Are Trump’s Attacks on the Media Adversely Affecting Public Opinion?

BY LEN NIEHOFF

Both during the election cycle and as president of the United States, Donald Trump has enthusiastically and aggressively attacked the media. On Twitter, in speeches, and at rallies he has repeatedly deployed his favorite “f words” against mainstream broadcast, print, and online news sources: “fake,” “fraudulent,” “failing,” and (phonetically) “phony.” Some attacks have been personal to individual journalists, some have been more institutionally focused, and some have been made in contexts that appeared to create physical risk to reporters who were present. But whatever the variation in flavors, the frequency of the attacks has remained constant. Indeed, Trump has devoted more tweets to attacking the news media than he has to job creation, one of the centerpieces of his campaign platform.

Words have consequences, particularly when they come from the leader of the free world. One consequence has been an international expression of concern over whether the United States has abdicated its leadership role with respect to freedom of the press and whether this is fueling antimedia sentiment and violence around the world. The United Nations high commissioner for human rights has described this shift as “a stunning turnaround.”

These attacks on the media, and their potential consequences, raise important questions for purposes of domestic media law. Have the president’s statements had a negative effect on how U.S. citizens view the media? If so, then how significant is the effect? Will that effect creep into legal proceedings and threaten to compromise their fairness? Will his strident and incessant attacks have an impact on how juries think about media defendants—perhaps even on how judges and legislatures do so?

We obviously cannot answer these questions with any certainty—and perhaps we never will. Consider, after all, the process we would need to follow: First, we would need to agree upon the kind of evidence that reliably measures public viewpoints about the media. Second, we would need to agree upon the kind of evidence that reliably suggests a material change in those viewpoints. Third, to avoid blundering into the sorts of errors that post hoc, ergo propter hoc reasoning often yields, we would need to agree upon the kind of evidence that reliably supports an inference that his remarks caused those changes. Third, to avoid blundering into the sorts of errors that post hoc, ergo propter hoc reasoning often yields, we would need to agree upon the kind of evidence that reliably supports an inference that his remarks caused those changes. And, finally, we would need to agree upon the kind of evidence that reliably shows his criticisms are having an unfairly

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The Founding Fathers Employed “Fake News”

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This summer, President Trump declared to the world that six well- respected American news organizations cannot be trusted, tweeting that CNN, NBC, CBS, ABC, the “failing New York Times,” and the Washington Post “are all fake news.” In October, Trump escalated his attack on news media when he tweeted: “Why isn’t the Senate Intel Committee looking into the Fake News Networks in OUR country to see why so much of our news is just made up—FAKE!” If his goal of undermining the mainstream news media was unclear, Trump left no doubt with his one-two punches targeting television network news. He first tweeted: “With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!” And, responding to criticism of his attack on NBC, he refined his position, tweeting: “Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!”

Not only has Trump decried legitimate news reports as fake, he also has been the author and disseminator of misinformation. His statements of “alternative facts” have been a hallmark of his presidency, with the Washington Post, among other organizations, maintaining the website Fact Checker solely to track Trump’s false and misleading statements. The site claims that, as of the beginning of October, 263 days into his presidency, Trump has made more than 1,300 false or misleading statements.

Trump says the media lied about the size of the crowd at his inauguration. (The National Park Service confirmed that fewer people attended Trump’s inauguration than President Obama’s 2009 inauguration.) Trump says three to five million illegal votes were cast during the 2016 presidential election. (No evidence has been presented to substantiate the claim.) According to Fact Checker, Trump has said Obamacare is essentially dead—on fifty-two different occasions. (The Congressional Budget Office contradicts this claim, saying the Affordable Care Act is expected to remain stable barring changes in major provisions.) During his visit to survey the damage to Puerto Rico following Hurricane Maria, Trump said the people of Puerto Rico no longer needed flashlights. (At the time of his statement, 90 percent of the island remained without power.)

Trump is not the only one in his administration who has followed his agenda of spreading misinformation. Even after the National Park Service confirmed that one-third fewer people attended Trump’s inauguration than Obama’s 2009 ceremony, then-White House press secretary Sean Spicer said that Trump’s inauguration drew “the largest audience ever to witness an inauguration, period, both in person and around the globe.” When she was the White House deputy press secretary, Sarah Huckabee Sanders seemingly endorsed a video meant to embarrass CNN, while simultaneously acknowledging she did not know whether the video accurately depicted the events shown. The video was created by conservative political activist James O’Keefe, who is known for producing videos where he apparently “catches” liberal and moderate politicians and organizations in embarrassing situations or making embarrassing comments. The subjects of O’Keefe’s videos, and critics on both sides of the political spectrum, generally claim that the videos have been deceptively edited to present a false scene. Despite O’Keefe’s dubious credibility, Sanders encouraged “everyone across the country” to watch the video, spreading information about which even she lacked confidence.

For the Trump administration, “fake news” appears to be any report that is critical of Trump or his policies and any report that supports his agenda is deemed true. But Trump’s use of fake news and cries for regulation and investigation are not new political tactics. There is a long history in this country of politicians and political parties using fake news to their advantage. The Saturday Evening Post recounts Benjamin Franklin’s use of a disinformation campaign designed to
strengthen American’s resistance to the British in 1782. With parallels to fake news stories today, Franklin printed a fake edition of an actual Boston newspaper, The Independent Chronicle, and distributed it in Paris, where he was representing the newly declared nation. Franklin included an article that said Native Americans were slaughtering and scalping white settlers in the service of British forces. In Paris, the fake article helped sway European opinion against England. When news of “Franklin’s massacre” reached the colonies, the fake article was reprinted in newspapers throughout New England as a factual accounting, ensuring that the colonists would continue to stand against the British.

However, the current role of the media in presidential elections can be traced to the election of 1800, with incumbent John Adams running against his vice president, Thomas Jefferson, who lost to Adams in 1796. Historians call the election one of the most controversial and consequential presidential elections in American history. It was the beginning of the two-party system in American politics. And, Thomas Jefferson himself called the election “the Revolution of 1800” because power passed from the country’s only political party, the Federalist Party, to the newly formed Democratic-Republican party. However, the battle between Adams and Jefferson bears noting because of its striking resemblance to today’s political landscape: the use of newspapers by both the Federalists and the Democratic-Republicans to sway public support, even resorting to the use of fake news, and the subsequent suppression of the press.

According to the book American Presidential Campaigns and Elections, a Boston businessman came to the capital after Washington became president in 1789 to publish a national newspaper, The Gazette of the United States, intending to “endorse the general government to the people.” However, then-Secretary of State Jefferson quickly became disenfranchised with the paper, viewing it merely as a propaganda outlet for the Washington administration. When Jefferson vehemently opposed the pro-British direction that Secretary of Treasury Alexander Hamilton advocated and Washington seemed to follow, the Gazette sided with Washington and Hamilton. Jefferson wanted his views to be heard, but he could not speak out directly against the administration while serving within it. Instead, he created a job in his office for a journalist who founded a rival newspaper, the National Gazette. Jefferson’s Gazette floated the idea of starting a political party to oppose Hamilton’s policies. From this the Democratic-Republican party was formed.

Although Jefferson’s Gazette folded long before the 1800 election, the precedent had been set. Benjamin Franklin’s grandson started the Aurora newspaper in Philadelphia to advocate Jeffersonian ideals of states’ rights and support for the southern farmers, quickly developing a network of local newspapers around the country. The paper became the leading and harshest critic of the Adams presidency and the Federalist Party, which was viewed as elitist, pro-British, and in favor of a strong federal, centralized government.

According to the Thomas Jefferson Foundation, a nonprofit organization founded to preserve Jefferson’s Monticello plantation and to educate the public about Jefferson, Jefferson became a financial supporter of Aurora reporter James Callender. Callender, an ardent advocate of a free press, wrote many scathing attacks of Adams and Federalist leaders. He also crafted a fake news story saying that Adams desperately wanted to go to war with France, which he knew likely would scare citizens, just recovering from the war against the British, into voting against Adams. Other articles in Aurora called Adams a fool, a coward, and a tyrant.

Wanting to silence their critics and prevent the growth of the Republican party, which appealed to agrarian emigrants, Adams and the Federalist Party led Congress to pass four acts, called the Alien and Sedition Acts of 1798. Two of the Acts impacted emigrants. The Naturalization Act lengthened the waiting period for becoming a citizen from five to fourteen years. The Alien Enemies Act authorized the president to imprison or deport resident aliens if they were deemed to be “dangerous to the peace and safety” because their home countries were at war with the United States.

Although the fear of a war between the United States and France was one of the factors that led to the curtailment of citizenship, the Sedition Act was a direct assault on the First Amendment. It gave the president wide powers to imprison and fine anyone who engaged in “treasonable activity” without giving any clear definition. It also became illegal for any person to ‘print, utter, or publish . . . any false, scandalous, and malicious writing against the government. The Acts briefly curtailed the vitriol published about Adams and gave the Federalists leeway to trash Jefferson. University of Virginia Professor of History Peter Onuf, wrote that Federalist newspapers called Jefferson an atheist, with one paper warning that, if Jefferson became president, “Murder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes.”

Twenty-five printers (of newspapers) were arrested under the Sedition Act, including Franklin’s grandson, the editor of the Aurora. According to the book, “Crisis in Freedom: The Alien and Sedition Acts,” by John Chester Milton. Many of the newspapers opposing the Federalists were raided and printers were ruined financially. However, the effort to suppress the press failed. If anything, the Acts, which were a major issue during the 1798 and 1800 elections, galvanized printers, politicians, and citizens to support the Democratic-Republican party. The party also saw an increase in the number of supportive newspapers following the measures. Ultimately, Jefferson cinched the presidency, but just barely.

Then, as now, how the country deals with fake news is a serious political issue with far-reaching consequences. Trump uses fake news to undermine the legitimacy of the mainstream press. But his calls for government action to investigate or regulate the press are more concerning. The Radio Television and Digital News Association, a professional organization devoted to protecting the rights of broadcast and digital journalists, notes that the White House calls Trump’s tweets official White House communications. Thus, his tweet suggesting that it is appropriate
for the Federal Communications Commission (FCC) to revoke network news FCC broadcast licenses based on an assessment of the content of the news must be taken seriously. (It should be noted that network news divisions and cable stations are not licensed by the FCC. Only local television and radio stations are required to obtain an FCC license to broadcast.)

Two former FCC commissioners, Alfred Sikes, a Republican FCC Chair under President George H.W. Bush, and Michael Copps, a Democrat who served as a commissioner for 10 years, speaking with the online digital news organization, The Wrap, criticized the threat by the executive branch to intervene into the jurisdiction of an independent federal agency. Both were doubtful that the FCC would ever take any such action against a broadcast license based on allegations of objectionable news content, in part, because it would take the votes of a majority of FCC commissioners to accomplish.

Trump’s call for the Senate Intelligence Committee to investigate the reporting of news organizations was similarly rebuffed. Republican Senator Richard Burr told the news organization Politico, that his committee would not investigate the media. However, he also said the committee’s final report would expose erroneous news reporting on the committee’s investigation into Russian meddling in the 2016 presidential election.

So, if the president’s complaints are unlikely to prompt a congressional investigation into the media or an FCC examination of the content of ‘news, what is the concern? Trump is fostering an environment where limitations on free speech and a free press are seen as acceptable and even necessary. One needs to look no farther than the coalition of those seeking to chip away at the protections afforded Internet service providers and interactive computer service providers, like Facebook, Google, Twitter, and Instagram, by Section 230 of the Communications Decency Act. Section 230 generally provides that these intermediaries will not be treated as content providers and therefore cannot be held liable for the posts, comments, messages or other content provided by their users. Those who support the proposed bill, Stop Enabling Sex Traffickers Act (SESTA), want to require interactive computer service providers to police the content provided by their users or face stiff penalties for failing to filter out the criminal advertising of traffickers. The service providers then would have to incur the expense of employing both automated filtering technologies and hiring hands-on staff to ensure that legitimate information is separated from criminal information.

The Electronic Frontier Foundation (EFF), a nonprofit organization that advocates to protect user privacy and free expression on digital platforms, says proposed laws like SESTA will force online service providers to err on the side of censorship to avoid the imposition of harsh penalties for underfiltering. Those most vulnerable to censorship will be those who are unpopular or who express controversial opinions. Even worse, argues EFF, innovation will be stifled because small start-up service providers will be unable to afford the costs associated with policing their users’ content.

SESTA proponents are not the only ones seeking to regulate interactive service providers. There are those who argue that the design of service providers like Facebook and Google permitted them to profit from the distribution of fake news ads on their sites during the 2016, without having any responsibility for them. Facebook told congressional investigators that it unknowingly sold more than 3,000 ads (totaling $100,000 in revenue) to an Internet “troll farm” located in Russia that has been linked to the Russian government. The ads were all fake news reports.

CNN, the New York Times, and the Washington Post have quoted Facebook’s chief security officer blog post that “the ads and accounts appeared to be focused on amplifying divisive social and political messages across the ideological spectrum—touching on topics from LGBT matters to race issues to immigration to gun rights.”

In other words, the goal of the ads was to destabilize American communities. Details have emerged that show the ads were geotargeted to reach specific audiences in different states with the goal of swaying public opinion during the 2016 election.

An analysis by BuzzFeed News of ads on Facebook during the last three months of the 2016 election found that fake news generated more engagement from users than the top election news reports from nineteen major news organizations combined. BuzzFeed News also found that almost all of the top twenty top-performing false election reports on Facebook during that time were either overtly pro-Trump or anti-Hillary Clinton.

Critics say Facebook did too little to combat fake news on its site. Facebook has responded by saying that it has blocked the fake accounts tied to the 2016 election fake news ads. It has vowed to deploy technology improvements to detect and track fake accounts. It also announced that it will no longer allow Facebook pages to advertise if they have a pattern of sharing fake news reports.

But will Facebook’s vow to self-regulate be enough to quite its critics? Even traditional news media are calling for the government to view tech giants like Facebook and Google as public utilities that must be regulated to protect the public from fake news. However, traditional media has a lot to gain by advocating for governmental limits on Facebook and Google: digital advertising dollars that they have lost to social media.

As the country debates what to do about a president who seeks to silence his critics and what to do about the proliferation of fake news from within and outside of the country, we would be well-served by studying the early history of this country and the events leading up to the 1800 presidential election.
negative effect in the specific context of legal proceedings. As noted, we may never have the capacity to fulfill all these requirements and certainly do not have it now.

It may, however, remain possible for us to say something even where we concede we cannot say it with the level of authority and certainty we would prefer. In that spirit, and within those severe limitations, we can ask: is there any indication that Trump’s criticisms are having an impact on public views of the media that may affect a media defendant’s ability to get a fair day in court? Let’s look at what the very limited available evidence may tell us.

One important resource is the State of the First Amendment report, which the Newseum Institute has been preparing and publishing since 1997. Given the outcome of the last presidential election, we have good reason to greet polling results with skepticism. But the methodology used by the Institute assures a relatively low error rate, reporting a 95 percent confidence level with a margin of error of 3.7 percent in 2017.

Beginning in 2016, the Institute noted signs of significantly increased public support for media freedom. For example, in 2016 a record low percentage of respondents (33 percent) agreed with the proposition that the press has too much freedom to do what it wants. In that same year, a record high percentage of respondents (51 percent) stated that the American press has about the right amount of freedom. In 2016, there was also a modest increase (2 percent) in the number of Americans who agreed with the proposition that the news should act as a government watchdog, yielding a strong 71 percent in agreement with this statement.

But the numbers from 2016 showed cause for serious concern as well. The Institute reported that 74 percent of Americans disagreed with the statement that the media attempts to report news without bias. This capped a four-year trend since the last presidential election, leading to a record low percentage of Americans (23 percent) who believe the media are un biased. In addition, in 2016, the majority of Americans (51 percent) stated that the news media had been inaccurate in its reporting on the presidential campaign.

In light of the well-recognized dynamic of “confirmation bias,” which prompts people to accept information that aligns with what they already think true, this would appear to make Trump’s attacks on the media deeply problematic. After all, much of his railing against the media rests explicitly or implicitly upon an accusation of unfairness on their part. His accusations that the media publish statements that are “fake” or “fraudulent” or “phony” might, therefore, prompt many American citizens who are predisposed to this viewpoint to shrug and say, “Yeah, that sounds about right to me.”

Furthermore, these 2016 numbers suggest that Americans distinguish between (a) abstract and generalized questions about what rights the media should have and (b) more pragmatic and specific questions about whether the media abuse their freedom. This does not bode well for outcomes in legal proceedings. After all, in any given case a jury is not called upon to decide the grand scope of First Amendment freedoms, but rather to determine whether in this particular instance the media behaved in a responsible, fair, accurate, and unbiased manner. These numbers may suggest that most jurors will enter the decision-making process with a presumption that the defendant did not do so.

The Institute’s 2017 report reflects some interesting shifts. The percentage of Americans who disagree with the notion that the media have too many freedoms remained strong at 69 percent. Thus, in an abstract and generalized sense, most Americans remained supportive of media rights and freedoms.

This year, however, 43 percent indicated that they believed the news media reported without bias. This is a very significant improvement over the 23 percent that held this view the year before and is to that extent an encouraging development. It is important to note, though, that this press-approval rating of sorts is statistically indistinguishable from the 44 percent approval rating that Americans have given President Trump and that the media have generally characterized as dismal.

Still, there are other signs of hope. Since the 2016 election, the New York Times, Wall Street Journal, LA Times, and Washington Post—all of whom have been sharply critical of President Trump—have shown a marked increase in readership and subscribers. In the final three months of 2016 alone, the New York Times added 250,000 digital subscribers. And both NPR and PBS saw a meaningful increase in listeners and viewers in 2016.

While this is probably a less reliable indicator of popular sentiment, donations to media-related organizations and journalism defense funds have also increased. For example, the number of donations to the Reporters Committee for the Freedom of the Press increased from about 2 per week to an average of 250 per week since the election. And other organizations, such as the Center for Public Integrity and the International Consortium of Investigative Journalists have seen a roughly 70 percent increase in individual donations. Furthermore, many young people seem inspired to jump into the pipeline: high school and summer journalism programs have reported a significant increase in interest in the last year.

It seems important, though, not to make too much of these numbers. After all, trust ratings for the media remain very low. And it is hard to know what to think about things like increased subscription numbers. They may reflect a change in the direction of general public opinion. Or they may, more modestly, signal that those who were already supportive of the media have been jarred out of their complacency and have decided to invest accordingly.

In any event, national averages offer no consolation to media defendants faced with the challenges posed by a specific case in a specific venue. We do not know all the reasons that ABC’s parent company Disney chose to pay $177 million to settle the “pink slime” defamation lawsuit brought by a South Dakota–based beef product company that had been the subject of an unflattering news report. But one consideration may have been that Donald Trump...
carried the state with a whopping 61.5 percent of the vote.

This suggests that the right question is not whether Trump’s comments are having an effect on public sentiment nationally, but whether they are having an adverse effect on public sentiment anywhere the media might be sued—which, in this digital age, means anywhere at all. If we can ever assemble a perfect statistical methodology, it will almost certainly tell us that the answer is a resounding “yes.” In the meantime, to quote a Nobel Prize winning author: “You don’t need a weather man to know which way the wind blows.”

Endnotes


3. See note 1, supra.


7. Id.


16. Id.


Recent High-profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press

STEVE ZANSBERG

This essay is inspired by, and dedicated to, Professor Owen Fiss, for whom I had the pleasure of serving as a teaching assistant in his first-semester Civil Procedure course (many, many years ago). Professor Fiss used that course to proselytize future law professors, litigators, Justices, Senators, Governors, and the like, that oftentimes “procedure determines substance.” Professor Fiss offered as “exhibit A” in support of this thesis the Supreme Court’s decision in Eisen v. Carlisle & Jacqueline—where the Court held that a putative representative of a class action (in which each class member suffered $70 in losses, on average) must bear the cost of providing written notice to all class members, which the sole plaintiff quite obviously could not afford. Moral: procedural rulings can effectively deny substantive relief.

Two recent high-profile First Amendment cases, Terry Bollea (a/k/a Hulk Hogan) v. Gawker Media and Beef Products, Inc. v. American Broadcasting Companies, Inc. (a/k/a the “Pink Slime” case) demonstrate the need for providing greater procedural protection to news media (press) defendants in civil litigation arising from their newsgathering and publishing activities. More specifically, it is my thesis that to provide the “breathing space” for the freedom of speech that the First Amendment requires, there must be an opportunity for interlocutory (pre-trial) appeal of dispositive motions premised on First Amendment defenses in civil cases challenging arguably protected speech. While others have advocated for such relief in the past, these two recent cases demonstrate that the need for such protection has never been greater.

Two Major Setbacks for Freedom of the Press

I do not intend to re-argue here the merits (substance) of those two cases. Suffice it to say that I firmly believe that in both cases the media defendants should have, and if they had the opportunity to appeal interlocutorily (or even post-judgment), would have prevailed. The so-called Hulk Hogan “sex tape” that Gawker publicized was unquestionably a matter of legitimate public interest and concern (as Florida’s Court of Appeals had earlier held) at the time Gawker.com posted its commentary on, and excerpts of, the tape. And, as we all know, the Supreme Court has held that lawfully obtained truthful information about “matters of public concern” cannot, absent countervailing interests “of the highest order,” give rise to civil damages for claims of “invasion of privacy” or “intentional infliction of emotional distress.” Nevertheless, after the trial court judge denied Gawker’s motion to dismiss (in which Gawker asked the judge to apply the Court of Appeals’ holding that Gawker’s report addressed a matter of legitimate public concern), and Gawker sought appellate review of that ruling, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction.

So too, the series of reports that ABC News broadcast, in March and April 2012—alerting the public to the fact that 70 percent of “fresh ground beef” sold in the nation’s supermarkets contained a highly processed, pulverized meat product, treated with anhydrous ammonia, which a former USDA microbiologist disparagingly dubbed “Pink Slime”—were comprised of fully protected statements of opinion (from highly credible on-the-record sources), substantially true assertions of fact, and were published without “actual malice.” As media lawyer Tom Junil put it “ABC had taken care to clearly describe the beef product and how it was made and never said it was unsafe for human consumption, and [] its statements appeared to be protected under the law as either true, or opinions.”

Notwithstanding the substantive merits of those two cases, both produced dramatic victories for the plaintiffs and, consequentially, devastating setbacks for freedom of the press: the Bollea case resulted in the bankruptcy and demise of the media outlet Gawker.com. This outcome produced what former New York Times Public Editor Margaret Sullivan dubbed “the Gawker effect” of media self-censorship. The settlement of the ABC “Pink Slime” case, which, at greater than $177 million, exceeded any previous defamation verdict that not vacated post-trial in U.S. history, prompted predictions of open floodgates of libel litigation against, and self-censorship by, the American press.

What produced these terrible outcomes? In both cases the presiding trial judge improperly denied the media defendants’ dispositive motions (requiring the cases to be tried to a local jury), and there was

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no guaranteed path for interlocutory appeal of those rulings. And that, alone, is the point of this essay: to fully protect the “breathing space” the First Amendment affords reporting on matters of legitimate public interest (whether it be a preexisting public controversy over a retired professional wrestler’s extramarital relations or the composition of the nation’s food supply), the press must be provided a “second look” by an appellate court before being forced to endure the financially crushing costs of trial and potentially business-ending jury verdicts.

Below, I outline four alternative routes to effect the necessary change—two are legislative, and two are judicial. The failure to provide for such interlocutory appeal of denial of dispositive motions premised on First Amendment defenses, either by statute or judicial creation, imposes an unacceptable burden on the freedom of the press and the freedom of speech.

The Limited Procedural Protections for Media Defendants in Free Speech Cases

Through a series of landmark decisions, starting in 1964, the Supreme Court has provided myriad substantive protections for freedom of speech and the press. These First Amendment–based precedents significantly circumscribe civil claims for money damages premised on publications that address matters of public interest and concern. Since New York Times Co. v. Sullivan, which first constitutionalized state libel law, up through Snyder v. Phelps (the 2011 ruling barring invasion of privacy claims brought by the surviving family members of a fallen soldier), the Court has held that substantially truthful statements, statements of opinion, rhetorical hyperbole, satire, and even highly offensive, “outrageous,” and unquestionably injurious speech cannot typically give rise to civil liability unless it fits within a recognized category of unprotected speech. Nor can false and defamatory statements about public officials or public figures be sanctioned absent a finding, by clear and convincing evidence, that the speaker uttered such false statements with knowledge of their falsity or with a “high degree of awareness of [their] probable falsity.”

But apart from these constitutionally based substantive limitations, the Court has, thus far, imposed only limited procedural limitations on speech-based torts. In 1986, the Court held in a defamation case brought by a public official or public figure, when ruling on a motion for summary judgment premised on defendant’s lack of actual malice, the trial court is required to determine whether the plaintiff has produced a sufficient quantum of admissible evidence from which a jury could find “clear and convincing” proof of actual malice. In other words, the trial court is required to apply the standard of proof the plaintiff must satisfy at trial to determine whether the plaintiff has defeated a pre-trial dispositive motion and only if the plaintiff has done so may the case proceed to trial. But even this apparent “accommodation” was described as a routine application of the standard for determining the viability of claims subject to heightened burdens of proof and was thus not inconsistent with Court’s “general reluctance ‘to grant special procedural protections to defendants in libel and defamation actions.’”

The other significant, and indeed more-frequently-than-not dispositive “procedural” protection the Court has extended to libel claims (and others involving the freedom of speech), is the requirement of “independent appellate review.” Under this doctrine, when an appellate court reviews a jury’s verdict against a defendant—media or otherwise—in a defamation case, the Court departs from its usual practice of giving deference to the jury’s determination of “the facts;” instead, because the existence of “actual malice” is considered a “constitutional fact,” the reviewing court has “an obligation to make ‘an independent examination of the whole record’ in order to make sure that ‘the judgment [below] does not constitute a forbidden intrusion on the field of free expression.’” But, alas, this tremendously valuable procedural tool only becomes available after a jury has returned its verdict against the press, following months or years of costly discovery and a full trial. Thus, once a trial court has denied a press defendant’s motion for summary judgment, applying the above substantive standard, in the absence of any statutory or other free-standing mechanism for interlocutory (mid-litigation) review, the case proceeds to trial and the defendant must await a “final judgment,” following all post-trial motions challenging the verdict, to appeal. Similarly, once a trial court denies a press defendant’s initial motion to dismiss a complaint—for example because the plaintiff’s claims are premised on nonactionable statements of opinion, or do not reasonably convey the allegedly defamatory implication the plaintiff urges—the press defendant must, absent any applicable statutory mechanism for interlocutory appeal, endure the high cost of discovery and trial prior to obtaining appellate review of the trial court’s ruling.

Recognition That Protracted Litigation May Itself Chill Freedom of Speech, Regardless of the Outcome

In New York Times Co. v. Sullivan, the Justices specifically acknowledged that news outlets’ concern about large civil damage awards could be more inhibiting than potential criminal liability for libel. Three years later, the Court acknowledged that “[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, [and] even fear of the expense involved in their defense, [will] inevitably cause publishers to ‘steer . . . wider of the unlawful zone’ . . . and thus ‘create the danger that the legitimate utterance will be penalized.’” Other courts have recognized the need for speedy resolution of claims that are premised on a defendant’s exercise of fundamental constitutional rights like those of free speech and freedom of the press. For example, the United States Court of Appeals for the District of Columbia Circuit has held that “The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.” Similarly, the Ninth Circuit Court of Appeals...
has held “[b]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable. . . . Therefore, defamation actions should be disposed of at the earliest possible stage of the proceedings. . . .”

Numerous state courts have also acknowledged that subjecting media defendants to protracted litigation, including costly discovery and trial, may itself trammel the protections of the First Amendment. For example, the district court for the District of Columbia has recognize[d] the primary values in our society reflected in the First Amendment and the significant risk that even a non-meritorious defamation action may stifle open and robust debate on issues of public importance. In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function. California’s Court of Appeals has similarly held that “[i]n cases involving free speech, a speedy resolution is desirable because protracted litigation may [itself] chill the exercise of First Amendment rights.” And New Mexico’s Court of Appeals has stated that “the failure to dismiss an unwarranted libel suit might necessitate long and expensive trial proceedings that would have an undue chilling effect on public discourse.”

Thus, there is abundant judicial precedent recognizing that the First Amendment compels expeditious resolution of such claims to avoid “chilling” the freedoms of speech “or of the Press.”

Different Routes Available to Provide the Needed Procedural Protection
As noted above, under the ordinary rules of civil procedure, and various statutes that demarcate the jurisdiction of appellate courts, media defendants must ordinarily await the final determination, post-trial, of a libel or invasion of privacy lawsuit to obtain appellate review of the trial court’s rulings denying dispositive motions. Interlocutory appeals are strongly discouraged, even in jurisdictions that allow for such discretionary appeals.

Statutory Bases for Interlocutory Appeal as of Right
Thankfully, legislatures in some twenty-nine states have established exceptions to those standard operating procedures, in two different forms. First, the state legislatures in Texas and New York have provided a guaranteed interlocutory appeal of denials of certain summary judgment motions.

The second, and far more widespread, legislative route to guarantee interlocutory review of dispositive motion denials is the anti-SLAPP statute. Two University of Denver law professors first coined the term “Strategic Lawsuits Against Public Participation” and advocated for the passage of laws to address and rectify the scourge of suits filed by certain wealthy interests (e.g., real estate developers) against environmental activists and other concerned citizens in retaliation for their voicing opposition to their development projects. The purpose of these “SLAPP” lawsuits is not to “win” them and recover money damages for any actual injuries the plaintiffs had sustained, but to impose the costs and burdens of litigating such claims on the defendants as a means to silence those critics and simultaneously “chill” the speech of others who might contemplate engaging in such public advocacy.

Following the passage of the first anti-SLAPP statutes, in Washington state in 1989, some legislatures and courts expanded the reach of such statutes beyond the purview of political controversies to include protection for defendants’ actions “in furtherance of their right of free expression” on matters of legitimate public interest or concern. However, according to The Citizen Participation Project, only twelve states’ anti-SLAPP statutes provide protection to press reports on matters of public concern.

The anti-SLAPP statute’s several inter-related benefits collectively facilitate speedy and early resolution of libel cases and “weed out” those that lack merit. Though the statutes vary state-by-state, several provide for a “special motion to strike” or other similar procedural mechanism by which the defendant may bring an early summary judgment-style motion. Importantly, the filing of such a motion automatic stays discovery, other than that which is necessary for the plaintiff to respond to the special motion to strike. Furthermore, many of the statutes play a significant role in deterring plaintiffs from filing meritless or frivolous claims, because the statutes provide for a mandatory award of attorneys’ fees to a defendant who prevails on a special motion to strike.

In addition to these significant procedural protections, fifteen states’ statutes also provide for a right to immediate interlocutory appeal of a trial court’s denial of the anti-SLAPP motion. Thus, had either of the Bollea v. Gawker Media or the ABC pink slime case been filed in any of the states that have adopted such a statute, both Gawker and ABC would have had the right to appeal the denial of their motions for summary judgment immediately and thereby avoid the financial burdens of trials and perfecting an appeal following an adverse jury verdict. But, alas, neither Florida nor South Dakota, the states in which those cases were adjudicated at the time, provides for an interlocutory appeal as of right.

It is, therefore, imperative that members of the press and their trade associations advocate and lobby aggressively for the adoption of anti-SLAPP statutes in all thirty-seven states that currently lack such legislation and to pursue and support passage of a federal anti-SLAPP Act by the U.S. Congress. The need for federal legislation is particularly great in light of the recent state of federal court decisions holding that state anti-SLAPP statutes do not apply to diversity actions litigated in federal court.

Judicial Interventions
An alternative route for establishing an automatic right to interlocutory appeal of the denial of a dispositive motion requires judicial intervention,
and innovation.

Because most states’ appellate courts’ jurisdiction, like that of the federal courts, typically require a final case-terminating judgment as a “final” appealable order, trial court judges cannot certify a denial of a dispositive motion for automatic appellate review. However, several states have recognized that denial of a summary judgment motion on grounds of actual malice may subject a defendant to unnecessary and burdensome litigation, which implicates a “substantial [constitutional] right,” such courts have allowed for an interlocutory appeal of such a ruling in those circumstances.

There are two alternative judicial routes to effectuate an “automatic” appeal, before trial, on the merits of a media defendant/public matter libel or invasion of privacy case: (1) by trial court judges erring on the side of caution, and granting defendants’ dispositive motions while expressing reservations; and (2) a more fully articulated legal argument for appellate courts to recognize a right of interlocutory appeal in such cases, as rooted in and mandated by the First Amendment. I will discuss each route below.

**Discretionary Approaches**

Notably, in the ABC pink slime case, South Dakota law provides for a potential interlocutory appeal of a denial of summary judgment, but such appeal is pursued via a petition to South Dakota’s Supreme Court which has discretion whether to grant the petition and hear the interlocutory appeal. Indeed, ABC News filed a petition seeking interlocutory review of the trial court’s denial of its summary judgment motion, but the South Dakota Supreme Court denied that petition, sending the case to trial. But such “discretionary” options place the onus on the appellate tribunals, which are prudentially required to avoid deciding thorny constitutional questions unnecessarily; thus appellate judges are inclined to deny discretionary interlocutory review, in the hopes that the matter may be fully resolved below (through settlement or a defense verdict).

Accordingly, trial court judges should “err on the side of free speech” and should, in exercising judicial “discretion,” presumptively grant dispositive motions in “close cases,” with the clear objective of enabling pretrial review by an appellate court. As the basis for this approach, I again credit Professor Fiss, who espoused the view that when balancing competing societal interests, the Supreme Court has recognized that the First Amendment “serves as a thumb on the scales” in favor of freedom of speech. While this “weighted balancing” approach is employed in the substantive balancing of interests, it should properly inform the balancing of interests in procedural questions, where a “false positive” (case goes to trial, despite substantive infirmity with the claim) has far greater adverse impact on the freedom of speech and the press than a “false negative” (a wrongly granted dispositive motion that is reversed on appeal and the case remanded for trial).

Indeed, such “procedural” exceptions to standard operating procedures have been recognized as justified by the First Amendment interest to avoid “chilling” speech. For example, the Supreme Court has recognized the “overbreadth” exception to the ordinary standing doctrine, allowing those subjected to criminal penalties premised on free speech activities to assert the rights of others, not present before the court, whose speech or expressive conduct could be chilled and thereby infringed by application of the challenged statute. Similarly, the ordinary “vagueness” challenge to criminal statutes is ratcheted up and applied with heightened judicial scrutiny when courts are called upon to assess the constitutionality of laws that criminalize speech and other expressive conduct.

And, when laws or ordinances are shown to impact constitutionally protected conduct, it is the government, not the party who challenges the law, who bears the burden of proof to establish that the statute passes constitutional muster (in contrast to the burden of proof on the challenger on most other occasions). This same shifting of the burden of proof has been applied in the area of libel law: a private figure plaintiff suing a member of the media for publishing on a matter of legitimate public concern must prove the falsity of the challenged statements, reversing the common law allocation of burden of proof on the defendant to establish the publication’s truth.

Lastly, and perhaps most aptly, in recognition of the fact that the mere pendency of a prosecution for engaging in protected expressive conduct and/or speech—regardless of whether a conviction is likely to result—the courts have created an exception to the ordinary “ripeness” doctrine, authorizing pre-enforcement challenges to such criminal statutes. Indeed, it was in that context that the Supreme Court recognized that “[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.” So, too, in defamation cases, the Court has recognized, “fear of the expense involved in their defense” may itself produce self-censorship even if there is little or no realistic prospect of judgment being entered against the defendant.

These examples demonstrate that, in a variety of contexts, the Supreme Court has recognized that ordinary procedural rules must be suspended or significantly modified to afford appropriate protection to freedom of speech enshrined in the First Amendment. Accordingly, it would be consonant with such precedents for trial court judges to “err on the side of freedom of speech”—to have the “First Amendment act as a thumb on the scales”—by granting motions for summary judgment in close cases, even while they express skepticism or ambivalence in such rulings. Proceeding in this fashion will allow (require) an appellate court immediately to review the entire case file and determine, in advance of trial, whether such a trial is necessary.

From the plaintiff’s perspective, the only real “cost” to such an approach is that the trial may be delayed for a year or so. But even in that case, the fact that the appellate court has sent the case back for trial is likely to incentivize a defendant to take another look at settlement rather than litigating through trial in the hopes of obtaining a favorable verdict or success on appeal.
The downside of the current practice—denying “close” motions for summary judgment and thereby delaying the defendant’s opportunity for appellate review until after a verdict has been returned—is self-evident.

**Make New Law**

Alternatively (and preferably), appellate courts can establish a right of interlocutory appeal by recognizing such a procedural remedy as compelled by the First Amendment. As demonstrated above, the courts have, in the past, recognized that the mere pendency of protracted litigation against the press, including the often-crushing costs of discovery, trial, posttrial motions and appellate practice, can themselves deny defendants their First Amendment rights. This, combined with the already established constitutional mandate of “independent appellate review,” can, I believe, lay the foundation for judicial recognition of another constitutionally-mandated procedural accommodation for The Freedom of Speech or Of the Press: mandatory interlocutory appeal:

In this brief essay, I do not provide a fully developed jurisprudential and precedential basis for such a newly crafted “procedural” remedy. Instead, I strongly encourage my colleagues in the legal academy (and their students) to prepare more thorough and persuasive arguments for appellate courts to adopt such a rule of law.

**Independent Appellate Review Frequently Protects the Press**

Of course, appellate review is not a panacea or a “silver bullet” that will invariably yield a defense judgment. However, studies conducted by the Media Law Resource Center, dating back to 1980, demonstrate that appellate review is, far more often than not, the ultimate salvation for press defendants in libel cases. According to the MLRC’s 2016 Report on Trials and Damages, media defendants who opted to appeal jury verdicts in favor of plaintiffs between 1980 and 2015 were successful in having those jury awards vacated or modified on appeal in 63% of the time. In all, a jury verdict in favor of the plaintiff was affirmed in full less than one-third of the time in such cases.

In state courts where state anti-SLAPP statutes provide for a right to interlocutory appeal of denied dispositive motions, media defendants can take advantage of those favorable odds, and may do so, as of right, before enduring the devastating financial burden of discovery and trial. One author surveyed the cases decided under New York’s statute found that between 1986 and 1994, more than ninety percent of interlocutory appeals of denials of summary judgment resulted in either a full reversal or a partial reversal.

**It Is High Time . . .**

The two recent high-profile media defendant cases bear out that, as Professor Fiss instructed, the lack of procedural safeguards can have devastating substantive impact: apart from the bankruptcy-causing jury verdict, Gawker Media expended $13 million simply defending the Hulk Hogan case, which for Mr. Bollea was financed (from behind the curtains, until exposed post-trial) by internet billionaire Peter Thiel. Securing the $140 million jury verdict in order to perfect the appeal of the jury verdict proved insurmountable for Gawker Media, forcing the company into bankruptcy, and eventually, to shutter the Gawker.com website altogether.

And while the amount ABC paid to defend the Pink Slime case has not been disclosed, it is a matter of public record that in the five years of litigation before the trial, involving as many as 48 attorneys entering appearances from both local and top-tier law firms in Chicago and Washington D.C., the parties took over 140 fact depositions, exchanged over a million pages of documents, and retained thirty expert witnesses. The trial was scheduled to last eight full weeks. As NYU’s media law and ethics professor Charles Glasser stated, “ABC was hemorrhaging legal costs . . . these news organizations are corporations – they have a fiduciary duty to stockholders.” The potential exposure ABC faced, under the South Dakota “food libel” law, was $5.7 billion. Few, if any, media companies could comfortably “carry” such a potential liability on its corporate ledger throughout the months or years of appeal.

The day the ABC Pink Slime settlement was announced, the plaintiff, Beef Products Incorporated issued a press release declaring “We are extraordinarily pleased to have reached a settlement of our lawsuit against ABC and Jim Avila . . . This agreement provides us with a strong foundation on which to grow the business . . .” Local news reported that terms of the settlement are confidential, but judging from the celebratory mood of BPI officials and their lawyers Wednesday morning, one could conclude that terms of the settlement were favorable to the company.

“We are extraordinarily pleased with this settlement,” BPI attorney Dan Webb said in a brief statement outside the Union County Courthouse. “I believe we have totally vindicated the product.”

Despite ABC News’ public statement declaring it stands behind its journalism (and does not retract any portion of its reports) and its continued commitment to reporting on matters of public concern, several commentators voiced concern about the “optics” of the settlement. Jane Kirtley, professor of media ethics and law at the University of Minnesota Law School, said “I think it could be read by many that the news media are prepared to back down if challenged,” and she noted that other potential plaintiffs might take this settlement to mean that “even a spurious lawsuit might result in someone getting money.” Fox News’ Dana Perino declared that BPI had in fact “won” the lawsuit, and that what ABC reported “was actually fake news.”

Then, five weeks after the settlement was announced, the news broke that ABC News’ corporate parent, The Disney Company, had paid $177 million, and that its insurers paid an undisclosed additional amount, to settle the case. This startlingly large figure prompted another round of hand-wringing about the future of libel litigation and its impact.

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on investigative journalism. While these two cases most starkly demonstrate the need for an early, pre-trial “second look” from appellate judges, such costly impositions on the press, under the status quo, are commonplace. For example, a few years ago in a defamation case against the Virginian-Pilot newspaper, the plaintiff, an assistant principal, sued the newspaper and one of its reporters over a news story, which the plaintiff alleged defamed him by implying that he had improperly intervened in school disciplinary matters to obtain preferential treatment for his son. The trial court overruled the defendants’ demurrer on the issue of defamatory meaning, forcing the case to proceed through extensive discovery and trial that resulted in a $3 million verdict for the plaintiff. Thereafter, the trial court granted the newspaper’s motion to strike the jury’s verdict on grounds that there was insufficient evidence of actual malice presented at trial.

On appeal, the Virginia Supreme Court not only affirmed the trial court’s posttrial dismissal order, it made clear its view that everything that had happened in the case followed the trial court’s earlier order, in overruling Defendants’ demurrer, was a waste of time and resources. So, while the Virginian-Pilot ultimately did not pay anything to the plaintiff, it was “on the hook,” and “out of pocket” for the tens, if not hundreds, of thousands of dollars in attorneys’ fees and the significant interference with its reporters’ and editors’ job responsibilities, tied up in months of unnecessary litigation. This experience seemed to embody the words of Fourth Circuit Judge J. Harvey Wilkinson:

Even if liability is defeated down the road, the damage has been done. The defendant in this case may well possess the resources necessary for full protracted litigation, but smaller dailies and weeklies in our circuit most assuredly do not. The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well.

In sum, to subject members of the press to the devastating costs of discovery and trial as the prerequisite for obtaining independent appellate review, “to ensure that the judgment below does not constitute a forbidden intrusion into the sphere of free expression,” is to effectively deny that remedy altogether. Almost two decades ago, the legendary media attorney Dick Winfield proclaimed, in these very pages: “Interlocutory Appeal as of Right: The Time Has Come.” Now that President Trump has announced it’s “open season” to sue the press, and his call has been heard, and taken up, by his wife, coal company magnates, Russian oligarchs and the like, the time for this crucial procedural safeguard for Freedom of the Press has most certainly come.

Endnotes

6. See infra n. 66 [FINAL FN].
7. See Gawker Media LLC v. Bollea, 129 So.3d 1196, 1202 (Fla. Ct. App. 2014) (“the written report and video excerpts are linked to a matter of public concern—Mr. Bollea’s extramarital affair and the video evidence of such—as there was [already] ongoing public discussion about the affair and the Sex Tape, including by Mr. Bollea himself.”); see also Bollea v. Gawker Media, LLC, No. 8:12-CV-02348-T-27, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012) (“prior reports by other parties of the existence and content of the Video, and Plaintiff’s own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.”)
8. See Snyder v. Phelps, 562 U.S. 443, 458 (2011) (“[Speech . . . on a matter of public concern . . . is entitled to ‘special protection’ under the First Amendment [and] cannot be restricted simply because it is upsetting or arouses contempt.”); see also Bartniki v. Vopper, 532 U.S. 514, 534 (2001) (“The right of privacy does not prohibit any publication of matter which is of public or general interest.”) (quoting S. Warren and L. Brandeis, The Right of Privacy, 4 HARV. L. REV. 193, 214 (1900)).
9. See supra n. 7.
10. That ABC News did not publish its reports with “actual malice” is well-supported by the evidence: first, ABC News relied on three highly knowledgeable and reputable sources who appeared on camera in those reports. Second, ABC News was aware that several other news and national media outlets had published the exact same information prior to ABC News’ reports. Compare Jim Avila, 70 Percent of Ground Beef at Supermarkets Contains “Pink Slime,” ABC News.com (Mar. 7, 2012) (since removed from the website) with David Knowles, Partners in “Slime”—Feds keep buying ammonia-treated ground beef for school lunches, THE DAILY, (Mar. 5, 2012), available at http://huffingtonpost.com/2012/03/05/pink-slime-for-school-lunch_n_1322325.html.
13. The amount the payment the Pink Slime plaintiff received remains confidential. However, in August 2017, Disney, the
parent company of ABC News, reported to the SEC its payment of $177 million, apart from insurance proceeds, to resolve previously disclosed litigation. See, e.g., Joe Flint, *Disney Discloses Litigation Charge*, DOW JONES NEWSWIREs, Aug. 9, 2017. BPI’s counsel confirmed that his clients had received more than $177 million in the settlement. Subsequently, in October 2017, a New Hampshire jury awarded a larger amount in a different defamation case, but at the time this article was submitted, post-trial motions and appeal of that verdict had not been completed. See Ryan Boysen, *Jury Awards over $274M in Billboard Defamation Case*, Law360 (Sept. 29, 2017), https://www.law360.com/articles/969754/jury-awards-over-274m-in-billboard-defamation-case.


21. See Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. [But] we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”). See also 22. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Arguably, too, the imposition of the “clear and convincing evidence” standard at trial, and the imposition on the plaintiff of the burden of proving material falsity, are two additional “procedural” limitations in defamation cases. See infra text accompanying n. 49.


30. See, e.g., *Welch v. Am. Pub’g Co. of Ky.*, 3 S.W.3d 724, 729 (Ky. 1999) (“Courts should resolve free speech litigation more expeditiously whenever possible. The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.”) (internal quotation and citation omitted); *Mark v. Seattle Times*, 635 P.2d 1081, 1088 (Wash. 1981) (“Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are waived if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.”) (citations omitted).


34. See, e.g., 28 U.S.C. § 1291; but see 18 U.S.C. § 1292(b) (allowing for interlocutory appeals in certain limited circumstances by trial court and discretionary granting of appeal by Circuit Court).

35. See CPLR §5011[a]±[i]v±; Texas Civ.Prac. & Rem.Code § 51.014.


38. During the *Bollea v. Gawker Media* litigation, Florida significantly expanded its anti-SLAPP statute to apply against non-governmental plaintiffs, but it did not apply retroactively to pending cases. The revised statute does not provide for automatic interlocutory appeal, in any event.

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O-M-G. Worst Article EVERRRRR!!! Or when Does the Yelp-fueled Takedown Rise to Defamation?

CHARLES N. INSLER

Criticism has always been a fundamentally democratic undertaking, an “endless conversation, rather than a series of pronouncements.” And like other forms of democracy, it is a messy, contentious business, in which the rules are as unclear as the outcomes. Criticism is an ugly affair almost by definition, for to “criticize is to find fault, to accentuate the negative, to spoil the fun and refuse to spare delicate feelings.” This is not an Internet issue. Criticism was a messy business well before the advent of the Internet, with artists like Mark Twain and John Steinbeck deriding their critics as the “scribbling race.”

At the same time, the Internet has clearly transformed the art of criticism and opinion. The scale of the Internet, with its “unique democratizing features, has vastly expanded what it means to be a critic and who can become one. Thanks to the Internet, “everyone is a critic,” from the Amazon scholar, to the Facebook writer, to the Yelp user. Thanks to the Internet, the “inflated, always suspect authority of ink-stained wretches [from traditional media] has been leveled by digital anonymity.”

“Digital anarchy” is a fitting description of the online review process. Nearly every American landmark—from the Statue of Liberty (“An eyesore with no aesthetic value”) to the Gateway Arch (“Quintessential tourist trap”) to the Space Needle (“most over-rated place everrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrrr
also not impose liability. “Best of” and “Worst of” lists are all the rage these days. “From law schools to restaurants, from judges to hospitals, everything is ranked, graded, ordered and critiqued.” Hotels may also be ranked, particularly the “Dirtiest Hotels,” which is what happened in Seaton v. TripAdvisor, LLC. When Kenneth Seaton, the proprietor of the Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee, had the ignominy of finding his hotel ranked #1 on “TripAdvisor’s 2011 Dirtiest Hotels” list, he filed suit for defamation and false light invasion of privacy. TripAdvisor moved to dismiss the case for failure to state a claim and the U.S. District Court for the Eastern District of Tennessee granted the motion, finding that a ranking system, built on the subjective reviews of individuals, was hyperbole that could not support a claim for defamation. “A reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is ‘inherently subjective’ and one that is ‘objectively verifiable.’”

Given the ubiquity of online reviews and the nature of Internet discourse, courts around the country have largely found that a reasonable person would not view the contents of an online review as asserting objective facts. This is what the law should be. To hold otherwise – to treat online reviews, or rankings built around the compilation of online reviews, as anything but statements of opinion – “would make nearly all negative internet reviews susceptible to defamation claims.” And as the Internet might say, such a holding would be ABSURRRRD!!!

When Reviews Cross the Defamation Threshold: Discrete Facts, Fake Profiles, and Smear Campaigns

Not every review has been insulated from liability. Reviews that contain discreet, verifiable facts; reviews that are not based on the actual personal experiences of the reviewer; and reviews that are part of an orchestrated campaign have been found to present actionable cases of defamation.

Discrete Facts

Some reviews may provide sufficient, discreet facts to make a defamation claim viable. For instance, in Cross-Fit, Inc. v. Mustapha, the U.S. District Court for the District of Massachusetts found that a review that claimed that a gym was “triple charging [its] members” and had gone “as far as to forge [the reviewer’s] name on a lease” was not a statement of opinion, because the statement could be proved true or false. In Bently Reserve L.P. v. Papaliolios, the California Court of Appeals found that a review that claimed the owners of an apartment complex “(likely) contributed to the death of three tenants,” the departure of eight tenants, and sought the eviction of six long-term tenants, could be reasonably perceived as containing actionable assertions of fact. The Internet, the Bently Reserve Court held, was not a free pass to engage in defamation: “the mere fact [that] speech is broadcast across the Internet by an anonymous speaker does not ipso factio make it nonactionable opinion and immune from defamation law.” In reaching this decision, the court highlighted that the defendant reviewer had not engaged in the typical “rant[] and rave[],” but had instead written a review that was serious in tone and content, contained specifics, and appeared based on specialized knowledge.

The Bently Reserve decision is troubling because it provides a disincentive for writing exactly the type of review that one seeks: a serious one, with specifics, and based on actual knowledge, rather than the unfocused rant that can be quickly ignored by the courts. This decision also runs counter to other authorities, which have emphasized that “sifting through a communication for the purpose of isolating and identifying assertions of fact should not be the central inquiry.”

Some courts have looked past obvious exaggeration to find a client’s remarks actionable. In Moldovan v. POLITICO, Andrea Polito, a wedding photographer, sued Neely Moldovan and Andrew Moldovan after the Moldovans created a media and social media firestorm with allegations (among others) that the photographer was “‘holding their [wedding] pictures hostage’ following a contract dispute.”

The Texas Court of Appeals found that while the phrase “‘holding their pictures hostage’ cannot be taken literally, we disagree that it is hyperbole.” The Texas Court of Appeals found that a reasonable person could find the hostage comment a verifiable statement of fact, capable of supporting a defamation claim, and affirmed the trial court’s decision to deny the Moldovans’ motion to dismiss. A jury ultimately awarded Polito more than a $1 million on her tort claims against the Moldovans.

Fake Profiles and Smear Campaigns

In Bently Reserve, the court focused on the reviewer’s first-hand knowledge. But not every review presents an opinion based on personal experience. Whether such a review may still enjoy the protections of the First Amendment has divided courts. In Mustapha, the court found it made no difference that the “reviewers have not based their reviews on their actual personal experiences at the [] Sports Club,” as long as the reviewers’ statements were opinion or hyperbole. In Seaton, the court also found that whether a review was from a “genuine traveler” or not was “irrelevant to the question of whether TripAdvisor insinuated that its ‘2011 Dirtiest Hotels’ list was based on anything other than opinion evidence.”

It should be obvious that not every review is based on personal experience. Some reviews may be the repetition of second-hand information, while other reviews may be written by technologists at the behest of luddite friends or family. And, of course, some reviews may be made up entirely. But this is no different than the offline world, where critical remarks may be repeated and passed along as second- or third-hand information without giving rise to a claim for defamation. Case law confirms that no reasonable person would believe that every review is authentic.

At the same time, courts have found (and rightly so) that creating fake profiles for the purpose of undermining a rival business can rise to the level of actual malice. In Romeo & Juliette Laser Hair Removal, Inc. v. Assara I, LLC, the U.S. District Court for the Southern District of New York found that the defendants created fictitious
clients with fictitious experiences to undermine the plaintiff’s competing salon business. In denying the defendants’ motion for summary judgment on plaintiff’s defamation claim, the court rejected the defendants’ argument that the Internet comments were statements of opinion and instead held that the statements describing fictitious hair treatments at the plaintiffs’ salon by fictitious clients were “readily capable of being proven false.”

In The Fireworks Restoration Company Co., LLC v. Hosto, Peter Mitchell and the defendant, Michael Hosto, had co-founded Fireworks Restoration, a property damage restoration company. After Mitchell’s and Hosto’s relationship soured, the two parted ways. Upset with his distribution under a settlement agreement and angry with Mitchell, Hosto posted three fictitious, derogatory reviews (using the names of actual, prior customers) about Fireworks Restoration and the quality of its restoration work. A jury awarded Fireworks Restoration $1 in actual damages and $150,000 in punitive damages on its defamation claim and the Missouri Court of Appeals affirmed the verdict.

The defendants in Romeo & Juliette Laser Hair Removal and The Fireworks Restoration Company did not limit their fictitious reviews to a single website. Instead, they posted their respective comments on a number of different sites, from HairTell.com, Yelp, CitySearch.com, and consumeraware.com to Google and Yahoo! Such conduct no longer invites the protections of the First Amendment. While a single review may be nonactionable opinion, a series of reviews directed at the same business may become actionable when it rises to an “orchestrated campaign” against a single entity. What constitutes an “orchestrated campaign” is, of course, a difficult question. If a single review is nonactionable then certainly two or three similar reviews scattered throughout the Internet should also be nonactionable. Nondefamatory speech does not become defamatory by force of repetition. Were it otherwise, no book or pamphlet would risk general distribution. But at some point— and the calculus should focus more on the speaker’s motive than the number of reviews—a campaign of negative reviews, circulated and reposted throughout the Internet, shifts from criticism to defamation. While the First Amendment should protect orchestrated smear campaigns, it should safeguard online reviews whose object is to convey an opinion—even uninformative or wrong opinions, or opinions based on second-hand information. This is no more than the First Amendment affords our offline opinions.

Courts Must Continue to Promote Criticism

Online reviews play a critical role for businesses and consumers alike. A good review can steer us toward a new restaurant and encourage us to try a new gym. A bad review can do just the opposite. For this digital marketplace of ideas to function freely and correctly, reviewers and critics must feel free to express their opinions—whatever those opinions may be. Legislators have recently begun passing legislation to promote this very goal. But this legislation is only aimed at prohibiting so-called gag clauses; it does not address defamation claims. This means that the courts must continue to safeguard the online reviewer’s right to criticism and opinion in whatever art form it may be found.

Endnotes

2. Id.
3. A.O. Scott, BETTER LIVING THROUGH CRITICISM (Penguin Press 2016); see also Oscar Wilde, CRITIC AS ARTIST (“[I]t is exactly because a man cannot do a thing that he is the proper judge of it; and that the true critic is unfair, insincere, and not rational.”).
5. Doe v. Cahill, 884 A.2d 451, 455 (Del. 2005); see also Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (“The Internet is a truly democratic forum for communication.”).
6. A.O. Scott, Everybody’s A Critic. And That’s How It Should Be.
7. Yelp is one of the major websites for reading and posting reviews, boasting 162 million unique monthly users and 83 million total reviews across 32 countries. Philip Walzer, Everybody’s A Critic On Yelp, Where It Matters, THE VIRGINIAN POST (Sept. 7, 2015). While restaurants are the most popular subject of criticism, the reviews cover a variety of businesses and professionals, from nail salons to urologists. Id.
8. A.O. Scott, Everybody’s A Critic. And That’s How It Should Be.
14. The brutal review is not confined to the Internet critic as Guy Fieri discovered after the New York Times reviewed his Times Square restaurant. Pete Wells, As Not Seen On TV, N.Y. Times (Nov. 13, 2012) (“Why is one of the few things on your menu that can be eaten without fear or regret—a lunch-only sandwich of chopped soy-glazed pork with coleslaw and cucumbers—called a Roasted Pork Bahn Mi, when it resembles that item about as much as you resemble Emily Dickinson?”).
16. Id. at 416.
central inquiry. Rather, it is necessary to consider the writing as a whole, as well as the ‘over-all-context’ of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.


22. Neumann, 369 P.3d at 1119.

23. Id. at 1126 (noting that the owner of a wedding venue had been called ‘two-faced, crooked, and [j] rude’ on Google reviews).

24. Westmont Residential LLC v. Butters, 340 P.3d 183, 189 (Utah Ct. App. 2014) (noting that the owners of an apartment building had been called ‘crooks’ that ‘will take full advantage of you!’ in a review on YAHOO! LOCAL).


26. Spencer, 397 P.3d at 785; see also CrossFit, Inc. v. Mustapha, No. CIVA 13-11498-FDS, 2014 WL 949609, at *2 (D. Mass. Mar. 10, 2014) (“[S]tatements that contain ‘imaginative expression’ or ‘rhetorical hyperbole’ are protected.”) v. Neumann, 369 P.3d at 1126 (“Such hyperbolic expressions further negate any impression that Liles was asserting objective facts.”).

27. Butters, 340 P.3d at 189; see also Neumann, 369 P.3d at 1126 (“In the context of [an] online review, the term [crooks] is clearly not being used” to denote criminal activity.


29. Id. at *7.

30. Id. at *1.

31. Id. at 1-3.

32. Id. at *7.

33. Id. at *7; see also Vogel v. Felice, 26 Cal. Rptr. 3d 350, 361 (Cal. Ct. App. 2005) (“[I]t is inconceivable that placement on the ‘Top Ten Dumb Asses’ list could be understood to convey any imputation of provable defamatory fact. This statement simply cannot support a defamation claim.”).

34. See, e.g., Neumann, 369 P.3d at 1126; Butters, 340 P.3d at 189; see also Galland v. Johnston, No. 14-CV-4411 RJS, 2015 WL 1290775, at *12 (S.D.N.Y. Mar. 19, 2015) (“Review sections on websites are well-recognized places for anyone to place an opinion. Within this context, an ordinary [internet] reader understands that such comments are mere statements of opinion.”).

35. Galland, 2015 WL 1290775, at *12. While liability may flow to the individual reviewer, section 230 of the Communications Decency Act immunizes Yelp, Google, and other review aggregators from any “liability arising from content created by third parties.” Kimzey, 836 F.3d at 1265; see also id. at 1270 (“Just as Yelp is immune from liability under the CDA for posting user-generated content on its own website, Yelp is not liable for disseminating the same content in essentially the same format to a search engine, as this action does not change the origin of the third-party content.”).

36. Id, see also Gillon v. Bernstein, No. CIV. 2:12-04891 WMJ, 2013 WL 5195625, at *4 (D.N.J. Sept. 12, 2013) (holding that review of wedding coordinator contained two factual statements that could survive motion to dismiss; that “the number of musicians promised did not show up” and that the wedding coordinator had sent the wrong electrical requirements for the band).


38. Id. at 431.

39. Id. at 433.

40. See id.

41. Sandals Resorts, 925 N.Y.S.2d at 414.


43. Id. at *8.

44. Id.


46. Seaton, 2012 WL 3637394 at *7 n.4.

47. See generally Burke v. Gregg, 55 A.3d 212, 221 (R.I. 2012) (dismissing defamation action brought against a radio-talk show host whose statements were based on a newspaper article).

48. See Curry v. Yelp Inc., No. 14-CV-03547-JST, 2015 WL 7454137, at *6 (N.D. Cal. Nov. 24, 2015), appeal filed (9th Cir. Jan. 25, 2016) (“[N]o reasonable investor could have understood Defendants’ statements to mean that all Yelp reviews were authentic.”).


51. Id. at *9.

52. Id.

53. Id.

54. Id.


56. Id.

57. Id. at 86.

58. Id. at 85.


60. The Fireworks Restoration Co., 371 S.W.3d at 86.

61. Mustapha, 2014 WL 949609, at *2; see also NTP Marble, Inc. v. AAA Hel- lenic Marble, Inc., No. 09-CV-05783, 2012 WL 607975, at *1 (E.D. Pa. Feb. 27, 2012) (denying summary judgment where the plaintiff claimed to be the subject of more than a hundred negative reviews).

62. Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719, 734 (C.D. Cal. 1996) (“[T]he public’s First Amendment rights . . . include the right to be passionate and even uninformed in the expression of one’s views.”).

63. See Angus Loten, Yelp Reviews Fuel Free-Speech Fight: Many Business Say Anonymity of Comments Is Unfair, Sue To Unmask Users, WALL ST J. (Apr. 3, 2014) (noting that Hadeed Carpet Cleaning saw its revenue sink from $12 million to $9.5 million following a rash of negative reviews). Incidentally, Hadeed Carpet Cleaning took its case against Yelp to the Virginia Supreme Court. See Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 441 (Va. 2015); see also Moldovan, 2016 WL 4131890, at *10 (noting that Polito had earned between $180,000 to $225,000 in a typical January to May period before the Moldovans’ statements, but had not earned more than $38,000 in 2015 after the Moldovans’ statements).

Preliminary Injunctions Enforcing Contractual Nondisparagement Clauses

BRUCE A. WESSEL

This article examines injunctive enforcement of contractual nondisparagement clauses.

Appellate courts in tort cases regularly reject requests for preliminary injunctions against defamatory speech, deeming such relief an unconstitutional prior restraint. Requests for permanent injunctions in tort cases fare better. Many appellate courts have adopted the “modern rule” that narrow permanent injunctions against specific defamatory statements are permissible, but only after adjudication that the challenged statements are false.

In contrast to tort cases, appellate courts in cases involving contractual nondisparagement clauses have been more willing to approve of preliminary injunctions imposing broad relief. The constitutional soul-searching that occurs in tort cases is less pronounced in contract cases seeking to enforce nondisparagement clauses, with courts holding that constitutional free speech rights have been waived by contractual promises not to disparage.

The Connecticut Supreme Court’s 2009 decision Perricone v. Perricone is the most comprehensive appellate ruling addressing injunctive enforcement of a nondisparagement clause. There, Connecticut’s highest court affirmed a preliminary injunction against the ex-wife of a prominent dermatologist, barring her from making “derogatory or defamatory” remarks about her former husband, thus blocking her from appearing on a television show.

The central constitutional holding in Perricone is that “a party’s contractual waiver of the first amendment’s prohibition on prior restraints on speech constitutionally may be enforced by the courts even if the contract is not narrowly tailored to advance a compelling state interest.” Perricone relies on the holding of Cohen v. Cowles Media Co., the U.S. Supreme Court decision establishing that the First Amendment does not bar a plaintiff from pursuing a damages action against a newspaper for breach of a promise of confidentiality.

Section I of this article discusses U.S. and state supreme court decisions on the availability of permanent injunctive relief to bar defamatory speech in noncontractual cases.

Section II discusses Perricone and Brimmer v. KB Home Lone Star, L.P., a 2003 Texas intermediate appellate case rejecting a temporary injunction enforcing a nondisparagement clause as an unconstitutional prior restraint. Three unpublished cases that approve of preliminary injunctions enforcing contractual nondisparagement clauses are also discussed.

Section III, largely based on the structure of Perricone, examines five questions, in addition to traditional equitable principles, that courts consider when reviewing requests for preliminary injunctions to enforce contractual nondisparagement clauses:

1. Is there state action?
2. Is a contractual prior restraint constitutionally valid?
3. Did the defendant waive free speech rights?
4. Does enforcement violate public policy?
5. Is the injunction sufficiently precise and not overbroad?

Of these five questions, the first two—state action and constitutionality—are relatively settled. The third and fourth questions—waiver and public policy—matter the most in determining the enforceability of nondisparagement clauses by preliminary injunctions. Perricone and Brimmer adopt different legal standards on how to determine waiver. As the only two published decisions on the topic of this article, they are the most important cases for courts and practitioners to consider.

I. Prior Restraint Cases

A prior restraint of speech—prohibiting speech before it is uttered—raises First Amendment concerns.

In 1931, the Supreme Court in Near v. Minnesota struck down as unconstitutional a state statute permitting injunctions barring newspapers from publishing defamatory articles. The Restatement (Second) of Torts explains that “ever since Near v. Minnesota, it has been recognized that prior restraint of a publication runs afoul of the First Amendment.”

In 1976, in Nebraska Press Ass’n v. Stuart, the Supreme Court explained that the common thread running through the cases following Near “is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”

In 2005, the Supreme Court in Tory v. Cochran agreed to answer the question of whether a posttrial permanent injunction in a defamation case violated the First Amendment. But the Court ultimately sidestepped the question because the plaintiff died after oral argument. Given the changed circumstances, the Court vacated the injunction and remanded, giving the substituted plaintiffs an opportunity to seek narrower relief. The Court, however, “express[ed] no view on the
constitutional validity of any such new relief.”

While the U.S. Supreme Court in \textit{Tory} did not decide the constitutionality of permanent injunctions prohibiting adjudicated false defamatory statements, state supreme courts have answered the question.

By a 5–2 vote, in 2007 the California Supreme Court in \textit{Balboa Island Village Inn v. Lemen} adopted the “modern rule” (and not the “traditional rule” that equity will not enjoin libel) and held that “a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory” is constitutional.\(^{14}\)

The case involved a dispute between a homeowner Anne Lemen and her neighbor, the Balboa Island Village Inn. Lemen, unhappy about noise from the bar at the inn, repeatedly approached customers and employees and made negative statements about the business, statements that were ultimately adjudged false.

The final injunction prohibited Lemen from making these false statements again. The California Supreme Court approved “a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory.”\(^{15}\)

There were two dissents in \textit{Balboa Island}. One considered the injunction censorship of speech and observed that past false and defamatory statements might, in the future, be true or nondefamatory depending on the context they were made.\(^{16}\) The other dissent proposed a balancing test and concluded that First Amendment free speech guarantees outweigh “garden-variety defamation.”\(^{17}\)

In 2010, the Kentucky Supreme Court in \textit{Hill v. Petrotech Resources Corporation}, vacated a temporary injunction barring defamatory comments as an impermissible prior restraint but followed California and adopted the “modern rule” that defamatory speech may be enjoined after a full trial on merits “upon the condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false.”\(^{18}\)

\textit{Hill} involved an investment in an oil and gas company and aggressive statements by the representative of a disappointed investor that the company was engaged in illegal activity. The temporary injunction, vacated by the Kentucky Supreme Court, imposed a blanket bar on defamatory statements about the company.\(^{19}\) But if and when the statements were adjudged false, the court ruled that they could be enjoined if a four-part test were met: (1) the injunction is clearly and narrowly drawn so as not to prohibit protected expression; (2) the falsity of the speech is finally adjudicated by a preponderance of the evidence; (3) the enjoined speech is not political in nature or imbued with public interest that outweighs the protection of private interests; and (4) the usual equitable requirements for an injunction are met.\(^{20}\)

In 2014, the Texas Supreme Court in \textit{Kinney v. Barnes}, citing the first dissent in \textit{Balboa Island}, rejected the “modern rule” and held “the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation” and that the “well-settled remedy for defamation in Texas is an award of damages.”\(^{21}\)

\textit{Kinney} involved a legal recruiter, Robert Kinney, who left his employment at BCG Attorney Search to start a competing firm. On public websites, BCG accused Kinney of paying a bribe to place associates at a law firm and engaging in an “unethical kickback scheme." Kinney sued BCG and its president for defamation, seeking an injunction that the statements on the websites be removed and also that the company president be enjoined from making similar statements in the future.\(^{22}\)

The trial court denied the requested relief as an unconstitutional prior restraint and the intermediate appellate court affirmed.\(^{23}\) The Texas Supreme Court in \textit{Kinney} distinguished between deleting past speech from a website and a bar on future speech. An order to remove the statements made in the past from the websites was constitutionally permissible; an order enjoining similar statements in future was not. The court reversed and remanded so that the lower court could apply the narrow holding that “a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint.”\(^{24}\)

\textit{Kinney} explained its holding that an injunction prohibiting future speech is an unconstitutional prior restraint under the Texas constitution: “even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged.”\(^{25}\)

Rejecting the “modern rule,” \textit{Kinney} concluded trial courts are “simply not equipped to comport with the constitutional requirement not to chilling protected speech in an attempt to effectively enjoin defamation.”\(^{26}\)

Whether a state has adopted or rejected the “modern rule” for permanent injunctions against defamation will likely be considered by the courts in that state when requests for injunctions against disparagement based contractual promises are decided.

In one sense, a contractual promise not to disparage takes the place of the final adjudication that a statement is false and defamatory. But there is a difference—a contractual promise not to disparage can prohibit truthful speech and thus anti-disparagement preliminary injunctions are generally broader than the permanent injunctions approved in tort cases under the “modern rule.”\(^{27}\)

\textbf{II. The Nondisparagement Clause Injunction Cases}

While nondisparagement clauses in contracts are commonplace,\(^{28}\) there are only a handful of cases analyzing their enforcement by preliminary injunctions.

As a general matter, negotiated nondisparagement clauses (such as in severance agreements and litigation settlements) are more likely to be enforceable than those contained in form agreements and employee handbooks.\(^{29}\) Indeed, under the
Five appellate decisions addressing preliminary injunctions enforcing nondisparagement clauses are discussed below. Two decisions are published; three are not. Four affirm the injunction; one reverses. One is from Connecticut, one is from Ohio, and three are from Texas.

These five cases address diverse circumstances: a divorce; the end of a romantic relationship; the purchase of a house with construction defects; a dispute between a small business and a larger company; and a controversy about 145 million-year-old dinosaurs.

Perricone, the only state supreme court case in the group, affirms a preliminary injunction against defamation and disparagement.

During their 2003 divorce, Dr. and Ms. Perricone entered into a confidentiality agreement with language forbidding the dissemination of information obtained in discovery and further acknowledging that Dr. Perricone and his business interests “may be severely harmed by the public dissemination of defamatory or disparaging information” about him. Ms. Perricone was prohibited from disseminating such information “to the public and the press.”

Years later Dr. Perricone learned that his ex-wife planned to appear on a television show to talk about him. He obtained a court order to enforce the nondisparagement clause, thus blocking her planned appearance on ABC’s 20/20. That order was affirmed by the Connecticut Supreme Court in 2009 in a comprehensive decision analyzed in more detail in Section III below.

Brammer is a 2003 published Texas intermediate appellate decision. It is the only case of the five vacating a preliminary injunction.

The nondisparagement clause in Brammer was in a settlement agreement resolving, temporarily, a dispute between a couple and homebuilder about construction defects in a house. The clause provided: “you agree not to use any public medium such as the ‘internet’ or any broadcast or print medium or source to complain or disparage the building quality or practices of KB Home, it being acknowledged that any complaints or actions against KB Home are to be resolved solely in a private manner.”

When the homeowners resumed their public complaints, including an interview on a television news program, the builder successfully sought a temporary injunction barring them from “directly or indirectly slandering or defaming Plaintiff in any way.” On appeal, the court rejected the injunction as “an unconstitutional prior restraint” and ruled that the homeowners had not waived their First Amendment rights by agreeing to the nondisparagement provision. The reasoning of Brammer is discussed more fully in Section III below.

AultCare v. Roach is a short unpublished 2007 Ohio intermediate appellate decision affirming an order barring Roach from making disparaging comments about AultCare. Roach had sued AultCare and other companies for interfering with his business. The litigation settled and Roach agreed not to disparage AultCare. About six years later, a preliminary injunction issued enforcing the nondisparagement promise and the appellate court affirmed, noting that the restriction had been agreed to voluntarily.

Taylor v. DeRosa is an unpublished 2010 Texas intermediate appellate decision about the discovery and ownership of the fossilized remains of an allosaurus, a dinosaur that lived 145 million years ago.

There was a mediated settlement of the dispute and the settlement agreement contained an arbitration clause and “a non-disparagement clause forbidding any party from criticizing or disparaging the other parties publicly.”

The DeRosas filed an arbitration demand alleging that Taylor repeatedly violated the nondisparagement clause. The DeRosas prevailed, with the arbitrator awarding damages and imposing an injunction barring Taylor from criticizing the DeRosas and their film about the allosaurus dinosaur.

Taylor filed suit objecting to the arbitration award; the DeRosas moved to confirm the award and the trial court did so. Taylor appealed, arguing that the injunction barring him from disparaging DeRosa was an unconstitutional prior restraint.

The court of appeals affirmed. While noting that prior restraints are usually unconstitutional, the court explained that the strong presumption in favor arbitrator decisions included deference to an arbitrator’s decision to restrain speech. On substantive grounds, the court said, “the injunction in the present case merely serves to enforce a bargained-for provision” not to disparage, a promise that was made in exchange for “substantial monetary compensation.”

Walls v. Klein is an unpublished 2013 Texas intermediate appellate decision about a soured romantic relationship, a settlement where Klein paid Walls $30,000, and the enforcement of the settlement agreement’s nondisparagement clause.

The agreement provided “[t]he Parties agree and acknowledge they will not disparage one another.” After the settlement, Walls said that she intended to publicly disparage Klein on Facebook and Klein filed suit to stop her. The court granted his request for temporary relief and she appealed. The court of appeals in Walls affirmed a temporary injunction barring Walls from “disparaging and/or defaming Klein in any mode, form, or fashion whatsoever.”

Walls unsuccessfully argued that the injunction was unconstitutional, specific performance was not a remedy for breach, and irreparable harm was not shown.

The court held that the trial court had correctly concluded that Walls waived constitutional rights in the agreement based on her testimony that she signed the agreement and received $30,000. The court also relied on clauses at the end of the agreement that it was entered into “voluntarily, with the benefit and advice of counsel.”

Walls’s argument that damages would suffice was rejected because the Walls/Klein agreement provided that the contractual obligations “shall be enforceable in a court of equity by specific performance.”

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The court also found sufficient evidence in the record of irreparable harm based on Klein’s testimony. Walls distinguished Bramer because in that case, unlike Walls, there was no testimony in the record from the defendants to support waiver. Also, there were issues of public concern in Bramer that were absent from Walls.

Finally, the court approved the text of the injunction—including the order that Walls not disparage or defame Klein—but modified the injunction to allow her to report “truthful incidents” to law enforcement.36

The structure of Perricone is a helpful framework for approaching motions seeking injunctive enforcement of nondisparagement clauses. Relevant case authority is analyzed under that structure in the following section.

III. Issues Courts Address

After finding that there was an agreement not to disparage, Perricone considered: (1) whether there was state action; (2) the constitutional validity of a contractual prior restraint; (3) whether there was a waiver of free speech rights; (4) whether public policy barred enforcement of the waiver; and (5) indefiniteness of the agreement. These five topics are addressed below:

A. State Action Requirement

There is an argument that constitutional questions are irrelevant to enforcement of private contracts because there is no state action. The counter-argument is that judicial enforcement of a contract is itself state action triggering constitutional scrutiny.47 None of the cases discussed in this article turn on this issue.

The Supreme Court in Cohen began its analysis by asking whether there was “state action” within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered.” If there was no state action, “then the First Amendment has no bearing on this case.”48

The Court found state action because the Minnesota Supreme Court’s ruling under review in Cohen was based on promissory estoppel theory, not a written agreement. Promissory estoppel is a “state-law doctrine which . . . creates obligations never explicitly assumed by the parties.” Thus, the state action requirement was met.49

In Perricone, there was written agreement. Perricone thus considered whether the Supreme Court in Cohen meant to “distinguish promissory estoppel actions from contract actions” on the issue of state action. The court ultimately assumed without deciding that “the judicial enforcement of a confidentiality agreement between private parties constitutes state action.”50

Perricone notes that a “number of courts have concluded that Cohen merely stands for the narrow proposition that, when the state creates a legal duty and then enforces that duty, the enforcement constitutes state action.”51

But Perricone also cites a law review article that argues “the distinction between the enforcement of a promise and the enforcement of a contract in this context ‘is dubious at best and probably false, because the defendant in a promissory estoppel action initially create[d] his
obligation by making a promise to do something.” That law review article argues that because state power is being applied in a manner that suppresses speech, there is state action.32

B. Validity of Contractual Prior Restraint

Whether contractual nondisparagement clauses are per se invalid has been litigated and the issue is settled. Even though such clauses limit free speech rights, they can be valid and enforceable.

Cohen is central. After finding state action, Justice Byron White, writing for the Cohen majority, rejected the argument that awarding damages for breach of the promise of confidentiality violated the First Amendment. While the newspaper otherwise would have had a First Amendment right to publish the name of its source, it could be held liable for damages for divulging the name because it had made a promise to keep the name confidential.33

In Perricone, Ms. Perricone unsuccessfully argued that judicial enforcement of agreements to limit speech are “presumptively unconstitutional” and “subject to strict scrutiny.”34

In rejecting this argument, the Connecticut Supreme Court relied on Cohen. The court recognized that “Cohen involved an action for damages, and not, as in the present case, a request for a restraining order;” but concluded that the “reasoning in Cohen is equally applicable here.”35

Perricone explained: “when private parties — and not the government — voluntarily have defined the scope of disclosures that would trigger sanctions, the parties cannot complain if the court merely holds them to their promises.” Where constitutional free speech rights have been waived by contract, the contractual promises “may be enforced by the courts even if the contract is not narrowly tailored to advance a compelling state interest.”36

Outside the preliminary injunction context, many courts have rejected arguments that nondisparagement clauses are constitutionally invalid. For example, in 1999 the Colorado Supreme Court in Pierce v. St. Vrain Valley School District, upholding a nondisparagement clause, overruled lower courts that considered the clause constitutionally impermissible.37

In Pierce, a school superintendent accused of sexual harassment resigned in exchange for a payment and a promise that there would be no disparaging public comments. Representatives of the school district violated the agreement and made comments about the circumstances leading to the resignation.

The former superintendent sued for breach of the nondisparagement clause. The trial court and the intermediate appellate court dismissed his lawsuit, accepting defendants’ argument that the nondisparagement clause was void as a restraint on free speech.

The dismissal of the lawsuit was reversed by Colorado’s Supreme Court. Citing Cohen, the Court held “the parties imposed their own restrictions on their ability to speak publicly” about the resignation. Enforcement of that agreement “does not violate the First Amendment.” Nor were there public policy reasons to void the clause. The school board “clearly concluded at the time they entered into the agreement that the public interests in the efficient administration of the school system outweighed considerations regarding the accessibility of this information to the public.”38

C. Waiver

Both Perricone and Brammer hold that free speech rights can be waived by contract if the waiver is knowing, voluntary, and intelligent. But Perricone puts the burden on the party trying to avoid the waiver and Brammer puts the burden on the party trying to enforce it.

Because the Connecticut Supreme Court had not previously considered who has the burden of proving the contractual waiver of First Amendment rights, Perricone addressed the question as a matter of first impression. It held that the policy of “freedom of contract and efficient resolution of disputes” applies to waivers of the First Amendment and, therefore, such waivers are “presumptively enforceable” and “the burden of proving . . . invalidity is on the party seeking to avoid the waiver.”39

Brammer rejected a similar argument. In Texas, the protection of free speech rights is more important than the enforcement of contracts and waivers can only be enforced if there is clear and convincing evidence of a knowing, voluntary, and intelligent waiver.40

In addition to the different legal standard, the evidentiary record in the two cases differed. There was no similar testimony from the defendants in Brammer.

In deciding whether the waiver was “intelligent and voluntary,” the Perricone court identified five factors to be considered: (1) the relative bargaining equality of the parties; (2) whether or not the terms of the agreement were negotiated; (3) whether the party seeking to avoid the waiver was advised by counsel; (4) the extent to which that party benefited from the agreement; and (5) whether the provision restricting speech was conspicuous. Considering these factors, the court found the waiver effective.42

In contrast, Brammer ruled there was no evidence in the record to show that the defendants “knowingly, voluntarily, and intelligently agreed to waive the constitutional safeguards implicated by defamatory or disparaging speech.”43

Both Brammer and Perricone cite the Ninth Circuit decision Leonard v. Clark.44 Leonard accepted the argument that a union had waived free speech and petitioning rights in a labor agreement between fire fighters and city that imposed economic consequences on certain lobbying efforts that would increase the city’s labor costs.

Brammer cites Leonard for the level of proof required to show waiver: “[The] United States Supreme Court requires clear and convincing evidence that waiver [of constitutional rights] is knowing, voluntary, and intelligent.”45

Perricone cites Leonard for its finding that a waiver is knowing.
voluntary, and intelligent when the waiving party was advised by competent counsel, actually proposed the language that it objected to, voluntarily signed the agreement, and was of relatively equal bargaining strength to the other party.66

In any proceeding seeking a preliminary injunction to enforce a nondisparagement clause, whether there was a knowing, voluntary, and intelligent waiver of free speech rights is likely to be a central battleground.

D. Public Policy
Dr. Perricone argued that once a court finds a waiver of constitutional rights, there is no need to consider public policy. The Connecticut Supreme Court disagreed, explaining that there is a “two step approach to claims involving contractual waivers of constitutional rights.” The first step is “whether the waiver violates the constitution.” The second step is “whether there are, nevertheless, compelling public policy reasons not to enforce the waiver.”67

The public policy analysis looks at interests beyond those of the parties and whether the restricted speech is about matters of public concern. If the speech is not about such matters, enforcement is more appropriate.68

Perricone explains that “[c]ourts also have considered whether the contractual restriction on speech was tailored to advance the primary purpose of the contract.” If not, there is a stronger argument against enforcement.69

Applying this test to the nondisparagement provision that the Perricones had agreed to, the court found it enforceable. The agreement did not involve criminal behavior, public health and safety, or other matters of “great public importance.”70 And because the divorce settlement gave Ms. Perricone a lump sum based on the value of Dr. Perricone’s business, the restrictions on speech were “tailored to advance [the] primary purpose of protecting the value of [his] business.”71

Brammer presented different circumstances. Brammer voided the injunction because the enjoined speech involved matters of public concern—alleged defects in homes that were being offered for sale.72

Walls, the unpublished Texas case that affirmed a nondisparagement injunction, involved a factual situation closer to Perricone, a failed personal relationship. Walls noted that Brammer involved matters of public concern, one reason the outcome in Walls differed from the outcome in Brammer.73

E. Scope and Specificity of Injunction
In both tort and contract cases, the enjoined party often argues that the injunction is overbroad or vague. Those arguments frequently meet with at least some success leading to a narrowing of the injunction.

In both Balboa Island and Walls, the appellate courts found the injunctions overbroad and imposed modifications so that the enjoined party could communicate with law enforcement.74 In AultCare, the court rejected defendant’s interpretation that the injunction prohibited him from talking to his lawyer. Even though this was a “plausible” interpretation, applicable doctrines required a reading of the injunction so that it did not bar communications with counsel.75

In Perricone, Ms. Perricone argued that the nondisparagement clause (and, necessarily, the injunction) was indefinite and that anything she might say about her divorce, including that she was divorced, could be considered disparaging. The court deemed these concerns hypothetical, noting that the defendant could seek modification of the injunction in the trial court “as it may apply in the future to other contemplated conduct.”76

Balboa Island follows similar reasoning in addressing hypothetical circumstances. It observes that if circumstances change—such as the prohibited statements become true—then the “defendant may move to modify or dissolve the injunction.”77

Conclusion
Given the prevalence of nondisparagement clauses in contracts, it is surprising how few appellate cases address preliminary injunctions enforcing such clauses. Perhaps practitioners are reluctant to seek such relief out of a concern that courts would view the requested relief an improper prior restraint. Perricone stands out for its thorough and thoughtful exploration of the important questions raised by motions to enforce nondisparagement clauses by preliminary injunction.

The key question for courts to consider in deciding motions seeking preliminary injunctions enforcing nondisparagement clauses is whether the defendant has waived constitutionally-protected free speech rights and whether there are public policy reasons not to issue the requested relief.

Perricone found waiver; Brammer did not. Perricone offers a five-factor test to determine whether the waiver was “intelligent and voluntary.” The decision relies, in part, on the defendant’s testimony that she signed the agreement and discussed it with counsel. There was no comparable testimony in Brammer.

The two decisions also differ because the speech in Brammer was about a public issue, while in Perricone the speech was about a private matter.

Walls, where the injunction was approved by the appellate court, has similarities to Perricone—testimony from the defendant in the record and no public policy considerations. In addition, Walls cites the language of the agreement that its terms were voluntary, entered into with the advice of counsel, and could be enforced in a court of equity by specific performance. Also, in both Walls and Perricone, the record demonstrated that consideration was paid for the promise not to disparage.

These factors—the contractual language and the evidentiary record—contributed to conclusion in both cases that enforcement of the nondisparagement clauses by preliminary injunction was appropriate.

Endnotes
injunction[s] are] seldom sought and usually denied.”


3. 972 A.2d 666 (Conn. 2009)
4. Id. at 672.
5. Id. at 679.

7. Permanent injunctions are constitutionally distinct from preliminary injunctions because permanent injunctions occur only after a judicial determination that the speech is unprotected. Mark Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 2 at 147, 170 (1998) (“After speech is conclusively judicially determined to be unprotected—because it is obscene, for example—a permanent injunction . . . . would be no more troubling on constitutional grounds than a civil or criminal penalty.”)

10. Restatement (Second) of Torts § 623: Special Note on Remedies for Defamation Other Than Damages (1977): “Equity courts have never been inclined to grant freely injunctive remedies against personal defamation, and ever since Near v. Minnesota (1931) 283 U.S. 697, it has been recognized that prior restraint of a publication runs afoul of the First Amendment. Nevertheless, it remains possible that injunctive relief might on some occasions become a suitable supplement to declaratory relief. When it has been formally determined by a court that a statement is both defamatory and untrue and the defendant persists in continuing to publish it, a carefully worded injunction might meet the need and be available against further publication of the statement that has already been determined by the court to be false and defamatory.”

11. 427 U.S. 734 (2005). The Court granted certiorari to decide: “Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.” Id. at 736. The plaintiff was prominent Los Angeles lawyer Johnnie Cochran.
12. Id. at 738-39.
13. 40 Cal.4th 1141 (2007)
14. Id. at 1144. The injunction prohibited statements such as the Village Inn serves tainted food, participates in prostitution, sells alcohol to minors, distributes illegal drugs, is involved in child pornography, and encourages lesbian activities. Id. at 1146.
15. Id. at 1167. This dissent also argued that the injunction was unnecessary because the plaintiff had not demonstrated that monetary damages would be an inadequate remedy. Id. at 1168.
16. Id. at 1172.
17. 325 S.W.3d 302, 309 (Ky. 2010).
18. Id. at 304.
19. Id. at 309.
20. Id. at 316.
22. Id. at 89-90.
23. Id. at 90.
24. Id. at 101.
25. Id. at 98. Balboa, Hill, and Kinney were all cited in a 2015 Seventh Circuit decision McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015), in which Judge Richard Posner and Judge Diane Sykes debate (without deciding) the constitutionality of post-trial injunctions against defamation. Judge Posner writing for the majority, vacates a broad injunction and remands so that the trial court can consider a narrower injunction. Id. at 463. Judge Sykes would have directed the trial court to deny the injunction. She argues against the constitutionality of permanent injunctions enjoining defamation: “Defamation by its nature is highly contextual . . . . A permanent injunction as a remedy for defamation does not account for constantly changing contextual factors that affect whether the speech is punishable or protected.” Id. at 465.
26. 443 S.W.3d at 99.
27. The injunction in Perricone barred defamatory and derogatory remarks. In other cases, disparaging statements are prohibited. Dictionaries define disparagement as “bringing discredit upon” and “to lower in rank or reputation.” Vivian v. Labrucherie, 214 Cal. App. 4th 267, 277 n.4 (2013).
29. Id. at 18.
30. 15 U.S.C. § 45b
31. 972 A.2d at 671.
32. 114 S.W.3d at 103-04
33. Id. at 105.
34. Id.
35. Id. at 106.
38. Id. at *1. 
39. Id. at *2.
40. Id. at *3.
42. Id. at *1.
43. Id. at *2.
44. Id. at *3.
45. Id. at *1.
46. Id. at *5.
48. 501 U.S. at 668.
49. Id.
50. 972 A.2d at 676-77.
51. Id. at 677 n.10.
53. Cohen was a 5-4 decision. Justices Harry Blackmun and David Souter wrote dissents. They believed that the publication of truthful information about a political campaign was protected by the First Amendment and would have affirmed the Minnesota Supreme Court’s decision voiding the damage award.
54. 972 A.2d at 677.
55. Id. at 679.
56. Id.
57. 981 P.2d 600, 604 (Colo. 1999)
58. *Id.* at 607. In *Trump v. Trump*, 582 N.Y.S.2d 1008 (1992), Donald Trump obtained a written promise from Ivana Trump that she would not speak about their marriage or his personal, business or financial affairs. When this agreement later became part of a proposed judgment, the trial court deleted the promise to remain silent and signed the judgment. Mr. Trump appealed asking the appellate court to reinstate the promise, which it did, rejecting the argument that it was an unconstitutional prior restraint.

59. 972 A.2d at 680-81. *Perricone* rejected the argument that for there to be a waiver of First Amendment rights, the agreement needs to mention the First Amendment specifically. *Id.* at 682.

60. 114 S.W.3d at 109-10.
61. 972 A.2d at 680.
62. *Id.* at 682-83.
63. 114 S.W.3d at 110.
64. 12 F.3d 885 (9th Cir. 1993)

65. 114 S.W.3d at 110.
66. 972 A.2d at 682.
67. *Id.* at 686 n.29.
68. *Id.* at 688.
69. *Id.*
70. *Id.* at 689.
71. *Id.* at 674 n.6 (“The separation agreement provided that the plaintiff would pay a lump sum to the defendant, which apparently was based on the defendant’s valuation of the plaintiff’s business.”) and 689 (“the restrictions on speech imposed by the confidentiality agreement are tailored to advance its primary purpose of protecting the value of the plaintiff’s business.”)

72. 114 S.W.3d at 109.
73. While nondisparagement clauses in negotiated agreements are mostly enforceable, in other areas they are not. *See* *Murphy, supra* note 28 at 18 (“non-disparagement clauses in certain contexts have attracted particularly scrutiny”

74. *Balboa*, 40 Cal.4th at 1160-61 (the prohibition on making statements modified to permit statements to “governmental officials with relevant enforcement responsibilities”); *Walls*, 2013 WL 988179 at *5 (permitting defendant “to report any truthful incidents of illegal conduct directed at her to law enforcement”).

75. 2007 WL 3088036 at *4.
76. 972 A.2d at 691 n.35.
77. 40 Cal.4th at 1161.
The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30 symposium will mark the anniversary of a landmark Supreme Court decision, issued in 1988, affirming the First Amendment right of editorial cartoonists and satirists to lampoon public figures.

But 30 years later, satirists of all stripes are working in an environment that presents challenges to freedom of speech unimaginable when the unanimous court decided *Hustler v. Falwell*. There are calls to change libel laws to make it easier to sue the news media. Cartoonists and journalists face intimidation on social media platforms. Those same platforms make it possible for cartoons drawn in Buffalo, Copenhagen, or Paris to reach audiences in any corner of the world, including places where insult laws and prohibitions on hate speech are the norm. In the era of Trump and Charlie Hebdô, will *Hustler*'s protections endure?

**The State of Our Satirical Union** is sponsored by the University of Minnesota’s Silha Center for the Study of Media Ethics and Law. The Association of American Editorial Cartoonists and some of its members are helping organize the symposium and will participate in many sessions. Held at the University of Minnesota, Twin Cities, on April 20 and 21, 2018, the symposium will explore the many dimensions of the *Hustler* decision, including the history of the case and participation by editorial cartoonists and other First Amendment advocates as “friends of the court.” Leading media law scholars and editorial cartoonists will interpret the legacy of the ruling in the context of major political events and legal developments of the last 30 years.

The symposium will feature some of the country’s best-known editorial cartoonists, whose work will be displayed throughout the event.

The Silha Center at the Hubbard School of Journalism and Mass Communication will publish a special symposium book examining the significance and vitality of satire in American life today. Scholars, media lawyers, historians, cartoonists, comedians, and others are invited to submit abstracts of articles, essays, and graphic art exploring these topics by January 16, 2018. The Silha Center will invite authors and artists whose abstracts are accepted to provide the final version of their submissions by March 5, 2018, and to participate in the symposium.

For further information, or to submit an abstract, contact Jane E. Kirtley, Silha Professor of Media Ethics and Law, Hubbard School of Journalism and Mass Communication, University of Minnesota, at kirtlof@umn.edu or 612-625-9038.

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**KEY DATES**

**ABSTRACTS DUE**

**JANUARY 16, 2018**

**FINAL ARTICLES DUE**

**MARCH 5, 2018**

**SYMPOSIUM**

**APRIL 20-21, 2018**
After Charlottesville, How Committed Do We Remain to Free Speech for All?

CHARLES D. TOBIN, ADRIANNA C. RODRIGUEZ, SCOTT S. HUMPHREYS, MATTHEW G. KUSSMAUL, JEREMY C. SAIRISINGH, AND LINDSEY ZIOMTS

The Nazis marching in Skokie, Illinois, almost seems like a quaint image now—a twisted Norman Rockwell painting of sorts. Until recently, that protest was a perfect metaphor for our country’s cultural commitment to the protection of all speech: a Jewish lawyer for the ACLU takes on the cause of a bunch of Jew-haters who antagonistically picked a peaceful suburb with a sizeable Holocaust-survivor population for their hateful protest. Now that’s all-in for the First Amendment.

Indeed, from the 1770 Boston Massacre through the 2017 Women’s March after the inauguration of President Donald J. Trump, vehement public protest—even by protestors who offend some or most of us—has been a fundamental part of what makes the United States unique. We gather together to loudly share our views, and we count on the police and the law to protect us. Democracy grows stronger when it encourages public dissent.

Or, so we have all grown up to believe. Somehow, Charlottesville feels like someone threw a can of black paint on that Rockwell image. Since the ugliness there, even some of the most ardent First Amendment advocates among us—to the point of screaming debate in a New York City bar—wonder if we need to rethink our convictions.

To be sure, the law does draw lines between permissible and non-permissible forms of protests in many ways: First Amendment carve-outs for true threats, incitement, fighting words; divining between symbolic speech and pure conduct; protecting the Second Amendment right to bear arms while precluding people from brandishing guns in others’ faces; the government’s ability to regulate the time, place and manner of speech in content-neutral fashion.

But for those of us who have studied the issue—and argued them in courts—the lines are, at times, very blurry. And the white supremacist in Charlottesville who barreled his car into the crowd killing a protestor—and his club-toting colleagues—clearly come nowhere close to the line protecting freedom of speech.

To further the discussion of where the lines ought to lie, and we are witnessing the case being made to redraw them, we offer this brief review of where they currently are drawn. And some research help to those who continue to struggle with finding sensible solutions in increasingly insane political times.

Hate Speech Is Protected under the First Amendment, Hate Crimes Are Not

“Hate speech” is a colloquial label attached to expressions that are extremely offensive to a particular group of people, or that directly call out and oppose the beliefs, conduct, or identity of others. Under the First Amendment, however, “hate speech” is treated the same as any other speech. No matter how disgusting, expressions are protected as long as they do not fall into the narrow categories of fighting words, incitement, true threats, or other unprotected speech. As the Supreme Court said, by 1969 it was “firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” The Supreme Court reaffirmed this principle as recently as July 2017: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”

This does not mean, however, that expressions of hate never have legal consequences. Forty-five states, the District of Columbia, and the federal government punish hate crimes under criminal law. These laws punish a defendant who selected a victim for a crime because of the person’s identity, either by increasing the maximum punishment available or setting a minimum sentence for the underlying offense.

The categories protected by hate crime statutes usually include race, religion, color, disability, sexual orientation, and national origin, but these vary between jurisdictions. For example, Illinois prohibits selecting a victim based on sexual orientation or gender identity, while Wisconsin only addresses sexual orientation—and Pennsylvania addresses neither.

Punishing a person for his or her hateful or biased motivation in this way does not violate the First Amendment. The Supreme Court has made clear that hate crime statutes are constitutional because criminal acts are not protected forms of expression, and “bias-inspired conduct” can be viewed as “inflicting[ing] greater individual and societal harm.” When it comes to punishing hate, the distinction between hateful speech and hateful conduct is paramount.

Fighting Words, True Threats, and Incitement

The U.S. Supreme Court has held that the First Amendment does not protect certain narrow categories of speech that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Three such categories of unprotected speech are “fighting
words,” “true threats,” and “incitement.” Although legally distinct, these categories often overlap and speech is often challenged under two or more categories.

II. “Fighting Words” Are Not Protected
“Fighting words” are “personally abusive epithets” that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” To qualify as “fighting words,” the words must be “directed to the person of the hearer,” meaning the doctrine has generally been limited to “faceto-face” interactions. The words “must do more than bother the listener; they must be nothing less than ‘an invitation to exchange fisticuffs.’”

The “fighting words” exception was established by the Supreme Court in Chaplinsky v. New Hampshire, 315 U.S. 573 (1942). In that case, the Court affirmed the defendant’s conviction under a state law prohibiting “offensive, derisive or annoying words to any other person” in a public place where the defendant repeatedly told a city marshal “You are a God damned racketeer” and a “damned Fascist.” In recent years, however, the fighting words doctrine has become very limited and is rarely invoked successfully, largely because “[s]tandards of decorum have changed dramatically since 1942” and “indelicacy no longer prevents speech beyond the protection of the First Amendment.” Today, a “clear example” of “fighting words” would be where one man, engaged in a face-to-face conversation, became angry and called the other man a “lying motherf***er” leading to a physical altercation.

A recent case involving anti-gay speech on a college campus illustrates the difference between highly offensive, yet protected speech directed at a crowd, and unprotected “fighting words” directed to an individual. In Gilles v. Davis, 427 F.3d 197 (3rd Cir. 2005), a self-styled “campus evangelist,” addressed a crowd in a busy public area. He preached invective against the LGBT community, cautioning students to “watch out [because] the homosexuals are after you on this campus” and announced that “nothing is lower than a lesbian.” At that point, a woman in the crowd volunteered that she was a Christian lesbian, and he took to pejorative taunting. This engaged angry responses from the crowd, someone called the campus police, and he was arrested for disorderly conduct. He later brought a civil suit against the campus police, claiming they had violated his First Amendment rights. The Third Circuit disagreed. The court held that the speaker’s “derogatory language generically directed to the crowd” was protected by the First Amendment as it was “not personally directed at a particular member of the audience” and was “not likely to incite an imminent breach of the peace,” but the “epithets directed at the woman who identified herself as a Christian and a lesbian” were “akin to a racial slur” and were “especially abusive and constituted fighting words.”

The “fighting words” doctrine has been addressed in a variety of other contexts:

- **Offensive Speech on Clothing.** In Cohen v. California, 403 U.S. 15 (1971), the Supreme Court overturned a man’s criminal conviction for disturbing the peace for wearing a jacket bearing the words “Fuck the Draft” in the public corridors of a courthouse, holding that “no individual actually or likely to be present could reasonably have regarded the words on [the] jacket as a direct personal insult.”

- **Flag Burning.** In Texas v. Johnson, 491 U.S. 397 (1989), the Supreme Court overturned the defendant’s criminal conviction for burning an American Flag during a protest, holding that the act was expressive conduct protected by the First Amendment and that the defendant’s statements expressing dissatisfaction with the federal government’s policies did “not fall within the class of ‘fighting words’ likely to be seen as a direct personal insult or an invitation to exchange fisticuffs.”

- **Ku Klux Klan Activities.** In Virginia v. Black, 538 U.S. 343 (2003), the Supreme Court held that a state may constitutionally ban cross-burning if done with an intent to intimidate a person or group of people. Although often analyzed under the “true threats” or “incitement” doctrines (see below), cross burning may also constitute “fighting words.” For example, a federal district court in Texas found that intimidating statements made by Ku Klux Klan members directed to a class of Vietnamese fishermen living in the area, coupled with overt acts of burning a shrimp boat and cross at a rally, and having a boat parade in which an effigy of a Vietnamese fisherman was hung from the rear deck rigging, were unprotected as “fighting words.”

- **Anti-Gay Speech.** In Snyder v. Phelps, 562 U.S. 443 (2011), the Supreme Court held that anti-gay speech on a matter of public concern cannot be the basis of liability for a tort of emotional distress, even if the speech is viewed as “offensive” or “outrageous.” The Court also stated, in dicta, that the demonstrators’ signs, saying things like “God Hates the USA/Thank God for 9/11,” Thank God for Dead Soldiers,” “God Hates Fags,” “Pope in Hell,” “Priests Rape Boys,” and “You’re Going to Hell,” were “not fighting words.”

- **Anti-Muslim Speech.** Recent cases have held that hateful speech directed against Muslims are protected by the First Amendment unless directed at individuals and likely to incite an immediate breach of the peace. For example:

1. The Sixth Circuit recently held that the First Amendment rights of a group of “selfdescribed Christian evangelists” were violated when they were removed from an Arab International Festival and cited by police. The Christian group was removed after preaching, “You believe in a prophet who is a pervert” and “God will put your religion into hellfire when you die.” The Sixth Circuit held that these statements did not constitute “fighting words” because they were not directed at any
individual” and that “the average individual attending the Festival did not react with violence … only a certain percentage engaged in bottle throwing when they heard the proselytizing.”

2. Two federal district courts recently held that municipal transit authorities could not refuse to display anti-Muslim advertisements purchased by a pro-Israel advocacy group, including subway ads stating that “IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. SUPPORT ISRAEL. DEFEATJIHAD” and bus ads portraying a menacing-looking man with a head scarf and the statement “Hamas MTV: Killing Jews is Worship that draws us close to Allah. That’s His Jihad.” However, one court vacated its opinion as moot after the transit authority revised its regulations to prohibit the display of all political advertisements, not just those dealing with anti-Muslim issues.

- **Anti-Abortion Protests.** Offensive signs held by protestors outside abortion clinics will not qualify as “fighting words” unless accompanied by invective likely to incite a breach of the peace directed at individuals working in the clinics, or patients or their families. For example, the Tenth Circuit has held that signs reading “The Killing Place” displayed by protestors outside an abortion clinic were not “fighting words” because they “were not personally abusive epithets so directed that they were ‘inherently likely to provoke violent reaction.’” Similarly, a federal district court in Kentucky held that signs containing graphic photographs of an aborted fetus could not be proscribed as fighting words.

- **Insulting a Police Officer.** In general, insults or swear words spoken to police officers are not punishable as fighting words. For example, a person cannot be punished if, while getting a ticket, he or she tells an officer “this sucks” and “you’re a fucking asshole.” Similarly, it was not punishable where a person trying to retrieve his automobile from impound at a police station said “you’re really being [an] asshole” and “you’re really stupid.” But if the epithets go beyond merely insulting language, they might be considered “fighting words.” For example, where a person made repeated personal attacks on the officers screaming things like “Mother F****ers,” “F*** heads,” and “F***ing pigs.” As one federal court put it: “if calling someone a goddamn f***ing pig does not exemplify ‘fighting words’ [the court] was hard pressed to imagine what words could be so construed.”

**III. “True Threats” Are Not Protected**

“True threats” have been defined as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” The threat itself is the crime, even if never carried out. As the Supreme Court explained in Virginia: “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.” The Supreme Court further explained that “[i]ntimidation … is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”

Importantly, “true threats” are distinguished from mere hyperbole or joking or facetious remarks, which are protected by the First Amendment. Thus, in determining whether or not a particular statement is a “true threat,” it is necessary to consider the overall context in which the statement was made and the reaction of the listeners. For example, in the seminal “true threats” case of Watts v. United States, 394 U.S. 705 (1969), the Supreme Court reversed an 18-year old man’s conviction for violating a federal law criminalizing threats against the President based on the man’s statements at a Vietnam War protest that he had been ordered to report for a draft physical and “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” While the Court recognized that “true threats” are not protected by the First Amendment, it held that the statements were mere “political hyperbole” which, taken in context, were nothing more than “a kind of very crude offensive method of stating a political opposition to the President.” Similarly, in Clai-borne Hardware, the Supreme Court reversed the conviction of a man who stated at a boycott rally that if anyone violated the boycott “we’re going to break your damn neck.” The Supreme Court held that the statement, taken in the context of the man’s “lengthy speeches,” which “generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them,” were not punishable.

Federal circuit courts have disagreed about the intent required for a true threat: a majority apply an objective test, which requires only that an objective or reasonable recipient of the communication would regard it as an actual threat, whereas the Ninth Circuit has applied a subjective intent test, which requires that the speaker subjectively intended his statements to be interpreted as an actual threat. The Supreme Court recently passed on an opportunity to resolve this issue in Elonis v. United States, ___U.S. ___, 135 S.Ct. 2001 (2015), which dealt with a man convicted under a federal statute for making threats on Facebook to his estranged wife and others. The Court reversed the conviction, but decided that case on statutory grounds, expressly declining to address any First Amendment issues, including what intent—objective or subjective—is required by the First Amendment.

Some examples of cases involving “true threats” include:

- **Threats to Judges.** Threats against judges are often held to be “true threats.” For example, in one case the Ninth Circuit held that the defendant’s
statement that he wanted to target a judge and “string the motherfucker up and cut her throat, his throat, and make it like a copycat so that people would do the same thing” combined with an offer to provide weapons and money reward was a “true threat” under both an objective and subjective standard. In another case, the Eighth Circuit affirmed a defendant’s conviction for obstruction of justice and threatening a federal official where the defendant mailed to the home of a federal district judge a letter stating that a foreclosure the judge had entered against the defendant was unconstitutional and attached a “Public Notice of Treason” which stated in part that “TREASON by law, is punishable by the DEATH PENALTY.”

- **Threats to Students.** Whether a student’s threats to harm other students constitutes a punishable “true threat” often depends on the context and demeanor of the speaker. Two cases decided by the Washington Supreme Court are illustrative:

1. A defendant student told the victim that he would “bring a gun to school tomorrow and shoot everyone.” The court held this was not a “true threat” because of the defendant’s demeanor (he was “half smiling” when he made the threat and “giggling” afterward) and history with the victim (they had known each other for over two years and never had a fight or disagreement, and the defendant had always treated the victim nicely.)

2. A defendant student told a therapist and later a deputy that he wanted to kill fellow high school students who had teased him. The court held this was a “true threat” because of the student’s serious change in demeanor when describing his plan to kill the boys, the plan’s depth of detail, and the student’s failure to acknowledge that shooting the boys would be wrong.

- **Anti-Abortion Speech.** Even if highly offensive, speech by anti-abortion protesters is unlikely to qualify as a “true threat” unless directed at specific individuals. In Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 773 (1994), the Supreme Court confirmed that a state can constitutionally ban protestors from displaying “signs that could be interpreted as threats or veiled threats” directed to patients or their families, but held that a law banning all “images observable” from the clinic violated the First Amendment even if the ban was intended to “reduce the level of anxiety and hypertension suffered by the patients inside the clinic.” By contrast, the Eight Circuit in United States v. Dinwiddie, 76 F.3d 913, 917 (8th Cir.1996), found a true threat when the defendant sent more than fifty messages to an abortion clinic director, including: “Robert, remember Dr. Gunn . . . This could happen to you . . . Whoever sheds man’s blood, by man his blood shall be shed . . . .”

- **Mere Hyperbole.** Speech that others find offensive or even frightening will not constitute a “true threat” if it can be viewed as mere “hyperbole.” For example, the Ninth Circuit recently held that a number of messages painted on a Volkswagen van, such as “I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!” “PULL ME OVER! PLEASE, I DARE YA,” “ALLAH PRAISE THE PATRIOT ACT … FUCKING JIHAD ON THE FIRST AMENDMENT! PS. W.O.M.D. ON BOARD!” were not true threats even though a woman called the police to report that she was frightened by them. The Ninth Circuit explained that they were “obviously satiric or hyperbolic political message[s],” and no “reasonable observer would have believed the statements were serious expressions of an intent to cause harm.”

- **Exhortations to Third-Party Violence.** Whether a speaker’s calls for others to engage in violence are “true threats” is a fact intensive inquiry that depends on the circumstances in each case.

1. Not True Threats

- Internet posts by the leader of a white supremacist organization urging others to kill a Canadian civil rights attorney were not “true threats” because the posts did not express the defendant’s own intent to kill the attorney, and there was insufficient evidence that defendant had “some control over those other persons” or that the defendant’s “violent commands in the past had predictably been carried out.”

- Posts to an online financial discussion board shortly before Barack Obama’s election, one of which stated “Re: Obama fk the niggar, he will have a 50 cal in the head soon” although “particularly repugnant” were not “true threats” because there was “no explicit or implicit threat on the part of [defendant] that he himself will kill or injure Obama” but instead just an “imperative that some unknown third party should take violent action.”

2. True Threats

- Defendant who published a blog post declaring that three Seventh Circuit judges “deserve to be killed” and “to be made an example of” for their decision that the Second Amendment did not apply to the states, and posted photographs, work addresses, and room numbers for each of the three judges, along with a map indicating the location of the courthouse and its anti-truck bomb barriers, and further suggested that the judges “didn’t get the hint” sent by a gunman who had murdered the family of another federal judge in Chicago.

- Anti-abortion group that published, in the wake of the murder of several abortion doctors that had been listed on pro-life “Wanted” posters, so-called “Deadly Dozen” posters listing the names and addresses of abortion providers in the area and deeming them “Guilty of
Crimes Against Humanity"

- Defendant who published posts on his Facebook page urging his “religious followers” to “kill cops. drown them in the blood of their [sic] children, hunt them down and kill their entire bloodlines” and provided names and later instructed his “religious operatives” that “if my due charges are not dropped, commit a massacre in the stepping stones preschool and day care, just walk in and kill everybody.”

IV. “Incitement” Is Not Protected

Under the “incitement” exception, speech is not protected if it is both (1) “directed to inciting or producing imminent lawless action” and (2) “likely to incite or produce such action.” Importantly, “mere advocacy of the use of force or violence” does not constitute “incitement” and is protected by the First Amendment. This is so because “the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”

The incitement doctrine was established in Brandenburg, a landmark decision that arose from a Ku Klux Klan leader’s speech at a rally that criticized Blacks and Jews and threatened “revengeance” if the “suppression” of the white race continued. The speaker was convicted under a state law that proscribed the advocacy of “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” The Supreme Court reversed the conviction, holding that the law was unconstitutional because the First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

Since Brandenburg, the Supreme Court has made clear that the state cannot “assume that every expression of a provocative idea will incite a riot” and must instead give “careful consideration of the actual circumstances surrounding such expression.”

The Supreme Court’s decision in Claihorne Hardware, 458 U.S. 886 is instructive. That case arose out of the 1960s civil rights movement and involved a boycott of white merchants in Mississippi. Charles Evers, an official of the NAACP, had stated in speeches that the boycott organizers knew the identity of those who had violated the boycott, and would take action against them. Evers also stated that “[i]f we catch any of you going into any of them racist stores, we’re going to break your damn neck” and that the sheriff would be unable to protect boycott violators. The trial court awarded the merchants damages and granted injunctive relief. The Supreme Court reversed, explaining that Evers’ lengthy speeches “generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them.” The Court also explained that while “strong language was used,” any acts of violence – with one possible exception – occurred weeks or months after the speech so it did not carry with it an imminent threat of violence.

The “incitement” doctrine differs in two ways from the “fighting words” and “true threats” doctrines. First, for the inciter the goal is to prompt third parties to engage in unlawful acts with some immediacy. By contrast, under the “fighting words” and “true threat” doctrines, the actor’s statements are targeted at a specific, identifiable person or group of people, who have been targeted by the speaker as his victims. Second, as to the context, the inciter is advocating imminent lawless action in a public setting and speaking contemporaneously. Specifically, the inciter is typically speaking to an audience urging them to take unlawful action. By contrast, the “fighting words” and “true threat” doctrines focus primarily on whether the statements have been directed at individuals or specific groups of individuals, which is less likely to occur in a public setting where the speaker is communicating broadly to a large group of people.

Guns at Rallies

- Modern controversy surrounding rallies has involved the mixture of protestors and guns.

- The fundamental right to own guns afforded by the Second Amendment, and the fundamental right to congregate and exercise free speech – as Charlottesville has clearly demonstrated – can be a volatile mixture. The courts are still sorting out the path to peaceful protests where people are permitted to bring their guns.

A. The Second Amendment to the U.S. Constitution

The United States Constitution does not grant an express right to bring a gun to a public gathering – a political protest, a town meeting, or some other event held on public or quasi-public property. However, other sources of law, such as state constitutions and statutes, provide rights that are broader than what the Supreme Court has interpreted the Second Amendment to require.

The Second Amendment, in its entirety, states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Court has not directly addressed how this right plays out in the context of protests, rallies, and similar public gatherings.

The Supreme Court has interpreted the Second Amendment as guaranteeing an individual right (as opposed to a right exercised by states, as some have argued) to “keep and bear arms.” The Supreme Court has not directly addressed how this right plays out in the context of protests, rallies, and similar public gatherings.

While there is clearly an individual right to keep and bear arms, federal, state, and local government may limit this right, although the parameters of their authority is still being developed by the courts. The leading Supreme Court cases articulating the scope of this right, Heller and McDonald and were decided in the last decade, and the Court has not returned to the issue in any significant way since McDonald in 2010.

For example, while the Supreme Court found in Heller that an outright ban on private handgun ownership was unconstitutional, it has not opined on whether the Second Amendment protects the right to own other forms of firearms, whether
firearms may be carried openly in public (“open carry”) or in a concealed manner (“concealed carry”), or under what conditions requiring a license to carry is permissible. Most lower federal courts have held that such restrictions are generally constitutional, although one federal court struck down an Illinois law broadly prohibiting open carry in that state.

Furthermore, some restrictions are presumed to be lawful, such as longstanding prohibitions on the possession of firearms by convicted felons and by those suffering from severe mental illness, as well as laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and provisions imposing conditions and qualifications on the commercial sale of arms. Likewise, the use and ownership of “dangerous and unusual weapons” may be restricted.

Because the Second Amendment doctrine is still evolving, addressing the presence of firearms at public protests and rallies will largely require turning to state and local law.

V. Understanding Differences in State and Local Law Is Crucial

There is wide variation in how states and municipalities approach the regulation of firearms. These laws are frequently updated and revised. As such, it is paramount for any government official or concerned citizen to understand the specific local laws that apply in his or her jurisdiction—not only at the state level, but even at county and municipal level. While this patchwork of laws can be complex, both gun rights advocacy organizations and groups advocating for greater regulation of firearms have produced a number of helpful resources to assist the public in understanding gun laws in their respective states. Gun laws are often highly specific with respect to what they prohibit and allow. Minute details and variations will matter a great deal.

1. Open Carry Laws

Among state-specific requirements pertaining to guns at public events, perhaps the most pertinent issue is whether a given jurisdiction permits open carry—carrying a visible firearm in public places—and if so, the scope of that right. However, laws in this area vary widely, with some states banning open carry outright, while others place restrictions such as licensing and permitting requirements.

In recent years, more states have begun allowing for open carry, and the number of states with outright prohibitions is increasingly small. One trend has been for states to adopt what is known as “constitutional carry” (also called “Vermont carry”), in which a state allows individuals to carry a handgun without a license or permit. A related issue is whether, even if a jurisdiction has adopted “constitutional carry,” that state allows anyone to open carry, or whether such rights are limited to state residents or perhaps residents of states with comparable open carry regimes.

Where a state has a permissive open carry regime, it will generally be more difficult to restrict guns at rallies and protests. Indeed, most states take the view that the right to bear arms is deserving of protection, entirely separate from the Second Amendment, so it could easily be the case that in a given jurisdiction protected under state law, having guns at a rally is specifically protected while bringing glass bottles, spray paint, or even tennis balls is not. With only a handful of exceptions, state constitutions have provisions that resemble—or even copy verbatim—the language of the Second Amendment. In a constitutional carry state, restraints on firearms at public events may be especially difficult to enforce. On the other hand, if a state requires a permit for open carry, or bans the practice altogether for most individuals, restrictions are more likely to pass muster under state law.

2. Location of a Rally

Even if a state has a permissive open carry regime, state laws may exempt certain locations from otherwise broad open carry policies. Places such as schools, government buildings, police stations, shopping malls, restaurants, and even entire cities may be off-limits for open carry. For example, openly carrying firearms without a permit is generally legal in Pennsylvania, but a state law makes it illegal to carry guns on public streets or property in the city of Philadelphia without a license (or exemption from licensing).

Knowing what venues are exempted from open carry, or are otherwise legally designated as “gun free” zones will be helpful in addressing the prospect of firearms at a public rally. The existence of location-based restrictions could potentially serve as a basis for arguing that firearms should be limited at a specific public event.

3. Carrying vs. Brandishing

The manner in which individuals carry makes a difference, even if a jurisdiction allows for open carry, with or without a permit (as the majority of states do). Some jurisdictions permit carrying a gun but not brandishing it.

For example, in Texas it is a criminal offense to “display[] a firearm or other deadly weapon in a public place in a manner calculated to alarm.” Likewise, Virginia law makes it a crime to “point, hold or brandish any firearm...or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm...in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured.”

4. Local Options for Further Regulation May Be Limited

City and other local government officials seeking to enact specific measures relating to the presence of firearms at a rally should take care to ensure that any such measures are permissible under state law. For example, even if a city wanted to ban a specific type of weapon or adopt a broader definition of “brandishing,” such measures may not be allowed under state law. The majority of states have enacted laws that, in various forms, preempt local government regulation of firearms and ammunition. In most cases, a preemption statute would primarily serve to nullify a local law that is deemed improper as a matter of state law, but a small minority of states have gone further, making local officials personally liable for violating preemption laws.

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5. The Mere Act of Carrying a Gun Is Generally Not Protected Speech

The First Amendment does not generally protect the right of a protester to carry a weapon. Having a gun may indeed constitute symbolic speech or expressive conduct, but such speech is only protected from suppression when the government’s reason for restraining it relates to its content.

For example, if the basis for suppressing a protest is that individuals are wearing handgun-shaped lapel pins or carrying inflatable “guns” that no reasonable person could think was an actual firearm or posed a danger of physical harm, suppression of this speech would likely be unconstitutional under the First Amendment. However, if a protester is carrying a gun unlawfully (e.g., without a permit in a state that requires permitting for open carry or conceal carry), or points a gun in the direction of a counter-protestor for a reason other than self-defense (i.e., “menacing”), these legal violations could independently serve as the basis for preventing a display of firearms without raising any First or Second Amendment concerns. Indeed, even if carrying a gun was speech, such a display could, at a certain point, fall into the realm of being a “true threat” exempt from First Amendment protections.

6. The Prospect of Lawfully Armed Counter-Protestors is Likely Insufficient Reason to Prevent a Planned Rally

Absent a “clear and present danger of immediate harm,” the possibility that a given rally or protest might be met with a vociferous and potentially violent response cannot be the basis for stopping that event from taking place. Behind this doctrine is the idea that government cannot punish a peaceful speaker or group as an alternative to dealing with a lawless crowd that might be offended by the speaker or group’s message. Thus, if a speaker’s message does not fall into a specific category of unprotected speech, such as fighting words, true threats or incitement, police and other public safety officials may have a de facto duty to protect speakers and groups that are met with resistance by other members of the public.

7. Making a Permit to Assemble Contingent on the Absence of Firearms

Whether a municipality or other government body can condition a permit on firearms not being present at a rally implicates both the First and Second Amendments, as well as jurisdiction-specific gun laws.

With respect to the First Amendment, the key question is whether such a requirement is a valid time, place and manner restriction. Generally, such requirements should likely be deemed valid under the First Amendment, although few courts have addressed the issue in a way that is directly analogous to the issue of guns at protests. Permitting schemes must be content neutral and comply various other requirements in order to survive constitutional scrutiny. A generally applicable and consistently applied prohibition on firearms and weapons at public events should not be problematic under the First Amendment, whereas decisions made on a case-by-case basis could be subject to challenge.

With respect to the Second Amendment, the Supreme Court has not specifically addressed the constitutionality of banning guns at rallies and other public events.

State-specific requirements and prohibitions will likely be the most relevant laws to consider. In states that restrict the ability of local governments to regulate firearms, officials will want to review carefully what types of actions are in the scope of their authority. Conversely, in states that generally prohibit or heavily restrict open carry, state laws will likely be of less concern.

Finding the lines in the law that demark where constitutionally-protected expression begins and ends has never been easy. Indeed, the winning parties in most of the First Amendment cases we hold dear have been people ranging from strange to downright despicable.

Most of us will remain forever dedicated to the notion that offensive speech has to remain protected. But recent events—especially the brutal images we watched from Charlottesville—may challenge our dedication like never before.
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