the Pissed Consumer website – if it was posted anonymously."²⁴⁸ Beyond again lumping "false and negative" reviews together in describing the speech targeted, the implication of this specific framing is obviously that the process only works if the complaints are anonymous. The explanation of the "Contra Costa method" above hints at why this might be.

Conclusion:

²⁴⁷ Both this example and the general explanation are derived from Tim Cushing, "The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants." *TechDirt* 3/31/2016. <https://www.techdirt.com/articles/20160322/10260033981/latest-reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml> (accessed 4/23/2016).

²⁴⁸ This website and its specific framing of the service rendered are the focus of a comment by user "MV" in Cushing, "The Latest in Reputation Management." <https://www.techdirt.com/articles/20160322/10260033981/latest-reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml#c205> (accessed 4/23/2016).

Yelp is a popular platform, and the way in which its popularity is discussed reveals much about how reputation is conceptualized in terms of online visibility. Those who use the site and those who are discussed on it clearly put stock in what is written. This of course presents a distinct reputational conundrum: one “might as well not exist” as a commercial entity without a presence on the site, yet the scrutiny itself often might not be particularly welcome. In either case, debates about speech regulation now significantly revolve around the internal policies and legal treatment of private platforms like Yelp.

Speech on Yelp and the reactions to it are likewise both significantly shaped by the specific architectural design of the platform. To some degree, Yelp succeeds in establishing particular discursive conventions on the site because of its filtering parameters, metrics for evaluation, and identification practices. Yet these features can also be gamed, and the “reputational imperative” perhaps drives unscrupulous practices like astroturfing that themselves threaten to undermine the value of the platform. Some examples covered above, however, suggest conversely that direct counterspeech and a slight reconceptualization of one’s concerns about reputation can also ameliorate many the concerns about visibility on Yelp.

First, in the spirit of Fertik’s comments about “wrestling with the pig,” there may be some reason to trust that readers are able to contextualize one or two seemingly irate or unhinged reviews. Empirical research suggests that readers do not weigh reviews particularly heavily when there are not a lot of them. More importantly, perhaps, there is

sometimes little good that can come from actually engaging with such critics because they are unlikely to reciprocate with civil reconsideration. In cases of clear factual discrepancies, however — the figurative “we don’t serve lasagna” situation — it makes sense to respond directly and firmly to set the record straight. Some might consider the necessity an indignity in itself, but it is clearly a relatively straightforward option that preserves the low barriers to entry of the platform while keeping it from descending into a cesspool of misinformation. As even McMillan’s comments about his own approach to defending his practice suggest, those who provide services in the economic marketplace and whose professional identity is of course intertwined with personal identity have incurred something of an obligation to defend themselves using counterspeech. Regardless of its fairness, this appears to be a significant speech norm that governs the socio-technical environment of interactive platforms.

The intertwining of the personal and professional identities takes on a more vexing dimension in cases where expressions of political preferences and other personal opinions or even the mere engagement in private conduct can generate backlash. In these cases, the Yelp page becomes a kind of magnet for centralizing criticism about an entity that simply did not exist on such a scale before the advent of interactive platforms like Yelp. Sometimes the tenor of such reactions is disturbing in the first place: the recent furor over the Minnesota dentist who hunted “Cecil the Lion,” for instance, was composed of outright death threats alongside the expected diatribes against hunting, and filtering of such comments was routinely derided as a kind of censorship by those

posting. Yet the extremity of such reactions should not mean that the entire conflagration or that all criticism of an entity must be categorically purged from the record. As is clear from commentary on the use of court orders as regulatory tools, those seeking redress through these means have a tendency to target far more critical speech than might otherwise be punishable by law.

Yelp's relegation of the comments to a separate page appears to represent a sensible compromise in this regard, as the incident does not vanish per se. An interested reader can still investigate the controversy, but those who seek more narrowly commercial information about the entity reviewed do not have to comb through hundreds of political diatribes to find it. It should not register as "censorship" for Yelp to curate the range of commentary about the entity that is being reviewed if that is indeed the kind of platform it endeavors to provide; at the same time, the prevalence of this perspective communicates that a significant faction is intolerant of any such efforts to moderate speech on the interactive web.

Chapter 5

Reputation and Consumer Review Platforms Continued: “Gripe” Sites

Gripe sites display similarities with more curated or rating-based general purpose consumer review platforms. They also evince significant differences in their methods of quantifying and filtering reputational information and thus their content will be dissected in more depth. Many postings to gripe sites contain the same kind of experience that one would expect to find in an ordinary review of a product or service: they cover perceptions of quality, the treatment of the buyer, and the overall satisfaction based on the poster’s expectations. Not surprisingly, however, posts on gripe sites are uniformly negative. Ripoff Report and other gripe sites eliminate the star rating system and therefore perhaps obviate some of the temptation for companies to pursue “astroturf” strategies to either enhance their own ratings or lower competitors’ based on volume of response. Yet in practice gripe sites can easily be used qualitatively for the same kind of fabricated complaint as any other review site. Finally, while gripe site reviews are in theory not much more anonymous than reviews on a site like Yelp (as they simply require an email address to sign up), the sites seem to not incentivize or really even enable the kind of profile or credibility building that Yelp appears to encourage by treating prolific reviewers with developed profiles favorably in its filtering algorithm.

Ripoff Report and its platform kin are rife with posts that stretch the idea of a “consumer review” to encompass what are basically complaints about *people*. Sometimes these people are nominally associated with a business or service, in which case a discrete

experience with the business might serve as the vehicle for complaint about the person. Other complaints are unambiguously presented as reviews of people with no pretense of a commercial “consumer” experience. In some sense it is not surprising that complaints about consumer experience would become complaints about individuals. Many services (such as music recording or personal training) are performed by individuals on an ad hoc basis. Three sample complaints randomly selected from the same day in 2015 help to illustrate these variations.

One post about a music producer named “J-Staffz” (real name Jabari Bowry) exemplifies how gripe sites can serve as a platform for consumer complaints about individuals who provide independent services for hire. A dissatisfied customer named Shawn Davis wrote a Ripoff Report posting about Bowry that advanced several significant allegations: Bowry supplied him with a beat stolen off another producer’s website (though he does not say which), falsely inflated his production credits (claiming to have worked with luminaries like Wiz Khalifa), and did not perform the promised promotional services for which Davis paid fifteen hundred dollars.²⁴⁹ Davis’ post alludes to “all the other scammer stories” about Bowry that one would encounter through a Google search of his name, and implores people to “think twice before send[ing] this scammer any money” [caps lock omitted]. The review functions therefore not only as information about a particular experience with Bowry’s business, but as a kind of referendum on his entire identity. Given the display of web search results and the nature

²⁴⁹ Ripoff Report Complaint 1222237, “JStaffz.” <http://www.ripoffreport.com/r/jstaffz/toronto-ontario-m1e-2m8/jstaffz-is-a-fake-scammer-music-producer-who-stole-over-1500-from-me-fraud-stole-money-1222237>

of his work, it would be difficult to imagine how Bowry could separate these kinds of allegations about his conduct in commercial dealings from impressions about him as a person overall.

A reader who comes to believe that Bowry inflates his credentials for business purposes might simply think less of him overall. At the same time, Bowry appears to have a number of other favorable links (such as interviews in prominent hip-hop publications) associated with his name in Google search, and, surprisingly, the Ripoff Report link is nowhere to be found on the first ten pages of results (at which point the links cease to be about him specifically). Given the public nature of his work, it is therefore possible that Bowry is particularly sensitive to the effects of something like a Ripoff Report review and is vigilant about promoting himself through other kinds of favorable coverage. Further, one of the interviews refers to Bowry's work with Khalifa and others, suggesting that such claims were vetted by an editor in at least some capacity. While the Ripoff poster Davis may have developed the impression that Bowry has worked with an even more illustrious roster of stars, it therefore appears unlikely (again at first glance) that the credentials are the outright fabrications of a con artist.

Yelp reviews of businesses often contain references to individual employees who then reflect poorly on the establishment overall. One might expect many such reviews to be fairly inconsequential; it is easy to imagine an avalanche of low-impact complaints about the rude clerk or slow waiter. On gripe sites, however, the equation sometimes appears to be reversed: the review functions less as a complaint about how one person

reflects on an establishment or company and more as a complaint about an individual who happens to work somewhere. These complaints therefore illustrate additional dimensions of the reputational overlap between one's occupational activities and digital personal profile.

An administrator of a rehab facility in Orange County named Dennis Larkin is the subject of one such post on Ripoff Report.²⁵⁰ The anonymous poster claims to have been a patient at the facility and alleges that Larkin sexually assaulted her. As the post puts it, "he took advantage of my relapse to coerce me into having sex with him so that I could get back into treatment." Further, the post alleges a pattern of such behavior at the facility, claiming that "this program has caused a lot of damage to a lot of women out there including myself" and that Larkin's subordinates are "paid very well to keep the secrets of [their] sex predator boss." The post concludes with a broad reference to a brewing class-action lawsuit that the poster claims has already secured the commitment of celebrity civil rights attorney Gloria Allred.

If everything in the post is true then a man who has committed serious crimes is walking free and continues an operation that could pose a danger to other women. Stating falsely that someone has engaged in specific instances of sexual assault would possibly qualify as libel per se under most states law — meaning that it would be presumed to

²⁵⁰ Ripoff Report Complaint 618946. <http://www.ripoffreport.com/r/South-Coast-Recovery/San-Clemente-California-92672/South-Coast-Recovery-Dennis-Larkin-Sexual-Harrasment-predatorial-behavior-by-owner-San-CI-618946> (accessed 3/23/2016). Attempts to contact Larkin have been unsuccessful.

harm the reputation of the subject.²⁵¹ Either way, therefore, such a post seems to suggest that Ripoff Report postings do not exclusively trade in the picayune.

As with the music producer Bowry, we can again contextualize the post within the larger search engine results profile of the person involved. As of April 2015, a Google search for Larkin's name and the rehab center has the Ripoff link listed high on the first page amidst the website for the rehab center, a report of its closure in 2010 (it has since reopened under different management), Larkin's LinkedIn profile, and several other websites devoted to allegations about Larkin's misconduct. While a significant percentage of the first page of results is taken up by complaint sites (the others are on personal blogs that mimic official sounding URLs like "southcoastrecoveryblog"), other links show that Larkin's center warranted favorable coverage from the OC Weekly for its non-pharmacological attention deficit treatments and received praise on a website devoted to addiction and treatment issues.²⁵² A cursory search related to Allred's recent

²⁵¹ The Cornell Legal Information Institute explains how libel per se is generally construed in the following terms: Libel per se is "[a] defamatory statement that is communicated in a fixed medium and is considered to be so harmful on its face that the plaintiff need not prove special damages. Examples of libel per se are statements that: (i) relate to the person's business or profession to the person's detriment; (ii) falsely claim that the person committed a crime of moral turpitude; (iii) imputes unchastity on the person; or (iv) claim that the person suffers from a loathsome disease." https://www.law.cornell.edu/wex/libel_per_se (accessed 9/3/2015).

It is possible, therefore, that both (i) and (ii) would encompass several of the statements about Larkin in this case.

²⁵² Matt Cooker, "SouthCoast Recovery Has Closed: Report." *OC Weekly* 2/22/2010. http://blogs.ocweekly.com/navelgazing/2010/10/southcoast_recovery_rehab_clos.php (accessed 3/23/2016).

"SouthCoast Recovery's California Drug Rehab Facility Expands Operations." *soberrecovery.com* 11/21/2014. <http://www.soberrecovery.com/addiction/southcoast-recovery-california-drug-rehab-facility-expands-operations/> (accessed 3/23/2016).

endeavors reveals no documented connection to the ex-patients at South Coast. The mixed results therefore suggest that the complaint sites could (if largely baseless) cause undue reputational harm, as Larkin is not a “libel proof” subject of ill repute for whom one more incendiary assertion (even if false) is likely to have little additional effect.

The tone of the Ripoff post and its context present mitigating factors regarding its reputational effects. Even a cursory look at some of the other search results would potentially lead one to be skeptical of the claims. Several blogs and a post on Complaints Board (a Ripoff competitor based in Latvia) are attributed to a man named John Kehoe and filled with unhinged rants about CIA conspiracies to put him in the “psych ward” at South Coast and to fabricate an addiction problem as part of an elaborate scheme to disqualify him from receiving his “inheritance.” The other pages feature allegations of sexual misconduct, mishandling of money and incompetence in administering treatment are perhaps more consequential. Yet such allegations might also be dismissed. They are written by members of a population that is easy to stigmatize as untrustworthy (however unfair this may be). Second, any business is likely to have disgruntled customers, and Larkin himself seems a natural target for animus as a central figure of the operation. Much of the discussion of his personal transgressions are either vague or subjective: he is a “dickhead” to one author, he “took advantage” of another, and he “walked off with all the money.” What these kinds of posts do not seem to do (with a few exceptions regarding the payment policies and the food) is offer concrete information about specific incidents of misconduct (which would help us to assess their credibility).

Regardless of the information quality, it is difficult to dismiss the sheer volume of vituperative comments regarding Larkin's character and behavior. The overall digital profile of this person that is displayed in searches could easily give one pause given the prominence of the Ripoff Report and Complaints Board posts. Given the sensitive nature of the service in question, it seems possible that the mere existence of the posts will cause some people to think twice about enrolling — whether true or not. At the same time, there is little evidence that much attempt has been made to counter the allegations. No defamation lawsuit has been filed, there are no rebuttals posted beyond a few scattered positive comments that could possibly be written by obsequious employees, and there is no indication that Larkin or anyone associated with the facility has attempted to discover the identity of the critical posters. Perhaps they concluded that a few posts on gripe sites are not consequential enough to even address publicly.

The Larkin posts are still nominally concerned with his employment; some Ripoff posting are only “reviews” in that they comment on the character of a person. One representative review about a man named David C. Hillsman does not offer any pseudonym that provides hints about identity or motivation. It merely states the following: “This man took \$50.00 and also tried to get me to use a credit card that wasn't mine. It was a long time ago but I wanted to post a report so that in the future, for everyone who sees it, to beware of avoid people like him. He is very untrustworthy and

abusive.”²⁵³ The post claims that its aim is “for everyone who sees it to beware of avoid people like him [sic].” In other words, the post is an attempt to help people make better “consumer” decisions about the people in whom they place their trust.

Despite this informative pretense, however, it seems difficult to overstate how little the post actually provides in the way of information that could be verified or even interpreted in a factual register. If the man in question “stole 50 dollars” then that might seem to make him a thief, but it’s not clear how it is related to the ensuing claim that he is “abusive.” Likewise, it is not clear what is even meant by the assertion that he “tried to make me use a credit card that wasn’t mine” (how does one do this?) or the idea that people “like him” should be avoided (what is a person “like him?”). Finally, the post seems petty in its randomness. If the person in question really is the monster claimed by the poster then a vague and anonymous posting on Ripoff Report years later might strike some as a fairly ineffective way to intervene. To some readers, it might ultimately reflect worse on the poster than on the subject of the post.

As in the case with the previous subject, however, there is one less ambiguous factor: the gripe site postings appear high on the first page of Google search results for David C. Hillsman. Because there are few other links of substance that identify this person, the instantaneous search profile generated is essentially dominated by this seemingly random Ripoff Report complaint. Perhaps this is not much of a problem for

²⁵³ Ripoff Report Complaint 1219279. <http://www.ripoffreport.com/r/David-C-Hillsman/Sacramento-California/David-C-Hillsman-REDACTED-This-man-tried-to-get-me-to-use-a-credit-card-that-wasnt-1219279> (accessed 3/23/2106).

him. He may be long established in an occupation for an employer who is unlikely to have any occasion to search his name or to even reconsider his or her association after coming across the links. Anyone else who viewed them might have personal knowledge of the circumstances that allow him or her to dismiss the allegations as either trivial or fabricated. At the same time, the situation raises significant issues regarding the visibility of such speech in search engines. What is to be done about this tendency of search engines to prominently feature links from this bizarre website in name search results?

Overall, then, “gripe” sites like Ripoff Report simply evince different aspirations from filtered, comprehensive sites like Yelp and thus present unique uses and challenges. The architecture of these sites does not provide the same kinds of reputational cues (such as filtering, reviewer information, and star rating) as a site like Yelp, leaving readers to interpret comments more or less based on the text alone. These sites eclipse the line between “consumer” complaint about people and commercial entities to a greater degree. Correspondingly, however, they also espouse a novel ethos regarding the role of counterspeech on their platforms that is both normative and practical. What does this mean for the ways in which people seek to manage the reputational impact of gripe site postings?

Gripe Site Content Policies — General Recalcitrance and Exceptions:

Gripe sites are generally loath to remove third party content. To recap, under the prevailing interpretations of Section 230, there is again no obligation for a site that is a passive host of third party content to filter, review, or remove that content because it is

defamatory. Because this effectively protects any site hosting consumer criticism from defamation liability for what users write (though this of course does not apply to conduct not covered by Section 230's safe harbor, such as copyright infringement), a website or search engine could theoretically refuse to remove anything even in the face of a court order declaring a post defamatory.

This appears to have long been the official policy of Ripoff Report. Owner and editor Ed Magedson unsurprisingly presents this as a badge of honor that burnishes the site's ostensible unfiltered appeal. As the relevant section of the website terms states, "[u]nlike other sites which accept payoffs and bribes to remove complaints, Ripoff Report has never and will never do so. Other complaint sites will DELETE [sic] your complaint for money. Ripoff Report won't."²⁵⁴ However mercenary, Magedson consistently articulates this kind of vision for his site as a kind of archive for complaints. "Unlike the Better Business Bureau," another section of the site states, "Ripoff Report does not hide reports of 'satisfied' complaints. ALL complaints remain public and unedited in order to create a working history on the company or individual in question." This preoccupation with a kind of historical verisimilitude is echoed in the policy of another prominent site, ComplaintsBoard.com:

²⁵⁴ Ed Magedson, "Did You Know?" <http://www.edmagedson.com/did-you-know/> (accessed 3/23/2016).

The allusion above to not taking "payoffs and bribes" is likely a dig at Yelp and the BBB, which both Magedson and some business owners allege essentially operate shakedown schemes once businesses are first rated on the sites by offering more favorable placement of negative reviews if the business or individual purchases advertising on the site.

Many complaints posted to ComplaintsBoard.com are a historical 'snapshot' of an ongoing situation, as seen through the eyes and perception of an individual consumer, often with incomplete or inaccurate information at their disposal. ComplaintsBoard.com always assumes that the consumer has a positive intent in writing their message, in helping themselves, in helping other consumers, in helping the subject business provide a better product or service.²⁵⁵

The reader is thus by design left with a perhaps greater responsibility to decide for him or herself how to interpret the posts given this framing, as the sites themselves eschew cues regarding the veracity of statements or the verification of identities.

While Magedson's comment technically makes no mention of court orders, commentators in the reputation management sphere have suggested that the ethos outlined above has more or less translated in practice as a blanket no-takedown policy. As one blog post by a lawyer working in reputation management stated recently:

...for years, the website Ripoff Report has had a very well-known policy: It doesn't remove content from its website, **ever** [sic]. In the past, this has been mostly true, even when Ripoff Report is presented a valid court order that information posted to the site is libelous and violates the First Amendment [by which the post assumedly means "is not protected by the First Amendment"].²⁵⁶

In this formulation, therefore, the commitment to providing an unfiltered archive of consumer complaints thus applies even when a statement has been judged false by a court.

²⁵⁵ ComplaintsBoard.com, "Terms of Use" <http://www.complaintsboard.com/terms-conditions.html> (accessed 3/15/2016).

²⁵⁶ Aaron Minc, "Ripoff Report May Now Remove Defamatory Content When Presented a Valid Court Order." <http://www.defamationremovallaw.com/2014/06/29/ripoff-report-may-now-remove-defamatory-content-presented-valid-court-order/> (accessed 3/23/2016).

At the same time, these nominal no-takedown policies often comes with caveats. Ripoff Report offers an “arbitration service” through which the subject of the report is encouraged to “arbitrate to set the record straight” rather than requesting that a report be removed.”²⁵⁷ The description flatters the potential report subject as an honest business operator who wants to do the right thing: “We developed the VIP Arbitration program in response to phone calls and emails from people and businesses like you -- those who have worked hard to create a good reputation and are having that reputation unjustly tarnished because of a false posting on Ripoff Report.”²⁵⁸

In order to accomplish this, Ripoff Report works with outside arbitrators to determine the truth of allegations in the report in question. Complainants are encouraged to submit evidence of falsity for the arbitrator to consider and are required to pay a two thousand dollar fee for consideration alone. The “arbitration statement” is first forwarded to the poster, whose response can be incorporated into the final statement that will be sent to the arbitrator. Perhaps more opaque is its “corporate advocacy program” through which qualified businesses will have positive reviews foregrounded once they have been vetted by Ripoff Report as worthy of this seal of approval. The pitch for the corporate advocacy program is framed in terms of “mak[ing] your search engine listings change from a negative to a positive.”²⁵⁹ This treatment will be sustained “as long as the member

²⁵⁷ RipoffReport.com homepage, “Arbitration Program” (accessed 3/18/2016).

²⁵⁸ RipoffReport.com homepage, “Arbitration Program” (accessed 3/18/2016).

²⁵⁹ “Corporate Advocacy Program.” <http://www.ripoffreport.com/CorporateAdvocacyProgram/Change-Report-From-Negative-To-Positive.aspx> (accessed 3/18/2016).

business lives up to their stated commitment to customer satisfaction and always take care of complaints quickly.”²⁶⁰

Even if the site technically declines to remove entire posts, therefore, it would also be inaccurate to call it a completely unmediated compendium of third party contributions. In less savory terms, moreover, it is not unreasonable to wonder whether such programs give the site a perverse financial incentive to keep damaging information as visible as possible to boost paid participation in these programs. To some who seek to impose liability for third party posts on gripe sites, the site’s commitment to free speech is much less high-minded than the “marketplace of ideas” rhetoric that its content policy descriptions would imply. Instead, they contend that the site more or less deliberately makes it difficult to address particularly problematic posts as a means of convincing subjects of these postings to spend money on its arbitration or self-administered “corporate advocacy” reputation programs. From one angle, it could indeed be little more than a digital age form of reputational extortion. As one critical website run by an activist named Michael Roberts put it, the connection seems obvious: “When someone posts a complaint, it can never be removed, even if the poster requests or demands it. Instead, they are referred to an arbitration program that costs thousands of dollars! That is pure extortion.”²⁶¹

²⁶⁰ “Corporate Advocacy Program.”

²⁶¹ “Introductory Video – How You Can Help Fight Ripoff Report.” ripoffreportscam.wordpress.com (accessed 3/18/2016).

There is certainly something that feels abhorrent about having to pay the platform facilitating defamatory speech for them to do anything about it. At the same time, Ripoff Report plainly does not act as the publisher of these posts. Perhaps they could be more accommodating by allowing users to simply delete their own posts themselves (as the previously cited blog points out, this is an uncontroversial capability for most other sites hosting user generated content), but the site does have reason to be skeptical about many such requests for the removal of “defamatory” content. The existence of the arbitration program in itself, therefore, could just as easily be seen as a natural extension of the site’s attempt to create an “uninhibited, robust, and wide-open” marketplace of ideas where it tries to remain as neutral as possible when it comes to critical content. Most conceptually, we might say that Ripoff Report is attempting to advance an ethos about the permanence of information on the web in general: once it is posted, the logic goes, the only option is further clarification; removal is effectively cast as an antiquated response to public speech.

Magedson has himself defended the site’s disposition as a protection for the author in situations where a subject threatens to sue over ostensibly true or non-factual but unflattering statements. As the section of Ripoff Report that discusses potential lawsuits states:

...if we removed complaints on request this would give companies an incentive to pressure authors to remove true and accurate reports in exchange for money or simply to avoid a costly lawsuit...there [would be]

a huge amount of pressure for them to just remove it when threatened with legal action.²⁶²

The no-takedown policy appears to offer a kind of excuse for the poster: even if he or she wanted to take down the post, it is not clear that he or she would even possess the power to compel Ripoff Report to do so.

Such a policy resonates with anecdotal accounts of the potential for abuse of takedown requests sent to media companies or to posters in general. On a recent podcast, for instance, former *Slate* editor David Plotz described the incentives for a news organization to quickly capitulate and take down material whenever anyone complains: “it is so much easier to take it down; it is so much easier to not deal with the threat and anxiety [of a potential lawsuit].” As fellow host Emily Bazelon then pointed out, such a temptation “is a problem [in free speech terms] because the more the press caves, the more people demand.”²⁶³ Law professor Susan Crawford has written of the likelihood that commenters sent cease and desist notices will typically respond in a similarly conservative fashion. “Most people will take materials down just to avoid the hassle of dealing with possible litigation,” she told Wired author Scott Gilbertson in a 2006 profile of reputation.com and Michael Fertik. While theoretically “the threaten-ee could bring his or her own lawsuit seeking a declaration that what they posted wasn't unlawful,” the

²⁶² “About Us: Want To Sue Ripoff Report?” <http://www.ripoffreport.com/ConsumersSayThankYou/WantToSueRipoffReport.aspx#2> (accessed 3/23/2016).

²⁶³ *Slate Political Gabfest* 7/10/2015, 36:47-37:32. http://www.slate.com/articles/podcasts/gabfest/2015/07/political_gabfest_on_political_polling_hulk_hogan_vs_gawker_and_what_questions.html

reality is that “most people will just buckle rather than fight back.”²⁶⁴ Ripoff’s policy might be self-serving and somewhat anomalous, but it also protects against the chilling of speech that results from the inevitably overzealous use of takedown requests.

Gripe Site Policies Meet Defamation Litigation — *Blockowicz v. Williams*:

A recent case demonstrated how some of these policies are actually put into practice by the site. In late 2010, the Seventh Circuit ruled in *Blockowicz v. Williams* that a default judgment won against an anonymous poster on Ripoff Report (who did not appear at the proceedings) could not be applied to Ripoff Report itself in order to force it to remove the post. As the court reasoned, Ripoff Report was not acting in concert with the poster and thus was not implicated in the court order itself; it had simply done nothing. The fact that it *could* remove the post but chose not to did not mean it was, as the plaintiffs alleged, “in active concert and participation” with the user who created the post. Even the fact that Ripoff Report’s own terms of service instruct users to not post anything defamatory did not mean that Ripoff Report could be compelled to enforce such a stipulation in this case. Rather than pursuing Ripoff Report, the court asserted, the proper avenue of redress for Blockowicz was in pursuing the missing poster and convincing a judge to hold him or her in contempt if the posts were not removed.²⁶⁵

As Eric Goldman pointed out, however, this advice does not take into account the true state of affairs when it comes to Ripoff Report. Even if Blockowicz were to find the

²⁶⁴ Gilbertson, “Delete Your Bad Web Rep.” <http://archive.wired.com/science/discoveries/news/2006/11/72063>

²⁶⁵ Summarized in Goldman, “Ripoff Report Isn’t Bound By Injunction Against User Post—Blockowicz v. Williams” http://blog.ericgoldman.org/archives/2010/12/ripoff_report_d.htm

poster and he or she complied, it is possible that Ripoff Report would refuse to take down the post once the poster requested it. Since “the initial posters no longer have the technical capacity to remove the posts,” such a decision by Ripoff Report would basically mean that “there could be circumstances where pernicious content simply can’t be forced off the web.” As Goldman notes, this is unlikely to happen frequently. At the same time, it forces us to consider the efficacy of the preferred solutions that Ripoff Report itself emphasizes in order to assess whether the site’s supposed commitment to “users’ First Amendment rights” (by which it evidently also means the privilege to not be censored by private actors when speech is *not* protected by the First Amendment) might sometimes lead to a speech marketplace that does not accommodate adequate measures for reputational vindication. Secondarily, examining the design and efficacy of these other options allows us to assess their varying degrees of formalism: are they ad hoc or relatively schematic?

First and foremost, the putative “no-takedown” policy is perhaps sincere in the technical sense that it will never remove a post from its servers outright, but it appears to be somewhat misleading when it comes to the site’s overall disposition about modifying or filtering content. The site will, in fact, alter posts in a few different ways. First and foremost, recent internal decisions have led the site to adopt a significant modification of its court order policy. The site is firm about the requirements for issuing such modifications:

[I]n order to [consider redacting information from posts], Ripoff Report needs to see the specific findings of the Court and those findings (meaning

the Judgment itself) needs to be self-explanatory, i.e., containing specific identification of the Report(s) at issue and specific identification of the statement(s) that were found to be false in the Report(s). We often get people who provide us with default judgments, and ask us to consider Report redaction content based on that. Those types of judgments don't meet our criteria. In that case, we advise people to post their default judgment, and whatever other sort of supporting documentation they have, as a Rebuttal to the Report, and to tell their side of the story.²⁶⁶

Thus, Ripoff appears to have drawn up an explicit policy that operationalizes the general skepticism about court orders outlined previously in the Yelp context. The alterations that result are therefore still limited. In explaining how it will actually go about modifying posts once the above criteria are met, the site outlines the following approach: “although the existing reports remain visible in their original form, we have made minor redactions to the titles of the affected reports to remove language that was *needlessly offensive and profane* [italics added]. Furthermore, despite our decision not to remove this text, anyone reading these reports should keep in mind that a court order has been entered which finds the statements below are not true.”²⁶⁷

The latter position is consistent with the established speech framework advanced by the site, as the court order is effectively positioned as merely one more bit of information that can be added to an existing report to make it more complete. But the

²⁶⁶ Minc, “Ripoff Report May Now Remove Defamatory Content When Presented a Valid Court Order.”

²⁶⁷ Ripoff Report, “Official Statement Regarding Seventh Circuit’s Decision in Blockowicz v. Williams” <http://www.ripoffreport.com/r/Megan-Blockowicz-Mary-Blockowicz-David-J-Blockowicz-Brendon-Blockowicz-Lisa-Blockowicz/Winnetka-Illinois-60093/Megan-Blockowicz-Mary-Blockowicz-David-J-Blockowicz-Brendon-Blockowicz-Lisa-Blockowicz-70642>

overall method of actually modifying the reports is also somewhat surprising given the site's otherwise aggressive stance on Section 230 immunity and its generally defiant disposition regarding pressure to "censor" posts. First, how does the site determine when some element of a post is "needlessly offensive and profane?" What is the standard? Wasn't part of the point of the site's design to defer such judgments to the users and readers exclusively? More specifically, it appears that in such cases Ripoff Report actually considers itself to be the kind of "good samaritan" that the original architects of Section 230 had envisioned. As Ripoff Report general counsel Annette Beebe has recently explained,

[t]he law protects and encourages Ripoff Report to make appropriate edits to Reports posted by third parties. Ripoff Report may use that editorial power to post findings from a court of law about the subject matter of Reports...Ripoff Report, upon request, may post that kind of finding with special prominence, and in some cases, may even redact the information specifically identified by the court as false from the original Report.²⁶⁸

This comment suggests the site in fact embraces a kind of responsibility for monitoring what is being said on its platform once potential factual issues come to its attention.

In the *Blockowicz* case, the site apparently took this route by replacing certain words in the title of the post with "((Redacted))." The original review at issue in the case has been amended quite thoroughly with both redacted terms and extensive explanations of how Ripoff Report came to particular decisions about what to do once faced with the court order and other external pressure. The results provide an important window on the

²⁶⁸ Minc, "Ripoff Report May Now Remove Defamatory Content."

actual implications for speech and reputation in such cases where it technically appears that there is more or less no way to legally compel the removal of content from the web.

The facts and procedural history that led to the court order at the heart of the *Blockowicz* court case are themselves laid out by someone who identifies himself as “David, general counsel for Ripoff Report” in one of the first comments on the original complaint. The report tells a sordid story posted by a “child protection officer working in the state of Nevada.” This person received false reports of child abuse from a “methamphetamine-addicted prostitute at the now defunct Mustang Ranch” and soon (after speaking with the woman’s husband) she “became aware of past incidences involving Megan S. Blockowicz, and her scumbag family [sic].”²⁶⁹ Some time later, the poster claims to have received calls from the parents of Megan Blockowicz, who implored her incessantly to take custody of the child in question and complained to the poster’s supervisor when their requests went unfulfilled. The post was written because “[the poster] felt compelled to inform the world of what a despicable scumbag this woman and her family is, and are,” and it “does not surprise [the poster] that she is a violent criminal, or that her family is aiding in her ability to avoid prosecution. Scumbags tend to protect one another!”²⁷⁰

²⁶⁹ Complaint 70642, Megan Blockowicz, Mary Blockowicz, David J. Blockowicz, Brendon Blockowicz, Lisa Blockowicz. <http://www.ripoffreport.com/r/megan-blockowicz-mary-blockowicz-david-j-blockowicz-brendon-blockowicz-lisa-blockowicz/winnetka-illinois-60093/megan-blockowicz-mary-blockowicz-david-j-blockowicz-brendon-blockowicz-lisa-blockowicz-70642> (accessed 3/16/2016).

²⁷⁰ Complaint 70642, Megan Blockowicz.

The post clearly advances incendiary claims that mix fact and opinion. Calling Blockowicz a “scumbag” would not be actionable as defamation, but alleging drug use, prostitution, and a “violent criminal” record might well be actionable if false. According to the Ripoff Report counsel’s account, however, a twist in the case is that the lawsuit was filed by Megan Blockowicz’s *parents*. While the report certainly says scurrilous things about them, most of it seems to amount to opinion; the claim that “her family is aiding in [Megan Blockowicz’s] ability to avoid prosecution” might be construed as a statement of fact but is still quite vague.

The default judgment entered in the actual case hearing, however, produced a court order that required Ripoff Report to remove several statements that referred to Megan Blockowicz, not her parents. These included some of the statements reproduced above which contain almost certainly non-actionable epithets like “scumbag” as well as factual assertions whose falsity had of course not been demonstrated in an actual trial.²⁷¹ It is not entirely clear why the Blockowiczes were permitted to serve the defendants by simply mailing the documents to an address found in an internet search for “David Williams” (the incredibly common name of the man suspected of co-writing the post). Needless to say, neither defendant received the materials and thus did not show up for the trial. Had they received notification of the lawsuit and mounted any kind of defense, it

²⁷¹ The account from the Ripoff counsel also provides extensive analysis of an issue regarding the omission of the date of the posts in court and the statute of limitations for defamation. This is obviously important but not the most salient issue for the substantive free speech discussion. For the sake of brevity it has therefore been left out of the main account here.

seems likely that the lawsuit would have been dismissed either for the substantive reasons outlined above or because the statute of limitations for defamation had expired.

What about the fact that Ripoff Report might still technically possess the ability to confirm whether the individuals named in the lawsuit were in fact the authors of the posts and simply take them down because they look malicious? There are still several problems with this approach. The first is that the Ripoff counsel's account claims that the people named in the lawsuit are probably not in fact the people who wrote the original posts because "none of the information such as the email addresses (which Ripoff Report automatically confirms before allowing any posts) was consistent with the information obtained by the plaintiffs."²⁷² In a way, though, the substance of the statements precludes even reaching the identity confirmation issue. No matter how sympathetic the Blockowicz's case may appear, they do not provide compelling ammunition for the position that Ripoff Report and websites that host similar content should be *forced* to decide whether critical or offensive statements should be taken off of the web at the behest of someone who does not like the statements.

If Ripoff Report had simply complied with the court order without investigation of its own in this case, they might have undermined both due process and free speech in significant ways. First, they would have taken the plaintiffs' word about the identity of the posters, who had effectively been deprived of the opportunity to appear in court and defend the statements. More importantly, Ripoff Report would have removed statements

²⁷² Complaint 70642, Meagan Blockowicz.

that could have been proven to be true. In fact, according to the summary of the procedural history posted on Ripoff Report, “the plaintiffs admitted many of the statements about Megan Blockowicz were true.”²⁷³ Correspondingly, Ripoff Report would have been accepting at face value the plaintiffs’ claims of undue reputational harm. Surely the statements were not going to burnish the Blockowicz’s reputations; on the other hand, the uncertain factual status of the statements and the ad hominem nature of the criticism suggest that they might well be interpreted by the reasonable viewer as merely exaggerations based on a personal vendetta. Finally, given the milieu in which the parties appear to be immersed, there is always the possibility that Meagan Blockowicz is essentially libel proof. Perhaps a few outrageous statements on a notoriously puerile website would not have much of an impact on her standing in the relevant community of peers.

In sum, therefore, there are significant factual issues that Ripoff Report is not in a strong position to confirm but would need to confirm in order to align its takedown decisions with the balance between free speech and reputation that would be required for a legal takedown mandate to be defensible. This incident provides an important countervailing perspective on the fitness of platforms themselves to make judgments about potentially defamatory content. As one advocate for shutting down Ripoff Report has claimed regarding the Google indexing of such links, “[t]he ability to make a decision about whether material is likely to cause harm is not rocket science and as I

²⁷³ Complaint 70642, Meagan Blockowicz.

noted above, it only takes a few keystrokes to remove it.” The *Blockowicz* case suggests that this is not always so.²⁷⁴

Yet there also appears to be a further twist in this case. The aforementioned “redacted” content was most likely not a piece of identifying information like an address or phone number that a site might rather uncontroversially remove in order to not facilitate harassment (in fact, this information is still displayed at the top of the page). In at least one of the Blockowicz postings, the redacted text was part of the “substance” of the review itself. This can be determined by comparing the title on the existing web page (Ripoff Report titles tend to be filled with adjectives and accusations and thus stretch on for several lines) with a screen capture of the same title in an *Ars Technica* article about the case from 2009. The title in that picture lists various names evidently used by one of the Blockowiczes accompanied by the description “Scumbag Con-artist Liar, Thief [sic] Winnetka Illinois.” The current title for the same page (Complaint 445743) simply reads “(((Redacted))) Winnetka Illinois.”²⁷⁵ The difference is especially significant because of how it alters the appearance of the page in searches: now the results page for a search of “Lisa Blockowicz” reveals the text from the titles in the displayed Ripoff links without the epithets from the original review.

²⁷⁴ “Defamation Victim Janice Duffy, Ph.D. Says that Online Complaint Sites Can Ruin People’s Lives.” <http://civilination.org/defamation-victim-janice-duffy-phd-says-online-complaint-sites-can-ruin-peoples-lives/> (accessed 3/16/2016).

²⁷⁵ Compare <http://www.ripoffreport.com/r/lisa-blockowicz/winnetka-illinois-60093/lisa-blockowicz-julie-bevans-blockowicz-lisa-marshall-lisa-kelley-lisa-mckenne--445743> with <http://arstechnica.com/tech-policy/2009/12/justice-elusive-for-chicago-family-defamed-online/>

It thus appears that Ripoff Report decided that some element of the case justified removing these epithets from the most widely visible part of the Blockowicz reviews (though they are still included in many parts of the body of the reviews). Perhaps they were convinced by the court order and negative media attention (which is referenced in the Blockowicz review) to temper the reviews voluntarily after all. It is also possible that the Blockowicz parents decided to pay for the arbitration program and that an arbitrator hired by Ripoff Report did indeed determine those parts of the post to be factually deficient (the “redacted” modification can also be the outcome of the arbitration procedure, though the intensive factual review done by an arbitrator could hardly be expected of a consumer review website as a compulsory measure for every contested complaint). Perhaps this reflects sound judgment because terms like “thief” and “liar” could be construed as facts in this situation rather than mere interpretive characterizations based on the already articulated (and not false) facts. Scum bag, however, is pure opinion; perhaps Ripoff felt that it was “needlessly offensive or profane.” Given the inconsistency with its other stances and the myriad other comments of that nature in the review, however, the decision and the overall outcome are at best confusing and more opaque than one might like. In a less flattering sense, they make Ripoff’s approach to managing content seem far less principled than its free speech absolutist bluster would imply.

Regulation by the Market — Grassroots Pressure on Ripoff Report and Novel Reputation Management Services:

Overall, we might also attribute some credit for Ripoff’s newfound willingness to alter the text of its reviews to public outrage directed at the website. One campaign spearheaded by an Australian woman named Janice Duffy (who herself identifies as a victim of online defamation and harassment) appears to have achieved some results in this manner. The campaign has certainly inspired a significant following, collecting over 1500 Facebook “likes” as of March 18, 2016. This page contains various endeavors to effectively shame those who associate with Ripoff Report. One, for instance, lists “enablers” who are verified as participating in Ripoff Report’s corporate advocacy program.²⁷⁶

Further, the campaign targets those who advertise on Ripoff Report. As she wrote on the homepage of her blog:

[i]n 2013 advertisers were alerted to the proliferation of vile and abusive content...on Ripoff Report. This was a success! When confronted with their brand next to hate speech and headlines that referred to women as ‘whores’, ‘sluts’ and ‘skanks’ (and worse) the advertising servers and their clients could not get their business off the website fast enough.²⁷⁷

The link to evidence of its success on Duffy’s blog is merely a ruling denying Ripoff Report a preliminary injunction against the boycott sites, so we must assume that the implied “evidence” is the fact that Ripoff filed a lawsuit for tortious interference with business dealings in itself. The boycott efforts thus have at least created the perception of

²⁷⁶ Post in Facebook group for “Join The RipoffReportRevolt,” 5/1/2015. <https://www.facebook.com/RipOffReportRevolt/?fref=nf> (accessed 3/18/2016).

²⁷⁷ See Janice Duffy, “Blog History.” <http://drjaniceduffy.com> (accessed 3/18/2016).

a threat to Ripoff's advertising revenue.²⁷⁸ While the link on Duffy's website itself does not highlight it particularly effectively, the pressure on advertisers might have had some direct effect as well. As one post in the Facebook group documents, Toyota Australia was "working toward removing [their] ads" in the fall of 2014.²⁷⁹

The epithets Duffy lists above are indeed ugly. Advertisers perhaps should be commended for not wanting their ads being served alongside vituperative and sexist language. At the same time, of course, dissociation from this specific content by actors in the private market is palatable from a free speech perspective in ways that legal punishment for merely facilitating such speech (or even engaging in it directly) would not be. Advertisers are entitled to denounce whatever speech they like, and those like Duffy who encourage it regarding sexist language have in that respect adopted a nominally progressive cause. If such decisions lead to a situation in which Ripoff Report cannot figure out a way to make money in the private marketplace then there is no supervening principle that demands that it "should" be entitled to solvency. Were this reasoning extended to an actual legal mandate, however, it would become problematic: drawing the line at so-called "vile content" is simply not a legitimate standard for distinguishing protected and unprotected speech under the First Amendment.

The broadest and perhaps most novel socio-technical question that is forced by statements like Duffy's might thus be whether there is value at all in giving legal

²⁷⁸ See Denial of Preliminary Injunction, *Xcentric Ventures v. Michael Roberts*. CV 2013-012936, Maricopa Superior Court, 11/18/2013.

²⁷⁹ Post in Facebook group for "Join The RipoffReportRevolt," 9/12/2014. <https://www.facebook.com/RipOffReportRevolt/?fref=nf> (accessed 3/18/2016).

deference to a platform where people can post such clearly mean-spirited and insulting statements with relative impunity. The reader might have already entertained a version of this question when digesting the introductory samples or the Blockowicz situation: why are we doing so much hand-wringing over how such uncouth mudslinging is treated? Duffy herself has taken issue with the very premise of making sometimes vicious criticism visible via a website like Ripoff Report:

I don't believe that even if someone has had an affair with their best friend's husband...that anyone deserves to be put in global stocks for what is essentially a private issue and [be] globally humiliated...I think they have an expectation for their privacy [and] not to be put on display to the world.²⁸⁰

The issue, again, is the remedy. Given the essentially unremovable status of a post like that at issue in the Blockowicz case (due to the intransigence of ROR), seemingly the only true legal solution would be to make any site like Ripoff Report liable for the content submitted by third parties — i.e. revoke its safe harbor under the CDA. Further, in order to implement the conception of tortious harm advanced by Duffy above, the range of actionable statements would probably have to be enlarged to include certain opinions or true statements with arguably public information value.

A network of activists has emerged in the past several years that endeavors to enact such changes to section 230 in addition to influencing advertisers and readers to boycott the site. In their more extreme pronouncements, they state goals such as “shutting

²⁸⁰ Skype interview with Janice Duffy, 5/19/2015.

down” Ripoff Report and other consumer review sites entirely.²⁸¹ Duffy’s group has even tentatively opposed the aforementioned “Yelp bill” targeting non-disparagement clauses in consumer contracts. As their Facebook page stated once the bill was announced, “[w]e need to make sure that these lawmakers don’t just make knee-jerk reactions based on lobbyists for the gripe sites who make millions of dollars from their defamation [sic] platforms.”²⁸² While they are of course careful to reference “defamation” exclusively in this context, the post nonetheless reinforces a kind of Manichean approach in which anything supported by one of the relevant platforms triggers opposition from the group.

Duffy’s example of an “affair with their best friend’s husband” could fit the criteria for the public disclosure tort, as such information might well be more or less privately held and not newsworthy in any traditional sense.²⁸³ While this kind of private impropriety might indeed be a poor candidate for de facto protection from liability via posting on Ripoff Report, this is hardly the only kind of claim that makes it onto the site. Regardless, even an accusation like Duffy’s example above would probably be defended by those of Magedson’s ilk who believe in the digital age inevitability that “sooner or later we will all be blogged.” Questions of tort liability aside, therefore, there is an unresolved normative debate in society about whether such ostensibly private information

²⁸¹ See “Ripoff Report Victims Unite for Justice,” whose homepage describes its “goal” as “Shutdown RipOffReport.com and gag Ed Magedson.” <http://ripoffreport-victims-unite.org> (accessed 3/18/2016).

²⁸² <https://www.facebook.com/RipOffReportRevolt/posts/658135677652871>

²⁸³ See the general description of the public disclosure tort criteria here: <http://www.dmlp.org/legal-guide/publication-private-facts> (accessed 3/2/2016).

does or does not have a place in a publicly visible forum on the web. Duffy's group seeks to persuade others that it does not; from the perspective of the marketplace of ideas, this is a perfectly acceptable to undertake because it targets a set of beliefs. If the contributions to a site like Ripoff Report were to wane or it were to become clear that nobody paid much mind to what was written on it, then Duffy et al would have scored a marketplace victory.

Maybe a more compelling defense of the existence of a site like Ripoff Report, though, is the fact that many of the posts that it hosts are probably not at all tortious (even if they are mean-spirited and vindictive). Yet treating a site like Ripoff Report (or even Yelp) as the publisher of third party content could be tantamount to shutting it down. Ripoff Report is a prime example of the perspective discussed in chapter two which warns that it would be impossible for a site to vet such a volume of third party content for anything tortious. As was also outlined in chapter two, a more moderate position would be to make sites that host third party content liable as distributors: if they are given notice that something potentially defamatory has been posted, they must act swiftly to remove it or be liable for it.²⁸⁴ Such an approach might still be impractical. At the very least, it would again seem to require that existing categories of actionable speech be enlarged in order to reach much of the speech on the site to which those seeking reform usually object.

²⁸⁴ Such a mechanism would reprise both the advantages and abuse opportunities inherent in the takedown system of the DMCA, which were described in a section on reform proposals in chapter 2.

The fact is that these websites cater to an evidently enormous demand for speech — much of which could not be restricted on its own merits. While it may only be possible to achieve the kind of forum presented by *Ripoff Report et. al.* through a law granting extra protection from liability for third party content, undermining such protection would at this stage leave a significant segment of the (otherwise protected) marketplace of ideas without an outlet that has clearly flourished in the maturation of the interactive web. The content of the speech itself might not constitute the kind of marketplace that Holmes or even Justice Stevens had imagined, but the fundamental premise of the marketplace understanding of free speech in itself precludes picking and choosing on these terms. As Holmes soberly but somewhat ominously wrote in the *Gitlow* case (regarding the revolutionary socialist “creed” that he previously labeled a “creed of ignorance” in *Abrams*):

If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.²⁸⁵

One might likewise argue that mudslinging and invective ought to “have their way” — until the point where they become tortious, of course — if that is primarily what those who flock to gripe sites are inclined to indulge in.

This still leaves the issue of how to manage speech once it appears on gripe sites. Much attention in the professional sphere of reputation management is dedicated to this question. Sometimes the proprietors of reputation management services that promise to

²⁸⁵ *Abrams v. United States* (1919).

address potentially defamatory postings or “hate speech” on Ripoff Report appear more or less neutral regarding the wisdom of the policies that govern the site; they are merely technicians offering solutions. Some appear to be more opportunistically preying on the desperation of those who feel aggrieved by the websites.²⁸⁶ Others, however, offer their services under the auspices of a broader agenda that at least nominally allies itself with efforts to combat cyberbullying, online harassment, and perhaps vaguer scourges like “incivility” on the web.²⁸⁷ It is therefore first important to outline some of the professional services that seem to specifically target the mitigation of Ripoff Report and gripe site links and the ways in which they characterize the overall reputational imperative to address such content on the web.

The last chapter introduced the possibility of using Google’s own takedown procedures to manage speech on Google platforms, and some of those who seek to combat Ripoff Report’s influence likewise advocate focusing more on the positioning of search results themselves. A blog post on the popular online marketing news website *Search Engine Land* suggests that of all the possible approaches to mitigating the effects of content posted on Ripoff Report, the one that “is a far lesser-known option that...

²⁸⁶ Duffy claims that her Facebook group has been infiltrated several times by unscrupulous reputation managers posing as victims and promoting particular services. See post in Facebook group “Join The RipoffReportRevolt,” 4/13/2015. <https://www.facebook.com/RipOffReportRevolt/photos/a.309856935814082.1073741828.112645615535216/646508635482242/?type=3&theater> (accessed 3/18/2016).

²⁸⁷ See e.g. the “CiviliNation” campaign, whose work promotes what it calls “civility in the digital age”: <http://www.civilination.org>; and the company Rexxfield, which its proprietor claims “identifies anonymous online bullies & antagonists”: <http://www.authorizedstatement.org/> (see Rexxfield description below logo on upper left hand side of home page).

works wonders” is to “get the listing removed from Google.”²⁸⁸ What the post then describes is essentially the court order process discussed previously, in which the subject of the posting brings a lawsuit against the anonymous posters, appears most likely in an ex parte proceeding, and obtains a court order instructing the relevant platforms to remove the post. The author asserts that “[w]hile the offending report will still appear on the Ripoff Report website, the reference to that report in the Google search index will be gone completely,” though a link to a redacted version of the removal request (in Google’s Lumen database where such requests are archived) will be placed at the bottom of the results page. Those who peddle general promises to “get “Ripoff Report links de-indexed from Google” and such are likely referring to this process as well.²⁸⁹

The author of the post does, however, encourage self-reflection in the decisions about whether to seek a court order: “Be honest with yourself here (otherwise, you’re just wasting time and money). If the report about you is true (or if you can’t prove your case), you do not have a valid claim for defamation.” Such restraint represents a sober approach that sensibly acknowledges that actual defamation or tortious disclosure of private facts (rather than, say, the amplification of a merely embarrassing claim that was already public or a caustic opinion about one’s personal life or business dealings) constitute the

²⁸⁸ Kenton Hutcherson, “How To Remove Ripoff Reports From Google – Not Just Bury Them.” *Search Engine Land* 2/24/2011. <http://searchengineland.com/how-to-remove-ripoff-reports-from-google-not-just-bury-them-65173> (accessed 2/24/2016).

²⁸⁹ One recently crashed Duffy’s Facebook group dedicated to voicing discontent about Ripoff Report with the following unsolicited message: “Hi Janice, I have figured out a proprietary way to get these de-indexed from Google...I don;t [sic] want to disclose this info publicly as if ROR found out, they may try to stop this method from working...it starts at \$4K for one link...are you listed on ROR?”

only harm that one should attempt to redress in this manner. The key ethos, it seems, is to realize that one must tread lightly and make an effort to not respond belligerently or unrealistically:

Mudslinging on the Internet is a two-way street and is very hard to undo or contain once it's out there. If you do find yourself going down this path with an opposing party, swallow your pride, bite your lip—do whatever it takes to keep them from making additional postings (this sort of thing can snowball quickly since it's so easy to retaliate). And that just plays right into the business model of companies like Ripoff Report who charge you to let you clean up the mess.²⁹⁰

In other words, the court order route is simply the least bad option compared to paying for something like Ripoff Report's arbitration program. It only should be used, however, to get around the site's recalcitrance when it comes to content that is actually tortious.

The reason for this seems attributable more to principle than to efficacy. Getting the reports de-indexed circumvents any further interaction with either the poster or Ripoff Report entirely. In doing so, the subject of the post can avoid the indignity of "hav[ing] to pay the company that published the complaint about you in the first place — Ripoff Report."

Some claim that Google effectively works in concert with sites like Ripoff Report and that this nexus is the core factor in amplifying the impact of gripe sites. Michael Roberts, the founder of REXXfield reputation management and a leader in the campaign to both reform the relevant laws (like Section 230) and to pressure Ripoff Report to alter its behavior, has advanced a theory of what he calls Google's "humiliation algorithm." The

²⁹⁰ Hutcherson, "How To Remove Ripoff Reports."

idea is basically that Google has an incentive to calibrate its algorithm in a manner that highly ranks gripe sites and other high traffic websites promoting controversial (and potentially reputation-damaging) speech about individuals and business in searches because it helps to drive Google's own AdWords revenue.²⁹¹ Further, because partner websites like Ripoff Report share in this revenue, they can only benefit financially from being as intransigent as possible when it comes to content management. As Roberts sees it, "if there are allegations of crimes or social dysfunction on the individual or business being searched for, invariably it will be on page one of Google, probably in position three, four, five, or six — these are what I call the 'humiliation slots.'"²⁹²

Roberts continues with a specific example of a real search for an attorney in New York. He shows how the search results for this attorney's name plus "attorney New York" creates a first page of results that does indeed feature that attorney's home page, but it also features several gripe site links above it. "Why does Google do this," Roberts asks? "If I click on [this attorney's homepage], Google doesn't make a penny... I believe that [Google] deliberately and artificially elevates [any instances of... close association with

²⁹¹ AdWords allows advertisers to display a segment of text and link to their website alongside the organic search results that are displayed when certain key words are searched. AdWords links are also distributed over partnering websites themselves in a similar fashion: advertisers can control which websites their ads are displayed on via Google according to keywords, domain names, general topics, and "demographic targeting preferences." See en.wikipedia.org/wiki/adwords and adwords.google.com (AdWords Help).

According to the Investopedia entry for Google, "The bulk of Google's \$66 billion revenue in 2014 came from its proprietary advertising service, Google AdWords." investopedia.com/articles/investing/020515/business-google.asp

²⁹² All quotations taken from Michael Roberts, "EXPOSED: Ripoffreport.com Lies & Defamation" https://www.youtube.com/watch?v=tMTCCT_NtBk&index=2&list=PLh2oMVNKDDVio70n62CGhPQ8Y3IyrGTYu

negative connotations or negative words]...with a view to repulse me from [the original attorney searched].” This is because “the best way to make money is to elevate [sites like Ripoff Report]” so that once the searcher notices the preview text for the Ripoff links on the results page, he or she will forego contacting that person and (hopefully) click on the sponsored links on the side of the page instead.²⁹³

This sequence of events described in Roberts’ “humiliation algorithm” video certainly could occur. At the same time, Google could also be engaged in a kind of editorial oversight of search results (at least on the first page) that is simply attempting to represent the spectrum of commentary and information regarding a particular term. As one SEO commentator wrote recently,

I’ve begun to suspect that Google could be incorporating some types of sentiment analysis in determining what may appear on page one of search results. If you think about Google’s clear historical desire to provide a variety of content on the first page, it’s not inconceivable to imagine that it may have decided to purposefully feature a mixture of positive/neutral/negative content on page one.²⁹⁴

According to the post, even a behemoth like Coca-Cola only appears to have positive or neutral content for about 75% of its first page of name search results. The possibility that Google’s algorithm uses sentiment analysis to try to present a spectrum of opinion is not actually inconsistent with Roberts’ observations, as even he does not allege that Google elevates *only* negative or “humiliating” links.

²⁹³ Roberts, “EXPOSED: ripoffreport.com.”

²⁹⁴ Chris Silver-Smith, “Are Search Engines Responsible For Reputation? Yes, Virginia, They Are. Big Time!” *Search Engine Land* July 16, 2015. <http://searchengineland.com/search-engines-responsible-reputation-yes-virginia-big-time-224984>

We might also pause to examine how representative of search and information-seeking behavior the story that Roberts tells might be. In order for it to add up, we have to accept that a meaningful number of searches for a specific person will unfold in this manner. They could, but why would the searcher necessarily go straight to the sponsored links on the side of the page once they have merely glimpsed the gripe site links? Second, why wouldn't the searcher click the actual gripe site links (if the person already had an individual attorney's name in mind) to examine what is written on them and determine whether it should really influence his or her decision to associate with the person searched? Roberts has a partial explanation for this in that he sensibly postulates that it would happen in one particular circumstance: "if I'm in a hurry, I've probably seen enough."²⁹⁵

While it doesn't explain why searchers would immediately jump to the AdWord links (from which Google bills the advertiser for every click) instead of navigating within a particular review site or simply searching again with more general search terms, this view is perhaps realistic about the often cursory approach to processing information that search engines enable. Because of the plethora of (say) attorneys listed, the efficient approach may well be to simply search again for someone with a completely unblemished first results page since doing so is virtually costless. Correspondingly, the understanding of reputational harm being advanced in Roberts' account therefore rests on a very specific assumption about search architecture and the behavioral conventions of

²⁹⁵ "EXPOSED: Ripoff Report."

searching. In conceptual terms, the explanation of Google's elevation of gripe sites and the harm that its links can cause (even without being fully read) is predicated on a kind of associational understanding of reputation. Reputation is so precarious in this formulation that any hint of controversy about a person is enough to repel the searcher from associating with the person.

Such a characterization of the dynamics of reputation is powerful and relevant, but there are other ways in which information seekers arrive at judgments and make decisions about whom to trust. Just as McMillan's anomalous Yelp review from his harasser could theoretically be easily dismissed once someone takes the time to read his brief response and notice the text of the other reviews surrounding it, there is no reason why this could not happen with the text snippets that accompany the links displayed on page one of Google searches as well. Ironically, as we will see, Roberts' own efforts to counteract the high ranking of Ripoff Report and other gripe sites (which will be discussed in detail below) in the "humiliation algorithm" hinge in part on precisely this assumed willingness to explore the actual substance of search results rather than merely noticing whether one looks generally positive or negative.

A panoply of other existing services nonetheless seeks to combat the favorable placement of gripe site links by influencing the link placement on the first page of search results for a person's name. *Search Engine Land* characterized the stock approach this way: "Reputation management firms, which are basically just PR or SEO (search engine optimization) firms, will devote countless hours to creating additional positive websites,

articles, and other media about you in an effort to push the offending Ripoff Report off of the first page of Google search results.”²⁹⁶ As the article continues, though, focusing squarely on the visibility of links themselves has its limits as a strategy for countering reputationally problematic speech:

In many cases, these efforts are successful. But in others, Ripoff Report listings are too strong to push down permanently, and the damage continues. And since SEO efforts usually require ongoing effort, any success can be short lived.²⁹⁷

As the “online defamation removal attorneys” at a firm called Vorys put it, therefore, “[g]etting material listed above highly-ranked Ripoff Report content would require the company to be posted about on major websites and online publications, such as CNN, Fox News, and The New York Times.”²⁹⁸

Reputation manager Pierre Zarokian (the man quoted in the above footnote peddling link removal on Duffy’s Facebook group) is more optimistic about the ability to rank above Ripoff Report links in search results. In an interview with the industry blog *Search Engine Journal*, Zarokian describes two options for combatting links on Ripoff Report: one is to have it “legally removed” (presumably through the court order procedure discussed above), and the other is to “bury it underneath positive search

²⁹⁶ Kenton Hutcherson, “How to Remove Ripoff Reports From Google.” *Search Engine Land* 2/24/2011. <http://searchengineland.com/how-to-remove-ripoff-reports-from-google-not-just-bury-them-65173> (accessed 3/17/2016).

²⁹⁷ Hutcherson, “How to Remove Ripoff Reports From Google.”

²⁹⁸ Vorys, “Ripoff Report Removal Strategy” <http://www.vorys.com/publications-1176.html>

results.”²⁹⁹ How does one accomplish this? “Typically social media pages tend to rank pretty high,” the interview summary explains, “so Pierre recommends creating multiple social media accounts for your business that will eventually push the Ripoff Report link off the first page.”³⁰⁰ In many cases, moreover, the article asserts that this can prove superior to “the legal” route, because “[i]f it’s a legit review there’s also the danger of losing the case because the claims were honest.”³⁰¹

The strategy of proliferating preferred web content via social media sounds sensible enough, but it is also fairly generic and intuitive. What person dealing with false content on a gripe site would not instinctively try to drown it out with other more flattering content posted on the platforms that are immediately accessible? What is more important in terms of the marketplace of ideas, though, is the clarification about “the claims being honest.” If this represents the kind of average advice that the subject of a Ripoff posting might encounter when pursuing self-help, then we can see how fluidly the discussion can slide from one reputational register into another. In this case, we have transitioned from addressing the task of mitigating unjust reputational assault (presumably involving false facts or outrageously revelatory information) into what are essentially tips for augmenting ordinary efforts to burnish one’s image. Beyond the casual recognition that “the claims might be honest” (which is presented in the article as if it

²⁹⁹ “How to Outrank Ripoff Report: Interview with Pierre Zarokian” <http://www.searchenginejournal.com/how-to-outrank-ripoff-report-interview-with-pierre-zarokian/84831/>

³⁰⁰ “Interview with Pierre Zarokian.”

³⁰¹ “Interview with Pierre Zarokian.”

should not entail any reconsideration of the desired outcome), there is simply no apparent acknowledgement that such a situation might therefore not justify the default righteous conviction that the material must come down by any means necessary.

Regardless, some of Michael Roberts' own businesses endeavor to transcend this arguably stock approaches to displacing the offending links or trying one's luck with court orders. Roberts runs two specific services in addition to his main reputation management and digital investigation company called REXXfield, which assists law enforcement in criminal investigations and "identifies online bullies and antagonists." One of the more specific services is called page1.me and the other is called authorizedstatement.org. In one sense they complement one another, though the functions are essentially the same: to displace the links to gripe site postings in search results and substitute a narrative of one's own.

Page1 appears nominally more concerned with simply pushing down the links.

The site contends that it does the following:

...quickly removes undesirable defamation and negative news stories from Google search results. It is designed for individuals or organizations who need to change first page Google results for their direct name search. Most cases are resolved within 4 – 12 weeks, with all undesirable results being pushed down to page 2 of Google or beyond.

It seems to mirror other reputation management services, therefore, in its conflation of "defamation and negative news stories" and in the way it focuses on the order of search results. The site additionally offers a "maintenance mode" for half of the original price (which is set according to individualized quotes once the prospective client submits the

target search words to Roberts). Under the section heading titled “I’ve tried other solutions, why does yours work?” Roberts explains that “all of the activity [meaning preferred content like blogs and social media]” that other online reputation companies will create for you “is okay, but doesn’t guarantee results.” Instead, “[w]ith page1.me, you may not need traditional SEO (although it still may be prudent in some cases).” It is understandable that Roberts would not want to reveal too many details about his methods for business purposes, but merely claiming that “you may not need traditional SEO” with his service does not shed much light on what is different about it.³⁰²

Authorized Statement advances a related but distinct claim. Specifically, Roberts frames the service as a search-optimized means of having the last word over the disputed statements contained within the gripe site links themselves. In this sense, it is being billed as a kind of ultimate counterspeech vehicle as much as a means of pushing undesirable links down in the results. In order to do so, unsurprisingly, Roberts’ pitch focuses on the substance of the text that will be inserted into the top search results for one’s name and its finality in the “argument” with the gripe site as much as on the placement itself. As he writes in the introduction,

A person making a statement has the final say on the issue relating to the statement because trolls, vandals, defamers, competitors and other virtual antagonists have no ability to comment or post their diatribe on the Authorized Statement page. This means that people or organizations

³⁰² All quotations in this paragraph taken from the homepage: <https://www.page1.me> (accessed 3/23/2016).

coming under attack or harassment need make only a single verified statement about the issue and then get on with their life.³⁰³

The idea that such a page represents the “last word” is perhaps optimistic (as it is still only one link), but Roberts indeed seems to capture the widespread appetite (documented in the reputation management rhetoric of chapter three) for some kind of mechanism to “take back” one’s informational profile.

Without suggesting that it is somehow hypocritical, it is nonetheless difficult not to notice that such a description represents almost the opposite emphasis as that espoused in his videos about the “humiliation algorithm.” Rather than assuming that every viewer has been conditioned to simply move on once they detect a whiff of any controversy or disapproval on the results page itself, Authorized Statement is effectively predicated on the idea that searchers will actually follow at least one link and spend significant time parsing sometimes painstaking textual explication on the page they are taken to.

Regardless of Roberts’ other assumptions about searching and reading habits, there does appear to be indirect professional support for the idea that such a strategy has some impact on search engine results. As a recent article in *Search Engine Land* contemplated, it is possible that “long-form content benefits search engine optimization” both because “search engines seem to intrinsically love long content” and because “a [study] shows a direct correlation between the length of the content and the number of backlinks pointing

³⁰³ “About” <http://www.authorizedstatement.org> (accessed 3/23/2016).

to it.”³⁰⁴ Thus while the caricature of internet search habits might be that “nobody wants to read long pages of content on the internet,” emphasizing the kinds of rebuttals that Roberts does might indeed boost visibility within the architecture of the relevant speech environment as well.³⁰⁵

What does one such statement look like practice? The roster of examples viewable via search is rather small. One written by a woman named Maureen Feland is interesting in the way that it seems to function as a kind of public relations supplement to ongoing litigation. It begins with an emphatic but rather vague description of “fallacious and demeaning allegations posted online about [her]” but does not actually describe them or rebut them on the page itself. Instead, the statement links to several personal websites related to “cyber safety” and “cyber stalking” (though one link is broken as of July 2015) and references a defamation action against someone named Scott Brazinsky. There is therefore a concrete reputational dimension of the conflict that the page seeks to ameliorate, but there is little of the direct counterspeech that one might expect to find in an “authorized statement” on the matter. Instead, the reputational claims consist of one confusing piece of text on her personal website that alludes to a relationship gone sour

³⁰⁴ John Lincoln, “The SEO And User Science Behind Long-Form Content.” http://searchengineland.com/seo-user-science-behind-long-form-content-230721?utm_source=Ignite+Visibility+University&utm_campaign=779f4979ab-video_monthly&utm_medium=email&utm_term=0_b832448b42-779f4979ab-102136469 (accessed 10/1/2015).

³⁰⁵ Lincoln, “Long-Form Content.”

and her alleged experience with “cyberbullying.”³⁰⁶ There is little actual information about how she is experienced in “surviving a cyber attack” (which is the heading on her personal website).

One thing the site does state is that “[u]nfortunately do [sic] to the fact that there is an open criminal investigation in the process, I was advised to not release that facts [sic] out for public viewing.”³⁰⁷ The rest of the “explanation” consists predominantly of bromides about keeping one’s head held high without any concrete explanation of what happened to her. It concludes that “freedom of speech has just become VERY COSTLY” because “a person has the capability of posting anything they want.”³⁰⁸ Regardless, the service seems to have delivered on its promise to some degree: her Authorized Statement ranked only a few slots below the catalyst Ripoff Report entry for a Google search of her name in July 2015.

Even a cursory reading of the Ripoff Report written by Scott Brazinsky (he has signed it himself)³⁰⁹ reveals a more complicated situation. The post advances many claims about Feland that are factual in nature — most of which have to do with using Brazinsky’s various bank cards, stealing from him, and various allegations of

³⁰⁶ Feland Authorized Statement. <http://www.authorizedstatement.org/ripoffreport-rebuttals/945339-Maureen-Feland-Boonton-NJ.php> (accessed July 2015).

NOTE: the page appears to have been taken down as of 3/23/2016.

³⁰⁷ <http://www.maureenfeland.com/> (accessed 4/22/2016).

³⁰⁸ <http://www.maureenfeland.com/> (accessed 4/22/2016).

³⁰⁹ “Ripoff Report Complaint 945339.” <http://www.ripoffreport.com/r/maureen-feland/boonton-new-jersey-07005/maureen-feland-maureen-mckenna-after-2-yr-relationshipshe-ruined-my-life-left-me-brokes-945339> (accessed 3/23/2016).

fraudulently obtained government benefits. Perhaps some of them are true. If so, they could conceivably function as “information” that would make prospective employers, friends, or partners wary in the future and thus protect them from being taken advantage of. If some of them are false, then a defamation proceeding should easily determine this and provide monetary relief dependent on the level of demonstrable reputational harm.

While those individual false statements would probably stay on Ripoff Report even after a judgment was issued, they would still be complemented by both any “rebuttals” that Feland posted for clarification on the page that certain statements had been judged defamatory (as Ripoff Report always encourages) as well as the Authorized Statement pages and Feland’s own websites. Feland would never be truly obscure in the way in which she perhaps once was prior to the Ripoff Report posting, but by the traditional (if intuitive) standards of reputational vindication, one might well expect that her name had been cleared with respect to the specific accusations in question. In a way she would appear to have an advantage over, say, a defamation plaintiff harmed by a news article from the 1960s in that the accusations and their rebuttal would be inextricably linked.

What would the average person searching for information about Feland likely surmise after perusing these various sources? As long as she were to eventually post comments to the Ripoff Report complaint indicating that certain statements had been found false and defamatory by a judge, it is certainly possible that the prudent reader would dutifully tally the troubling true statements about her, measure them against those

judged to be false, and come to a rational calculation about what to think of her based on the resulting evaluation of risk. But there is also another orientation with which one could easily approach her mediated profile: an indifference to the truth or falsity of the discrete factual claims. Such a position would be rooted in the attitude outlined in chapter two that is adopted by the frustrated online reader who abandons traditional efforts to sort truth from falsity and instead embraces a kind of nihilistic detachment. The overall tenor could lead one to conclude that they are both just generally vindictive people who should be avoided not because of the facts themselves but because they are engaged in a kind of “flame war” which has taken this form in the first place.³¹⁰ Such an attitude might thus indicate that the reader has assumed mutual fault in the dispute when there is none. This could be entirely appropriate; it might also be problematic in causing blindness to some true power imbalance in their situation.

For better or for worse, then, one could be forgiven for concluding that this woman has (with the assistance of Roberts’ service) borrowed the discursive cachet of “cyber-safety” for what is essentially a narcissistic attempt to make herself look better in a personal squabble. Why shouldn’t a reader with any cynical inclinations begin to doubt the seriousness of such labels when they are invoked for such petty purposes? This would be a negative outcome in the sense that cyberbullying is a real phenomenon with a

³¹⁰ Another fairly benign example of such reasoning could be the following: People routinely stipulate that they want “no drama” in Craigslist roommate ads. One might be averse to “drama” but instinctively avoids such prospective roommates because the need to stipulate a distaste for “drama” still indicates a kind of proximity to it. The parallel is that simply being proximate to a particular kind of dispute will indicate to some people that one is to be avoided regardless of issues of fact or fault in the individual disputes themselves.

precise meaning. In no realistic sense would a posting on Ripoff Report (or several) of the type at issue here constitute the kind of ongoing intimidation of someone with less social power that defines a course of conduct as “bullying.”³¹¹ Cheapening the term in this manner does an injustice to those who truly experience bullying. At the same time, adopting this kind of jaded interpretive posture that assumes all invocations of something like “bullying” are driven by petty self-interest might also lead to a positive short term outcome in tempering the panic about online reputation in general. Many people reading the relevant postings could write them off as merely the hyperbolic and ultimately unremarkable assertions of two people whose relationship has soured — which would in turn theoretically diminish the true reputational consequences for both parties. As this interpretation would hold, they are basically engaging in a dyadic flame war that happens to be playing out over a nominally public forum; the pages exist merely for them to snipe at one another and vent their own resentment.

The Authorized Statement pages involving Roberts himself cannot be explained without some explanation of his backstory involving online smears and attempts to discredit and threaten him. These seem to emanate from two sources that have come together in a kind of unholy alliance in the present. The first is his ex-wife Tracy Richter, who has alleged a litany of abuses and personal failings on Roberts’ part which have not

³¹¹ Emily Bazelon has characterized the professionally accepted definition of bullying in this way: “The definition of bullying adopted by psychologists is physical or verbal abuse, repeated over time, and involving a power imbalance. In other words, it’s about one person with more social status lording it over another person, over and over again, to make him miserable.” Emily Bazelon, “Defining Bullying Down.” *New York Times* 3/11/2013. <http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html>

withstood factual scrutiny. Richter is currently serving a life sentence in prison for murder. Since her conviction, Richter, her adult son from another marriage, and her mother have managed to recruit Ed Magedson to their efforts to have Richter exonerated. This has entailed enlisting the services of a man named Darren M. Meade, who seems to have functioned as a kind of cyber-minion of Magedson's until what appears to be a recent falling out.³¹² Meade is himself a former business associate of Roberts. Roberts contends that he extracted himself from a partnership with Meade and another man currently incarcerated for fraud after it became apparent that a technique for altering the code for web page content that they were going to purchase for their reputation management service essentially constituted illegal hacking.³¹³ This has alienated Roberts from Meade et al. In the present, Meade and his assistants have allegedly created content on Ripoff Report that asserts outlandish and very likely false claims about the district attorney who prosecuted Richter in Sac County, IA, Roberts, and others close to these parties (like Richter's first husband). An article outlining the story in the *Sydney Morning Herald* juxtaposes two that illustrate the sordid range of claims with which (assumedly)

³¹² The relationship and their activities in connection with the Richter case are laid out in a criminal warrant for search of Richter's mother's computer. See "In the Matter of an Application for a Search Warrant for the Residence at 4221 155th St. Urbandale, Iowa." Available at <https://www.scribd.com/doc/233387848/Application-for-Search-Warrant> (accessed 4/22/2016).

³¹³ Though Roberts might bristle even at the description of him as a former "associate" of Meade, it must be noted that some sources dispute his account, claiming that Roberts is less innocent than he presents himself. See e.g. <http://www.foxnews.com/tech/2012/01/20/google-cide-online-reputation-managers-can-wipe-from-web/>; posts by John Romano and Anthony Roberts in this thread: <http://forum.vpxsports.com/30326/progenex-exposed-by-fox-news-for-hacking-scam>

Though important to acknowledge, it is not, however, the task of this project to determine the extent to which this might be true or reconcile any of the competing claims from these parties about the incidents outlined here. The author takes no position on these matters.

Meade and his associates have saturated the web. Their search engine-optimized syntax gives them the quality of a kind of avant garde internet poetry: “Even today a Google search for "Michael Roberts" turns up lurid headlines about him like, "Michael Roberts Cyber-Terrorist Troll Fails Polygraph" and "Mike Roberts Child Torture and Child Pornography, Exact Recipes for the Manufacture of Liquid Explosives“.³¹⁴

Roberts therefore has good reason to be vigilant in monitoring and countering what is said about him online. At the same time, Roberts’ actions suggest that he has taken his legitimate mandate to defend himself against claims of, for instance, something called “exact recipes for the manufacture of liquid explosives” as a license to claim harm when even benign statements are published about him. This is most evident in his exaggerated response to the *Sydney Morning Herald* article quoted above.³¹⁵ The piece itself is even-handed in its portrayal of Roberts and judicious in its descriptions of the saga it presents. There is no snark or even assignment of definite blame in most cases. Journalist Daniel Glick incorporates many sources, and to this reader demonstrates no discernible agenda in the piece. If there is anything unflattering about the article, it is merely that the author does not dodge the fact that Roberts has been repeatedly entangled with questionable individuals — though this is hardly presented in a way that itself imputes any kind of guilt.

³¹⁴ Daniel Glick, “I Married a Murderess.” *Sydney Morning Herald* 4/20/2013. <http://www.smh.com.au/lifestyle/life/i-married-a-murderess-20130419-2huhc> (accessed 3/23/2016).

³¹⁵ “Response To Journalist Daniel Glick’s Fallacious Article ‘I Married a Murderess’ SMH.” <http://www.authorizedstatement.org/people/michael-roberts/statements/journalistic-ethics-logical-fallacies-project-daniel-glick.php> (accessed 3/23/2016).

Yet Roberts responded with a nearly obsessive “rebuttal” post using Authorized Statement that savages the article as if it were a Ripoff Report posting itself. The bulk of the Authorized Statement devoted to the article follows the form of a Socratic logical analysis (e.g. identifying particular logical fallacies that invalidate assertions or descriptions in the article) of the article. It runs over 10,000 words including excerpted segments of the original article. In many instances, it is difficult to understand why Roberts would even object to the characterization from the article; in others the rebuttals seem fairly specious (such as insisting that he is a “licensed private investigator and journalist” rather than a “reputation manager” as described in the piece).

Sometimes this hair splitting in fact introduces unflattering meanings of particular statements that at least this reader had never contemplated while digesting the original article. For example, a segment of the piece concerns a strange episode in which Richter convinced Roberts to participate in a “trust exercise” involving her rolling him up in a sheet and then — to his surprise — partially suffocating him with a plastic bag. Roberts’ rebuttal insists that the article implies that “[Roberts] is an imbecile” because Glick misstates the timing of when Richter drugged him — thus suggesting that he had voluntarily participated in the trust exercise before being drugged when in fact he was drugged all along.³¹⁶ Aside from the fact that the article is clear to state that this episode was a “catalyst in their breakup” (implying that Roberts was indeed competent enough to recognize how inappropriate and troubling it was), why would a reader not be

³¹⁶ “Response To Journalist Daniel Glick’s Fallacious Article.”

sympathetic to him either way? Why respond with this bizarre and obsessive rebuttal? Who cares? It simply is not that consequential a statement even if the sequence is in fact wrong. Perhaps there are some worthwhile clarifications in his response (though these often come in instances where he disputes how a quotation is being used, making it difficult for the reader to assess), but overall it is unclear why they couldn't have been settled through, say, an email to the story's editor.

More concerning, though, is the assertion that currently sits atop the Authorized Statement page concerning Glick's article. It reads:

A 124 page criminal warrant that was unsealed today indicates that Journalist Daniel Glick is participating in the following crimes: Ongoing Criminal Conduct, a Class "B" Felony (IOWA CODE § 706A.2); Conspiracy, a Class "D" Felony (IOWA CODE §706.1); Solicitation, a Class "D" Felony; Extortion (IOWA CODE § 705.1), a Class "D" Felony (IOWA CODE § 711.4); and Witness Tampering, an Aggravated Misdemeanor (IOWA Code§720.4), Facilitation of A Criminal Network By Attempting To Induce A Witness" commits a Class "B" Felony. IOWA CODE § 706A.2 (2013).

Although Dan Glick's direct actions are limited only to witness tampering, if it is established that his defamatory and fallacious article was done in concert with the conspirators named in the warrant, then Glick himself may be considered a principal of all indicated crimes, pursuant to RICO laws. The warrant reveals that Michael Roberts is in fact a victim of the criminal conspiracy, as opposed to a "murky" individual as characterized by Glick in his article.³¹⁷

One need merely open the court document in question to realize that these statements are patently preposterous. Glick is not mentioned in the document, which is the aforementioned search warrant for Tracey Richter's mother's computer and concerns Ed

³¹⁷ "Response To Journalist Daniel Glick's Fallacious Article."

Magedson's connection with the Richters and Meade et al. Nowhere is there any documentation or even anecdotal suggestion indicating that Glick is actually involved with these people. It is nearly impossible to imagine how Roberts could even have conceived of implicating Glick in what is described in that warrant simply because Glick happened to write an article that Roberts found unflattering. The statements on Roberts' page are not sophomoric, ungrammatical allegations of strange behavior that can be easily dismissed as flaming or hyperbole. They are soberly delivered allegations that an otherwise reputable, successful professional has committed serious crimes. Such statements possibly constitute libel per se, and their source is a reputation management professional. If the casual browser indeed declines to read past the first few lines of any link as Roberts has asserted in other contexts, then these allegations are likely to be what he or she takes away from the page. The Authorized Statement link ranks third in a Google search for "Daniel Glick journalist" as of March 2016.³¹⁸

Glick appears to not have made any public response to Roberts' page. Glick indeed has quite an established career, so there is much other web content linked to his name. Further, given the frequency with which journalism subjects could be expected to object to the way they are depicted, it seems reasonable to guess that any potential employer (like an editor) who was considering Glick for a position or assignment might interpret Roberts' claims through such a lens. Glick is, then, in a way demonstrating how refraining from engagement with outlandish accusations (and thus not dignifying them)

³¹⁸ Screen capture available.

might — despite their falsity — sometimes represent the most effective reputation management strategy for the subject of the speech. Glick simply has no reason to “wrestle with the pig.” Yet regardless of Glick’s response, this episode more fundamentally also exemplifies the disturbing propensity for panic about reputation defense to beget belligerent behavior of one’s own. Roberts may not consciously think of himself as a victim, but his use of the tools he has created seems driven by a kind of righteous conviction that he must retributively discredit the author of any statement he finds objectionable. This suggests how in extreme cases counterspeech can — when taken to its logical extreme and fueled by the kind of paranoia that seems to characterize much discourse about reputation online — perhaps create harm of its own.

Conclusion:

In a recent interview, Roberts stated the desired outcome for the grassroots reform movement with which he identifies: “Until Ed’s immunity under the CDA is removed or reduced, there will be no relief. Alternatively, if the executives in Google who have the power to reduce RipOffReport’s search ranking do so, then Ed Magedson and his malicious users will once again be irrelevant to all except those in their immediate sphere of influence.” Perhaps the demise of a platform like Ripoff Report would bring an increase in civility to online discourse. Unfortunately, the First Amendment and the “marketplace” emphasis in the American free speech tradition generally do not encourage the accomplishment of “civil” discourse at the expense of all critical or caustic speech. Section 230 represented a practical effort to ensure that such speech would in fact

flourish on the web by allowing platforms host it without assuming crippling liability. The provision of a platform for “gripping” has value overall in facilitating opportunities for a range of critical speech - in its informational, social, and “safety valve” (i.e. flaming or venting) functions.

The popularity of gripe sites demonstrates that such strong sentiments about consumer and social experiences are ubiquitous. Were they truly stifled, they would likely “smolder underground” and potentially emerge in uglier or more oblique ways if not given an outlet. While it might seem off-putting at first that people would take to any platform to write “consumer reviews” about individual people in such volume (indeed this author has never done so and has no plans to), it also can be understood as a natural informational extension of social conflicts. There need not be anything strange about the application of “consumer” criteria to people: the essence in both cases is, after all, simply the act of formulating impressions and decisions based on information.

Some prevailing speech norms regarding the use of these platforms likewise seem to preclude simply shutting down the platforms or significantly restricting what one can use them to say. As was also on display in the contractual attempts to prevent critical speech on Yelp, trying to enforce absolute silence is most likely to simply inflame greater vitriol and legitimate reputational damage than whatever original critical posts would have. This does not mean that law must capitulate to norms in all instances, but it certainly indicates a powerful expectation about opportunities to speak that has developed according to the particular technological and economic context in which these sites

operate. For all the newly widespread concern about unjust reputational harm on the internet, there is clearly also very little public tolerance for attempts to stifle criticism even if the platforms dedicated to it are often less than perfect in their operation.

In terms of formal content policy, there is enough evidence to suggest that a more deferential takedown policy would affect far more speech than the kinds of heinous, “obviously” defamatory lies or revelations of deeply embarrassing and publicly irrelevant (but true) information that advocates might rhetorically invoke as the true target. Some may think it “not that difficult” to sort legitimate from illegitimate claims of reputational harm, but this in fact can be a tall order even in a formal legal proceeding. Additionally, some advocates of greater liability for gripe sites are after more speech than that which is already legally actionable. The slippery slope is ever steeper when it comes to designations like “hate speech” or “vile” content — categories that US law itself does not exempt from First Amendment protection.

This does not mean that gripe sites should not — based on the pressures of the market — change their internal content policies to be more accommodating of modification requests and consistent in their application. Likewise, it does not imply that professional services should not be developed to leverage technical features of the speech environment to assist those seeking to mitigate perceived harm from review site content or even that Google should not try to reflect the dubiousness of much content specifically on gripe sites in its keyword or name search rankings. Consumer sites may be entitled to

not having the government dictate how they screen third party content for defamatory or “negative” material, but they are also not entitled to favorable search position.

In this vein, the activists targeting Ripoff Report have had some success where it counts most: in convincing the intermediaries to consider voluntary exceptions to their recalcitrant content policies, influencing advertisers to disavow any connection with the distasteful speech that appears on the site, and probably fomenting greater skepticism about the content on these sites in general. Finally, it is of course crucial that review sites do not actually contribute to the creation of whatever content that they may host. If the allegations in the Iowa court documents about Magedson’s deputizing of Meade and others to circulate heinous lies about those involved in the Richter case prove to be true, then the site is clearly unfit to be considered for the safe harbor of Section 230 in these cases.

Maybe most important, though, is that the disputes that erupt over some of the more incendiary speech on these sites demonstrate the need to resist the most extreme strains of the ascendant reputational logic in which any “negative” posting is cause for panic and outrage. In the “Nazis in Skokie” context, Donald Downs recognized this tendency of counterspeech to become overly confrontational as “one of the worst lessons that the law can teach.”³¹⁹ In extreme cases this may well be true, and the responses of Roberts et al seem to suggest that the fear of reputational damage can encourage a kind of bellicose tribalism when an individual feels like he or she must defend him or her self. At

³¹⁹ Downs, *Nazis in Skokie* 92. This unfortunate byproduct of the emphasis on confrontation as a cornerstone of “republican virtue” is discussed in more detail at the end of chapter 1.

the same time, it seems premature to correspondingly dismiss the value of counterspeech on the web entirely simply because some overreact based on perceptions of harm to their own reputations. Overall, then, recognizing ways to adopt a less sensitive outlook in the digital speech environment could reduce the kind of paranoia that seems to accompany much discussion of reputation online. Such an attitude could thus prove equally salutary in at least delegitimizing (if not eliminating) the invocation of “victim” status as a cover for boorish behavior of one’s own.

Might a more sober and discerning focus on the likely perceptions of readers themselves be one avenue for achieving this less hysterical approach? As the preceding examples have attempted to demonstrate, there are myriad ways in which the content posted on these sites can be interpreted as “information” that should or should not help readers make decisions about either social or commercial association. Ripoff Report may well be a notorious website that in the words of one Florida judge “appears to pride itself on having created a platform for defamation.”³²⁰ The flip side of this, however, is that a notorious website can be consciously acknowledged by readers to be just that.

Malicious Ripoff Report postings or their retaliatory “defensive” equivalent (in something like the Authorized Statement page about Glick) both rely for their impact on the visceral discomfort which publicly posted vitriol like this can cause and in fact bank on the idea (that Roberts himself advances) that readers will absorb little more than the headline. On the other hand, the subjects of such speech still have the power to redirect

³²⁰ *Giordano v. Romeo*, no. 3D11-707 (Third District Court of Appeal, Florida, 2011), 4. caselaw.findlaw.com/fl-district-court-of-appeal/1590014.html

the conversation and remain civil rather than engaging in reciprocal mudslinging. If anyone bothers to read the responses or even to contextualize the original complaints, it does not seem farfetched to assume that the truly unhinged accusers will more often than not be dismissed or even denounced themselves. The key, it seems, is again for readers to do some measure of due diligence in evaluating sources and speakers on the web. Simply dismissing a person as tainted because someone else has written something nasty about him or her is an unacceptable ethos for the interactive web's open speech platforms that are indexed by search engines. These platforms can retain low barriers to entry and function without their proprietors assuming distributor or publisher liability only if those who use and view them are willing to do some interpretive work.

In the best cases, the platforms in question themselves represent a collective push to move resolution of reputational disputes away from all-or-nothing decisions about removal or tangential considerations of money damages and toward more direct engagement with the actual contested speech. Many reputation management endeavors targeting such speech seem to hinge on this ethos as well, as they often focus on the most efficient and reputationally restorative way to deal with the speech itself rather than on punishing the author with a lawsuit. This is a paradigm shift — rendered via nominally “private” mechanisms — that reform in libel law has endeavored to achieve for decades. To this end, therefore, while consumer review platforms might well have much room for improvement regarding the procedural and substantive transparency of their policies,

their fundamentally speech-maximizing ethos ultimately appears to provide an elusive kind of remedy as well.

Chapter 6

Reputational Conflicts Over Independent “Citizen Criticism” on the Web

This chapter focuses on a set of conflicts in which an individual or group of critics have aimed to expose wrongdoing of a largely non-commercial variety. They do so through standalone topical blogs on platforms like Google’s “Blogger” rather than through for-profit sites that aggregate third party criticism. As the last chapters have shown, the content that consumer review sites host often stretches the definition of “consumer review” to include personal criticism and flame wars. As was noted, these sites provoke disputes because of their treatment under Section 230, their visibility in search, and general “free for all” tenor of discourse that prevails. The kinds of dedicated personal websites in this chapter have different discursive conventions and civic goals. They do not enjoy the protection of Section 230 and are treated less favorably in search results. Correspondingly, they prompt different kinds of reputational concerns and responses.

The speakers examined in this chapter see themselves as civically-minded critical muckrakers. Two case studies are analyzed. One involves Maura Larkins, a former public school teacher-turned-vehement critic of the system who operates the San Diego Education Report blog and several others. The other examines the message board and blog Fornits, which is dedicated to activism and community-building for survivors of a particular variety of teen rehabilitation program. In terms of topic and purpose, there is surely some overlap between these speakers and many of those who contribute to

consumer review site. A line of complaint based on one's tenure as an employee for a particular institution might, for instance, begin on a personal blog devoted mainly to one's own daily tribulations but metastasize into Ripoff Report postings warning others to boycott the institution in question. At the same time, the speakers and conflicts covered here can be distinguished in several ways.

First, it is possible to see these speakers as driven by the conviction that their complaint or experience represents important public knowledge even if the reader him or herself would otherwise have minimal or no contact with the entity being criticized. In the parlance of libel and privacy law, the speakers thus conceive of the subject as a broader "issue of public concern" (or at least present it in a manner consistent with this conception). In instances of the relevant tort litigation examined here, sometimes courts have agreed; other times they have resisted recognizing the speech in question as more than personal sniping. Second, these speakers evince an approach to conveying information and presenting arguments that is markedly different from that ordinarily found on review and gripe sites: while the language may still be hyperbolic at times, the overarching pretense is one of evidence-based argument and exposure rather than emotional venting or "flaming." Indeed, the speakers in this chapter would likely bristle at the suggestion that their speech could be defended from tort lawsuits because it expresses rhetorical hyperbole or even opinion based on disclosed facts. For them, the blogs and other online publishing endeavors represent efforts to disseminate truth for the benefit of the broader public or some more narrow community of interest.

In some cases, further, the speech venues examined here function as meeting places for those with corroborating experiences or similar critical agendas to participate in the information gathering process and the formulation of the critical narrative collaboratively. In this vein, the collection of speakers discussed here in fact often eschew anonymity. Part of the critical endeavor involves identifying their experiences publicly as either a credential that (putatively) establishes credibility or again as a means of attracting like-minded or similarly situated individuals.

Finally, the particular kinds of criticism produced by the subjects of this chapter has prompted correspondingly distinct attempts at reputational vindication by the people criticized. The speakers themselves usually cannot avail themselves of Section 230 defenses for hosts of third party content (since they wrote it themselves), and their writings have mixed positioning in name search results. While takedown or retraction requests might seem eminently reasonable in some such cases, the speakers often defiantly reject such requests, viewing themselves as righteous citizen critics performing a public or community service. They therefore catalyze different combinations of legal action and counterspeech, which in turn implicates private reputation management services in different roles as well. In particular, some such conflicts involving discussion of issues of public concern raise ethical and democratic questions about the propriety of private companies assisting those who seek to “whitewash” discussion of themselves online.

The cases examined here thus mobilize concerns similar to what have traditionally been called “strategic lawsuits against public participation” (SLAPPs).³²¹ Yet further examination also reveals mutations characteristic of the novel speech genres that they represent. Sometimes the “SLAPP” designation is an imperfect fit due to three recurring factors: the mixture of factual and opinion criticism that is only partially defensible, the degree to which the criticism grows out of individual grievance, and the scorched-earth manner in which it is pursued. Those who seek to remedy the speech in question likewise deviate from the classic SLAPP plaintiff. In these cases, subjects of criticism bring legal action more as a foundation for subsequent reputation burnishing performed by private actors than as an effort to silence the speakers per se. The reputational disputes examined here thus demonstrate that the idealized “citizen critic” contemplated in some early writings about speech online is hard to find in its platonic form, yet there is a countervailing danger that panic about reputation management might — if unchecked — smother some novel sources of criticism about matters of public importance.

The Law Greet the Expansion of Platforms for Citizen Criticism:

The virtues of the “citizen critic” have long been extolled in free speech theory and jurisprudence. Most generally, this valuation is embedded in the implicit hierarchy of speech that casts political speech both as the most “valuable” in its contribution to

³²¹ One basic definition of a SLAPP is the following from California’s anti-SLAPP law: “the term applies to lawsuits brought primarily to discourage speech about issues of public significance or public participation in government proceedings.” See Digital Media Law Project, “Anti-SLAPP Law in California.” <http://www.dmlp.org/legal-guide/anti-slapp-law-california> (accessed 3/21/2016).

democracy and also that which best captures the framers' intentions in creating the First Amendment. As Owen Fiss has memorably written, much of classic free speech doctrine saw the task of the First Amendment as "protect[ing] the street corner speaker" who fulminates against government misdeeds "from the menacing reach of police" who would take away his soapbox.³²² In First Amendment jurisprudence, this position has been most vigorously advocated regarding the scrutiny of public officials. As Justice Brennan wrote in the *Sullivan* case, the actual malice fault rule was created "for the citizen-critic of government," for whom "[i]t is as much his duty to criticize as it is the official's duty to administer."³²³ This formulation in the *Sullivan* case thus identified a specific beneficiary who could then better follow Justice Brandeis' admonishment in *Whitney* that "public discussion is a political duty, and that this should be a fundamental principle of the American government." Such deference to those who voice criticism of official conduct is thus an integral part of the marketplace framework in which "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."³²⁴

The Court was quick to apply this "citizen critic" framework in its seminal discussion of the internet in the *Reno* case. Formulated in terms of its prevailing model for different regulation of print and broadcasting, the Court argued in *Reno* that the internet resembled the press much more than it did broadcasting. As described in chapter

³²² Owen Fiss, "In Search of a New Paradigm," *Yale Law Journal* Vol. 104 (1995), 1614.

³²³ *NYT v. Sullivan*, 376 U.S. 282.

³²⁴ *Whitney v. California*, 274 U.S. 376.

one, the scarcity of the electromagnetic spectrum had long justified government regulation of the allocation of speaking opportunities in broadcasting. The technology and economics of newspapers, on the other hand, did not demonstrate the same scarcity and thus did not warrant the same level of regulation. As the Court had put it in *Tornillo v. Miami Herald*, a government-mandated right of reply for newspaper editorials about political candidates would impose a burden on newspapers that was not justified within the existing First Amendment distinction between print and broadcast media. Because broadcasters were granted licenses on the condition that they represent diverse viewpoints (since only so many licenses could be granted), they could be constrained in their editorial functions. Newspapers should not be constrained, the Court implied, because their operation was governed by no similar duty; a dissenter could find myriad other print outlets for his or her criticism or even start his or her own.

The Court in *Reno* analogized the architecture of the internet to this characterization of the opportunities afforded by print media. Specifically, Justice Stevens' opinion celebrated what he saw as the internet's provision of "relatively unlimited, low cost capacity for communication of all kinds." Further, in his now oft-cited characterization of the technology's potential for democratizing the media environment, he wrote:

[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity... Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a

pamphleteer. As the District Court found, ‘the content on the Internet is as diverse as human thought.’³²⁵

As touched on in discussion of *Reno* in chapter two, such features meant that content regulation would become more a matter of self-help than government intervention.

The *Reno* Court further argued that a decentralized, open-access network with an almost endless number of channels would allow “content regulation [to be placed] in the hands of users, rather than legislatures and courts.”³²⁶ This would in turn enhance the marketplace of ideas and bring the contemporary speech environment more in line with the mode of regulation envisioned in the classic marketplace theory derived from Mill. It would create an infinitely more robust marketplace of ideas marked by “an abundance of communications opportunities, [an] increase the diversity of speakers, and eliminat[ion of] the need for onerous spectrum regulation.”³²⁷

The point here is not to mock or even necessarily challenge such a rosy prognosis. Rather, it is simply important to start by pointing out that these formulations contain bold and optimistic predictions about how the internet would fit with the existing media-specific legal framework but that neither Stevens’ nor Fiss’ vision is very explicit about who would actually end up using such publishing tools, how they would write, how many people would see and interact with that content, and where the speakers would train their targets. Perhaps this is wise: these commentators in the mid-nineties probably could not

³²⁵ *Reno v. ACLU*, 521 U.S. 870 (1997).

³²⁶ This is Owen Fiss’ characterization of some conclusions from another paper in the special Yale Law Journal issue in which his own article appeared. Fiss, “In Search of a New Paradigm,” 1613.

³²⁷ Fiss, “In Search of a New Paradigm,” 1613.

have predicted the varieties of “citizen critics” that have emerged in the years since. Regardless, the vision expressed above has found some fruition on the platforms of the web. It is important now to explore some perspectives on the ways in which independent speakers have complemented the traditional professional news institutions and how they and others distinguish their own goals and responsibilities. This in turn frames the inquiry into specific cases that revolve around the reputational impact of some of these endeavors.

Who Counts as a “Journalist” on the Web?

As the use of chat rooms waned, popular blogging platforms like Tumblr and WordPress as well as user-generated video platforms like YouTube emerged following the turn of the millennium as some of the primary venues for realizing Justice Stevens’ vision of the internet as a place where “any person with a phone line can become a town crier.” Such platforms have multiplied in recent years, and are generally easy enough to set up and maintain that users need little technical savviness. A 2006 Pew study captured the rise of blogging as a popular use of the internet for commentary and self-expression, finding even then (and perhaps contrary to stereotypes of vocal internet users) that “the blogging population is young, evenly split between women and men, and racially diverse.” By 2008, roughly 40% of internet users responded that they had read blogs.³²⁸ The popularity of publishing on blogging platforms has evidently waned with young people (ages 12-29) in subsequent years with the multiplication of social media outlets

³²⁸ Aaron Smith, “New numbers for blogging and blog readership.” *Pew Research Center* 7/22/2008. <http://www.pewinternet.org/2008/07/22/new-numbers-for-blogging-and-blog-readership/> (accessed 3/24/2016).

(sometimes called “microblogs”), as a follow-up study in 2010 found a marked decrease (28% to 14%) in the number who said they had written on blogging platforms.³²⁹ The study’s author, Amanda Lenhart, interpreted the results as an indication that “youth may be exchanging ‘macro-blogging’ for microblogging with status updates.” If “microblogging” social media platforms were displacing a segment of what had previously been expressed through standalone “macro” blogs, then what might be left on standalone blog websites?

The 2006 study noted a particular discrepancy between the typical assumptions about the medium and the reality of what most blogs actually cover: “While many well-publicized blogs focus on politics, the most popular topic among bloggers is their life and experiences. The Pew Internet Project blogger survey finds that the American blogosphere is dominated by those who use their blogs as personal journals.” This undergirds an important point of self-conception: “Most bloggers do not think of what they do as journalism.” The study also found that while roughly half of those surveyed do conceive of their writing as an attempt to “tr[y] to influence the way other people think,” the more primary motivation is often simply “an interest in sharing stories and expressing creativity.”³³⁰ It is thus clear that the medium is embraced by a diverse range of people with many motives and interests, though they are likely now older on average than the

³²⁹ Benny Evangelista, “Blogging is for old people, Pew report finds.” *SF Gate* 2/4/2010. <http://www.sfgate.com/business/article/Blogging-is-for-old-people-Pew-report-finds-3200499.php> (accessed 3/24/2016).

³³⁰ Amanda Lenhardt and Susannah Fox, “Blogging is bringing new voices to the online world.” *Pew Research Center* 7/19/2006. <http://www.pewinternet.org/2006/07/19/bloggers/> (accessed 3/24/2016).

typical internet user. Further, the characterizations above suggest that they often see their endeavor as a novel kind of writing that is public and directed toward a particular audience but also not exactly “journalistic” in its goals and conventions.

Such a distinction therefore raises an important question: what is the relationship of personal blogs run by non-professional journalists or casual writers to the adjacent domain of journalism and “professional” commentary on public and community issues? This can be examined in terms of both topical focus and conventions of writing and presentation. The discussion at this stage is not meant to be exhaustive; the goal is to introduce themes and points of tension that frame the subsequent discussion of some particular blogging endeavors and their degree of conformity with the rather idealistic speech environment envisioned in the *Reno* case. Further, this discussion sets up a broader analysis regarding new media and the changing face of journalism in the digital age. As the subsequent case analyses will attempt to demonstrate, some of the novel reputational concerns raised by self-publishing “muckrackers” in fact might reaffirm the virtues of the practices associated with the professional press more than they reveal a radically new marketplace in which such institutions are no longer necessary.

Various courts have weighed in on the question of whether when those who self-publish on the web should be treated like members of the institutional press. The question of “who counts as a journalist” has, for instance, long preoccupied those interpreting the statutory testimonial privileges that grant journalists exemption from revealing

confidential sources.³³¹ Some such state “shield laws” (like Oregon’s) require connection to specific outlets traditionally identified with the news media explicitly. Others seem to apply more broadly to the spirit of the publication rather than the medium or institutional affiliation. As some have argued, the production and delivery of news has evolved to the point that distinguishing between the institutional press and those who self-publish it nonsensical when we consider the underlying purpose of a shield law: “The media landscape has changed significantly since these shield laws were first enacted in the early 1970s, and there are now plenty of people in the “new media” who are performing roles that are just as important as what traditional journalists do.”³³² “In the age of blogs,” echoed veteran journalist Michael Kinsley in a 2014 article, “it is impossible to distinguish between a professional journalist and anyone else who wants to publish his or her thoughts[,] and that’s a good thing.”³³³

Perhaps some perform essentially the same service at the *New York Times* and therefore should be able to conduct their work similarly. On the other, there will be many instances in which the fit is not perfect. It would appear overall, therefore, that adjudication of whether certain kinds of bloggers are proper beneficiaries of state shield laws and other relevant protections should be determined on a case-by-case basis. One

³³¹ As held in the 1972 case of *Branzburg v. Hayes*, the First Amendment contains no affirmative mandate for journalists to receive special protection against law enforcement requests to reveal sources. Legislatures are, however, free to enact statutory protections as they see fit.

³³² Doug Mataconis, “Bloggers, Media Shield Laws, and the First Amendment.” <http://www.outsidethebeltway.com/bloggers-media-shield-laws-and-the-first-amendment/>

³³³ Michael Kinsley, “No Place To Hide” (book review), *New York Times* 6/8/2014. http://www.nytimes.com/2014/06/08/books/review/no-place-to-hide-by-glenn-greenwald.html?_r=0 (accessed 3/6/2016).

such case that was prominently covered in business and technology publications both helps to illustrate the difference and reinforce the wisdom of refraining from drawing too bright a line.

Testing the Legal and Informational Status of Independent Blogging — The Case of Crystal Cox:

In 2012, a federal court in Oregon issued a decision involving the online publications written by a Montana woman named Crystal Cox. Cox has styled herself an “investigative blogger,” but at the time her ire appeared overwhelmingly directed at a single target: an Oregon company called Obsidian Finance. Instead of operating through one website, she created many that advanced the same core claims: that Obsidian finance was a bad company that had behaved unethically and illegally. Cox considered herself a victim of the company after its work as a bankruptcy trustee for a company that owed Cox money. The claims advanced by her websites were not subtle, with the web addresses themselves using titles such as “obsidianfinancesucks.com and bankruptcytrustee-fraud.com.”³³⁴

When Obsidian Finance sued Cox for defamation, the judge had to decide whether Oregon’s shield law and retraction statutes could be marshaled in Cox’s defense. The retraction statute was relevant here because it would have required that Obsidian request a retraction of specific statements in question before it could proceed with a lawsuit. The shield law was relevant because Cox had attributed several of the statements

³³⁴ Summary taken from Timothy B. Lee, “Blogger Not Eligible for Oregon Media Shield Law,” *Ars Technica*, December 8, 2011. <http://arstechnica.com/tech-policy/2011/12/judge-blogger-not-eligible-for-oregon-media-shield-law/>

of fact on her blog to anonymous sources. Though the actual existence of these sources is questionable, the shield law theoretically would have protected her from having to reveal them. In his ruling, judge Marco Hernandez outlined seven criteria for determining whether a publisher in such a situation should be considered a journalist for the purposes of these statutory defenses. In his view, Cox met none of them. These included:

(1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting 'the other side' to get both sides of a story.³³⁵

Implied in the ruling, of course, is that these criteria constituted the core features common to all journalistic enterprise. They thus are prerequisites for newfangled genres of “investigative blogging” (or whatever similar appellation) to merit the special consideration for the press that suffuses both the letter of the law and much American free speech rhetoric.

Why did Cox’s writing not meet these criteria and what might this portend for other blogging or concerted self-publishing endeavors on the web? First, her blog contained what radio host Bob Garfield described as “hav[ing] elements of journalism” but also “elements of gadfly crackpotitude.”³³⁶ As Forbes writer Kashmir Hill wrote in a 2012 article on the decision, the sheer obsessiveness and unrestrained animosity with

³³⁵ Lee, “Blogger Not Eligible for Media Shield Law.”

³³⁶ Bob Garfield, “A Blogger's First Amendment Rights - and Responsibilities,” *On The Media* January 24, 2014.

which Cox's blogs attacked Obsidian and its principal, Kevin Padrick, indicated that "this is not the work of a journalist, but the work of someone intent on destroying reputations."³³⁷ In other words, the extra protection afforded by retraction and shield statutes requires that those independent self-publishers who claim to be doing "journalism" should at least make an attempt to temper their language and be as transparent and even-handed as possible. Serious allegations such as those advanced on Cox's blog might be held to an even higher standard of civility and thoroughness in order to differentiate them from mere personal vendettas. As Hill concluded rhetorically, there may well be bloggers doing the same kind of work as those in professional news organizations, but "[Cox] wasn't able to prove at trial that what she had written was true...[d]o we really want to claim this person as one of our own, folks?"³³⁸

There is also a dimension of Cox's saga that probably sets it apart from the majority of cases involving other self-published critical websites. Garfield's description cited above contained one more term: Cox's writings also had "elements of a shakedown." Hill's *Forbes* article copies an email that she obtained which appears to show that Cox had contacted Obsidian prior to the defamation trial in order to "offe[r] them reputation services." The email is not totally explicit, but Cox does seem to suggest that she would take down or alter some of her websites in exchange for money:

³³⁷ Kashmir Hill, "Investment Firm Awarded 2.5 Million After Being Defamed by Blogger," *Forbes* 12/7/2011. <http://www.forbes.com/sites/kashmirhill/2011/12/07/investment-firm-awarded-2-5-million-after-being-defamed-by-blogger/>

³³⁸ Hill, "Investment Firm Awarded 2.5 Million"

I want to let you know and Obsidian Finance that I am now offering PR Services and Search Engine Management Services starting at \$2500 a month to promote Law Firms[,] Finance Companies[,] and to protect online reputations and promote businesses. Please Let me know if Tonkon Torp or Obsidian Finance is interested in this service [all caps sic].³³⁹

This appeal is reminiscent of the “Corporate VIP” services offered by Ripoff Report in its thinly veiled appeal to exchange money for the removal of unwanted content. The idea that Cox just happened to be informing them of her new endeavor that was initiated completely independently of her dispute with them simply strains credulity. What is more alarming is that the issuer of the proposition is someone who has otherwise cast herself as a victim of censorship attempts and rhetorically wrapped herself in the First Amendment. Her eagerness to suddenly fold on the defense of her critical speech in exchange for money suggests a less than principled commitment to robust public debate.

In terms of the actual legal questions, the ultimate outcome of her case in fact represents a recognition that bloggers and similarly situated speakers can in fact be counted as the “press” in the eyes of the law. After hearing Cox’s appeal, the Ninth Circuit held in 2014 that Cox was in fact entitled to the same protections in a defamation lawsuit as she would as a member of the institutional press.³⁴⁰ Indeed, it is important to recognize the principle established in this case (one to which even the district court judge Hernandez was theoretically receptive) and celebrate Cox as an activist who successfully broadened our digital age understanding of “journalism” in a productive way. At the same

³³⁹ Hill, “Investment Firm Awarded 2.5 Million”

³⁴⁰ *Obsidian Finance Group v. Cox*, No. 12-35238, 2. <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/17/12-35238.pdf> (accessed 10/10/2015).

time, it is difficult to see Cox's overall endeavor as particularly principled or civic-minded. Cox's case therefore represents a kind of cautionary example for any examination of the journalistic status of those who use independent self-publishing platforms to share information and stories on the public web

This goes beyond the rather confusing pitch for reputation services discussed above. After her initial defeat in the district court trial, for instance, she solicited the services of a well known First Amendment lawyer named Marc Randazza. Soon enough, however, Cox was retaliating against Randazza himself and publishing more vituperative diatribes on new blogs like "unethicalscumattorney.com" (complete with borderline-campy background images suggesting a "wolf in sheep's clothing") regarding his supposed mistreatment of her.³⁴¹ A series of blogs have popped up decrying what they allege is Cox's own tendency to "pos[t] a bunch of negative stuff about you on the internet...then offe[r] to sell you 'reputation management services.'"³⁴² One makes an especially blunt connection between her general alleged conduct and the classification of her writing in its subheading: "crystal cox is NOT a journalist."³⁴³ Ultimately, therefore, she is perhaps at worst more reminiscent of some of the protagonists from the preceding discussion of Ripoff Report: serial litigants who adopt either the mantle of "free speech crusader" or "cyberbullying victim" in a kind of mercenary, opportunistic fashion as it benefits them in the context of particular disputes.

³⁴¹ <http://unethicalscumattorney.blogspot.com/> (accessed 10/12/2015).

³⁴² <https://phillylawblog.wordpress.com/2012/04/03/the-evolution-of-crystal-cox-anatomy-of-a-scammer/> (accessed 3/21/2016).

³⁴³ <http://crystal-cox.com/> (accessed 3/2/2016).

In terms of optics, therefore, Cox may ultimately be a poor poster person for treating independent self-published critics with the kind of deference that the American free speech tradition ordinarily affords the press. Another recent case provides perhaps a more palatable example of a blogger who did qualify for the protections of a retraction statute. In 2014, footage of a Florida man named Christopher Comins shooting dogs in a public field was captured by University of Florida student Matthew Frederick VanVoorhis. The video was posted on VanVoorhis' blog and was shared widely, generating condemnation of Comins. VanVoorhis himself referred to Comins as "barbaric." Comins sued for defamation, but his suit was dismissed for not giving VanVoorhis the advance notice required by the retraction statute for a media defendant (though an epithet like "barbaric" also would almost certainly constitute a non-actionable opinion based on the disclosed facts represented by the video). This dismissal was upheld on appeal, and the ruling contained reasoning that, according to TechDirt, "highlighted the importance of blogs to our media landscape."³⁴⁴ Specifically, the Florida court seemed to explain why blogs filled a particular niche in the contemporary journalistic marketplace: they characterized the type of blog that they were ready to consider a legitimate media defendant as "a site operated by a single individual or a small group that has primarily an informational purpose, most commonly in an area of special interest, knowledge or expertise of the blogger, and which usually provides for public impact or

³⁴⁴ Mike Masnick, "Court Declares That Yes, Bloggers Are Journalists." <https://www.techdirt.com/articles/20140416/06001926929/court-declares-that-yes-bloggers-are-media.shtml> (accessed 10/15/2015).

feedback.”³⁴⁵ On a final positive note, attorney Marc Randazza assisted with VanVoorhis’ representation and this time the attorney-client relationship remained amicable.

The rulings and situational specifics of both the Cox and VanVoorhis cases prompt consideration of some core legal and informational issues that recur in cases involving critical bloggers. How do other bloggers conceive of their work? Do readers treat this kind of content as they would a traditional “news” story or do they approach it more skeptically than they might a newspaper website? How might efforts to litigate against such publications trigger some of the same concerns that have traditionally motivated the provisions of anti-“SLAPP” legislation? Do some of these writers represent a new manifestation of the citizen participation in public affairs that SLAPP law seeks to protect?

Defining the Norms of Blogging — Self-Regulation and Informational Orientation:

While the bloggers surveyed by Pew have in at least one instance expressed a general aversion to thinking of themselves as “journalists,” several sources indicate the prevalence of two values among bloggers: disclosure and permanence. One “bloggers code of ethics,” for instance, emphasizes the imperative to disclose alterations and instances of uncertainty in one’s writing.³⁴⁶ Another such “code” from media scholar and Justice Department fellow Martin Kuhn seems to go a step further, arguing for a fairly radical stance on the permanence of posts once they have been published. Kuhn writes

³⁴⁵ *Comins v. VanVoorhis*, Fla. Court of Appeal, Case No. 5D11-2754. Quoted in Masnick, “Court Declares That Yes, Bloggers Are Journalists.”

³⁴⁶ <http://pcij.org/blog/bloggers-code-of-ethics> (accessed 10/15/2015).

that bloggers of all stripes should “not self-censor by removing posts or comments once they are published.”³⁴⁷ As another proponent of such a maxim named Rebecca Blood (who identifies herself as a “blogging pioneer”) states, “[t]he network of shared knowledge we are building will never be more than a novelty unless we protect its integrity by creating permanent records of our publications.”³⁴⁸

As an example, she describes the following situation:

"Deleting the entry [that someone has claimed is inaccurate] somehow asserts that the whole incident simply didn't happen — but it did. The record is more accurate and history is better served if the weblogger notes beneath the original entry that the writer has made the corrections and the article is now, to the weblogger's knowledge, accurate."

This is in an interesting echo of Ripoff Report editor Ed Magedson’s intransigence regarding the removal of posts and thus seems to reinforce a particular norm regarding how to deal with problematic content on the web. While Magedson’s motives might be less noble, there is a practical informational reason to adopt this general approach. The general principle, then, is that the coherence of an interactive public discussion across platforms depends on statements being preserved and emended rather than simply vanishing; the latter could easily render a series of responses built on that statement meaningless.

347 Abel Pharmboy, “Tar Heel Tavern #87: MSM Addendum.” Science Blogs 10/22/2006. <http://scienceblogs.com/terrasig/2006/10/22/tar-heel-tavern-87-msm-addendu/> (accessed 3/24/2016).

348 The post from which these quotations are taken is an excerpt from her book on the subject. Rebecca Blood, *The Weblog Handbook: Practical Advice On Creating And Maintaining Your Blog* (New York: Basic Books), 2002. http://www.rebeccablood.net/handbook/excerpts/weblog_ethics.html

What about the lens through which the casual reader might be expected to assess this kind of independent, self-published content? Courts and legal commentators have themselves directly considered the impact of the medium on the distinction between fact and opinion. While courts have in fact always weighed contextual factors in some form to decide whether a statement qualifies as an expression of fact or opinion, the Digital Media Law Project primer on this distinction in California law explains that internet forums present particular complications because “it is a medium where the lack of face-to-face contact can often make judging the actual meaning and context of a publication difficult.” In order to anticipate the likely reaction, therefore, “[c]ourts are likely to take into account the particular social conventions of the Internet forum at issue in evaluating a statement's context.”³⁴⁹

This context is often elusive, but a debate (if only an implied one) over the impact of the medium has emerged. Some see the self-published quality of blogs as a factor that undermines the likelihood of their being perceived as “factual.” Others, however, caution that this approach both trivializes the writing on these sites and mischaracterizes how people actually think about them. Interestingly, these positions do not always line up consistently with either the parties one might otherwise expect to be particularly protective of independent publishers or with those whom we might expect to want greater liability for reputationally consequent speech.

³⁴⁹ <http://www.dmlp.org/legal-guide/opinion-and-fair-comment-privileges> (accessed 10/15/2015).

According to a 2012 Blog Law Blog post about a defamation case in California, “[i]n determining statements are nonactionable opinions, a number of recent cases have relied heavily on the fact that statements were made in Internet forums.”³⁵⁰ The court in this particular case thus “considering the statements’ contexts – internet forums – as likely places for opinions rather than facts — at the expense, apparently, of fully considering the content of the statements themselves.” The author of this post sees such a trend as “sad and disturbing” because it means “the courts are overlooking the reality that many users of such forums actually treat postings they read as fact.” A reader might well approach a site like Ripoff Report expecting not facts per se but a kind of righteous emotional validation of his or her own bad experiences. Would this be true for a blog that professed to expose wrongdoing at an institution with which the writer is supposedly familiar? If, in other words, some self-published website displays the formal features and mimics the tenor of a “news” site, would the reasonable viewer still approach it in a largely non-factual register?

As the above post implies, the blanket assumption that “a reasonable person would not go to those sites expecting facts” is not as anomalous at one might expect. A 2014 decision from the NY Superior Court in the case of *Nanovicirides v. Seeking Alpha* held, for instance, that the “fact that the article appears on an internet message board also supports a finding that the article must be an expression of the author's opinion.” What this implied, according to a post on the Holland and Knight Firm’s website, is that the

³⁵⁰ <http://bloglawblog.com/blog/?p=4287> (quoting *Chaker v. Mateo*, No. D058753, Cal. Ct. App. 2012).

court was saying that “a statement is more likely to be an opinion, and thus less likely to be actionable, if only because it appeared on the Internet, *irrespective of any context or other facts* (emphasis in original).”³⁵¹ The court offered a tempered version of this principle in another case called *Hadley v. Doe*, in which it “conceded that “case law across jurisdictions supports the proposition that the forum ... of an Internet message board, chat room or blog is a factor that weighs in favor of finding that a reasonable reader would not read a statement as a factual assertion” (but the defendant’s speech could still be defamatory in this instance).³⁵²

Some in the legal community who generally advocate for expansive “breathing space” in the online speech environment see the default assumption that blogs are forums for opinion to be a boon. Mark Goldowitz of the California Anti-SLAPP Project (CASP), an organization that provides briefs and legal defense in tort cases that it perceives as threatening speech rights, for instance, recently praised the 9th Circuit’s *Redmond v. Gawker* decision for “recognizing what many of us already knew: that readers of blogs and online discussion boards do not treat these forums as reliable sources of factual information; rather, boards and blogs are places for freewheeling discussion and the airing of (often outrageous) opinions.”³⁵³ Yet this perspective is not simply predicated on

³⁵¹ Richard Raysman, “Message Board Post Highly Critical of Company is Opinion and Thus Not Defamatory,” 7/15/2014. <http://www.hklaw.com/digitaltechblog/message-board-post-highly-critical-of-company-is-opinion-and-thus-not-defamatory-07-15-2014/> (accessed 10/16/2015).

³⁵² Richard Raysman and Peter Brown, “Courts Conflict on Anonymous, Allegedly Defamatory Online Speech,” *New York Law Journal*, 8/12/2014.

³⁵³ Mark Goldowitz, “Redmond v. Gawker Continues the Evolution of Online Defamation Law” (accessed 10/17/2015).

the assumption that readers should disregard whatever they read as “mere” opinion — a perspective that would arguably trivialize the speech contributions of these forums.

Rather, Goldowitz clarifies that the “freewheeling discussion” should be understood to “invite consideration and possibly research by the readers” rather than simply be taken at face value. Goldowitz likely means that readers’ understanding that *anything* they encounter on a self-published website or a user-generated content platform should be taken with a grain of salt makes such content more like an “opinion” because, in a discursive sense, “opinions” do not appeal to readers to be accepted at face value.

In a way, however, this advice seems slightly tangent to the true distinction between expressions of “fact” and “opinion.” Instead, it is more rooted in an overall ethos of digital literacy that several previous commentators have echoed: the expanded range of content on the web and general marginalization of editors requires that we as readers bring a more critical and discerning eye to what we consume. In this case, such a critical eye specifically involves weighing sources against one another and considering the possible motivations for their conclusions. The *Redmond* opinion, in fact, reinforces the idea expressed in the previously discussed “blog codes” that transparency is the key virtue in these forums: “the decision recognizes the significance of the now-common practice of providing active links to source material as a legitimate way of allowing the reader to make up his or her own mind regarding what the writer has asserted.” As long as one discloses the sources or at least alludes to the background information on which

his or her opinions are based, presumably, the reader is in a position to decide why the author holds a particular view and whether that particular view is in fact justified.

This seems like a reasonable enough approach to balancing critical speech with the interest in discouraging baseless allegations that masquerade as fact (as opposed to clear hyperbole or opinionated commentary). It is important, however, to also note that it again runs counter to the pervasive reputation management ethos that holds that any association with “negative” content is likely to cause undue reputational harm — whether an interested reader theoretically could make up his or her own mind to disregard it or not.

Some in the legal community who offer remedies for putatively harmful speech see the default interpretive orientation toward this kind of web content in opposite terms. “Though it may be hard to believe that something published on the web could cause... catastrophe,” write the attorneys at Cyber Investigation Services, “it happens all the time.” This is because — contrary to those who assume that “no reasonable person would go to these sites expecting facts” — “people seem to believe what they read on the web, and the ripple effect happens very quickly.”³⁵⁴ This is probably an exaggeration in the opposite direction. Nonetheless, it indeed seems reasonable to reject the more extreme formulation implied by the NY Superior Court's *Nanoviricides* decision that the internet as a whole is a forum “where the preponderance of speech is either hyperbolic or acerbic,

³⁵⁴ Bruce Anderson and Chris Anderson [sic], *Winning the War On Internet Defamation* (Valrico, FL: CIS Publishing), 2012.

and thus might never be prima facie considered as fact.”³⁵⁵ Claims presented with the discursive signals of factuality should be assumed to inspire reception in a factual register. An important question going forward, then, is what those discursive signals are. What kinds of presentation might invite the instinctive adoption of a factually evaluative mode of reception and, secondarily, when it is reasonable and demonstrable that statements that might otherwise sound hyperbolic or opinionated on their face nonetheless might be received as facts?

Conflicts Over Blog Criticism: San Diego Education Report

The first case study examined here involves a San Diego blogger and former elementary school teacher named Maura Larkins who has been embroiled in protracted litigation with a law firm that had represented her former employer, the Chula Vista School District. The blog she started in 2005 on Google’s Blogger platform is called the San Diego Education Report, though Larkins has since created blogs addressing ancillary issues — such as one facetiously titled “Role Model Lawyers.” Larkins contends that she was improperly dismissed from her job at Castle Park Elementary School in 2002, and unsuccessfully sued the school district regarding her termination. In 2007, the law firm representing the school district, Stutz, Artiano, Shinoff, and Holt, sued Larkins for defamation. Though summary judgment was entered in favor of the law firm, the settlement terms worked out before a trial on damages left the situation unresolved until 2014. Larkins has maintained her blogs in some capacity throughout the conflict.

³⁵⁵ Raysman, “Message Board Not Defamatory.”

The Larkins saga offers a window on the multifaceted nature of the “citizen critics” who capitalize on the low barriers to entry on interactive publishing platforms. Larkins is earnest and informed but also caustic and at times hyperbolic. Her grievance is both personal in nature and pertains to an issue of public concern. Given this combination, she therefore represents a paradigmatic kind of independent online speaker.

Larkins began blogging in 2005 about “problems that officially developed in 2001” with administrators and other teachers at the school where she worked at the time. According to Larkins’ narrative of the conflict posted on her blog, the inciting incident involved a brother who was unhappy with Larkins’ appointment as co-administrator of their late father’s estate and conspired with his wife to “use the police to remove [Larkins] from her position.”³⁵⁶ Administrators in Larkins’ school district subsequently removed her from her classroom after discovering a police report filed by the sister-in-law — though Larkins claims the district would not officially reveal the source of their concern because “using the illegally obtained police report (no charges were filed against me) was a misdemeanor.”

Larkins alleges that after the district flip-flopped about the reason for her initial removal and she subsequently returned to the classroom in April, she was (in what she calls a “set-up”) again confronted by administrators about supposed complaints from teachers that they feared Larkins was “going to come to school and shoot everybody.” While the district again asked Larkins to return to work in September 2001, “this time

³⁵⁶ The following chronology and the causation that it implies is taken from the following page on Larkins’ blog: <http://mauralarkins.com/MauraLarkinsCase.html> (accessed 10/19/2015).

[she] refused” because “it was clear that anyone could make an accusation against [her], and it would be believed and acted on: [she] was not safe at work.” When the district refused to investigate the complaints, Larkins asserts, she filed three grievances and was threatened with dismissal. At this point, the law firm Stutz, Artiano, Shinoff and Holtz became involved. While no action was taken immediately, she then filed a lawsuit in February 2002, which she contends prompted the district to fire her, “thus violating California Labor Code section 1102.5 which prohibits retaliation against employees for reporting wrongdoing.”

This basic sequence of events is the basis for Larkins’ grievance with both the district (obviously) and the law firm representing it. At the same time, it is important to acknowledge that Larkins is adamant about her personal conflicts not being the exclusive impetus for her blogging. As she stated in an interview, “the truth was, I never would have blogged...if it hadn’t been for the problems that I had seen over the previous decades in the schools.” She “would have been happy to just leave and just go on to a different part of [her] life personally, but there was too much wrong going on in the schools.”³⁵⁷ Further, she conceives of the topic as having broader relevance beyond her district and the school attorneys that represent it: “I actually don’t think that Stutz is much different from most school law firms...there is a council of school attorneys and it’s national and they have approaches to representing schools that is kind of standard.”³⁵⁸ In other words, therefore, Larkins was inspired to blog because she thought there were

³⁵⁷ Interview with Maura Larkins 4/2/2015. 3:08-3:38.

³⁵⁸ Larkins Interview 4:01-4:28.

general problems in the operation of the school districts that she had gleaned from her own experiences as a teacher, and she thought these issues had fairly broad relevance beyond both her own dispute and even the locality in which it took place. She appears, therefore, to have conceived of her writing as an attempt to share her thoughts and expose the wrongdoing that she felt she had experienced first hand because it would benefit the public rather than merely vindicate her personally.

Larkins' hearing regarding her dismissal from her job commenced in early 2003, and her lawsuit based on the decision to terminate her (the decision which she believed to be a violation of employment law) was dismissed. In the interim period between the hearing and the lawsuit dismissal, Larkins' relationship with the Stutz firm grew more acrimonious. An August 2003 letter reproduced on her website, for instance, is described as an indication that "CVESD and Stutz support decision in which Maura Larkins was dismissed and called unfit for duty because she filed a lawsuit."³⁵⁹

Larkins Case — Distinguishing Fact and Opinion:

Generally, Larkins' blog alleges that her hearing was handled improperly and that the district failed to respond to her lawsuit in good faith. Larkins describes the hearing regarding the district's termination decision, for instance, as "almost as comical as it was illegal," and she offers an anecdote in which "[the presiding judge] jumped up and ordered the panelists to join him in a side room," and she overheard him "t[ell] them to

³⁵⁹"CVESD and Stutz support illegal OAH decision." <http://mauralarkins.com/062303stutzsupportillegaldecision.html> (accessed 10/20/2015).

disregard my testimony.”³⁶⁰ Her timeline of the case contains claims that the district “altered documents and suborned perjury”³⁶¹ in refusing to investigate the original complaints. It is this behavior on the part of the district that Larkins attributes (at least in part) to the encouragement and assistance of members of the Stutz firm. About these documents, for instance, Larkins states that:

Attorney Daniel Shinoff did a partial investigation, collecting documents at Castle Park Elementary School. But no one ever interviewed Maura Larkins, the target of the allegations. Mr. Shinoff has failed to produce for the Superior Court approximately forty of the Bate-stamped documents he collected.

She speculates that this is because “[o]ne suspects that those documents implicated teachers and administrators in wrongdoing and proved that the allegations against Maura Larkins were false.”³⁶²

The defamation lawsuit was initiated in 2007 after Stutz sent a cease and desist letter that specified several statements that the firm alleged were defamatory. Additionally, it informed Larkins of the deadline after which they would file a lawsuit were the statements to not be removed. While the letter did generally assert that the blog was “replete with defamatory statements,” the firm offered several examples. The first two it quoted directly: “a culture of misrepresentation and deception exist at Stutz Artiano” and “the firm clearly suffers from a lack of professionalism or lack of

³⁶⁰ “Case Summary: What Happened at Castle Park Elementary.” <http://mauralarkins.com/MauraLarkinsCase.html> (accessed 10/20/2015).

³⁶¹ This claim appears under the entry for September 2001 on her master timeline. <http://sandiegoeducationreport.org/MainTimelineMauraLarkinscase.html> (accessed 10/20/2015).

³⁶² “Human Resources Asst. Supt. Richard Werlin created the Michelle Scharmach hoax at Castle Park Elementary School.” <http://mauralarkins.com/msreport.html> (accessed 3/24/2016).

understanding of the law.” The others it referred to categorically: the blog “accuse[s] the firm of obstruction, and of violating California law.” The firm’s letter claims that these statements are “actual misrepresentations of fact, defamatory on their face.” Yet the action requested in the letter is still perhaps surprising: rather than requesting that these individual statements be removed, the letter stipulates that “in the event that *all references* to Stutz, Artiano Shinoff and Holtz or any of the firm’s attorneys is not removed from your website by August 15, 2007, we will have no option but to file suit [emphasis added].”³⁶³

Larkins did not remove these or any statements about the firm, so the firm followed up on its promise to file suit. The complaint is worth discussing in detail because it lays out each of the statements on Larkins’ blog that the firm argued were defamatory. These statements can be evaluated according to the sometimes difficult distinctions in libel law between fact and opinion. Further, they can be compared with statements made in other cases involving bloggers or other online critics as well as evaluated under the general anti-SLAPP guidelines offered by the CASP attorney Marc Goldowitz in the previous section. In general, the blog presents myriad statements that seem to frustrate any neat categorization of her statements as largely either “factual or opinionated.”

To start, the statements on Larkins’ blog overwhelmingly alleged either unprofessional or unlawful conduct on the part of the firm. The complaint therefore

³⁶³ Cease and Desist Letter, Stutz Firm to Maura Larkins, August 6, 2007.

argued that the statements it included were libelous per se, as statements that impugn the professional integrity or basic qualifications of the plaintiff are usually assumed to have harmed the plaintiff's reputation under most states' law. The statements listed in the complaint are indeed severe and highly critical of Stutz. Many allege unethical behavior in handling Larkins' hearing and extrapolate general negative characteristics on the part of the firm from this alleged behavior. Paragraph 19, for instance, details Larkins' claim that "given the sheer volume of misstatements, the only reasonable inference that can be drawn is that Daniel Shinoff [et. al.] intended to obstruct at every step and stand education law, as well as labor law, the penal code, and the constitutions of California and the United States on their heads."³⁶⁴ Stutz took this statement to allege "that SASH engages in unprofessional and unethical conduct and lacks professional competence or integrity in its chosen profession," and further, to "also impl[y] that SASH has engaged in violations of the law."

It is productive to try to distinguish the parts of this kind of statement that allege incompetence or professional bad-faith from those that allege actual illegal conduct. Larkins' central defense was that her statements were protected because they were true. Importantly, then, she was not interested in playing the kind blogger's "get out of jail free" card that is implied by those who assert that self-published web writing is by default an expression of opinion. In fact, the underlying pretense of Larkins' blogging seems to

³⁶⁴ *Stutz v. Larkins*, Complaint for Damages for Defamation, paragraph 19.

be that it represents a kind of journalistic enterprise that was reporting facts about issues on which the mainstream press had abdicated coverage.

As touched on earlier, opinion in defamation law is typically protected when it offers commentary on or interpretation of a clearly identifiable and not false set of facts or on known situations from the news of the day (the latter of which is usually called “fair comment”). Alternately, one can also usually argue that a statement represents “pure” opinion that is not capable of being proven true or false even if it seems to involve some allegation of deficiency. The DMLP website’s overview for California, for instance, explains that “you can safely state your opinion that others are inept, stupid, jerks, failures, etc. even though these statements might hurt the subject’s feelings or diminish their reputations.”³⁶⁵ Hyperbole is also generally protected under this rationale: the law “protects the use of hyperbole and extreme statements when it is clear these are rhetorical ploys.”

When applied to Larkins’ blogging, this distinction presents a conundrum. On one hand, some of her statements (or at least dimensions of them) could clearly be framed as factual in nature. Yet one might at least attempt to defend these statements as opinions as well. Consider another statement which Stutz argued was defamatory per se: “Stutz works hard to make sure that LOTS of tax money goes to lawyers who: A. prevent legitimate investigations of problems in schools; and B) make sure that tax dollars do not

³⁶⁵ Digital Media Law Project, “Opinion and Fair Comment Privileges.” www.dmlp.org/legal-guide/opinion-and-fair-comment-privileges (accessed 3/24/2016).

go to victims.”³⁶⁶ Is this a factual statement or an opinion based on implied false facts, or could it be construed as a form of protected opinion? The ungenerous interpretation is that she is implying that Stutz did something directly to achieve those outcomes in a nefarious manner — say, intimidating a witness or destroying a document improperly. Further, it implies a kind of scheming (which is of course not documented) in which Stutz lawyers sit around nefariously rubbing their hands together and trying to devise plans about how to “make sure tax dollars do not go to victims.”

On the other hand, however, it could be seen as simply an embellished interpretation of the basic outcome of her acrimonious relationships at the school and the ultimate decision about her employment. She might well feel reasonably wounded by the way she was treated by her peers and supervisors; anyone who assisted in the eventual outcome (like the law firm) would thus deserve (in this logic) to be tarred with the same brush. The fact on which the statements are based would simply be that Larkins (the theoretical “victim” in the statement) was the loser of the hearing and subsequent litigation. Because of this, she assumes that a “legitimate investigation” was prevented by Stutz (who of course simply didn’t see it as a legitimate investigation in their defense of the district and acted pursuant to this conviction within the established procedures of the law to “prevent” it). They thus “made sure that tax dollars did not go to [Larkins]” because they didn’t; she lost and is resentful of the way she was treated by her fellow staff.

³⁶⁶ Stutz v. Larkins, Complaint for Damages for Defamation, paragraph 21.

Perhaps a statement like this is still presented with too much of the discursive signaling that accompanies a kind of “if you only knew what I know” implication of (unsubstantiated) facts to support the opinion that Stutz “works hard” to achieve the outcomes that Larkins is criticizing. At the same time, it at least seems possible that a statement which extrapolates negative characteristics or imputes bad motives based on a disclosed outcome that is known to have affected the speaker adversely could be contextualized as (protected) opinion by a reader who is somewhat familiar with the situation. Indeed, much of our speech is like this: we characterize the motives, intentions, and moral composition of our adversaries based simply on the fact that they pursued some course of action with which we did not agree. Our opinions of the conduct or outcomes we comment on might be farfetched, unfair, or, frankly, stupid (from the perspective of readers); they are still protected.

It is worth wondering how Larkins’ might have defended her statements as opinion on public issues via comparison with another recent California case. In *Mateo v. Chaker*, the judge agreed with defendant Mateo’s argument that the following statements were expressions of protected opinion: “‘This guy is...a deadbeat dad’[;] ‘He uses people, is into illegal activities, etc.’[;] [v]aried accusations of fraud, deceit, picking up street walkers, and homeless drug addicts.”³⁶⁷ They were opinion in part because of their propositional content in itself and also partly because they lacked “the formality and polish typically found in documents in which a reader would expect to find facts.”

³⁶⁷ Quoted in “Court treats degrading online postings as protected free-speech opinions,” *Blog Law Blog* 10/19/2012. bloglawblog.com/blog/?p=4287 (accessed 10/23/2015).

Despite this lack of “polish,” these statements were nonetheless considered to be “of public interest, regarding each forum [on which they were posted].” The statements thus qualified for the protection of the California anti-SLAPP statute, which requires that “the statement that the plaintiff complains of qualifies as free speech in connection with a public issue.” Mateo thus prevailed on a motion to dismiss in this case using the anti-SLAPP defense.

Larkins’ statements alleged serious deficiencies of conduct but nothing nearly as salacious or specific as “picking up street walkers and homeless drug addicts.” Further, it would be hard to call them unrelated to a public issue if statements about an otherwise obscure man being a “deadbeat dad” met that threshold. While Larkins would ultimately be unsuccessful in convincing the court that Stutz was a limited purpose public figure regarding the school issue,³⁶⁸ the conduct of sought-after public school attorneys would seem to easily meet the threshold for issue of public concern. Might she have prevailed using the same defense?

Even if she could have, a problem with this approach is that Larkins might be loath to call the allegations named in the Stutz complaint “opinions” because in one sense this diminishes their consequence. Further, if we apply the implicit criterion in CASP attorney Goldowitz’ comment on the *Redmond* case — that the “opinionated” nature of

³⁶⁸ Recall that *Gertz v. Welch* had established a loose test for determining whether an individual or other entity qualified as either an all-purpose public figure or a limited-purpose public figure: courts were to weigh the entity’s general level of notoriety, the degree to which it had injected itself into a public controversy related to the specific speech in question, and its access to means of corrective counterspeech. The D.C. Circuit later clarified the test in the *Waldbaum* case to focus more intently on whether the entity had or sought “a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.”

blog postings inheres in their intention to generate further inquiry rather than be accepted as authoritative — then Larkins’ interpretations of Stutz’ actions seem like a poor fit. Language like “the only reasonable inference...” does not suggest that the author is merely trying to provoke the reader to compare different perspectives. Nonetheless, the general tenor of the statements invites speculation about whether her tendency to characterize Stutz as unethical and to insinuate malicious motives or tactics in their advocacy for the school district could have been defended as either hyperbole or simply emotionally-charged opinion about disclosed facts. It is therefore possible to argue that the instances in which Larkins engaged in ad hominem characterizations might well represent protected speech; it is the more specific allegations of discrete actions that are more problematic.

Some of the statements named in the complaint (and in borderline cases elsewhere on the blog)³⁶⁹ appear to present unambiguously factual assertions. Again, Larkins was adamant that she had evidence to prove that everything written on her blog was true. In addition to her defenses presented in her answer to the defamation complaint, her blog offers assertions like this: “Unfortunately for Stutz law firm, and for the taxpayers who have provided millions of dollars, what Maura Larkins says about Stutz is the absolute

³⁶⁹ For example, a more recent post claims the following: “In 2005, a federal judge reprimanded Lozano, Smith, a big California education law firm, for their illegal tactics, but most education lawyers have continued to play from the same (illegal) playbook.” Were this statement to name an actual firm, Larkins would again face the steep burden of proving that it had in fact done something “illegal” comparable to the offenses for which Lozano Smith was convicted. In fact, one of the statements named in the Stutz complaint addresses essentially the same kind of association involving the Stutz firm directly. <http://www.mauralarkins.com/stutzartianoshinoff.html> (accessed 10/21/2015).

truth.”³⁷⁰ But it is sometimes not entirely clear which evidence is supposed to correspond specifically with which assertions or even how the concepts of “truth” and “falsity” are being deployed exactly. Sometimes Larkins writes in a manner that suggests direct evidence of her claims; other times the factual statements in the defamation complaint seem closer to inferences based on non-specific impressions of Stutz lawyers’ unsavory propensities.

Take, for instance, Larkins’ ubiquitous claims about Stutz having committed some sort of legal violations in its counsel during her conflict with the school district. The complaint describes a statement on her blog that “public officials who want to keep the public in the dark call on Dan Shinoff and Mark Breese to keep witnesses quiet and to finesse the paperwork.” Statements like “finesse the paperwork” and “keep the public in the dark” could still (in a certain context) represent the kinds of opinion statements that interpret an outcome that is otherwise more or less commonly known. In this case, for instance, any question left unanswered during the proceedings could inspire two different opinions: one that assumes it represents “keeping the public in the dark” deliberately and another that sees nothing wrong with it.

On the other hand, the assertion that the attorneys are called to “keep witnesses quiet” certainly strongly implies a factual claim about their conduct because it describes a fairly concrete course of action. As Stutz put it in the brief, “[t]his statement is an assertion of fact that public officials call Dan Shinoff when they want to engage in

³⁷⁰ This statement appears in the sidebar of this page: <http://mauralarkins.com/MauraLarkinsCase.html> (accessed 10/21/2015).

inappropriate and unlawful conduct such as tampering with witnesses.” This is not the kind of vague assertion that one might argue is an uncharitable interpretation of an otherwise accepted set of facts. Absent some public proceeding that establishes it (of which there is none in this case), it requires previously unknown smoking gun evidence — a video, a document, or even another observer’s verbal testimony — that reveals that Dan Shinoff has intimidated a witness within the legal meaning of this term.

Larkins’ materials on the blog and evidence marshaled during the trial did not appear to demonstrate this.³⁷¹ At the time, Larkins claims, she had “requested production of documents, specifying certain missing pages of a set of Bate-stamped documents related to statements on [her] website.” These “documents had been collected by Mr. Shinoff in 2001 at the school,” and they appear critical to establishing the factuality of her claims, but “[Stutz] claimed that its paralegal could not find the documents. Defendant filed a Motion to Compel Depositions and Production of Documents. The motion was denied, citing procedural errors.”³⁷² Unfortunately, it is difficult to glean from Larkins’ descriptions on the website what is in these documents or how they corroborate the assertions about Stutz’ conduct.

Larkins’ answer to the complaint and opposition to the motion for summary judgment likewise do not shed much light on the specific justifications for individual

³⁷¹ Larkins argues that the trial court “abused its discretion” and prevented her from mounting an effective defense by “throwing out all of [her] evidence submitted in opposition to the Motion for Summary Adjudication, and also throwing out the Opposition itself, because information was in the wrong column (Appellant used the format required before Jan. 1, 2008).” Larkins Opening Brief, sections V(A); V(D)(1).

³⁷² Quoted from Larkins’ opening brief in *Stutz v. Larkins*, California Fourth District Court of Appeal, March 28, 2013, section V(D)(2)(b).

statements. They often reiterate the putatively harmful statements with either the reaffirmation that the statement is true or with vague allusions to information contained in various depositions or contradictions between the law firm's own statements. In defense of the claim that "Shinoff keeps important documents locked up in his files, and presents perjured testimony," for instance, Larkins' answer asserts that SASH had specifically admitted to keeping important files locked up during its November 2007 deposition by "claim[ing] that it had not destroyed or hidden the documents" (a seemingly trivial clarification on its own). Yet she simply asserts that "the proof is in the attached depositions, which may be compared and contrasted with one another" as substantiation of the claim about perjury. To substantiate the claim about "public officials who want to keep the public in the dark call Dan Shinoff," she states merely that "[she] possesses a wealth of testimony and documentation to prove this statement."³⁷³ At the conclusion of her answer, Larkins indicates that she is confident that the "statements are supported by the deposition transcripts attached."³⁷⁴ What is attached is a list of nearly twenty depositions from her preceding conflict with the school district and one incomplete deposition of Stutz lawyers.³⁷⁵ Perhaps there is some possibility that the documents were

³⁷³ Larkins Answer to Complaint, Fourth Affirmative Defense, line 10. <http://mauralarkins.com/AnswertoStutzDefamationLawsuit.html> (accessed 3/7/2016).

³⁷⁴ See paragraph 9, Larkins Answer to Complaint: <http://mauralarkins.com/AnswertoStutzDefamationLawsuit.html> (accessed 10/21/2015).

³⁷⁵ There is disagreement about why the depositions were not completed. Larkins' version is that "Daniel Shinoff didn't show up for his deposition and Ray Artiano walked out of his" (personal correspondence). The partial deposition transcript for Artiano shows numerous instances in which Shinoff (acting as his attorney) instructs Artiano not to answer because (in one way or another) the questions do not seem sufficiently "calculated to lead to the discovery of relevant evidence." Shinoff ultimately states that he will not be attending his deposition "because [he's] concerned that the deposition will go the same way." See Artiano Deposition, p. 52-53.

purposefully suppressed or that the judge was secretly looking for a way to dismiss Larkins' evidence without really considering it. Nonetheless, while she was likely counting on being able to substantiate the claims in further legal proceedings, it is difficult to see any explicit link in her writing or her deposition of the SASH lawyers between specific statements or assertions in the existing documents and the allegedly defamatory statements in Stutz' complaint.

The average blog reader who encountered a statement like the example above regarding Dan Shinoff intimidating witnesses therefore might well take it as an assertion of concrete smoking gun evidence. If the reader knew what Larkins knew, the assumption would go, then it would justify the allegation of serious deficiencies and illegal conduct on the part of the Stutz firm.³⁷⁶ For the firm's case, moreover, there was concrete indication that the statements were false in that the firm had never been sanctioned or even investigated for any of the kind of misconduct alleged in the relevant statements. To the extent that Larkins' defense was not able to establish such evidence or significant reason to believe that such evidence existed in the pretrial stages, therefore, it would be difficult not to judge the above excerpted statements from the complaint as defamatory statements based on false facts.

Larkins Case — Harm and Remedy:

Though the statements were ruled defamatory per se by the judge in granting summary judgment for Stutz, it is still useful to examine the kind of actual harm that

³⁷⁶ The assertion appears to have come from this posting on Larkins' website, which now includes the same text with the word "lawyers" in place of "Dan Shinoff and Mark Breese." <http://mauralarkins.com/PublicEntityAttorneys.html> (accessed 10/21/2015).

Stutz claimed and which might be deduced from the nature of the statements and the context of their display. These considerations help to better illuminate the implications of a case like this for how we should think more broadly about the discursive and informational nature of the medium as well as the relevant approaches to regulating its content.

The conclusion that the firm suffered actual damages to its reputation because of the statements about it on Larkins' blog might appear technically justified given the nature of the statements and some anecdotal evidence about their effect. Conversely, however, it also appears slight in degree. The deposition of Stutz lawyer Ray Artiano contains some explanation of how the firm perceived the harm that Larkins' website caused the firm. Specifically, Shinoff (acting as Artiano's counsel) stated that "[i]t is our belief that your website has interfered with prospective economic advantage...your website is slanderous, per se."³⁷⁷ It is not just that the website had been harming the firm in the present; because of the nature of the allegations, it was assumed that it would in the future. This harm was specifically anticipated in situations involving Google searches of the firm's name that were evidently turning up Larkins' website in the results. As Artiano stated in his subsequent answer:

[I]t has come to my knowledge that there have been a number of individuals who have googled the name of the website...[a]nd I know that it has caused concern on the part of at least one attorney [considering a job with the firm]. I'm assuming that anyone who googles us, as most clients and prospective clients do, they'll come across your website and

³⁷⁷ Artiano Deposition 17.

know nothing at all about the author of the website and whether or not the statements have any truth at all.³⁷⁸

If Larkins had penned an op-ed in a print publication then perhaps its impact would have been fleeting enough that the firm would not bother with a lawsuit. The implication seems to be that its continued visibility on the web through its link to the firm's name in search results led them to anticipate prospective harm.

The ultimate consequence of someone coming across the website and considering the allegations might, however, be less than dire. As Larkins pointed out, the above description in fact could well establish that the statements have done and will do no harm to the firm at all. Such an argument is in a way awkward for the author of the statements, as are all arguments that advocate protection of speech based on its supposed impotence.³⁷⁹ In a later discussion regarding the damage of the statements, Larkins explained that many of those who visited her blog did so through search queries that had nothing to do with the Stutz firm. While these visitors might have noticed some of the material regarding Stutz once navigating the blog, they would not have been looking for it or particularly inclined to care about it, and as she notes, many “only stayed on the site for a second or two.”³⁸⁰

³⁷⁸ Artiano Depostiion 20.

³⁷⁹ This quality has been recognized in Justice Holmes seminal dissent in *Abrams v. United States*, for instance. There Holmes argued that Abrams' speech should be protected because it was not likely to actually inspire an insurrection. As he wrote, “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.” *Abrams v. United States*, 250 U.S. 616 (1919).

³⁸⁰ “Remittitur issued in Stutz v. Larkins on Aug. 20, 2014--but Judge Judith Hayes issued new default judgment TWO WEEKS EARLIER.” <http://learningboosters.blogspot.com/2014/08/today-court-of-appeal-issued-remittitur.html> (accessed 10/22/2015).

Nonetheless, it appears that the consequence of the prospective employee's suspicion was that he "had to check around after he saw the materials on [her] website to determine who this person was and why these things were being said so that he could determine whether or not he should join our firm."³⁸¹ If this prospective employee is any indication, the statements were likely to do no more than the California Anti-SLAPP Project attorney Goldowitz suggested independent blog criticism should be expected to do: "invite consideration and possibly research by the readers." If the statements are determined to fit the ordinary scope of libel per se then they are assumed to cause reputational harm. This instance perhaps suggests the shortsightedness of assuming material reputational harm given the informational context in question.

Following the summary judgment ruling, Larkins was to face a jury trial to determine damages. Before this could happen, though, the parties came to a private settlement agreement. This agreement would create acrimonious debate for years. The original agreement took the form of an injunction dictating that Larkins was to refrain from publishing the statements contained in the complaint and "statements with regard to Plaintiff and its lawyers accusing illegal conduct or violation of law, unethical conduct, lack of professional competence or intimidation..."³⁸² As the law firm saw it, "[d]efendant fully understood the stipulated injunction and knowingly waived certain constitutional rights in order to avoid a trial on damages." Larkins, on the other hand,

³⁸¹ Artiano Deposition 21.

³⁸² Quoted from Larkins' opening brief in *Stutz v. Larkins*, California Fourth District Court of Appeal, March 28, 2013.

later contended that “[i]n fact, there was absolutely no discussion of constitutional rights during negotiations or in the court room on April 6, 2009.” What Larkins believed she was agreeing to was the following: “simply stating the facts about Plaintiff’s actions without giving an opinion about their ethical or legal characteristics was an acceptable limitation for [the] website.”³⁸³

The next several months brought more court proceedings in which Stutz complained that Larkins had failed to comply with the terms of the injunction. One violation claimed by the firm, for instance, involved the following connected phrases that Larkins posted after the initial agreement: "Attorneys who have helped cover up events in schools are in charge of training both new board members and new school attorneys," and, "Dan Shinoff trains board members and employees."³⁸⁴ Larkins claimed that the statements were merely facts, not additional characterizations of the facts or associations between them in a manner that fit one of the four prohibited categories. One exchange is especially effective in capturing the ambiguity and dissatisfaction with the application of the terms on both sides. Judith Hayes, the trial court judge in the case, stated the following:

You can't use language that states or implies illegal, unethical, incompetent, or intimidating tactics on the part of the law firm. Now, I know what you're asking me to do, and that is give to you a shopping list of what you can say and what you can't say. Listen to me. No, I know you're shaking your head, but you have to listen because we're at the point

³⁸³ Larkins Opening Brief

³⁸⁴ *STUTZ ARTIANO SHINOFF & HOLTZ v. LARKINS*, Court of Appeals of California, Fourth District, Division One. Filed August 5, 2011. <http://www.leagle.com/decision/In%20CACO%2020110805043/STUTZ%20ARTIANO%20SHINOFF%20&%20HOLTZ%20v.%20LARKINS>

where I'm going to rule...If you have questions about what you can or cannot say, I can only suggest that you run them past the filter of perhaps someone who can give you guidance in this area³⁸⁵

The problem appears to have been that Larkins saw the statements she was making as “simply stating facts about Stutz’ actions” while the firm and the court were looking at their implications. Why else would Larkins connect the assertion that “[a]ttorneys who have helped cover up events in schools are in charge of training” with the nominally factual claim that “Dan Shinoff trains school attorneys?” Larkins might have thought she was confined to “just facts” by the injunction, but this ignores the purpose of the injunction within the context of the case. Nobody would care if she were simply publishing random facts about the firm such as the number of attorneys it employs; the whole purpose was to prevent her from implicating it (through the assertion of facts or even through the expression of “pure” opinion) in specific kinds of wrongdoing.

After further proceedings in which Stutz alleged that Larkins still was not cooperating and moved to hold her in contempt, the parties modified the injunction in December of that year. This injunction was much more drastic. As Judge Hayes stated, “every time I rule that [Larkins] shouldn't use one phraseology, she simply switches to another in an . . . apparent attempt to circumvent the Court's order.” She therefore “modif[ied] the injunction to prevent any mention of [the Stutz Firm] on [Larkins's] [Web sites].” Here is how she rationalized this change:

I’m doing that not in an attempt to foreclose or eliminate [Larkins's] right to free speech, but because it is crystal clear to me at this point that she is

³⁸⁵ *Stutz v. Larkins*, August 5, 2011.

unable or unwilling to modify her [Web sites] in any good-faith attempt to remove reference to that law firm. So we're cutting it off at this point. No more reference to the law firm.

This is confusing in that it implies that she was supposed to “modify her web sites in [a] good faith attempt to remove reference to that law firm” in the first place. This does not sound quite the same as an injunction that merely forbids her from making certain explicit characterizations of Stutz behavior and repeating defamatory statements. There is no doubt bound to be some ambiguity in applying an injunction against certain subjective characterizations on a platform like Larkins’. Nonetheless, these subsequent descriptions in court sometimes create the impression that none of the parties truly had a concrete conception of what its enforcement would entail if Larkins continued to post statements that she thought were outside its scope.³⁸⁶

Larkins continued to post about the firm. After she was threatened with a contempt charge, she appealed with the help of University of San Diego law professor Shaun Martin. A state appeals court subsequently struck down the modified injunction as an unconstitutional prior restraint for its prohibition on all future statements — defamatory or not — about the firm. Though the Stutz firm insisted that it sought the modified injunction simply as a means of “avoid[ing] ordering Larkins to pay monetary damages” for her continued violation of the original terms, the appeals court was quick to counter that “[w]hile the record supports both contentions as a factual matter, the trial court's benevolent subjective intentions in issuing the modified injunction do not

³⁸⁶ Quotations and summary taken from *Stutz v. Larkins*, August 5, 2011.

diminish its unconstitutionality.”³⁸⁷ The parties appear to have reverted back to the original injunction in the interim, yet Larkins has contended that “[s]ince [the appellate decision in 2011], Plaintiff and the trial court have instead used the April 6, 2009 stipulated injunction to prevent Defendant from mentioning Plaintiff—circumventing and ignoring the decision of the Court of Appeal.”³⁸⁸ After Stutz again objected to her continued postings on the blog, Larkins’ answer was struck and a default judgment of 30,000 dollars in nominal damages against her (plus court costs) was eventually affirmed by the same appellate court in August 2014.

Larkins characterized the outcome this way: “The Court appears to be sending a warning to all bloggers who might want to inform the public about the tactics of public entity lawyers--and the judges who go beyond the law to defend them.”³⁸⁹ Whether one accepts that the firm and the court have sought to prevent Larkins from speaking about them entirely or not, it would appear that the firm has finally prevailed. There was no “Streisand effect” in this case, though various stages of it have garnered modest and largely neutral attention in the local press. Were Larkins to have avoided this ultimate outcome, she likely would have needed to decide years ago to cease speaking about the firm entirely.

³⁸⁷ *Stutz v. Larkins*, August 5, 2011 (footnote 15).

³⁸⁸ Larkins Opening Brief, section A(2).

³⁸⁹ “Remittitur issued in *Stutz v. Larkins* on Aug. 20, 2014--but Judge Judith Hayes issued new default judgment TWO WEEKS EARLIER.” <http://learningboosters.blogspot.com/search/label/%20A%20school%20district%20lawyer%20lawsuit%20%28Stutz%20v.%20Larkins%29> (accessed 10/22/2015).

What, ultimately, is the contribution to the marketplace made by Larkins' self-published criticism — even if some of it is (in the judgment of a court, at least) of partially dubious or unclear factual provenance? How does this value and the harm likely caused by the statements measure up against what has turned into a significant investment of resources for both parties? In some sense, Larkins embodies the spirit — if not the execution — envisioned in the *Reno* court's paean to the digital citizen critic of the future. Even without respect to the merits of the positions, her blog displays an encyclopedic awareness of and sustained investment in local San Diego politics and civic affairs. Further, her experience as a teacher undoubtedly gives her insight into the mechanics of education systems as well as some of the hot button education issues of the day — such as teacher evaluation, about which she speaks authoritatively. More specifically, even, there are probably general issues regarding the school attorneys in San Diego — the ways in which schools choose them for work and allocate resources to pay for them, for instance — about which Larkins does contribute meaningfully to public discussion. One might well wonder if the process should be more competitive or query what kind of work the public gets in exchange for the firms' billable hours without alleging misconduct that lacks obvious substantiation. Further, even exaggerated scrutiny might inspire others to speak up about their own grievances — some of which might well expose more serious wrongdoing or at least spark conversation about related issues. The *San Diego Reader* has recently published articles about potential conflicts of interest in

this domain, and it has not yet been sued for defamation.³⁹⁰ Perhaps there is a way for her to still participate in this conversation.

It would thus be a shame if her perspective on these issues was automatically invalidated by simple mention of the Stutz firm. The firm of course denies that its intent is to stop Larkins from speaking about it entirely. Intention aside, however, the practical implication of the injunction (as it has been interpreted even after the appellate ruling) would seem to be that there is essentially nothing that Larkins could write about the firm that would not violate it, as her underlying objective in talking about the firm in any capacity would ultimately be to accuse it of the conduct covered (at least loosely) by the injunction. It is certainly no injustice to ask a blogger with journalistic pretensions to avoid defaming his or her subjects. At the same time, Larkins' case demonstrates how the complications of engaging in independent criticism on the web cut both ways. It seems unlikely that a newspaper would have ended up in an even remotely similar position to the one Larkins found herself in under the injunction. On the other hand, a newspaper never would have run many of the posts on Larkins' blog.

The ultimate upshot of this episode might be simply that Larkins and bloggers who are similarly galvanized to write are not journalists; they are people with critical opinions that relate to public issues but are too firmly rooted in negative personal experiences for them to fully adopt the professional conventions of journalists. To some

³⁹⁰ See Dorian Hargrove, "Going off the rails on a gravy train?" *San Diego Reader* 4/20/2015. <http://www.sandiegoreader.com/news/2015/apr/20/ticker-san-diego-county-office-education-conflict/> (accessed 5/24/2016); Dorian Hargrove, "He Got Quite An Education," *San Diego Reader* 2/3/2010. <http://www.sandiegoreader.com/news/2010/feb/03/city-lights-he-got-quite-education/> (accessed 5/24/2016).

degree, given the speech environment in which their writing appears, this means they should perhaps back off of the most aggressive kind of muckraking that investigative reporting is lauded for.

At the same time, their assertions ought to be understood in context and thus be taken with a grain of salt. While defamatory statements deserve to be adjudicated as such (at least in terms of actual harm), the best ultimate outcome for the marketplace ideas might lie in relying a little more on readers to be able to decide just how much to trust a lone critical source with an obvious personal grievance — as is assumed to happen when readers consider the validity and persuasiveness of statements deemed to be opinion. To this extent, many of the more hyperbolic or emotionally-charged statements by a blogger like Larkins would ideally be shielded by the SLAPP defenses advocated by CASP attorney Goldowitz and on display in the *Mateo* case. At the very least, it seem that such speakers make all too easy targets for the kinds of excessive equitable relief on display in the case of the Larkins injunction. Those who write in this mode might reciprocate by making an effort to be more judicious about the ways in which they phrase assertions about their grievances based on what can be clearly substantiated.

Conflicts Over Blog Criticism: Fornits.com, Sue Scheff, and the “Troubled Teen Industry”

The second case study examined in this chapter involves another protracted conflict that prompts similar questions regarding critical blogging and its perceived threat to reputation. This conflict involves a website called Fornits.com, which contains a

message board forum, a wiki, and a blog “primarily devoted to discussing the troubled teen industry.”³⁹¹ This “troubled teen industry” refers to a set of inpatient rehabilitation organizations — mostly located in camp-like settings in remote areas inside and outside of the US — that present themselves as a kind of last stop for teenagers who are displaying incorrigible disciplinary problems or are struggling with substance abuse. The industry has become controversial in recent years both for its practices on site as well as questions about the business models of various organizations and those who recruit for them.

One person caught up in this controversy is a Florida woman named Sue Scheff. At times Scheff has been a critic of the industry. She frequently writes of her own harrowing story of placing her child in one such “troubled teen” program and subsequently extracting her. At the same time, she also became embroiled in a conflict with Fornits over criticism of her alleged role in soliciting enrollments for several programs even after her personal experience. Scheff’s story is doubly interesting because she has experience as both a defamation plaintiff and defendant regarding statements about the troubled teen industry. She was sued in 2004 for defamation by one of the programs of which she was critical; later, she sued Fornits and one of its contributors for critical statements about her involvement with other segments of the industry. In 2006, she was awarded damages of 11.3 million dollars.

³⁹¹ *fornits.com* homepage (accessed 3/21/2016).

Fornits is an eclectic website but one that is unified by two interrelated purposes. The first is to publicly publish information about an industry that its contributors feel has profoundly damaged their lives or the lives of their loved ones. In this capacity, the site endeavors to provide a kind of supplementary journalistic function. The second is to provide a forum where those who have experience with this industry can connect with one another. These two purposes combine in a potentially very productive manner: “survivors” of the industry discuss what they know and experienced in a way that both sheds light on issues that may receive little public attention otherwise and helps them come to terms with their own experiences and feel less alone in working through such experiences.

Author Maia Szalavitz echoed this description in characterizing the value of a site like Fornits in a 2007 article for *Reason*. In an informational sense, it is “one of the best sources parents and journalists have for finding out about abuse in residential teen tough-love programs, often straight from the mouths of abused teens and their parents.”³⁹² This is perhaps especially true because of the population in question. As regressive an attitude as this may be, the average reader might be less than sympathetic to the isolated testimony of former addicts or others coming from extreme disciplinary circumstances. One troubled teen activist described the sometimes knee-jerk distrust of the testimony of this population: “If the kid is doing well, then they are obviously helped by the place; if

³⁹² Maia Szalavitz, “Tough Love and Free Speech,” *Reason* 8/24/2007. <https://reason.com/archives/2007/08/24/tough-love-and-free-speech> (accessed 10/22/2015).

they're doing badly they're a scummy junkie liar.”³⁹³ When these voices are aggregated (as they are on the Fornits site), however, they might become more difficult to ignore. Further, alternative sources of information are perhaps more important in this area because of the lack of government oversight or standard information references: ‘In mental health care and behavioral health care it’s a huge problem because there really is very little evidence-based treatment available.’³⁹⁴

Yet the site is also valuable in a social sense for the contributors and some readers because “some people come out of there thinking ‘that had to have been done...’ and then there are others who recognize it as abuse.” A significant part of the site’s value thus comes from the fact that “[t]his is a marginalized community that before the internet each of them thought they were alone,” and therefore “[w]hen these kids found each other and they found that they weren’t alone,” it was “enormously valuable.”³⁹⁵ This connection is, again, doubly important for this community in that many of them will have negative associations with professional therapy itself from their experiences, and “institutional abuse is a really difficult form of trauma to treat because the person who is treating you is a representative of the abuser — symbolically.”³⁹⁶

³⁹³ Interview with troubled teen activist, 9/1/2015, 13:00-13:08. At another point, this person also describes how “children and people with addictions and people with mental illness are inherently discredited — wrongly so” (19:13-19:19).

³⁹⁴ Interview with troubled teen activist, 9/1/2015, 9:20-9:37.

³⁹⁵ 26:18-26:25.

³⁹⁶ 25:50-25:57; 28:20-28:51.

After Scheff's experience with placing and then extracting her daughter from one of these programs, she vociferously criticized the organization with which he had dealt specifically. This organization, called WWASP, sued Scheff in August 2004 for statements that she had made on a number of websites devoted to the industry. As WWASP's complaints states:

defendants published to customers, referrers, public officials, media representatives, and other third parties statements falsely accusing World Wide and its member organizations of criminal conduct, dishonesty, deceptive advertising, and other unconscionable business practices including the abuse and neglect of children...³⁹⁷

Scheff won on every claim in the jury trial, but WWASP appealed. The defamation claims essentially came down to the question of whether or not WWASP was a limited purpose public figure. The Tenth Circuit Court affirmed the district court's jury instructions: WWASP had to prove actual malice as a limited purpose public figure regarding the statements in question. This was because a legitimate public controversy existed over the best way to treat "troubled teens" and WWASP had taken steps to inject itself into this controversy by giving interviews and appearing on television news programs. Additionally, the appellate court agreed that it was proper for Scheff to be able to introduce evidence of other publications regarding WWASP to mitigate the likelihood that her statements themselves had caused damage to WWASP in the form of lost profits. Scheff and her organization, PURE, thus again prevailed.

³⁹⁷ *WWASP v. PURE*, WWASP Amended Complaint (12/19/2002), 7.

Their victory represents a positive free speech outcome, yet the trial would also plant the seeds for Scheff's later actions that would prove decisively less speech-friendly. In the trial transcript, the specific allegations brought by WWASP reveal a troubling possibility: rather than merely being a principled crusader for truth out to avenge the industry misrepresentation that put her daughter in peril at one of WWASP's schools, Scheff is presented as a critic with a financial motivation. Specifically, WWASP council describes how Scheff has a plausible financial incentive to draw parents thinking of placing their children in a troubled teen program away from WWASP schools and into one of the programs who would pay Scheff's organization a referral fee. As WWASP counsel stated according to the transcript:

...she had actually started developing some schools that she could refer to besides World Wide schools [from which]...she was making good money...she found a way to get people to her website by making claims about first of all what happened at [WWASP school that her daughter attended] Carolina Springs that were untrue.

Perhaps more damningly, WWASP lawyers presented evidence that Scheff's organization "claimed they have a proven — approved set of schools and programs that had all been visited," yet "the schools at least in Utah that we have been able to talk to...that she made money off, she never visited." In sum, the case established evidence putatively showing that Scheff had criticized WWASP schools (however truthfully) in order to drive business to others who paid her for referrals, misrepresented the degree to which she had vetted

these programs, and lied about the credentials that were integral to make these assurances appear credible.³⁹⁸

The record indicates that a disgruntled former client of Scheff's named Carey Bock might have catalyzed the initial attention to Scheff on the Fornits site, but the underlying issues and Scheff's retaliatory tactics are what motivated the sustained (and one might say escalated) condemnation over subsequent years. Much of the criticism that would eventually appear on Fornits was sophomoric and uncouth, trading more in epithets and ad hominem attacks rather than the expression of ideas per se. Such expression is of perhaps diminished value in the marketplace framework. What is much more important in this case is the formidable body of criticism that is both principled and meticulous about piecing together the activities in which she was engaged, how they squared with statements she had made, and what this information revealed about the industry and those who involved in it overall. In First Amendment jurisprudence, inarticulate or ad hominem speech is mostly tolerated as an inevitable accompaniment to otherwise substantive criticism when speakers are passionate; the case of Fornits is no exception.

To begin, one of the lead critics (who also administers the website "SueScheffTruth") in fact acknowledged the value of Scheff's defense in the WWASP case and praised her to the degree that she helped spread awareness about the schools in WWASP's network. "[I]t was found that while Sue Scheff did have her own agenda, and

³⁹⁸ Trial Transcript, *WWASP v. PURE*, U.S. District Court for the District of Utah, Central Division, August 2, 2004, 19-21.

was being paid by programs for her referrals,” states a post on this website, “she was nevertheless telling the truth about WWASP’s treatment of children.” As a result, “if Sue Scheff has said things about these two schools, I would tend to believe her, even though I would not trust her for a second to refer a child to a program.”³⁹⁹ The emphasis in a post like this is therefore placed firmly on the informational implications rather than on trashing Scheff for its own sake. Despite the personal dispute between Bock and Scheff and the vitriol that would be plentiful in other quarters of the debate, it is important in framing the ensuing reputational conflict to establish that the core motivation for criticizing Scheff appears to have been largely informational, not merely personal.

Scheff’s lawsuit against Bock was decided in 2006. She also sued Ginger Warbis, the proprietor of Fornits, but Warbis succeeded in having this lawsuit dismissed as she was not responsible for the posts directly. The statements at issue in the Bock case were allegations that Scheff was a “crook,” a “con-artist,” and a “fraud.” Bock did not appear for the trial, so the judge entered a default judgment in favor of Scheff. After hearing only Scheff’s side of the case, the jury awarded 11.3 million dollars in damages. There is some ambiguity regarding why Bock did not appear for the trial. She has stated that “there was no defense presented because I was not aware that the case had been scheduled for trial.” Bock had fled her home because of Hurricane Katrina and insisted that she “[has] evidence to back up [her] beliefs...[a]ll [she] want[s] is the opportunity to present that

³⁹⁹ “Note to Parents,” *SueScheffTruth.com* 9/19/2013. <http://www.sueschefftruth.com/note-to-parents/> (accessed 10/22/2015).

evidence.”⁴⁰⁰ On the other hand, the Florida appellate court that eventually heard her appeal in 2007 denied it on the grounds that “appellant was well aware that she was unrepresented and that there were hearings she failed to attend.”⁴⁰¹

Perhaps she still would not have persuaded a jury that her statements were justified — if only as opinions based on disclosed facts, or as pure opinions incapable of being proven true or false. Nonetheless, the legal commentators consulted for the few scattered news stories that appeared in the wake of the record damage award suggested that it was more symbolic than practical in its effect. An article on the website WebWire called it an “empty victory,” for instance, and noted that “although it is doubtful the verdict will be collected, it may serve to chill free speech of those attempting to expose child abuse or untoward business practices” (one of the schools that Scheff referred parents had just been prosecuted for child abuse and other offenses).⁴⁰² In an article in *USA Today*, law professor Lyrissa Lidsky “called the award ‘astonishing’” and commented that the decision to pursue a jury award (at Scheff’s own expense) seemed more focused on publicity than on actually recuperating harm: “What’s interesting about this case is that (Scheff) was so vested in being vindicated, she was willing to pay court

⁴⁰⁰ “Creepy Sue Scheff,” *AutoAdmit.com* 8/9/2007. http://www.xoxohth.com/thread.php?thread_id=670020&mc=1&forum_id=2 (accessed 5/24/2016).

⁴⁰¹ *Bock v. Scheff*, No. 4D07-3283 (Fla. Fourth District Court of Appeal), 2008. <http://caselaw.findlaw.com/fl-district-court-of-appeal/1365700.html> (accessed 5/24/2016).

⁴⁰² “Sue Scheff and PURE Win Empty Victory over New Orleans Mom,” 10/9/2006. <http://www.webwire.com/ViewPressRel.asp?aId=21829#.VP5zjFpH2r8> (accessed 10/22/2015).

costs...[t]hey knew before trial that she couldn't pay, so what's the point in going to the jury?"⁴⁰³

The Fornits message boards were inundated with posts about Scheff in the years following the WWASP decision and the conclusion of Scheff's lawsuit against Bock. The source of particular outrage was that Scheff claimed to be able to distinguish the "good" programs from those that were abusive. As one person involved in the controversy put it,

[s]he presented herself as a parent who had been wronged by this industry but who now vetted these new places and she could send [your] kid to a good one. The problem there is that first of all there is no diagnosis such as 'troubled teen' so there is no 'good' place. A place that sells itself as a treatment for 'troubled teens' is by definition as quackish as a place that sells itself as a treatment for all cancer.⁴⁰⁴

A post on the "Sue Scheff Truth" website later echoed this sentiment: "the point is that you cannot trust marketing, you cannot trust 'advocates', and you cannot trust educational consultants, for whom it is legal to take 'kickbacks' for referrals...[d]on't trust anybody who says they know 'safe' places for kids." Further, it was not clear that she was even disclosing her business model to prospective clients. As the above critic also argued, "it's outrageous that somebody could be able to hide the fact that [she] made [herself] a crusader against child abuse and then ignored complaints about child abuse in their for-profit business."⁴⁰⁵ A Fornits thread discussed this in reference to the FAQ

⁴⁰³ Laura Parker, "Jury Awards 11.3 Million over Defamatory Internet Posts," *USA Today* 10/11/2006. http://usatoday30.usatoday.com/tech/news/2006-10-10-internet-defamation-case_x.htm (accessed 10/22/2015).

⁴⁰⁴ Interview with troubled teen activist, 4:20-4:57.

⁴⁰⁵ 3:27-3:47.

section of her website as it existed in 2002, offering the following reproduction from Scheff's website and accompanying explanation of what was not being disclosed:

How much does this service cost?

Nothing. We will never charge a parent a fee for anything. This is an absolutely "free" service. There is never a charge to parents for advice, materials, and/or review of program information.

INTERPRETATION: You, my little fool, will be paying extra money up front to the program and they, in turn, will pay it back to me. See? This is how "we will never charge a parent fee for anything." We get your money funneled to us indirectly from the program.

Over time, the substantive threads on Fornits spawned others with less constructive criticism to offer. Some made fun of her appearance or her religion; others taunted her with lewd sexual discussion. One can capture the flavor of these posts through the opening to Scheff's entry on the profane satirical website Encyclopedia Dramatica (as it still exists): "Sue Scheff claims to be a Concerned Mother and so-called advocate for them and teenagers, but in reality is a greedy Jew who sends them to some programs while bashing other programs."⁴⁰⁶ In response, Scheff ratcheted up her efforts to silence the critics who were themselves growing more rabid. The crucial part for this analysis, however, is that she did so by methodically constructing a portrait of herself as the victim of a vicious online mob intent on ruining her reputation. This portrait captures the slice of her experience that is sympathetic in that nobody likes to be discussed in the crude manner on display above. The feeling of having a group of people who are outraged at you and willing to say vicious things to convey their outrage could only be

⁴⁰⁶ https://encyclopediadramatica.se/Sue_Scheff (accessed 10/22/2015).

uncomfortable. Unfortunately, it also obscures much of the way in which this sensational element of the Fornits discussion was mixed in with more or less civil, substantive criticism of her.

Scheff first enlisted the help of the company then called Reputation Defender. Specifically, the company created other web content by buying domains and starting blogs that would be filled with content to deflect the criticism found on Fornits and elsewhere. These web addresses would often feature some combination of her name and some negative term or term related to the conflict. Significantly, she built the content of many of them around the defamation judgment itself. “2009 begins the collection process for internet defamation,” begins one that seems to do little but rehash the case with a sympathetic tenor. What is especially interesting about this website is the URL: “carey-bock.blogspot.com.” With the assistance of Reputation Defender, it appears that Scheff’s more specific strategy was therefore to gradually fill in the relevant “search hole” for any terms *associated* with the case (beyond merely her name). Anyone looking for information on Carey Bock would most likely first encounter some version of Scheff’s characterization of the relevant events, peppered with insipid warnings like “free speech does not condone defamation” and “internet defamation can ruin lives.”⁴⁰⁷ In this case, therefore, the law professor Lidsky’s characterization of the defamation judgment seems particularly astute: even beyond its subjective value for Scheff’s dignity, it was essentially being used most centrally as a search engine optimization hook.

⁴⁰⁷ “Sue Scheff 2009 Begins the Collection Process for Internet Defamation.” *Sue Scheff on Internet Defamation*. <http://carey-bock.blogspot.com> (accessed 10/23/2015).

Some of the websites created as part of the reputation burnishing program also involve the schools to which Scheff had referred her PURE clients. One focuses on Whitmore Academy, the school that troubled teen activists were quick to point out “was initially charged with multiple counts of child abuse and hazing” and the owner of which “pled no contest to four counts of hazing, and was ordered to pay fines and complete community service.”⁴⁰⁸ Scheff’s website presents a sunnier side of Whitmore, featuring a picture of the mansion in which it is housed that is captioned “a place for positive change!” and a picture of Whitmore kids assembled in swimming attire “exploring Canada!” on a trip to the lake. More importantly, Scheff defends the program from the accusations about its treatment of those under its supervision. While it does not seem to address the same charges or pleas named in the above press release, Scheff argues that the parties settled because “the initiator” (a woman named Joyce Harris) “simply did not want to be deposed” and that “the plaintiffs would have lost if they had gone to trial.” Further, Scheff reinforces her own victimhood after describing what she sees as the unfair targeting of the school: “My support of the Sudweeks [proprietors of Whitmore] and their program prompted a group of radicals to target me on the Internet. They posted twisted truths and outright lies about me, my family and even some of my friends. They even accused me of supporting child abuse.” She concludes by again bringing the issue back around to her defamation verdict, through which she says “[t]he jurors wanted to send a

⁴⁰⁸ International Survivors Action Committee Press Release, “Sue Scheff and PURE Win Empty Victory over New Orleans Mom,” 10/9/2006. <http://www.webwire.com/ViewPressRel.asp?aId=21829> (accessed 5/24/2016).

message to my abuser that you can't defame a person on the Internet simply because you don't like them.”⁴⁰⁹

On one hand, this kind of effort to redirect the search engine narrative about her is straightforward counterspeech. It is interesting in what it reveals about the almost secondary function of the actual defamation lawsuit in this case, but from the perspective of the marketplace of ideas, it adds to the discussion more than it subtracts. The Fornits participants and those who allege that they have been abused by programs that Scheff defends undoubtedly disagree vehemently with what she has written; it is their job to make sure that their counter-narrative is as prominently displayed and more soundly argued. This perspective tracks with that of at least one commentator at the Electronic Frontier Foundation: as quoted in the 2007 *Reason* article on Scheff and the troubled teen industry, attorney Kevin Bankston expressed support for enterprises like Reputation Defender because “the group was described to him as using positive articles to defend against negative ones, not suppressing speech.” Yet there are also more insidious aspects of Scheff’s reputational rehabilitation effort that signal far worse outcomes for the marketplace of ideas regarding this particular issue. As Bankston continued in the above quotation, “[t]o the extent that Reputation Defender is using baseless legal threats to get speech critical of its clients taken taken down—that is something we’d have serious problems with.”⁴¹⁰

⁴⁰⁹ <http://thewhitmoreacademy.blogspot.com/2009/01/whitmore-academy-settles-but-doesnt.html> (accessed 10/23/2015).

⁴¹⁰ Szalavitz, “Tough Love and Free Speech.” <https://reason.com/archives/2007/08/24/tough-love-and-free-speech>

First, it is somewhat noteworthy that the company Reputation Defender was even willing to take on a client whose claim to reputational injury was somewhat dubious. When the full circumstances are considered, the defamation trial that actually occurred seems like a poor source on which to base the conclusion that even a significant portion of the criticism of Scheff contained false statements of fact. Understandably, both Reputation Defender, Scheff, and the lawyer (now deceased) named John Dozier who assisted her with her cloying vanity memoir called “Google Bomb” all emphasize the feelings of psychological insecurity that she experienced at the hands of the more vitriolic commenters. Dozier was particularly fond of excoriating what he called the growing “internet mobosphere” comprised of “First Amendment fanatics” who defend personal attacks — a category into which he lumped all of the discussion of Scheff.

Perhaps such exaggerated sensationalism should be expected from a man who would routinely send cease and desist letters to anyone who *referenced his website* for reasons other than praise.⁴¹¹ Regardless, nobody defends these commenters without qualification. As lawyer Phil Elberg (who has successfully represented a variety of clients who sought redress against different organizations in the industry) put it, “[i]t’s unfortunate that nuts and angry people have chosen to attack Sue Scheff in obscene terms...[t]his has allowed the focus to shift away from the tactics that Scheff has used

⁴¹¹ See entries about Dozier on the Cato Institute’s “Overlawyered” Blog: <http://overlawyered.com/tag/dozier-internet-law/> (accessed 10/23/2015).

and the fact that she describes herself on the net as a child advocate and a critic of the industry, when in reality, she symbolizes so much of what is wrong with it.”⁴¹²

The activist quoted earlier agrees that the posters who crossed the line into vulgar personal attacks do not reflect well on the critics overall, but also rejects the idea that it justifies the kind of wholesale whitewashing that Reputation Defender and Scheff sought: “I tried to tell [a friend who knows Reputation founder Michael Fertik] this might not be your best case example; I’m sure there are cases where there are actual loonies who go after somebody, but this is a case where this woman sued people for exactly the same thing that she turned around and did.”⁴¹³ The problem, then, is not the desire to push back against personal attacks per se; it is the information that suffers in the process:

The truth is very hard to uncover, it gets very murky, and you’re really hiding important information that needs to get to the public. When you have somebody who literally put her kid in an abusive place, found out that it was abusive, pulled her kid, and made a business out of putting other kids in abusive places, you don’t want somebody to be able to hide something like that.⁴¹⁴

An anonymous poster on Fornits agreed with the spirit of these characterizations of the work done by Reputation Defender, calling them “Sue Scheff’s hired censors.”⁴¹⁵

A number of internet commenters seem to agree with this assessment — though sometimes in less polite terms. One thread on the notorious law school discussion website

⁴¹² Quoted in Szalavitz, “Tough Love and Free Speech.”

⁴¹³ Interview with troubled teen activist 2:15-2:46.

⁴¹⁴ 1:31-2:01.

⁴¹⁵ Comment by anonymous user, “Trouble 4 Reputation Defender,” fornits.com 11/12/2008. <http://www.fornits.com/phpbb/index.php?topic=26131.msg318724#msg318724> (accessed 3/21/2016).

AutoAdmit (home of the “stupid bitch to attend Yale law” thread discussed in an earlier chapter) featured an entry within a larger thread about Scheff’s various legal endeavors titled “lol at reputation defender bitch sue scheff...lawpwned.”⁴¹⁶ The commenters here evidently thought little of the company’s tactics. As a 2008 entry caustically commented, “Sue Scheff seems to be Reputation Defender's most satisfied client/media shill[;]She spent \$10K for that POS of theirs, MyEdge[;] Translation: she spent \$10K for them to spam the net with 100 blogspot blogs.”⁴¹⁷ An entry on Scheff’s *Encyclopedia Dramatica* page describes her use of the company’s services similarly: the company is “a private army of anti-trolls for hire, [that] will (for a price) spamdex the fuck out of google search to white-wash your reputation and push down in the order of search results anything said that you do not want anyone to see.”⁴¹⁸

One commenter on another website that discussed Scheff’s story wondered if Scheff wasn’t being a bit hypocritical by creating websites in her “defense” that themselves seemed to make an extra effort to insult and undermine various adversaries. “What is Scheff’s deal?” wondered commenter McHugh-Roohr, who was confused because “[h]er story claims that she was libeled by some sort of internet firestorm[, e]xcept that now she seems to own and operate a whole mess of websites, many of them

⁴¹⁶ Post by Yettis Are Us, “lol at reputation defender bitch sue scheff...lawpwned,” *AutoAdmit.com* 11/12/2008. http://www.autoadmit.com/thread.php?thread_id=880235&mc=1&forum_id=2 (accessed 10/23/2015).

⁴¹⁷ Post by user “DeanRobbins!” from April 6, 2008. http://www.autoadmit.com/thread.php?thread_id=653572&amp;amp;amp;mc=1&forum_id=2#9587837 (accessed 10/23/2015).

⁴¹⁸ “Sue Scheff,” *Encyclopedia Dramatica*. https://encycopediadramatica.se/Sue_Scheff (accessed 10/23/2015).

slandering one Carey Block [sic].”⁴¹⁹ Another Scheff blog dedicated to mocking Joyce Harris (who had brought a lawsuit against Whitmore Academy), for instance, offers disparaging (though largely PG-rated) characterizations of Harris’ reputation in her “swingers group” and solicitations to “click here for her latest scam” — the link, of course, pointing to Scheff’s Whitmore website. Such speech unquestionably should be protected — though as we have seen, the accusation of a “scam” can be problematic when it can be spun as factual. The point is that Scheff’s prudish mentality regarding criticism of her (what attorney and blogger Ken White sometimes derisively calls “pearl-clutching”) appears to have been strikingly absent when it came to her own speech about her adversaries.

The most objectionable component of Scheff’s reputation defense is arguably her efforts to make statements vanish from the web altogether. This is no doubt the most ideal outcome for many who feel wronged by reputationally damaging statements. As in other cases, however, Scheff in this instance appears to have been incapable of narrowing her targets to those statements that might have either been judged defamatory (the very few listed in her defamation complaint against Bock) or even those that more subjectively caused her to feel threatened or humiliated (though in this case it seems unlikely that a court would have in fact accepted the statements as true threats or to be so outrageous as to constitute intentional infliction of emotional distress — otherwise we must assume Scheff would gladly have brought these claims).

⁴¹⁹ Kain and Associates, “Critical Commentary is Not Bad Faith Use of Troubled Teen Site.” <http://www.defendmydomain.com/critical-commentary-is-not-bad-faith-use-of-troubled-teen-site/> (accessed 10/23/2015).

First, Scheff in fact succeeded (albeit temporarily) in appealing to GoDaddy, the company that provided web hosting service for the Fornits site, to drop it from its servers (Fornits was eventually able to get up and running again). Fornits contributors later posted the complaint that Scheff had sent to the relevant GoDaddy department (which was included with GoDaddy's warning to them). It leaned heavily on both the fact that a defamation judgment had been entered against *one* of the posters on the site and on the claim that she had ““filed a report with internet crimes bureau as well as [her] local fbi office.” Further, she added that she had a planned appearance on 20/20 to talk about the case — an appearance at which she “would love to be able to share with people that GoDaddy doesn't tolerate this type of terrorism [sic] on the Internet.” When the Fornits community looked into these claims, they allegedly found nothing: “after contacting the Broward County sherrifs dept, it was discovered she never filed anything. The case number didn't even fit the format they use!” Likewise, “[w]hen 20/20 was contacted, they didn't seem to know anything about Sue Scheff either.” For GoDaddy's purposes, however, the legitimacy of the complaints did not appear to matter much. As the Fornits posters discovered when contacted by GoDaddy, the company “reserves the right to terminate Services if Your usage of the Services results in, or is the subject of, legal action or threatened legal action, against Go Daddy or any of its affiliates or partners, *without consideration for whether such legal action or threatened legal action is eventually determined to be with or without merit*” (italics added).”⁴²⁰

⁴²⁰all quotations taken from an email exchange between GoDaddy and Fornits administrators: <http://www.fornits.com/docs/bullshit.html> (accessed 10/23/2015).

Scheff did not stop at the hosting of Fornits. She also filed a trademark dispute with WIPO⁴²¹ over the use of “Sue Scheff” in the domain names of several of the ancillary websites critical of her (she evidently held a “registered service mark for SUE SCHEFF and another for SUESCHEFF.COM”). The WIPO panel that heard the dispute ruled, however, that the sites’ use of her name “appear[ed] to be a legitimate noncommercial or fair use of the Domain Name” despite the fact that the comments found were “disparaging.” Further, such fair use criticism did not in fact “tarnish” the trademark within the relevant legal meaning of the term: “fair-use criticism, even if libelous, does not constitute tarnishment and is not prohibited by the Policy, the primary concern of which is cybersquatting.” The WIPO panel thus ultimately ruled that these domains did not have to be transferred to Scheff due to their legitimate critical purpose and clear differentiation from her own sites (e.g. through the modifier “truth” in the domain of one).⁴²²

Despite the limited success of these more censorial reputation-burnishing endeavors, Scheff has managed to find other platforms to complement the roster of websites that she and Reputation Defender created around the conflict. In a sense, it is to her credit that she identified the current events niche that would best amplify her cause: since her initial flurry of activity immediately following the trial, Scheff has more

⁴²¹ United Nations-affiliated organization that adjudicates cross-border intellectual property disputes and — as in this case — implements the “WIPO-initiated Uniform Domain Name Dispute Resolution Policy (UDRP)” to settle domain name disputes. <http://www.wipo.int/amc/en/domains/> (accessed 10/24/2015).

⁴²² “Critical Commentary is Not Bad Faith Use of Troubled Teen Site.”

recently styled herself as an anti-cyberbullying guru. In 2012, she evidently managed to convince the bookers for the Anderson Cooper Show to include her as a guest with expertise on cyberbullying — of course making no mention of the broader conflict that spawned this newfound identity.⁴²³ One particularly gullible writer (though in a college newspaper) described Scheff’s experience as “being victimized online and cyber-stalked due to her advocacy work,” ultimately comparing what she suffered to the bullying of Rutgers freshman Tyler Clementi in the wake of his tragic suicide.⁴²⁴ At Huffington Post, she is a regular blogger whose “expertise is educating parents that are struggling with their out-of-control teenager and Internet safety for both kids and adults.” Further, her bio states that “her name and voice ha[ve] become synonymous with helping others that are being destroyed virtually as well as educating kids and adults about their online reputation.” Those whom she “helps” in this regard might not fully understand why she became so involved in reputation management in the first place, but they can at least rest assured that their mentor has some experience in manicuring her own reputation.⁴²⁵

Conclusion:

The cases of Scheff and Larkins thus demonstrate that the “citizen critics” of the web resist neat categorization as amateur “journalists.” The blogging platforms

⁴²³ “CYBER BULLYING - SUE SCHEFF APPEARS ON ANDERSON COOPER - APPARENTLY NOT FULLY VETTED BY PRODUCERS,” *Jillie’s Take* 1/9/2012. <http://jilliestake.blogspot.com/2012/01/cyber-bullying-sue-scheff-appears-on.html> (accessed 10/23/2015).

⁴²⁴ Shawn McBride, “PURE Bully!” *The Verge* 12/18/2013. <http://wordpress.monmouth.edu/?p=6929> (accessed 10/24/2015).

⁴²⁵ Sue Scheff Author Bio. <http://www.huffingtonpost.com/sue-scheff/> (accessed 10/23/2015).

commanded by these speakers afford the airing of personal grievances that are tinged with public importance. They do invite debate over different interpretations of the issues they cover, yet they also clearly aim to expose perceived wrongdoing in a factual register. No code of ethics or set of blogging conventions guarantees that those writing will confine their speech to that which is transparently substantiated or politely critical. At the same time, discursive conventions and the overall mediated context in which such writing appears perhaps mitigate some of its reputational impact. Such speakers might indeed represent novel threats to reputation, yet they are also uniquely vulnerable in ways that established news institutions would not be. Both case studies demonstrate the extraordinary tenacity (and some would say masochism) required in order to prevent one's ability to speak on a topic from being completely smothered by a determined plaintiff.

Further, and most importantly, even the worst excesses of "citizen criticism" force us to reconsider how we calibrate reputational harm in the context in which their speech circulates. Such voices have much to offer even if the execution falls short of the ideal "town crier" envisioned by the *Reno* court. Subjects of critical speech on the web have an incredible array of tools at their disposal. If we indulge the prevalent paranoia about "online reputation" too much and allow those criticized too promiscuous an identification as "cyberbullying victims," we risk vindicating only the most narcissistic impulses of those subject to legitimate criticism about issues of public importance.

Chapter 7

Convergence Journalism, Reputation, and the Search for the Boston Marathon Bombers

When missing Yale student Annie Le's dead body was discovered inside of a laboratory wall on September 13, 2009, the journalists covering the case and the editors of their publications had to make choice. On one hand, they could wait and dutifully report the police updates about the investigation but refrain from publishing information about those not formally charged in the crime. Or, on the other hand, they could report any and all police speculation about possible "persons of interest" and perhaps even try to extrapolate from these inquiries to generate their own connections and leads. The first approach would surely help to avoid jumping the gun on naming suspects or trying to explain what had even happened. The second could pay huge dividends, making a news organization the go-to source for information on the case, but it could also undermine the reputation and privacy of any investigation subject who turned out to be a dead end.

The New Haven police announced the name of a "person of interest" (but who had not been arrested or charged) several days later, at which point most news outlets reported the name and began their own investigations into his life. The organizations' decisions to do so hardly caused controversy, yet *New Haven Independent* editor Paul Bass still refrained from publishing the name until the police had officially arrested the suspect. As Bass later described to author Dan Kennedy, the decision "derived in part from [his] institutional memory" — specifically from an earlier incident in which "police

had mistakenly identified a Yale professor as a person of interest in the murder of a student named Suzanne Jovin [but] no evidence against the professor was made public and the murder was never solved.”⁴²⁶ Bass’ experience and sense of responsibility for the norms of the profession had made him wary of such premature announcements. What if he had no such professional identity or even experience?

The decision about how to approach the investigation and when to publish personally identifying information about suspects is not a new conundrum of journalistic ethics. There is disagreement about how this decision has traditionally been approached but acknowledgement that it is pervasive. While one veteran journalist, for instance, asserted in a *Washington Post* discussion of the subject that “[f]or many years, naming an uncharged suspect was strictly prohibited in journalism,” another pushed back, arguing that “[his] experience is quite different.” “There is no consistency,” he continued, because “standards and norms differ dramatically from place to place.”⁴²⁷

Additionally, accounts like the one above and Kennedy’s telling of the 2009 Le story focus only on the decisions at professional print and online media outlets about

⁴²⁶ This quotation and the account of the coverage of the Le case are taken from Kennedy’s book in which Bass is a central protagonist. Dan Kennedy, *The Wired City: Reimagining Journalism and Civic Life in the Post-Newspaper Age*. Amherst: UMass Press (2013), 22-23.

⁴²⁷ This article outlines the general debate and some incidents prior to widespread use of social media and web 2.0 technologies. The cases of Richard Jewell (wrongly suspected 1996 Atlanta Olympics bomber) and Steven Hatfill (wrongly suspected in 2002 anthrax mailing) are cited as paradigmatic examples of the damage to reputation and emotional stability that can occur when media widely misidentifies such a “person of interest” as a suspect before he/she has been charged with anything.

Tom Jackman, “Naming a murder suspect who hasn’t been charged: Should the media do it? Would you?” *Washington Post* 8/1/2012. https://www.washingtonpost.com/blogs/the-state-of-nova/post/naming-a-murder-suspect-who-hasnt-been-charged-should-the-media-do-it-would-you/2012/08/01/gJQAIpUOX_blog.html (accessed 1/13/2016).

whether to publish the name. Yet the affordances of social networking platforms and the general dynamics of name search have added another dimension to some such investigations: the possibility that discussion of potential suspects by users of social networks will create “information cascades”⁴²⁸ in which a misidentified suspect’s name is widely distributed. Sometimes those making decisions about whose names to publish and how to discuss them are neither restrained and experienced editors like Paul Bass nor enterprising journalists seeking to scoop other outlets; they are not journalists at all. Rather, they are simply interested strangers whose attention and speculation can be aggregated on social platforms like Reddit and Twitter. Finally, a suspect misidentified by one overzealous newspaper would have a clear target for legal action to defend his or her reputation. In the case of viral misidentification distributed over multiple platforms with no clear origin, it is less evident who the aggrieved party might hold responsible.

This chapter focuses on the reputational consequences of the nexus between crowd-sourced investigation and professional journalism in a few recent incidents. Both main case examples involve the crowd-initiated effort to assist law enforcement in the investigation of the Boston Marathon bombing that was conducted on a “subreddit” (topically focused forum on Reddit) called “/r/findbostonbombers” (and to a lesser extent /r/Boston). The discussion hinges on two central misidentifications: Salaheddin Barhom and Yassine Zaimi, the “bag men” first spotted by Redditors but later

⁴²⁸ This concept was introduced through the work of Cass Sunstein on the information dynamics of the internet in chapter two. In essence, Sunstein writes that an information cascade occurs when “people cease relying on their private information or opinions [and] decide instead on the basis of the signals conveyed by others.” See Sunstein, *Republic.com 2.0*, 84.

depicted in this inflammatory manner on the cover of the NY Post (they would eventually sue the paper for libel and infliction of emotional distress), and Sunil Tripathi, a missing Brown University student who was fervently but incorrectly identified briefly as a suspect on Twitter and on the subreddit and was later discovered to have committed suicide. These misidentifications are more specifically analyzed in terms of how the forums attempted to police themselves and how the discussion on the sites intersected with coverage in professional media outlets. Likewise, the extensive “post-mortem” discussion on different areas of Reddit gives insight into the ways that Reddit users have subsequently reflected on the implications for future crowd-based scrutiny.

The tensions and outcomes illustrated in these case examples thus contribute to several narratives that have run through this project. The first involves reputation and the debate over the appropriate degree of permanence for information on the web. On one hand, the perpetual existence of the original links implicating the wrong person might impede closure for the victim. At the same time, there is probably little continued material threat to reputation in these cases because of the surfeit of discussion exposing the mistakes and thus exonerating the victim. The concern for “reputation” is most readily cited in these cases, but it in fact does not seem to even capture what is most troubling for victims in these situations — which is a fear for their personal safety and the psychological strain of knowing that so many strangers wish you ill (however underserved this is). Further, the abrupt disappearance of any links threatens to render critical commentary about them either nonsensical or at least less comprehensible and

impactful if readers cannot also view the original content. It likewise makes any accounts of what happened and who might be to blame more prone to revision or whitewashing.

The second reputational narrative involves the role of publishing or sharing norms and the ambiguities of journalistic ethics for amateur commentary on public affairs. As with much of the libel reform commentary discussed in the early chapters, the cases here largely reinforce the primacy of information-sharing and interpretive norms in reckoning with and mitigating reputational harm. Hypothetical solutions mandating takedowns or facilitating more tort actions against website hosts or the publishers of individual comments might well offer redress in select cases, but there is no mechanism that can obviate every dubious assertion that could impact an individual's reputation or make him or her feel targeted. Instead, some collective sense of responsibility for what is published proves far more powerful in mitigating such harm. The relevant debate, as we will see, is among commenters over how to determine what those responsibilities are.

Finally, these cases provide further insight into the role of intermediaries in actively regulating speech on their platforms — either through the enforcement of content policies or intra-platform reputation systems (such as the “up/downvote” mechanism on Reddit). They likewise highlight some limitations that platforms face when they attempt to constrain discussion to minimize reputational harm and privacy violation.

In the aggregate, therefore, this chapter revisits an overarching topic engaged in the previous chapter on reputational disputes regarding blogs and independent “citizen critics”: the distinction and perhaps also the symbiosis between “professional” journalism

and peer production or user-generated content. This relationship is important in both the ethical as well as political economic register. The cases examined illustrate how the shape of this uncertain relationship intersects with the reputational concerns about exposure and the mistrust of readers to properly contextualize information. Specifically, new risks to reputation stem from the convergence of news producers and the “people formerly known as the audience.”⁴²⁹ At the same time, this convergence at times contributes much to the marketplace of ideas and presents novel means of achieving reputation vindication via counterspeech. Professional news organizations can amplify misinformation generated by the crowd, but by the same token they can also amplify corrections supplied by the crowd to flawed media storylines.

Most fundamental, however, is the way in which the spectrum of “crowd investigation” controversies sheds light on the kind of self-consciousness about reputational information that is evolving with the use of interactive platforms. Much of the professional media narrative about these platforms has focused on their affordances for unrestrained mob behavior — or “digital lynchings” for those feeling hyperbolic. Yet social media discussions about how to cover these investigations and comments on articles about the investigations paint a more nuanced picture. There appears to be a growing wariness about overreacting to alternative leads (however tempting) and a

⁴²⁹ The phrase comes from a now widely-cited blog post by NYU journalism professor Jay Rosen that was attempting to capture what he perceived as an intensification of the phenomenon of “active audiences” and the convergence of news producers and news consumers using emergent tools of social media and self-publishing. The phenomenon (and other similar ideas — some of which precede Rosen’s) will be discussed in more depth in a following section. See http://www.archive.prssthink.org/2006/06/27/ppl_frmr.html (accessed 1/11/2016).

seemingly common expectation that harm will result if the frenzy to scoop other publications (or even the professional media as a whole) is not tempered. Instead of trying to label the platforms as “harmful” or “productive” overall, then, these cases demonstrate that we would be wiser to recognize that the effects of platforms themselves cannot be reductively characterized in this manner. They do not *intrinsically* foster any particular kind of speech or harm; rather, we are ultimately witnessing the growth and development of the social and informational norms that govern their use and their reception.

A Framework for Approaching the Blurred Boundary Between Audience and Producer:

In a sense, it is fascinating that people are willing to spend free time speculating about crimes, evaluating evidence, and digging through social media information on potential suspects. It is perhaps further curious that they have some reason to expect that such a system is *worth* participating in for reasons other than simply blowing off steam. Those who take to a platform like Reddit to make sense of some bit of news are participating in a discussion about information; they are largely not there just to spew invective. What’s more, they are participating in a discussion that operates largely without the oversight of any omniscient or expert arbiter of what is being discussed. How can this be? By what mechanisms do such discussions occur, what model of knowledge generation do they represent, and what do the participants expect to get out of them?

Though voluntary collaborative activity of course predates the internet, the use of digital interactive platforms for collaborations such as those above more specifically embodies what Yochai Benkler has called “peer production of information, knowledge, and culture generally.”⁴³⁰ Such peer production acts as a central feature of the overall “networked information economy” in which a significant share of knowledge production is “commons-based” rather than property-based.

As Benkler argues, unique opportunities for peer production arise in the networked information economy because of the disaggregation of different facets of the communication process. These are the functions of production, relevance/accreditation, and distribution. “In the mass-media world,” Benkler explains, “these functions were often, though by no means always, integrated. NBC News produced the utterances, gave them credibility by clearing them on the evening news, and distributed them simultaneously. What the Internet is permitting is much greater disaggregation of these functions.”⁴³¹ For Benkler, the possibility of producing, verifying, and distributing information outside of a centralized, proprietary model is a boon for society and democracy: “It is the feasibility of producing information, knowledge, and culture through social, rather than market and proprietary relations—through cooperative peer production and coordinate individual action—that creates the opportunities for greater

⁴³⁰ Yochai Benkler, *The Wealth of Networks*, Cambridge: Harvard UP (2006), 68.

⁴³¹ Benkler 68-69.

autonomous action, a more critical culture, a more discursively engaged and better informed republic, and perhaps a more equitable global community.”⁴³²

What do such endeavors look like? Benkler invokes many examples, but two are most useful in the context of this chapter: the peer-produced encyclopedia Wikipedia and the community news site Slashdot. Benkler calls Wikipedia “one of the most successful collaborative enterprises that has developed in the first five years of the twenty-first century” and frames its success in terms of its ability to generate reasonably comprehensive and accurate information “out of the coordinate but entirely independent action of millions of users.”⁴³³ Specifically, Wikipedia succeeds in this manner because its architecture facilitates a particular kind of crowd correction that itself is predicated on shared norms for what “good” entries look like and for how disputes about information should be handled. In accordance with Wikipedia’s own mission statement, those who contribute “undertake to participate in a particular way...to make its product be an encyclopedia,” which they define as “conveying in brief terms the state of the art on the item, including divergent opinions about it, but not the author’s opinion.”⁴³⁴

The commitment to a shared vision for the purpose of the site and a style of presenting information largely makes the pool of writers self-selecting and facilitates swifter correction or resolution when there is vandalism to a page (such as when the entire page for “abortion” was periodically deleted) or attempts to sabotage a page with

⁴³² Benkler 92.

⁴³³ Benkler 70.

⁴³⁴ Benkler 73.

false or irrelevant information. The large, dispersed pool of contributors in fact becomes an asset rather than a hinderance to the conversation because of the open architecture that allows nearly anyone to edit: “even in a group of this size, social norms coupled with a facility to allow any participant to edit out purposeful or mistaken deviations in contravention of the social norms, and a robust platform for largely unmediated conversation, keep the group on track.”⁴³⁵ While founder Jimmy Wales and a small number of “system operators” can still technically intervene in disputes over particular pages or block users, Benkler says that “this power seems to be used rarely.”⁴³⁶

Slashdot uses a related but distinct method of harnessing peer judgment and decisions to negotiate cooperation in knowledge production. As a site for sharing and discussing news articles, Slashdot exemplifies the peer production of “relevance and accreditation” rather than content itself. Instead of relying on editing and voting, therefore, Slashdot uses a rapidly rotating set of moderators drawn from the community of users itself whose eligibility for moderation is directly tied to the accrual of “karma” points that are based on contributions to the site that other users have deemed positive. These moderators are themselves “metamoderated” by volunteers from among a core group of earlier adopters. The system works without the use of any kind of “professional accreditation experts” because it “aggregat[es] small judgments, each of which entails a trivial effort for the contributor, regarding both relevance and accreditation of the

⁴³⁵ Benkler 74.

⁴³⁶ Benkler 72.

materials.”⁴³⁷ The picture that emerges, therefore, is again of a kind of self-regulating forum governed largely (though still not completely) by a combination of norms and reputation mechanisms built into the architecture of the site.

Building off of the features of this framework, the following case study asks four questions regarding the reputational implications of crowd investigations on social media and their subsequent integration into professional news reporting. These are: 1) What kind of guidelines or norms did those discussing the case or investigating particular people follow — did they think of themselves as behaving like journalists, following other kinds of guiding principles, or having no particular responsibility for the responses to their public speculation? 2) How (if at all) did the forums themselves provide parameters for the discussion via either technical architecture or direct intervention (e.g. banning particular posters)? 3) How did the professional media outlets incorporate posts from social media into their reporting on the incidents and their aftermath? 4) For those misidentified, what were the immediate and longer-term reputational consequences? Do these outcomes lend credence to calls for legal mechanisms to compel intermediaries to de-index or remove particular content? What kind of justice (if any) do existing tort remedies provide in these cases?

Boston Bombing Case 1: Barhoum and Zaimi

As the immediate tragedy of the Boston Marathon bombing in April 2013 gave way to the investigation into its perpetrators, a massive constellation of informational

⁴³⁷ Benkler 80.

machinery kicked into gear. The FBI pored through surveillance footage from around the bombing and attempted to cross reference this footage with tips from those who had been present and intelligence information on possible terrorism connections. A novel component of this machinery, however was the community on Reddit that had gathered under the subreddit /r/findbostonbombers to both assist in the physical work of looking at surveillance footage and trying to locate information on those identified as well as to discuss theories of what had happened and why.

In addition to preexisting curiosity, it appears that part of the initial impetus for the involvement of Redditors was that law enforcement agencies were themselves requesting the involvement of the public. By the third day after the bombing (Wednesday), the FBI was imploring interested citizens to come forward with any information that might help to identify the perpetrators. The (admittedly tabloid-oriented) site Newser reported, for instance, that the FBI was making the following appeal: “The person who did this is someone’s friend, neighbor, or relative...[s]omeone knows who did this.”⁴³⁸

Beyond the tips based on personal knowledge, a bit of identifying detail had catalyzed independent analysis of photographs of the scene shared by bystanders. According to Reuters, the FBI had reported that “[t]he picture beginning to emerge from the investigation [was] that of a suspect or suspects carrying black nylon bags or

⁴³⁸ Rob Quinn, “FBI Sifts Through Thousands of Boston Tips,” *Newser* 4/17/2013. <http://www.newser.com/story/166364/fbi-combing-through-thousands-of-boston-tips.html> (accessed 1/21/2016).

backpacks” — thus giving something for amateur sleuths to look for.⁴³⁹ As an *Atlantic Wire* post from the same day concluded, such involvement was simply “a byproduct of what you get when the FBI asks the public for help.”⁴⁴⁰ The endeavor was thus not terribly different from Benkler’s framing of the collaborative potential of a platform like Slashdot: “aggregating small judgments, each of which entails a trivial effort for the contributor” but which have the potential to provide a collective benefit that exceeds any individual contribution.

That same day, another *Reuters* report noted that some discussion of the information released by the FBI itself had begun on /r/findbostonbombers. Much of this discussion appears not to have even focused on people. The *Reuters* report suggests that much of the discussion focused on technical scrutiny of pictures of the devices that the FBI had released and claimed were used in the blast. Though involved in no official capacity, many of those scrutinizing the devices possessed engineering knowledge that could be useful in advancing the investigation. Contributors to the subreddit were, for instance, annotating these pictures with observations about where the components could have come from; they were likewise speculating about how skillfully designed the bomb was and thus what kind of perpetrator might have made it.⁴⁴¹ In addition to these pictures

⁴³⁹ Tim McLaughlin and Mark Hosenball, “Boston bomb suspect spotted on video, no arrest made.” *Reuters* 4/17/2013. <http://www.reuters.com/article/us-usa-explosions-boston-idUSBRE93F06T20130417> (accessed 1/21/2016).

⁴⁴⁰ Alexander Abad-Santos, “Reddit and Chan Are on the Boston Bomber Case.” *The Atlantic Wire* 4/17/2013. <http://www.thewire.com/national/2013/04/reddit-and-4chan-are-boston-bomber-case/64312/> (accessed 1/21/2016).

⁴⁴¹ “Crowdsourcing the Boston bombing investigation.” *Reuters* 4/17/2013. <http://www.reuters.com/video/2013/04/17/crowdsourcing-the-boston-bombing-investi?videoId=242300386&mod=related&channelName=domesticNews> (accessed 5/24/2016).

released by the FBI, however, the Reddit investigators were poring over a series of citizen cell phone videos and pictures taken in the immediate aftermath of the bombing. The discussion of these and other materials would subsequently take a dramatic turn away from merely trying to identify circuitry and triggering devices.

April 17 proved to be a particularly confusing day for reporting on the investigation at all levels. At one point, the FBI was supposed to hold a press conference to announce what some outlets anticipated was going to be a “breakthrough” in the case related to a surveillance video from a store near the bombing site.⁴⁴² This anticipation appears to have been generated by the mass media itself. According to the *Atlantic Wire*, “CNN, ABC Boston, The Boston Globe and the AP at various points within a one-hour period...reported that a person connected to the Boston bombing was taken into custody — CNN and Fox News had, minutes earlier, reported that there had been an arrest.”⁴⁴³ The reporting was widespread enough that the Boston Police Department issued an official tweet at 2:33 that afternoon to clarify that no arrest had been made. Likewise, the rumor about the “breakthrough” had nothing to do with social media: the reporters who had camped out at the courthouse for the announcement were “piggybacking on CNN sourcing and law enforcement sourcing.” As a result of this confusion, it was in fact the professional press that the FBI chastised in its message at the end of that day: “we ask the

⁴⁴² Alexander Abad-Santos, “After 'Misinformation Flying Around,' New Video May Be Break in Boston Case.” *The Atlantic Wire* 4/17/2013. <http://www.thewire.com/national/2013/04/boston-bombing-third-victim/64302/> (accessed 5/24/2016).

⁴⁴³ Abad-Santos and Sullivan, “New Video May Be Break in Case.”

media, particularly at this early stage of the investigation, to exercise caution and attempt to verify information through appropriate official channels before reporting.”⁴⁴⁴

The fact that there was so much overlap between the official investigation, the coverage in the professional media, and the discussion on interactive web platforms represents a significant paradigm shift in journalism. Specifically, the overlap implicates the concepts of “media convergence” and “convergent journalism” as phenomena peculiar to the networked information economy. Convergence has many meanings — it can refer simply to the combination of previously distinct functions (e.g. voice communication and video data processing) in a single device or the fact that content is consumable through multiple channels, for instance. The relevant dimension here, however, is the way in which it captures the perception that audience participation is integral to the production of digital media products.

The emphasis on audiences and convergence in digital media culture is attributable in large part to the work of Henry Jenkins in media studies,⁴⁴⁵ who seminally emphasized how “media audiences nowadays play a crucial role in creating and distributing content.”⁴⁴⁶ Journalism professor Jay Rosen’s quotation in the introduction incorporates a Jenkins-inspired logic. The “people formerly known as the audience” are often now less distinctly passive “consumers” because they have “become news

⁴⁴⁴ <https://www.fbi.gov/boston/press-releases/2013/no-arrest-made-in-bombing-investigation>

⁴⁴⁵ See primarily Henry Jenkins, *Convergence Culture*. Cambridge: MIT Press (2006). The basic definition of convergence is simply “flow of content across multiple media platforms.”

⁴⁴⁶ “What Is Media Convergence?” <https://mconvergence.wordpress.com/about/> (accessed 2/1/2016).

producers and distributors themselves.”⁴⁴⁷ According to media scholar Jeffrey Wilkinson, the fact that “almost anyone with a bit of training can now create attractive, informative, and entertaining content” is a major driver of what is now a familiar narrative about the effect of the internet on media markets. In this formulation, it contributes to the “long tail” market phenomenon in which legacy media must compete for a diminishing share of audience attention and advertising revenue.

This state of affairs catalyzes more interaction between professional content producers and the “former audience.” The participation of the “crowd” in the Boston bombing investigation would seem to vindicate those who have called for reporting itself to be reorganized around the kind of raw materials produced by users of social media or other self-publishing platforms. Grant Wilkerson writes that “[t]he work of those who create new forms of content (including news and information) can be harvested and/or licensed to mass media for their own use,” and thus “it is increasingly common for newspaper web sites to feature photo galleries where local amateur photographers can post their work and visitors can even purchase them.”⁴⁴⁸ The first rule of doing reporting in the age of social media, according to digital strategist Alyssa Kritsch, is to “source from the street.”⁴⁴⁹ Kritsch celebrates the plethora of raw material produced voluntarily on public social media platforms as a boon for journalists trying to capture the nuances of

⁴⁴⁷ transmediajournalism.org/contexts/where-journalism-has-gone-before/ (accessed 2/1/2016).

⁴⁴⁸ Quotations taken from this post by Wilkinson: “Media Convergence and the Implications for Audiences, Institutions, and Journalism Education.” rthk.hk/mediadigest/20080415_76_121820.html (accessed 1/19/2016).

⁴⁴⁹ Alyssa Kritsch, “Four Ways Social Media is Changing Journalism.” <http://blog.hootsuite.com/social-media-for-journalism/> (accessed 1/19/2016).

a story as it unfolds: “crowdsourcing is easier than ever for journalists and news agencies[,] [as] literally thousands of citizens are taking photos and videos every day, developing an endless archive of sourceable content, and it’s all just a keyword search away.” Further, she advocates drawing from spontaneous reactions on social media in moments of crisis or protest in order to enrich coverage in professional outlets. In fact, she cites the coverage of the Boston Marathon bombing as an instance in which this approach succeeded: “marathon runners and bystanders rapidly became citizen journalists, taking photos and videos of the aftermath.” This contributed much to the professional coverage of the unfolding story, as “the most-read headlines featured on major news networks were sourced from citizens.”

It is perhaps not surprising that by its third day (April 17), the bombing investigation had become “the most crowdsourced terror investigation in American history.”⁴⁵⁰ That day brought the first inflammatory scrutiny on Reddit and the more bilious message board 4chan of two photographs of people standing near the marathon finish line holding bags. These photographs appear to have come from “the crowd” themselves — specifically a Flickr series posted by a man who worked in an office very close to the blasts.⁴⁵¹ The first has been referred to as “the man in the blue jacket,” who appears to have a backpack slung on his arm that somewhat resembles the backpack that was confirmed to have contained the pressure cooker bomb used in the blast. Little more

⁴⁵⁰ Alexander Abad-Santos, “Reddit and Chan Are on the Boston Bomber Case.” <http://www.thewire.com/national/2013/04/reddit-and-4chan-are-boston-bomber-case/64312/>

⁴⁵¹ The photo collection is here: <https://www.flickr.com/photos/hahatango/sets/72157633252445135/with/8652877581/> (accessed 1/22/2016).

was made of this man. He was never identified by name, though news outlets such as the *Atlantic* were careful to blur his face in reporting on the crowd scrutiny since “the only suggestion of a connection to the bombings comes from people on Reddit who have been looking at photographs.”⁴⁵²

The other photograph introduced on the 17th was of the two men who became the “bag men” of the *NY Post* cover. What appears to have set off the speculation about these men was the contention that something in the backpack worn by one of them looked like it could be the outline of a pressure cooker.⁴⁵³ Looking at the image with its crude MS-Paint annotation where the poster thought the outline of the device was, it is difficult not to see the scrutiny as mere confirmation bias. What is depicted could perhaps be a pressure cooker, but this is only because it could really be any vaguely rounded object that would fit in a backpack of that size.

One might charge that even engaging in this kind of wild speculation in a public forum based on so little information is at best irresponsible. At the same time, the initial suspicion about the “bag men” appears to have been stifled on Reddit itself fairly quickly. As Gawker (still snidely) put it in its evisceration of the *Post* the next day, “thanks to [participants on /r/findbostonbombers’] ability to do really basic internet detective work, they managed to figure out pretty quickly that the guy in the blue track jacket [Barhoum]

⁴⁵² Abad-Santos, “Reddit and Chan Are on the Boston Bomber Case.”

⁴⁵³ i.imgur.com/i7S8bEm.jpg

almost certainly isn't a bomber. All they had to do was find his Facebook."⁴⁵⁴ As they discovered, for instance, Barhoum was "a Moroccan-American kid, a local high-school soccer player and track runner...[who] took a couple of geekily enthusiastic photos of himself at the marathon."⁴⁵⁵ Such a profile of course does not dispositively eliminate him as a suspect; Dzhokhar Tsarnaev would later be described by peers as a kind of "average kid" in a similar manner. Nonetheless, it appears that the Reddit forum was at least able to fairly quickly produce evidence to indicate that the two men in this picture might well have had no involvement whatsoever.

Incredibly, however, this did not stop the *New York Post* from running the picture of the two on its front cover the next day with the accompanying headline: "BAG MEN: 'Feds seek these two pictured at Boston Marathon.'" In other words, the *Post* decided to run the headline *after* there had been substantial activity on social media that had located the social network profiles of the two men pictured and discussed the improbability of the two being suspects. To the *Gawker* reporter quoted above, this indicated "two possibilities: one, the *Post* newsroom couldn't even be bothered to do the *bare minimum* of follow-up reporting...[o]r, two, that the *Post* did the followup reporting...but is institutionally so committed to identifying an Arab, any Arab, as a terrorist, that it still splashed his photo on the front page and insinuated his suspect-hood."⁴⁵⁶

⁴⁵⁴ Max Read, "The Post's Person of Interest Is a Local High School Track Runner." <http://gawker.com/5994955/the-posts-person-of-interest-is-a-local-high-school-track-runner> (accessed 1/21/2016).

⁴⁵⁵ Read, "The Post's Person of Interest."

⁴⁵⁶ Read, "The Post's Person of Interest."

The sequencing of these events seemed not to matter to some outlets, as some cast the story as one in which the *Post* article was but one component of a witch hunt against the two men that had been precipitated by social media “vigilantes” and that the paper was only dutifully reporting the reasonable speculation about their involvement. As a *Sky News* piece the next day described it, “[a] teenager says he fears for his safety after internet vigilantes wrongly identified him as a suspect in the Boston Marathon bombings and he was pictured on the front of the *New York Post*.”⁴⁵⁷ Attributing the problem to “internet vigilantes” undoubtedly offers more tabloid appeal, but it distorts the full picture. The “vigilantes” indeed scrutinized the two; then they figured out that they were probably not involved in the bombing, and the *Post* published the article anyway.

In its defense, the *Post* claimed that it had not actually asserted anything factually inaccurate and that it had a duty to do more than simply wait for the police to announce the official suspects. The picture of two had indeed been circulated in law enforcement circles in connection with the investigation, but they were never actually labeled suspects. Since the *Post* never actually called them “suspects” outright, it reasoned, its coverage was consistent with the information it was getting from law enforcement. And if this information was coming from law enforcement, then “it might be newsworthy.”⁴⁵⁸ What

⁴⁵⁷ <http://news.sky.com/story/1080260/boston-bombings-wrong-suspect-reveals-fears> (accessed 1/25/2016).

⁴⁵⁸ This is from a statement offered by Post Editor Col Allan, quoted in Wemple, “Young Men, Please Sue the New York Post.” https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/04/22/young-men-please-sue-the-new-york-post/?tid=a_inl (accessed 1/25/2016).

was the paper supposed to do, asked Editor Col Allan — “wait until the complete truth is clear?” In such a case, “there [would be] little need for journalists.”⁴⁵⁹

As many were quick to point out, however, such arguments strain credulity given the aesthetic presentation of the story and the framing of its implications. “Affixing the headline ‘Bag Men’ amounts to an accusatory affirmation,” wrote the *Washington Post*’s Erik Wemple, because readers knew that “[a]uthorities were seeking individuals carrying bags that could have held the sort of pressure-cooker bombs that turned the marathon into a scene of terror.”⁴⁶⁰ Why else would the *New York Post* have fixated on the “bag” element of the connection if it was not implicating the men in the bombing? The paper likewise sought to defend the cover by noting that they had, in fact, included a disclaimer in tiny font at the bottom of the cover stating that “[t]here is no direct evidence linking them to the crime, but authorities want to identify them.” Writing at *Reuters*, former *Slate* media columnist Jack Shafer captured the impotence of such an addendum: “The *Post* essentially libels the two guys with big type and takes it back with the small.”⁴⁶¹

The title of Wemple’s article implored the two to “sue the *NY Post*,” and they did so in June 2013. The complaint alleged several counts of libel per se, false light invasion of privacy, and negligent and intentional infliction of emotional distress. As it described, the combination of the front page and article “would [falsely] lead a reasonable person to

⁴⁵⁹ Allan, quoted in Wemple.

⁴⁶⁰ Wemple, “Please Sue the NY Post.”

⁴⁶¹ Wemple, “Please Sue the NY Post.”

believe plaintiffs were involved in causing the Boston Marathon bombing, that law enforcement personnel considered them suspects in connection with the crime, that law enforcement personnel were actively seeking them in connection with the crime...” As a result, it had caused material reputational harm in that it “discredited plaintiffs and/or held them up to scorn, hatred, ridicule, or contempt in the minds of a considerable and respectable segment of the community.”

As the complaint alleged, the Post’s story and headline also inflicted “severe emotional distress” and “embarrassment and humiliation, the nature of which no reasonable person could be expected to endure.” Claims for negligent or intentional infliction of emotional distress often fail because the conduct described is not so clearly beyond the bounds of ordinary decency that no reasonable person should be expected to endure it. As mentioned previously, much free speech theory and jurisprudence has long been wary of punishing speech based on its caustic or embarrassing nature — in other words, based on the subjective emotional responses of listeners. In the paradigmatic *Hustler v. Falwell* case, for instance, the Court cautioned that “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views.”⁴⁶² In this case, though, Barhoum and Zami’s fear of persecution represented the kind of emotional distress that might well have satisfied this stringent standards of the tort given the gravity of the *Post*’s implications.

⁴⁶² *Hustler v. Falwell*, 485 U.S. 55 (1988).

Barhoum and Zaimi offered anecdotal accounts of the harm they suffered as a result of the *Post* story in a variety of interviews following its publication. In a later proceeding, the judge reported that upon becoming aware of the *Post* article, “plaintiff Zaimi’s manager called the FBI, who informed him that Zaimi was not a suspect.”⁴⁶³ The high school student Barhoum experienced a pervasive sense of fear that people would recognize him from the cover and attack him. According to the *Sky News* article quoted above, for instance, “[Barhoum] was so frightened by being wrongly implicated that he ran back to school on Thursday when he saw a man staring at him.”⁴⁶⁴ As he stated to *New York Magazine*, “[p]eople are definitely going to be looking for me just to hurt me.”⁴⁶⁵ He anticipated that the impact would spread to his family and his ordinary dealings, telling *Sky News* that “[w]orkwise, my family, everything is going to be scary.” Finally, it is worth noting that at least Barhoum framed the impact of the story in terms of the dignitary injury of simply being falsely accused of such a heinous act. “It’s such a disaster,” he continued in the *NY Magazine* interview; [t]o be blamed for all that injury and death. It’s the worst.”

What is perhaps especially interesting, though, is the dual approach that Barhoum and Zaimi took to clearing their names. In addition to the lawsuit, Barhoum in particular seemed to recognize the “reputational imperative” that he be proactive in addressing the

⁴⁶³ Memorandum of Decision and Order on Defendants’ Motion to Dismiss, *Barhoum and Zaimi v. NYP Holdings*, March 4, 2014, 14.

⁴⁶⁴ “Wrong Suspect Reveals Fears.”

⁴⁶⁵ Joe Coscarelli, “<http://nymag.com/daily/intelligencer/2013/04/wrongly-accused-boston-bombing-suspects-sunil-tripathi.html>”

accusations and clearing his name. When he was alerted to the discussion on Reddit and Twitter by peers, an exchange captured from his Facebook page by a *Gawker* reporter (before it was set to private) indicates that he was encouraged to immediately assure the police that he had nothing to do with the bombing. When he did so, he was told by an investigator that “this shouldn't happen and you have to stand up for yourself — you can't just let people talk.”⁴⁶⁶ His instinct to immediately post “going to the court right now!! Shit is real but u will see guys I did not do anything” is perhaps itself revelatory. In response, his friends chimed in with expressions of solidarity: one asked if he needed a lawyer; another affectionately assured him that “RHS track teams [sic] behind you bro we know you just like to run[;] you couldn't figure out a bomb if your life depended on it 😊.”⁴⁶⁷ While the attention on Reddit had by this point turned to clearing his name, Barhoum's subsequent actions suggest that he indeed felt some responsibility to proactively deny the accusations. In the immediate aftermath of the *Post*'s publication of the cover, he “ha[d]n't even lost his somewhat naïve faith in the goodness of journalists, ‘gladly posing for photos and taking media questions outside his home in Revere, Mass.’”⁴⁶⁸

Barhoum's name would have been cleared anyway, but it is difficult not to think that his candid approach also greatly enhanced the ability of myriad other news outlets to

⁴⁶⁶ Coscarelli, “Boston Marathon Bag Kid Relatively Chill.”

⁴⁶⁷ Taken from a screen capture of the page that is reproduced in Read, “The Post's Person of Interest.”

⁴⁶⁸ Joe Coscarelli, “Boston Marathon ‘Bag’ Kid Relatively Chill About Implied Bomber Accusation” (quoting a Daily News article on the subject). <http://nymag.com/daily/intelligencer/2013/04/salah-barhoum-chill-about-post-bomber-accusation.html> (accessed 1/26/2016).

construct a sympathetic narrative about his ordeal. In one sense, therefore, the publicity that he embraced possibly contributed to his widespread exoneration in a way that money damages from a lawsuit never could. On the other hand, we must acknowledge that the courage required to openly confront such a serious accusation should perhaps not be universally expected of every person wrongly accused of anything. Both he and Zaimi still potentially suffered a legally recognized reputational and psychological injury for which they might still deserve redress even if they had not been as proactive in their own public defense.

The lawsuit proceeded, and in March of 2014 the judge rejected the Post's motion to dismiss the charges for the three counts of defamation and for negligent infliction of emotional distress. Judge Judith Fabricant granted the motion for the claim of false light invasion of privacy, as the photograph had been taken in a public setting.⁴⁶⁹ With regard to the defamation claims, the decision hinged on whether "the publication was reasonably susceptible to the interpretation that the plaintiffs participated in the bombing, or that investigators suspected them of doing so."⁴⁷⁰ As Fabricant wrote, "[t]he Court is not persuaded" by the *Post's* defenses because "a reasonable reader could construe the publication as expressly saying that law enforcement personnel were seeking not only to identify the plaintiffs but also to find them, and as implying that the plaintiffs were the bombers, or at least that the investigators so suspected."⁴⁷¹

⁴⁶⁹ Memorandum of Decision and Order on Defendants' Motion to Dismiss, *Barhoum and Zaimi v. NYP Holdings*, 19.

⁴⁷⁰ Order on Motion to Dismiss, 10.

⁴⁷¹ Order on Motion to Dismiss, 10.

In addition to the caption on the cover, Fabricant reasoned that the article made much of the fact that Zaimi was carrying a backpack in one picture that was not visible in a subsequent picture — thus indicating that he had put it down. In the context of an investigation that revolved around a bomb in a backpack that had been placed on the ground near the finish line, such a statement implied that the two might in fact be responsible for the bombing.⁴⁷² The degree to which the implications of the cover and article thus lent themselves to defamatory interpretation was complemented by the pair's reports of being harassed or questioned by both peers and strangers. Overall, then, this combination was enough to “support the inference that at least some readers who recognized the plaintiffs gave credence to the impression of their involvement in the crime...such that the article triggered harm to their reputation.”⁴⁷³

The denial of the motion to dismiss for the above claims of course does not guarantee that the plaintiffs would have prevailed at trial or that they would have been awarded substantial damages had they prevailed, but it indicates that these were real possibilities. At any rate, it suggested that a judgment against the *Post* was likely enough that the paper opted to make a settlement offer rather than go to trial — though no news outlet was able to obtain any information regarding the terms of the settlement. Thus, while Zaimi and Barhoum may already have been thoroughly exonerated in the public sphere shortly after the initial publication, they were additionally compensated for the injury they suffered to a degree that they found acceptable.

⁴⁷² Order on Motion to Dismiss, 11.

⁴⁷³ Order on Motion to Dismiss, 14.

On one level, this outcome seems both just and important if we assume that the *Post* indeed would have lost a jury trial. Yet one might wager that the reason has more to do with the medium and the brief but intense feeling of persecution that the two experienced than with the lasting reputational impact of the content itself or its origins on social media. Whether one performs a search for anything related to marathon bombing suspects or for the names of the two specifically, it would be virtually impossible for the reader to find any ambiguity in the results about whether the two were legitimately involved in the bombing. In fact, as several of the above stories suggested, the two largely appear both sympathetic and even impressive in their composure.

Rather, the true injury for which they might be justly compensated stems from the atmosphere into which the *Post* cover thrust them — however briefly. As law professor Clay Calvert commented following the filing of the lawsuit, “a reader passing the paper on his way to the subway would only see headline and photo, but fail to read the article on the sixth page.”⁴⁷⁴ For that brief moment when many such readers would only have glanced at the headline, both the material reputations and the dignity of the two was unquestionably violated by the impression that the cover created. Paradoxically, then, a case which may have begun with “internet vigilantes” was probably not harmful because of some ineradicable tangle of links on a search engine; it was harmful because it would have been fleetingly glimpsed on a physical newspaper.

⁴⁷⁴ Amy Zhang, “A closer look at the “Bag Men” defamation lawsuit.” <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2013/closer-look-bag-men-defamat>

What does such a case reveal about the sometimes awkward symbiosis between social media and professional outlets? It clearly shows that the “raw material” of social media actually influences the direction of the eventual news product in a way that traditional journalism sources perhaps did not. As one representatively idealistic perspective on the journalistic value of social media has articulated it, “the web as a whole can be used as a kind of “public newsroom” — or “a place where information is processed and organized and fact-checked by a staff of hundreds and thousands of volunteers.”⁴⁷⁵ In a case like that of Barhoum and Zaimi, we see the novel dimension of what this can sometimes entail: the journalist has effectively outsourced a portion of the fact-checking and narrative orientation to the crowd. Further, the insights drawn from the crowd might subsequently be incorporated wholesale into the professional piece rather than simply forming the basis of a reporter’s aggregate interpretations. The *Post* might have been anomalously irresponsible in the “bag men” case, but the episode still exposes how the choices made by professional outlets are in fact inextricable from any evaluation of the reputational consequences of these newfangled uses of social media for crowd investigation.

Boston Bombing Case 2: Sunil Tripathi

Once law enforcement clarified that Baroum and Zaimi were not in fact suspects, the attention on social media and in the press naturally turned to other possibilities. While

⁴⁷⁵ Kevin Morris, “Reddit Is Far Greater Than the Future of Journalism,” *The Daily Dot* 8/20/2012. <http://www.dailydot.com/society/reddit-far-greater-future-social-journalism> (accessed 1/19/2016).

Barhoum and Zaimi had been quickly vetted and essentially exonerated on Reddit hours before the *Post* decided to run the cover, the misidentification of Sunil Tripathi as “suspect number two” (based on surveillance photographs that the FBI had released of the two men later identified as the Tsarnaev brothers) would prove harder to contain and would implicate a different kind of nexus between professional news media and those discussing theories on social media. At the same time, the next case provides an arguably more valuable window on the dynamics of discussion and information sharing on the platforms in question. In turn, it prompted a public reflection on the kinds of norms and practices that guide the operation of these platforms. Despite its reputational consequences, the Tripathi case therefore suggests that there is some deliberative and journalistic value in preserving the record of how and when the social media investigation went wrong.

The Tripathi case implicates concerns about “internet vigilantes” and the tendency of the crowd to devolve into a “mob” more directly than did the case of Barhoum and Zaimi. In popular discourse, it seems that for every article about the power of the crowd as a new journalistic force, there is another that laments the carelessness with which social media mobs descend on people at the slightest provocation and pass on information without even doing the most basic work to verify it. Myriad news coverage and commentary has highlighted both the anti-social impulse that might drive individuals to join in the collective shaming of someone perceived to have committed some

transgression⁴⁷⁶ as well as the very real possibility that such vitriol will have been fueled by distorted or entirely false facts.⁴⁷⁷ The Tripathi case forces us to confront how the platforms themselves and the norms that govern their use might exacerbate or perhaps mitigate these tendencies.

Considering the role of the platform and its unique affordances in a case like Tripathi's in turn allows us to explore a reputational conundrum adjacent to the previous chapter's concerns about the journalistic status of "citizen critic" bloggers. In this case, the tension revolves around the impact of aggregated voices with often only a fleeting investment in a given situation rather an individual voice of conscience who is hell bent on taking down an adversary. In other words, concern over the "mob" tendencies of crowd investigations on social media forces us to query whether the ease of posting, the sharing properties of the forums, and the perceived ephemerality of the content inspires new need for forum moderation, adaptations in social and journalistic norms, or even new legal recourse for the subjects of such discussions.

⁴⁷⁶ e.g. this piece that approaches the issue from the perspective of Christian morality: "Internet Outrage, Public Shaming and Modern-Day Pharisees." www.relevantmagazine.com/culture/internet-outrage-public-shaming-and-modern-day-pharisees (accessed 1/20/2016).

Or this piece, which presents a version of the argument that fear of the mob inspires self-censorship: "Why We Should All Fear The Righteous Online Mob." www.huffingtonpost.com/2013/12/27/justin-sacco-online-vigilantism_n_4505452.html (accessed 1/20/2016).

⁴⁷⁷ This piece focuses more squarely on the factual distortions upon which viral condemnation can sometimes be based and the consequences for those targeted: "While there's something to be said for taking a stand against sexism, perhaps the collective Internet could take a lesson from all of this hullabaloo. Joining in a visceral, mob-like attack online can result in serious trouble for someone in real-life. And sometimes, the Internet can be wrong." <http://thefederalist.com/2015/06/24/tim-hunt-sexist-online-wrong/> (accessed 1/20/2016).

The origins of the Tripathi rumor are difficult to untangle, and it would certainly be unfair and inaccurate to blame it on one person. Nonetheless, retrospective news accounts that have attempted to retrace the steps that led to Tripathi's identification by a former high school classmate on Twitter as the inciting action that began the cascade of assertions that he was in fact the suspect. The classmate, Kami Mattioli (now a sports journalist in Charlotte), was looking at the pictures that the FBI had released on Thursday, April 18 (the day of the Bag Men cover and the day before the Tsarnaev brothers were apprehended) when she thought she spotted a resemblance between Dzhokhar Tsarnaev and Tripathi. It was known that Tripathi had gone missing from Brown University about a month prior; his family had created a Facebook page to publicize the search and give people a place to pool information in the effort to find him (he was later found to have committed suicide prior to this episode). As Mattioli tweeted that day, "the back story of his sudden disappearance and the FBI's inability to find him is suspicious."⁴⁷⁸ Combined with the resemblance to "suspect two," Mattioli concluded that this might well indicate that Tripathi had been involved in the bombing.

Mattioli's decision to effectively think these thoughts aloud over Twitter rather than either communicate with law enforcement directly or, say, talk it over with one of her friends outside of social media rankled many. It is easy in retrospect to see how one might approach the situation differently, but could Mattioli have truly anticipated the

⁴⁷⁸ Screen captured tweet from @kmattio, 4/18/2013. Archived at <http://imgur.com/a/1PqCt>. Originally linked in Kaczynski and Gray, "Chechen Brothers — Not Missing Brown Student — Are Suspects," *Buzzfeed* 4/19/2013. <http://www.buzzfeed.com/andrewkaczynski/nbc-reports-overseas-figures-not-missing-brown-student-are-s#.nweAr8gVrr> (accessed 1/27/2016).

consequences at the time? She defended her decision based on a combined appeal to ignorance and the imperative refrain to “say something” when one “sees something.” The manner in which she said something could easily have been more private, but one might well be forgiven for assuming that a tweet that misidentified a suspect would be quickly corrected rather than begin a cascade that influenced national media coverage.

Some have probed whether any public tweet should become fodder for a news story at all if the author probably did not anticipate his or her words being amplified in this manner.⁴⁷⁹ Nonetheless, a contingent in the journalism and marketing professions advances a competing norm that social network users should expect their content could possibly be used as raw material by journalists. Gawker’s Hamilton Nolan has humorously articulated this ethos in a recent article reminding readers of the following:

The things you write on Twitter are public. They are published on the world wide web. They can be read almost instantly by anyone with an internet connection on the planet Earth. . . . Because Twitter is public, and published on the internet, it is possible that someone will quote something that you said on Twitter in a news story. This is something that you implicitly accept by publishing something on Twitter, which is public.⁴⁸⁰

This is perhaps not unreasonable when the topic of discussion pertains to a high-profile national story. There is, however, evidently a kind of dissonance between the activities of journalists and the expectations of some social media users about how their content will be used. Mattioli likely would have confined her speculation to private channels had she

⁴⁷⁹ See e.g. “Twitter, journalism, private lives, public speech: How reporters can ethically navigate social media.” www.slate.com/articles/technology/technology/2014/03/twitter_journalism_private_lives_public_speech_how_reporters_can_ethically.html (accessed 1/20/2016).

⁴⁸⁰ Hamilton Nolan, “Twitter Is Public,” *Gawker* 3/3/2014. <http://gawker.com/twitter-is-public-1543016594> (accessed 1/30/2016).

realized in advance that it would become the basis for much wider and arguably irresponsible speculation. Perspectives like Nolan's would seem to suggest that journalists will use whatever material they can find regardless, so it therefore behooves users of social media to be cognizant of this when they speak.

When Mattioli tweeted "I'm more than a little freaked out right now about the photos of suspect #2" because he "looks just like a kid from my area that went missing exactly a month [sic] and has yet to be found,"⁴⁸¹ word that there might be a connection quickly made its way to Reddit forums /r/Boston and /r/FindBostonBombers. According to an analysis by the website "New American Media," it was "[w]hen Reddit user "pizzatime" (who saw Mattioli's tweet but who never knew Tripathi) confirmed that Tripathi looked exactly like Suspect 2 [that] a subreddit devoted to the bombing confirmed it was Tripathi."⁴⁸² For several hours, Tripathi's involvement remained merely a theory on the subreddit. As Thursday night progressed and the manhunt for the (still unidentified) Tsarnaev brothers got underway, however, many of those who had taken an amateur interest in the investigation were also tuned into the Boston Police Department's public scanner frequency. It was thus when a Twitter user named Greg Hughes tweeted at 2:43 AM that "BPD has identified the names: Suspect 1: Mike Mulugeta. Suspect 2: Sunil Tripathi." According to Atlantic writer Alexis Madrigal's coverage of the

⁴⁸¹ Screen captured tweets from @kmattio, 4/18/2013. <http://imgur.com/a/1PqCt> (accessed 1/27/2016).

⁴⁸² Lalit Kundani, "When the Tail Wags the Dog: Dangers of Crowdsourcing Justice," *New American Media* 7/27/2013. <http://newamericamedia.org/2013/07/when-the-tail-wags-the-dog-dangers-of-crowdsourcing-justice.php> (accessed 1/28/2016).

investigation, “the key moment was clearly at 2:43 AM when Hughes tweeted that the police scanner had mentioned these two names as suspects.” The problem, of course, was that Hughes had somehow misunderstood what had been said over the scanner. The word “Mulugeta” was indeed spelled out at 2:14 AM by someone speaking on the scanner for some reason, but there was no indication that this was supposed to be the name of a suspect; in the many reviews of the scanner audio since the incident, nobody has been able to discern any reference to Tripathi.⁴⁸³

If the early discussion stemming from Mattioli’s Twitter account and the Reddit site had been the kindling, Hughes’ tweet started the full viral conflagration. Importantly, again, the involvement of professional news outlets (and others who command large followings) seemed greatly accelerate the spread of the incorrect information and enhance its credibility. Madrigal cites tweets by the following journalists that repeated the alleged scanner confirmation verbatim within 20 minutes of Hughes’ assertion: Kevin Michael, a cameraman for the Hartford, Connecticut CBS affiliate; BuzzFeed’s Andrew Kaczynski; Digg’s Ross Newman, Politico’s Dylan Byers, and Newsweek’s Brian Ries” —and this list is probably not exhaustive. At 2:58 AM, for instance, Jack Moore of ABC News tweeted that “[o]ne of the suspects (according to BPD) is Sunil Tripathi” and included a link to ABC’s initial coverage of his disappearance in March.⁴⁸⁴ This initial flurry was punctuated by a 3 AM tweet from YourAnonNews, the “main Twitter account”

⁴⁸³ Alexis Madrigal, “#BostonBombing: The Anatomy of a Misinformation Disaster,” *The Atlantic* April 19, 2013. <http://www.theatlantic.com/technology/archive/2013/04/-bostonbombing-the-anatomy-of-a-misinformation-disaster/275155/> (accessed 1/28/2016).

⁴⁸⁴ <https://twitter.com/JackPMoore/status/325141363119235072> (accessed 1/29/2016).

of the hacker group Anonymous that today is followed by 1.61 million other accounts, which repeated the same scanner confirmation.⁴⁸⁵ By 5 AM, journalists and pundits who had not been following the online discussion about suspects in real time began to chime in. Conservative columnist Michelle Malkin, for one, invited her followers to observe “COMPLETE cvg of MIT/ #watertown rampage by bombing suspects Mike Mulugeta (dead) & Sunil Tripathi” in case they were “just waking up.”⁴⁸⁶

How was discussion of Tripathi handled when the discussion had migrated to Reddit on Thursday, April 18? Did it truly turn into the kind of mob witch hunt that would be commonly caricatured in the aftermath of the incident? The /r/ FindBostonBombers subreddit has been closed from public view, but reflections on the discussion that took place there have proliferated on other subreddits and comments on news articles. Likewise, the relevant /r/Boston pages where another significant discussion of Tripathi happened have been archived. In the estimation of some participants, the main problem was that there was no authoritative voice or official account to displace all of the independent comment threads and sources of the Tripathi rumor. As one wrote in the post-mortem discussion, the first exchanges about Tripathi on the page were in fact

⁴⁸⁵ He asserts that at this point “the informational cascade was fully on.” To get a sense of how widely these secondary amplifications would have spread, he writes the following: “@YourAnonNews's tweet was retweeted more than 3,000 times. We don't know how far Hughes's, Kaczynski's, or Michael's tweets went because they've been deleted. Hundreds of references to their tweets remain on Twitter.” Madrigal, “#BostonBombing.”

⁴⁸⁶ <https://twitter.com/michellemalkin/status/325173529999970304> (accessed 1/29/2016). Reproduced in Adam Weinstein, “Everybody Named the Wrong Boston Suspects Last Night and Promptly Forgot,” *Gawker* April 19, 2013. <http://gawker.com/5995058/how-the-fuck-did-everybody-focus-on-two-named-boston-suspects-last-night-then-forget-about-them-this-morning>

“initially upvoted and discussed for about half an hour before being locked.” But the initial rumor simply multiplied — and spread to other forums — too quickly: “People then began posting on the family’s Facebook page [set up to help find him] that he was behind the bombings. From that point on, every few minutes a new thread would emerge about Sunil.”⁴⁸⁷

It is clear that various formulations of the Tripathi rumor gained steam through the upvote mechanism⁴⁸⁸ on /r/FindBostonBombers and — more surreally — the speculation intensified once the scanner discussion was alleged to have confirmed his status as a suspect even though such an assertion had originated on social media. To some participants, the fact that assertions of his involvement were continually upvoted indicates the shortcomings of the the mechanism as a means of sorting truth from falsity: the bombing investigation demonstrates that “it simply allows people to give more credence and emphasis to things that appeal to (often) nothing more than a fleeting sense of “yeah, what he said!” rather than logic, reason or intelligence” and thus to “thrust similar group think into the fore while hiding information that may be equally important yet not nearly as ‘appealing’ or ‘engaging’ to the casual reader.”⁴⁸⁹ Nonetheless, the

⁴⁸⁷ Post by user “Thirtydegrees” on subreddit “/r/misc” in response to a thread that posed this question: “How close were we to finding the Boston Bombers?” <https://redd.it/1cuj7p> (accessed 1/30/2016).

⁴⁸⁸ Reddit’s reputation mechanism for increasing the visibility of a particular comment by a user. It functions in a manner that is similar to Benkler’s description of the equivalent Slashdot mechanism (explained previously). A Reddit thread can be organized by the viewer so that only comments over a certain upvote threshold are displayed. The Reddit “reddiquette” (community guidelines) page outlines some rules for how to use the upvote and downvote mechanisms here: <https://www.reddit.com/wiki/reddiquette> (accessed 3/24/2016).

⁴⁸⁹ Comment by user “Diverdn” on /r/misc. https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9khqia (accessed 1/30/2016).

perception that Tripathi was a suspect eventually prompted some to crow (in posts that now appear impossibly deluded) about how social media had scooped both the mainstream media and law enforcement. Hughes, the man who claimed that he heard scanner confirmation of Tripathi's suspecthood, implored "[j]ournalism students [to] take note: tonight, the best reporting was crowdsourced, digital and done by bystanders." On Reddit, those active on the forums congratulated one another for their savviness: "This is historic Internet sleuthing...Reddit solved the bombing [b]efore the Feds Solved the Bombing," wrote one.⁴⁹⁰

Such assessments turned out to be unwarranted, but this fact has probably obscured another dimension of the story — and one whose implications go beyond this one lamentable instance of a misinformation cascade. The discussion on the forums in question was actually far from unanimous, and a chorus of participants expressed concern about identifying the wrong person while the discussion was unfolding. In fact, the official guidelines for posting on /r/FindBostonBombers included the following command: "DO NOT POST PERSONAL INFORMATION [caps sic]." Some participants in the forum were adamant about this guideline. "LISTEN UP ALL YOU FUCKING IDIOTS... YOU CAN LITERALLY RUIN AN INNOCENT MAN'S LIFE WITH THIS!!!!!! [caps sic]" warned one post on April 17, the day that Zaimi and Barhoum were being vetted on the site.⁴⁹¹ The most upvoted comment on the /r/Boston thread titled "Is Missing Student Sunil Tripathi Marathon Bomber #2?" early on Friday

⁴⁹⁰ Lalit Kundani, "When the Tail Wags the Dog: Dangers of Crowdsourcing Justice."

⁴⁹¹ Abad-Santos, "Reddit and 4Chan are on the Boston Bomber Case."

morning (when the Tripathi rumor was in full swing) echoed this sentiment even as it cautiously celebrated the identification of Tripathi as a crowd victory:

I would, however, like to caution against people now concluding that we should all be internet detectives / vigilantes, etc...[t]here have been plenty of cases in the past (even the recent past) where online communities (reddit included) have gotten it wrong and caused someone innocent a lot of grief... So I hope people aren't patting themselves on the back *too* hard over this.⁴⁹²

It seems significant that this post gained so much traction during and immediately following the search for the bombers (it has since been closed to further comments).

Perhaps many of those participating in the forum were in fact cognizant of the potential for misidentification. In one sense this could be cause for pessimism: what if even a sympathetic user base and dedicated moderators were powerless to quell the cascade because of the architecture of the forum itself and the ease with which others could cherry pick the narrative they found most exciting and bolster it (there or elsewhere)?

At the same, the reflection that was on display on other threads following the investigation seemed to hold out some hope that what happened could ultimately reinforce more responsible information vetting norms. The poster above imploring participants to not be too sanguine later emended the post with the names of the real suspects, yet he or she also felt it important to leave up the original “for posterity” as a kind of archival reminder of what can go wrong in these endeavors.⁴⁹³ One who had

⁴⁹² Comment from user “honestbleeps” on subreddit /r/Boston. https://www.reddit.com/r/boston/comments/1cn9ga/is_missing_student_sunil_tripathi_marathon_bomber/c9ic3vo (accessed 1/31/2016).

⁴⁹³ https://www.reddit.com/r/boston/comments/1cn9ga/is_missing_student_sunil_tripathi_marathon_bomber/c9ic3vo (accessed 1/31/2016).

participated on /r/FindBostonBombers vowed that “we’ll learn from this,” and “the next time an investigation happens, we’ll be even more stringent in terms of what we accept and what we do not.” Another agreed: “Like every other bad event, we’ll learn from this. Be even more stringent in our efforts.”⁴⁹⁴ There was even some push to reopen /r/FindBostonBombers in anticipation that the media narrative of the investigation would veer toward caricature of a uniformly bloodthirsty mob if the efforts of those participating to keep Tripathi’s information off of the thread were hidden.⁴⁹⁵

In an interview with the *Atlantic Wire*, the main moderator for the forum, “Oops777,” indicated that he or she had indeed been simply overwhelmed by the rate at which the rumor about Tripathi had persisted and people were flouting the “no personal information” edict in order to advance that storyline. This moderator claimed that when tweets started appearing that Tripathi had been confirmed as a suspect on the police scanner, the claim “was posted so many times in /r/FindBostonBombers that [he] had to stay up the entire night deleting them.”⁴⁹⁶ Even more interestingly, Oops777 claims that attempts at moderation (and to simply enforce the rules of the particular subreddits) were spun by some as attempts at censorship: “The attitude within the subreddit also changed:

⁴⁹⁴ Comment from user hrishirc, How Close Were We To Finding the Boston Bombers?
https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9ktiws (accessed 1/31/2016).

⁴⁹⁵ User mebee99 wrote: “Now anyone can say anything they like about what happened... **PLEASE reopen the subreddit** - make it so that nobody can post, but allow people to be able to see it, and to be able to say hey, this did NOT happen and here is the proof.”
https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9lp0d1 (accessed 1/31/2016).

⁴⁹⁶ Alexander Abad-Santos, “Reddit’s ‘Find Boston Bombers’ Founder Says ‘It Was a Disaster’ but ‘Incredible’.” *The Atlantic Wire*, April 22 2013. <http://www.thewire.com/national/2013/04/reddit-find-boston-bombers-founder-interview/64455/> (accessed 1/31/2016).

all of the users turned against the mods, and there were multiple posts telling mods to stop censoring things, or as they called them at the time ‘facts.’”⁴⁹⁷ Such an attitude seems to ignore the entire purpose of moderators and community guidelines on a forum like Reddit, but it is nonetheless significant in suggesting that at least some segment of Reddit users sees any kind of content regulation as somehow antithetical to the spirit of the forum.

Whether supportive of moderation efforts or not, a common refrain among those reflecting on the Boston bombing investigation is that the institutional press needs to be far more skeptical of information posted on Reddit and social media in general. In fact, many lay the blame for the spread of the misidentifications on the press for failing to do even reasonable vetting of the information that was being shared on social networks. While self-serving in obvious ways, such an argument is hard to dismiss given the eagerness with which professional outlets repeated the rumors circulating online. One user attributed this eagerness to their desperation to scoop one another — or what he called the “First! mentality” of the news outlets.⁴⁹⁸ Another argued that the problem lay with the media treating Reddit like it was an organization: “The problem comes when an

⁴⁹⁷ Abad-Santos, “Reddit's 'Find Boston Bombers' Founder Says 'It Was a Disaster' but ‘Incredible’.”

⁴⁹⁸ Comment by user ApeManRobot, “How Close Were We To Finding the Boston Bombers?” https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9kdast (accessed 1/31/2016).

actual organization, like the news media, mistakes us for an entity like them, and take our speculation and run with them as accusations, statements, and investigations.”⁴⁹⁹

If voluntary investigation on social discussion platforms should not be expected to parallel the ethos or reliability of the professional press, can it serve any informational purpose consistent with previously cited exaltations of “peer production” and “the people formerly known as the audience?” Benkler’s largely celebratory analysis of peer production on Wikipedia and Slashdot is very much grounded in the ways that they produce *knowledge*. What if platforms like Reddit fall short of “knowledge” production — at least in circumstances as fraught as a bombing investigation? The answer may be that they still produce something slightly more modest. After excoriating those who promoted the Tripathi rumors, many were also willing to concede following the bombing investigation that the distributed attention of the users on a site like Reddit is in fact rather powerful in its ability to scrutinize details and make observations. The crowd in this sense can be harnessed as a kind of processor of raw material for the institutional arbiters (journalists, law enforcement, or whomever) with more direct responsibility for making sense of the narrative. One user framed the symbiosis this way: “If you want to help, think of yourself as a fresh new intern... You don't know shit, you can't do shit, but

⁴⁹⁹ This comment comes from a user who has since deleted his account, but the comment remains on the “How Close Were We To Finding the Boston Bombers?” thread. https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9kfc4ur (accessed 1/31/2016).

every pair of eyes on a photograph may see something that the others have missed, so be eyes, be ears, just don't be the fucking mouth.”⁵⁰⁰

This kind of symbiosis extends to the crowd’s ability to dig up information — if perhaps not to analyze it. The *New Yorker*, for instance, acknowledged in the aftermath that “[Reddit] is extremely effective at excavating digital trails, which appear to have been left behind by the suspects: an Amazon wish list, potential YouTube account and Twitter account for the suspects have emerged.” Thus, if there is an appropriate model to apply from Benkler’s celebration of peer production that captures the function of social platforms in these situations, it is perhaps not Wikipedia. It is the “NASA clickworkers” — a group of “public volunteers... [who] could mark craters on maps of Mars, classify craters that have already been marked, or search the Mars landscape for “honeycomb” terrain.” For Benkler, they represent how a “complex professional task that requires a number of highly trained individuals on full-time salaries can be reorganized so as to be performed by tens of thousands of volunteers in increments so minute that the tasks could be performed on a much lower budget.”⁵⁰¹ The key, though, is that the clickworkers bore no further responsibility (and harbored no further ambition) outside of the marking; they simply performed the rote task based on some guidelines for the layman participant offered by NASA. In the final analysis, NASA has an institutional reputation that it must maintain and thus an incentive to not misuse the crowd-sourced work of the clickworkers.

⁵⁰⁰ Comment from user “LOOKS_LIKE_A_PENIS,” “How Close Were We To Finding the Boston Bombers?,” /r/Misc. https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9kledp (accessed 1/31/2016).

⁵⁰¹ Benkler, *Wealth of Networks* 69.

While many of the news outlets who lifted storylines wholesale from social media during the Boston bombing investigation may have undermined their own reputations in this regard, it is possible that they did so merely because they drew from social media in a suboptimal way — they misappropriated the crowd’s processing of raw material — not because they drew from it in the first place.

Conclusion:

What do these two misidentifications say about how participants on internet discussion forums should approach their own decisions about the ethics of commenting and sharing other commentary on sensitive subjects? The participants on Reddit who vilified the moderators as “censors” during the peak of the Tripathi rumor might do well to reconsider such views given the ways in which the sheer breadth of the forum and the reputation mechanism it employs make it unlikely for users to enforce the relevant community speech guidelines without moderation. Fortunately, it appears from much of the post-mortem discussion of the episode that many who participated (and observed) were willing to reflect on what occurred and acknowledge these shortcomings. They may not have the same kind of institutional experience that prompts someone like *New Haven Advocate* editor Paul Bass to approach such situations conservatively, but there is at least the possibility that the collective acknowledgements of the misinformation problems that can arise in situations like this will cause some to think twice before retweeting or upvoting dubious “scoops” in the future.

Further, it is true that someone like Mattioli (the high school classmate of Tripathi) could easily have kept her speculation about the identity of “suspect two” to a relatively private circle of those who actually knew Tripathi. At the same time, it might be asking a lot for those who discuss sensational current events stories to monitor and second-guess their speculation to such a degree that they eliminate the possibility that observers will draw inappropriate conclusions and that these conclusions will (for a time) spread uncorrected. Being self-critical and receptive to the correction of one’s own beliefs is of course a pre-requisite of rationality. At the same time, the marketplace of ideas requires that speakers have enough leeway to put forward their beliefs and risk them being publicly declared wrong rather than having to stifle their commentary because the mere possibility of being wrong exists. The Supreme Court has recognized that false statements made in the midst of pursuing “hot news” are less likely to constitute actual malice (as foreknowledge or strong suspicion of their falsity is significantly less likely) and therefore harder to prove libelous; might we extend the same benefit of the doubt to those tweeting their gut assessments of photographic resemblances as well?⁵⁰²

Those who view misinformation cascades like those involving Tripathi and the “bag men” with indignation and sanctimony are certainly justified to some extent given the injury that each suffered and the occasional hubris of some of the participants. Yet the more strident critics who simply dismiss the idea of “crowd investigation” as a self-

⁵⁰² In *Associated Press v. Walker* (1969), the Court declined to hold the AP liable for defamation because Walker could not prove that the statements in question had been made with actual malice (or even negligence) given the “necessity for rapid dissemination” of the story, which involved a reporter relaying information about an ongoing protest at the University of Mississippi. *AP v. Walker*, 388 U.S. 159.

evidently misguided proposition might also consider what they are truly asking for. Is it better to live in a world where our speech norms and platform parameters (if not our laws) dictate that there should be *no* public deliberation over these matters? Where moderation is so strict that, say, a user would be temporarily banned from Reddit for breaking the rules of a particular forum? Some commentators or users themselves might argue for this; the point here is just to acknowledge that it is indeed the kind of alternative that would be required to truly mitigate the possibility that rumor cascades will occur.⁵⁰³

The experience on /r/FindBostonBombers seems to demonstrate that even a forum that nominally tries to set reasonable boundaries for acceptable speculation (e.g. the “no personal information” policy) cannot fully eliminate the kind of speech it seeks to limit. In this sense it presents a problem like that posed by speech on review sites or by the accessibility of popular blogging platforms: in order to eliminate the possibility of antisocial or even nefarious use, they would have to not be usable at all. Despite the potential for reputational and psychological harm in a case of viral misidentification, it would ultimately be a shame to ban conversation about, say, the investigation into a heinous and public crime outright. Such discussion still facilitates the collective reckoning with such events and the opportunity for exposure to the diversity of perspectives that can come from interactions across social networks (i.e. between relative

⁵⁰³ As one reddit user commented in the post-mortem on the Boston bombing investigation, for instance, “[t]he only solution is admins giving out week-long IP bans to anything even remotely dox-like [resembling a release of personal information]. ‘Reflecting’ on it is useless.” Comment by user Clifford_Banes, “How Close Were We To Finding the Boston Bombers?,” /r/Misc. https://www.reddit.com/r/misc/comments/1cuj7p/how_close_were_we_to_finding_the_boston_bombers/c9kftpu (accessed 1/31/2016).

strangers) on social media. Many such perspectives, for instance, in fact counseled against the kind of ugly profiling and knee-jerk reactions in which some indulged following the bombing.

Further, as the “NASA clickworkers” analogy suggests, there is a kind of distributed division of labor that such forums can provide to complement professional news coverage and official investigations. Though hardly heroic, much of the investigation into the “bag men” arguably mitigated the damage done by a professional news outlet. Restricting some of one’s sensitive speculations to private channels thus cannot be the whole answer. There must also be some acknowledgement of the real (though not perfect) collective commitment to evolving more nuanced speech norms on public platforms, the countervailing corrective powers of widespread public scrutiny, and the complicity of the professional media in amplifying misinformation as well.

Conclusion: An Exception That Proves the Rule

One genre of content perhaps has been conspicuously absent from the dissertation given its ubiquity in the news. This is so-called “revenge porn,” or nude images initially shared in confidence with a partner that are then non-consensually circulated more widely or posted to a public website for “revenge” when the relationship presumably has gone sour. Such websites often include identifying contact information as well, and unsurprisingly have been reported to cause both humiliating discussion and outright harassment of the victims. Further, some of the highest profile cases have contained an extortionate dimension. The setup is usually that a bogus legal “takedown service” is advertised on the main site that promises to get the images removed for a fee, but it turns out that this is usually run by the same entity as the revenge porn site itself.⁵⁰⁴

The controversy over revenge porn serves as a final topic that brings together the threads of analysis that the project has attempted to combine. Revenge porn captures much of the kind of reputational panic that has suffused the cases covered previously and the overall discourse of reputation management. The threat of a revenge porn posting implicates the kind of paranoia about the accidental dissemination of unflattering or embarrassing content that has evolved alongside the explosion of mobile technology and interactive speech platforms. This possibility is made all the more threatening because of the anticipated social reaction, as the assumption can only be that a horde of bloodthirsty

⁵⁰⁴ For a thorough investigation of this issue see generally Adam Steinbaugh, “Call a Spade a Spade: Mugshot Sites and Revenge Porn Sites are Extortion.” <http://adamsteinbaugh.com/2013/10/07/call-a-spade-a-spade-mugshot-sites-and-revenge-porn-sites-are-extortion/> (accessed 3/9/2016).

trolls will be waiting to deride and harass us if we were to “get posted” on a revenge porn website.

This panic thus stems from both generational self-awareness and, increasingly, more pervasive cultural acknowledgement. The end of 2014, *Slate*'s Amanda Marcotte wrote, marked “the year people started caring about online harassment” after that year's much-publicized celebrity photo hack.⁵⁰⁵ The hack and its exposure of the private intimate photographs of numerous celebrities was still shocking even in an era of ubiquitous celebrity sex tapes and hand-wringing over teen sexting. When Jennifer Lawrence has to contend with the same threats as the average obscure iCloud user, the issue is bound to precipitate a more widespread cultural reckoning.

Revenge porn has inspired a number of reform efforts. Many of these reform efforts seek to either pass new laws or strengthen the enforcement of existing laws as they apply to situations involving digital technology. Other activist endeavors such as the Cyber Civil Rights Initiative are also social in nature, focusing on raising awareness about the harm that can be done by revenge porn and on providing support for victims. One of the most prominent advocates of legal reform, Professor Mary Anne Franks, argues that statutes expressly criminalizing revenge porn in itself are necessary because of blind spots in current law. Specifically, “federal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual pornography is

⁵⁰⁵ Amanda Marcotte, “The Year People Started Caring About Online Harassment.” *Slate* 12/23/2014. http://www.slate.com/blogs/xx_factor/2014/12/23/online_harassment_2014_was_the_year_of_gamergate_revenge_porn_laws_and_the.html (accessed 3/11/2016).

part of a larger pattern of conduct intended to distress or harm the victim.”⁵⁰⁶ The narrow legal definition of harassment and stalking therefore might not encompass revenge porn when “many purveyors of non-consensual pornography [are] motivated by a desire for money or notoriety” rather than explicit intimidation per se. Such laws of course also focus on the sharing within the context of a broader course of conduct rather than treating the sharing itself as injurious.

Advocates of new statutes that address revenge porn sharing directly must of course contend with the challenge of essentially fashioning a content-based exception to First Amendment protection that has never been recognized by the Supreme Court. As opponents point out, the Court explicitly rejected the application of a simple ad hoc balancing test concerning the relative value and harm of speech in the recent *United States v. Stevens* case. According to Chief Justice Roberts, “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”⁵⁰⁷ Any argument that a *criminal* statute is constitutional because the expression it prohibits is simply not very valuable in a particular case is not likely to pass muster. As Roberts explained further in *Stevens*, “[w]hen we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”⁵⁰⁸ The Court therefore would have to be persuaded to add essentially a whole category of

⁵⁰⁶ Mary Anne Franks, “Combating Non-Consensual Pornography: A Working Paper” (September 7, 2014). Available at SSRN: <http://ssrn.com/abstract=2336537>.

⁵⁰⁷ *U.S. v. Stevens*, 130 S.Ct. 1577 (2010).

⁵⁰⁸ *U.S. v. Stevens*, 130 S.Ct. 1577 (2010).

punishable speech to its traditional categories like incitement and obscenity. The Court might well still reject such an approach in principle.

When we consider the definition of revenge porn and how different it is from other types of expression, however, then it actually does not seem particularly controversial to argue for another categorical exception for such “nonconsensual pornography.” Even libertarian icon Eugene Volokh has cautiously embraced the idea that “courts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.”⁵⁰⁹ If any category of expression is a good candidate for such treatment, in fact, revenge porn would appear to be it. It seems fairly easy to define narrowly enough to not cause the kind of vagueness issues that plague any effort to consistently punish something like “offensive” or even “racist” speech. It also seems to resemble a kind of conduct in itself as much as it does “speech,” as it might be argued that the inherent purpose of the dissemination is an assaultive gesture rather than an attempt to communicate ideas.⁵¹⁰

Is there some expressive value to the non-consensual circulation of nude images?

One could argue that the dissemination of nude images is intended to express some characterization of the subject of the photographs (say, the judgment that he or she is

⁵⁰⁹ Eugene Volokh, “Florida’s ‘Revenge Porn’ Law.” *The Volokh Conspiracy* 4/10/2013. <http://volokh.com/2013/04/10/florida-revenge-porn-bill/> (accessed 3/9/2016).

⁵¹⁰ The exception for obscenity, for instance, can be defended on the grounds that anything appealing to the “prurient interest” (one of the prongs of the test from *Miller v. California*) does not really stimulate the contemplation of ideas as we expect “speech” to do; it merely excites the genitals. Fighting words, likewise, was a category originally distinguished in the *Chaplinsky* case because they were thought to provoke immediate physical retaliation rather than contemplation and rebuttal via speech.

sexually promiscuous) and even perhaps to provoke a debate about these characterizations. Further, the sharing of the photographs could represent a kind of venting or bragging about one's relationship (or former relationship) rather than a direct attempt to inflict psychological injury on the subject of the photograph. In such cases, the reasonable speaker might indeed have trouble predicting whether his or her speech would fall under a definition like Florida's, which criminalizes the transmission of such photos to a website "for the purpose of harassing the depicted person or causing others to harass the depicted person." Further, one could simply argue that the pictures have an artistic value. As one opponent of revenge porn statutes phrases it, "the nonconsensual nature of the publication may imbue an image with artistic value that it otherwise wouldn't have, just as an *objet trouvé* has artistic value that was unapparent to its discarder."⁵¹¹ The Penn State fraternity brothers whose revenge porn ring was exposed in 2015 drew on a distinctly postmodern version of this logic, claiming that the photos were merely "satire"

⁵¹¹ Mark W. Bennett, "Are Statutes Criminalizing Revenge Porn Constitutional?" <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional/> (accessed 3/9/2016).

— essentially part of a jocular, self-referential *imitation* of the stereotypical excesses of fraternity culture rather than simply an indulgence in them.⁵¹²

But these exceptions and objections apply poorly when one considers what revenge porn disseminators and the websites that host the pictures do in most cases. Some seedy message board dedicated to guys swapping “sext” pictures and complaining about their relationships could theoretically have such a function. The obsession on the most prominent revenge porn sites with *identifying* the woman in the photograph and directing negative attention toward her indicates a much greater preoccupation with affecting *her* rather than conducting some kind of fraternal gripe session.⁵¹³ Additionally, it is difficult not to imagine that the sharing of the photograph itself constitutes a kind of hostile gesture. The goal is likely not to proffer it as evidence to illustrate some argument about the circulator’s significant other or to stimulate the aesthetic sensibilities of the

⁵¹² One of the brothers explained that “...it was a satirical group. It’s like, there’s literally sites like that that millions of people access, whether it’s totalfratmove.com or any of the other thousands of sites that post, you know, pictures of girls and post funny text conversations and Snapchat stories and things like that...[t]here’s a certain stereotypical Greek life culture and, as you see in movies, people try to live up to that and people try to kind of incorporate those elements.”

Journalist Katie McDonough interpreted these comments to indicate the following: “...harassing and degrading women has taken on a bizarrely self-referential quality in the Internet era. Now, acts of entitlement and sexual aggression are framed as postmodern expressions (critiques, even!) of white hypermasculinity.”

Katie McDonough, “If you’re shocked by this Penn State frat’s nude photo ring, you’re not paying attention.” *Salon* 3/19/2015. http://www.salon.com/2015/03/19/it_wasnt_malicious_if_youre_shocked_by_this_penn_state_frats_nude_photo_ring_youre_not_paying_attention/ (accessed 3/11/2016).

⁵¹³ According to the Cyber Civil Rights Initiative, fully half of revenge porn posts include identifying *social network* information (i.e. not just names and a likely incorrect address pulled from a cursory internet search). http://www.cybercivilrights.org/end_revenge_porn_infographic (accessed 3/8/2016).

viewer; it is to cause the subject of the photograph discomfort from the knowledge that it is circulating at all.

What about when the person circulating the photograph does want to use it as a kind of evidence about an issue of public importance? As nearly every anti-regulation perspective eagerly points out, the fact that someone is, say, tweeting odd pictures of his genitals to young women could itself represent newsworthy information if that person is publicly noteworthy in some way. If the nonconsensual dissemination of such images were punishable in itself, this argument goes, we would never have been privy to “Weinergate.”⁵¹⁴ For at least these reasons, therefore, one might say that revenge porn is hardly the same as other categories that are regulable in part because they stray too close to conduct.

Dealing with such exceptions in legislation might, however, prove fairly simple. As Franks has argued, any revenge porn law must have “clear exceptions for commercial images, reporting, investigation, and prosecution of unlawful conduct, or images relating to the public interest.” This is because “without such exceptions, the law is vulnerable to invalidation on First Amendment grounds.” Volokh argues in a similar vein that there are possible exceptional cases where material would appear to be covered by the statute yet still “contribute to public debate,” but these are “likely to be so rare that the law’s

⁵¹⁴ See e.g. the claim by the Harvard Digital Media Law Project director Jeff Hermes that “revenge porn laws could have kept former New York Rep. Anthony Weiner’s (D) nude selfies legally suppressed.” cited in Cathy Reizenwitz, “Revenge Porn Is Awful, But The Law Against It Is Worse.” *Talking Points Memo* 10/16/2013. <http://talkingpointsmemo.com/caffe/revenge-porn-is-awful-but-the-law-against-it-is-worse> (accessed 3/12/2016).

coverage of them wouldn't make it 'substantially' overbroad" (and thus not constitutionally defective on its face — only "as applied" in these very rare instances).⁵¹⁵

Laws banning revenge porn might — if drawn narrowly enough — thus pass constitutional muster. At the same time, this does not guarantee their effectiveness. Those already on the books have not really factored into prosecutions of revenge porn site proprietors — most notably that of seminal "kingpin" figures Hunter Moore and Craig Brittain or the more recent prosecution of San Diego residents Eric Chanson and Kevin Bollaert for their site "You Got Posted." As Mike Masnick of TechDirt pointed out, "even though various states have rushed to pass anti-revenge porn laws, none of the cases [of high profile revenge porn prosecutions] above relied on such laws. Rather they used existing laws around unauthorized computer hacking and extortion to bring those individuals and sites down."⁵¹⁶ With this in mind, it is not overly cynical to think of those who have belatedly boarded the bandwagon to "do something" about revenge porn as really engaging in a kind of empty public relations maneuver. Senator Al Franken, for instance, has for "reasons unknown...suddenly decided that revenge porn is a big issue that he needs to take on."⁵¹⁷ But this kind of posturing is ultimately possibly unnecessary: "the good thing is that all of this legal activity [based on existing criminal and

⁵¹⁵ Volokh, "Florida's 'Revenge Porn' Bill."

⁵¹⁶ Mike Masnick, "Now That Basically All Revenge Porn Has Moved Out Of The US, Al Franken Says FBI Should Do Something." <https://www.techdirt.com/articles/20150404/06563730546/now-that-basically-all-revenge-porn-has-moved-out-us-al-franken-says-fbi-should-do-something.shtml> (accessed 3/10/2016).

⁵¹⁷ Masnick, "Al Franken."

administrative law] and platform policy changes *have* worked in terms of making it clear that revenge porn is not a worthwhile pursuit.”⁵¹⁸

What this brief tour through the debate over revenge porn laws is intended to demonstrate in the context of the overall project is that while revenge porn has captured many of the headlines in this area, it clearly just the tip of the iceberg of concern over emergent genres of reputationally consequent speech. Further, it stands out because of its relative lack of polysemy as “speech.” While the same critical speech can sound like a scourge when framed as “bullying” and an important democratic contribution when called “muckraking,” one struggles to think of similar rhetorical substitutions with “non-consensual pornography.” The category does, however, still implicate the discursive question of how “seriously” *any* ribald or provocative content on the web is likely to be taken. Some defend revenge porn on the grounds that it is “just satire,” and while this seems perverse given the content and the power dynamics involved, it echoes those claims that anything on blogs is “just opinion” or that assertions of guilt on Reddit are “not meant to be news.” It implies an interpretive orientation that is somewhat pervasive in internet discourse. This orientation could — paradoxically — ameliorate the kind of reputational gravity of some embarrassing or demeaning content that might not otherwise be actionable. On the other hand, it probably does not do much to assuage the psychological insecurity or anticipation of physical danger that victims of revenge porn might rightfully feel.

⁵¹⁸ Masnick, “AI Franken.”

Nonetheless, the majority of conflicts around reputational information simply cannot be neatly separated into perpetrators and victims as in the high profile cases of revenge porn. The roles can be much more fluid, and in fact, many situations are only vexing in the first place because the speakers occupy some more liminal area in between righteous whistleblower (who would deserve obvious legal and cultural deference) and vitriolic blowhard or vengeful, threatening sociopath (whose “speech” might be less problematically regulated and condemned). It is, frankly, much more difficult to judge the net contributions and implications of a speaker like the education blogger Maura Larkins, the Ripoff Report critic of Megan Blockowicz, or the commenters on the Boston Bombing Reddit forum than someone circulating revenge porn. It is likewise difficult to see someone who has been spoken of offensively or critically for her professional activities as a victim in the same sense as a woman whose confidentially shared nude image has been circulated for revenge.⁵¹⁹ Any discrete legal remedies for revenge porn are thus important but will be limited in their overall implications because content-based solutions for revenge porn (if they are actually narrow enough to not contain fatal First Amendment flaws) do not really apply to any other situations. Novel legal remedies

⁵¹⁹ There is at least one prominent case of conflict over revenge porn in which the supposed perpetrator claims that he had nothing to do with the dissemination of the images. An outspoken opponent (and victim) of revenge porn named Holly Jacobs claims that her ex-boyfriend, Ryan Seay, was the perpetrator. Seay denies it; the ensuing legal investigation did not prove that he was involved; and he insists that he has been unfairly maligned for something that he himself finds abhorrent. This example is invoked here because it seems important to clarify that as in some of the other kinds of reputational disputes covered in the project, even revenge porn cases can perhaps produce their own problematic consequences for those accused. Regardless, this project makes no endorsement of any particular account of Seay’s involvement or lack thereof.

See <http://www.miaminewtimes.com/2013-10-17/news/revenge-porn-holly-jacobs-ryan-seay/> (accessed 3/9/2016).

might be both justified and palatable in ways that they would not be in other speech contexts.

Even so, revenge porn still forces us to confront the actual harm from a pragmatic perspective in a manner similar to the approach in the case studies of this project. In practice, this first means questioning the ways in which intermediaries could be made to respond to the kinds of market forces embodied by the campaigns against Ripoff Report in chapter 5 or Reputation Defender's efforts to shift the narrative around Sue Scheff in chapter 6. They must consider whether they truly want to allow this kind of material to flourish on their platforms given the optics involved and whether they can police such content without compromising the core design principles of their platforms.

Twitter and Reddit, for instance, have already banned the sharing of revenge porn images as a matter of site policy (though some individual subreddits had bans in their forum rules before the official change was made).⁵²⁰ Further, as lawyer Mitchell Matorin has argued, the real goal should be convincing Google that the sites are worth demoting in search results. As was often the case in the preceding case studies, leveraging search is perhaps the most direct remedy to dealing with revenge porn as well, because "if a link is

⁵²⁰ The Twitter policy bans "intimate photos or videos that were taken or distributed without the subject's consent," and while posters may appeal, the punishment is serious if the photo is found to violate Twitter's policy: "if Twitter employees determine a photo does violate the new rules, the firm will not only hide the post from public view, but also lock the account of the person who posted it." This is supposedly "unlike Reddit policies," which do not formally sanction the poster in any way.

See <http://www.washingtonpost.com/blogs/the-switch/wp/2015/03/11/twitter-updates-its-rules-to-specifically-ban-revenge-porn/> (accessed 3/10/2016).

buried, it's dead."⁵²¹ Because of the cohesiveness of "revenge porn" as a category, such efforts by intermediaries probably do not undermine the marketplace of ideas for the same reason that revenge porn statutes are probably constitutional. We should, however, still question whether the same can be said of all efforts to pressure intermediaries to cull speech that undermines "reputation" in the more nebulous sense that the term is sometimes invoked.

At the same time, a lesson of some of the preceding chapters would seem to be that we should still expect neither targeted legal sanction nor even consensus among popular platforms to completely settle the matter. Some people will want to share these images; some platforms (say those hosted overseas)⁵²² will still allow the most committed to do so. As Franks herself acknowledges (in the context of civil litigation), "even a successful lawsuit does not guarantee the removal of the images, which is most victims' top priority."⁵²³ This is, again, partially an impetus for the creation of tailored criminal statutes. At the same time, it is reminiscent of the overall problem with content perceived to harm reputation: once it exists, how can its harm truly be ameliorated?

In this vein, there is a dimension to the harm caused by revenge porn that appears somewhat inherently beyond regulation. Franks likens the knowledge that people are viewing one's non-consensually shared image to the testimony a child pornography

⁵²¹ Kelsey McKinney, "Jennifer Lawrence Isn't the Only Victim of Involuntary Porn," *Vox.com* 9/1/2014. <http://www.vox.com/2014/6/25/5841510/its-nearly-impossible-to-get-revenge-porn-off-the-internet> (accessed 3/9/2016).

⁵²² Masnick argues in the previously cited piece that "basically all revenge porn has moved out of the US."

⁵²³ Franks, "Non-Consensual Pornography."

victim who stated in a *New York Times* op-ed that knowing that someone “is getting some kind of sick enjoyment from [looking at] it [is] like I am being abused over and over and over again.” This is a rather gut-wrenching thought and reinforces the need to get the images off of the web to whatever extent possible. Yet there also has to be some way to account for the fact that people *will* evade these regulations and that these kinds of unauthorized thoughts (whether about nude images being circulated or about inflammatory statements) could never be fully eradicated by any law. We therefore have to focus on norms and proactive counterspeech responses as well in order to address the problem in any kind of comprehensive way.

Even new laws are partially justified by their symbolic denunciation of this type of conduct in addition to their punitive effects. According to attorney Mary Adkins, symbolic rejection “is in fact “exactly why we need these laws—if, for nothing else, as a start to signaling what society values.”⁵²⁴ The proprietors themselves might also listen to public denunciations or personal appeals. In one rather amazing recent story, journalist Kevin Roose reported that the purveyor of the website “Complaints Bureau” voluntarily decided to ban the revenge porn postings from his site (it hosted these and other content reminiscent of that on gripe sites) after an interview with Roose and a personal appeal from a revenge porn victim.⁵²⁵

⁵²⁴ Mary Adkins, “The Revenge Porn of #Twitterpurge.” *Slate* 7/21/2014. http://www.slate.com/articles/double_x/doublex/2014/07/_twitterpurge_is_revenge_porn_we_need_laws_to_stop_the_non_consensual_posting.html (accessed 3/9/2016).

⁵²⁵ Kevin Roose, “At home with a revenge porn mogul.” *Fusion* 1/12/2016. <http://fusion.net/video/252712/complaints-bureau-revenge-porn-mogul/> (accessed 3/10/2016).

Perhaps most importantly, a holistic analytic approach requires that we acknowledge the cultural dimension of a phenomenon like revenge porn. It might indeed be extremely unsettling to imagine someone getting off to a non-consensually shared image, but lessening the stigma attached to this kind of victimhood might help to ameliorate some of the accompanying social feelings like shame and humiliation. Simply put, it reflects much about the culture in which such images circulate that the non-consensual dissemination of a nude image previously shared in confidence with a partner would implicate issues of “reputation” at all. Why does the fact that a woman was taken advantage of in this manner have any bearing on her “reputation” in the first place? What kind of twisted sexist double standard justifies the simultaneous coveting of such images within a relationship and the denunciation of their subject *when they have only been shared further by the person for whom they were exclusively intended?*

In some quarters of commentary, the initial sharing of the image is in fact treated as an equivalent transgression to the nonconsensual dissemination. Scott Greenfield, the editor of the legal blog SimpleJustice, for instance, put it this way: “Just as we forgive someone who might have been foolish enough to send out a naked photo of his or herself, why are we willing to destroy the lives [sic] of someone who acted, in a moment of panic, equally as foolish?”⁵²⁶ A comment on an *Ars Technica* story about the aforementioned Holly Jacobs lawsuit framed the issue in similar terms:

I've got a crazy idea. How about, if you don't want somebody posting "compromising photos" of you on the internet, you just...don't give them/

⁵²⁶ Eric Larson, “It's Still Easy to Get Away With Revenge Porn.” *Mashable* 10/21/2013. <http://mashable.com/2013/10/21/revenge-porn/> (accessed 3/10/2016).

let them take said photos in the first place? But hey, who needs personal responsibility when you've got lawyers, right.⁵²⁷

These sentiments in a way go beyond ordinary victim blaming. One might well caution one's children to be careful about whom they allow to possess intimate photographs, but the logic of these comments is that the very act of doing so itself *deserves* the kind of punishment manifest in revenge porn and that the use of law for redress of the harm caused by the further dissemination is frivolous. Such a sentiment might have prevailed in a different socio-technical climate as well, but it is also redolent of the peculiarly contemporary mandate to exercise excessive caution given the prevailing state of reputational precariousness. Even something which should reflect worse on the *disseminator* than on the subject is processed as an abject reputational threat.

A version of this emphasis on the reputational damage of revenge porn was even embraced in a recent Texas civil case by a judge who granted a revenge porn victim's claim of invasion of privacy and intentional infliction of emotional distress. As she wrote in the decision, "the nature of the invasions of privacy here are particularly disturbing and shocking and should give rise to an inference of mental anguish resulting from the threats to Nadia's reputation." What this implies, of course, is that the victim was emotionally distressed because the circulation of the photographs represented "threats to her reputation" — not because of the fear of being stalked or the visceral discomfort of

⁵²⁷ Timothy B. Lee, "Revenge porn" suit targets generic porn sites, Web hosts." *Ars Technica* 5/1/2013. <http://arstechnica.com/tech-policy/2013/05/revenge-porn-suit-targets-generic-porn-sites-web-hosts/?comments=1> (accessed 3/9/2016).

having lots of people able view something intimate that she did not choose to share with them.⁵²⁸

What Greenfield probably means by “destroying the li[fe] of someone...” is that indulging in the familiar kind of scorched earth backlash against someone perceived to defend or participate in unpopular expression (like revenge porn) is also counterproductive as a speech norm. It might send a signal to those observing that such conduct is not tolerated in a certain (hopefully prominent) segment of society, but it still more or less scapegoats an individual for a more widespread (or in some cases tangential) problem. Worse, it risks perpetuating the kind of mentality in which disagreements over social media must escalate into clan warfare because those involved anticipate such an overwhelming reputational fallout or deluge of vitriol from opponents of their position. Rephrased this way, then, Greenfield’s sentiment reinforces the wisdom of resisting the kind of reactionary ethos demonstrated by the likes of Sue Scheff and Michael Roberts. A similar sense of self-restraint might just as well be counseled for those who would publicize poorly sourced information for crime scoops or the thousands of people who flood Yelp pages with invective for some perceived transgression. The “reputational imperative” is a staple of the socio-technical environment of interactive web platforms. It is therefore important to both try to resist its most hysterical formulations as well as remain mindful of the effects that one’s speech might have.

⁵²⁸ “Appeals Court Partially Upholds Revenge Porn Verdict.” <http://www.texaslawyer.com/id=1202747770589/Appeals-Court-Partially-Upholds-Revenge-Porn-Verdict?mcode=1202615604418&slreturn=20160025191206> (accessed 3/10/2016).

Given this cultural context, it is nonetheless not surprising that the purveyors of likely extortionate revenge porn websites themselves would appeal to notions of a specifically *reputational* (rather than emotional or physical) vulnerability in pitching their “takedown services.” The aforementioned website “You Got Posted” was accompanied by links to a website for a fictitious “takedown lawyer” who would remove the photos for a fee (it was of course later shown that this was simply the same proprietors of the main site).⁵²⁹ The website name? “Change My Reputation.” The act of non-consensually disseminating one of these photographs should be actionable. If we refuse to corroborate the idea that there is something reputationally compromising about being a victim of such dissemination, though, then we can also remove one component of the threat at a deeper level.

In doing so, we would also be acknowledging the insidious kind of discursive substitution that pervades the cultural conversation about reputational harm and free speech. The concept of reputation is used as a placeholder for a nebulous set of dignitary, material, and emotional harms that critical speech is thought to cause. Such harms are not illusory, but the remedies are different depending on which is foregrounded. At bottom, these “reputational” concerns express anxiety about controlling a novel kind of mediated personal image. This is not an outlandish concern; at the same time, there is simply a limit to the amount of control that any person can and should exert over others’ perceptions.

⁵²⁹ Lawyer Adam Steinbaugh’s blog addressed the similarities here: <http://adamsteinbaugh.com/2012/12/27/involuntary-porn-site-changemyreputation-com-yougotposted-sca/> (accessed 3/11/2016).

Most importantly, the conflation of these meanings of “reputation” can also empower those who would game both normative and legal systems of speech regulation for mercenary purposes, claiming the righteous entitlement to remedies for “defamation” or even “cyberbullying” when the speech at issue is merely unflattering or fleetingly inflammatory. If nothing else, hopefully our future discussions of the effects of speech over interactive platforms can begin to more adequately distinguish these concerns. Overall, the goal of the project has simply been to demonstrate that too much sensitivity to the panic that surrounds novel genres of speech on the web can easily empower opportunists who ultimately would abuse mandates to protect a more capacious understanding of “reputation” than American tort law has ever truly embraced.

In this vein, it is productive to conclude with a brief self-reflexive analysis. If and when some of the protagonists in this project — Michael Roberts, Darren Meade, Ed Magedson, Janice Duffy, Sue Scheff, Crystal Cox, Maura Larkins, Kami Mattioli, and even perhaps some of the less controversial reputation management professionals discussed — become aware of what is written, they might retaliate. This is an unpleasant prospect, but it is in some sense a fundamental risk assumed when one writes publicly about contemporary phenomena. If they fabricate factual allegations or insinuate unseemly facts packaged as opinions, then the problem will clearly be “reputational” and tort litigation might even be appropriate. It might at least be necessary to rebut some statements in a public forum and work to counter the position of critical speech in search results for “Ben Medeiros.” Such results may indeed be unwelcome; the desire to manage

them will not be tantamount to an entitlement to be free of them. Most likely, moreover, the problem will be dealing with the psychological discomfort inherent in being the target of any person's aggression. It will be crucial in any case to distinguish criticism of ideas and ad hominem mudslinging — categories to which this author could not object without displaying colossal hypocrisy — from statements that might cause undue reputational damage.

To some degree, then, the prevailing free speech ethos that has evolved with the interactive web holds that participation in the marketplace of ideas simply requires one to possess some measure of fortitude — a “thick skin” colloquially. With this as a prerequisite, hopefully what is outlined above has correspondingly established that there is always a multifaceted framework in existence for addressing the concrete *reputational* consequences of some such conflict. Law is not impotent, but it is not the whole solution. Emphasizing “self-help” in a time when the term often resonates most loudly as a neoliberal euphemism for privatization and the decline of the welfare state might seem suspect. Hopefully the analysis here has also demonstrated that “self-help” has multiple registers when invoked in the socio-legal discourse regarding reputation. If speech platforms like consumer review sites or Reddit are going to exist at all, then we must acknowledge a limit to the protection that law can provide before it suppresses discussion and empowers censors. No framework that relies on the coercive power of the state alone could completely obviate all potential for harm even if it tried.

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