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Injunction Junction, What's Your Function? Crafting Permanent Injunctions to Be Appropriate Remedies in Defamation Cases

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INJUNCTION JUNCTION, WHAT'S YOUR FUNCTION? CRAFTING PERMANENT INJUNCTIONS TO BE APPROPRIATE REMEDIES IN DEFAMATION CASES

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When someone is liable for defamation, a court will almost always levy monetary penalties against the defamer. A rarely used penalty for defamation is the imposition of a permanent injunction on the defaming party that would prevent them from repeating their defamatory content. Many courts see permanent injunctions as an unconstitutional prior restraint on a person's right to speak, refusing to allow the condemnation of a person's speech before they have spoken it. However, the common justifications for denying permanent injunctions are weaker upon reevaluation, particularly in the Internet age, and some courts and legal scholars recognize that an injunction can address the harms of defamatory speech without violating the U.S. Constitution. This Note lays out the rationales behind the historic aversion to granting injunctions in defamation cases and discusses why acts of defamation today can be more consequential and harder to contain without properly tailored injunctive relief, and establishing a set of guidelines that courts can use to craft a permissible restraint on speech that has been adjudicated defamatory.

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TABLE OF CONTENTS

I. INTRODUCTION

Suppose one reads a story of filthy atrocities in the paper. Then suppose that something turns up suggesting that the story might not be quite true, or not quite so bad as it was made out. Is one's first feeling, 'Thank God, even they aren't quite so bad as that,' or is it a feeling of disappointment, and even a determination to cling to the first story for the sheer pleasure of thinking your enemies as bad as possible? If it is the second then it is, I am afraid, the first step in a process which, if followed to the end, will make us into devils.[1]

Alex Jones, founder of Infowars.com and noted conspiracy theorist, has discussed many extraordinary, and ultimately fictitious, stories on his shows.[2] Nevertheless, some in his audience take what he says as truth and sometimes even act on those misguided thoughts.[3] Despite his assertion that he is merely a "performance artist"[4] and "should not be taken seriously,"[5] Jones is often cited as one of the primary purveyors of false media narratives and as an instigator of targeted campaigns of harassment and

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[1] C.S. LEWIS, MERE CHRISTIANITY 106 (1st ed. 1996) (1952).

[2] *See* Eliza Relman, *How a Public-Access Broadcaster from Austin, Texas, Became a Major Conspiracy Theorist and One of Trump's Most Vocal Supporters*, BUSINESS INSIDER (Jun. 19, 2017, 11:53 AM), https://www.businessinsider.com/alex-jones-bio-conspiracy-trump-megyn-kelly-2017-6 (recounting the rise of Jones's media empire).

[3] *See Charges Filed Against Suspected "Pizzagate" Gunman*, CBS NEWS (Dec. 5, 2016, 5:28 PM), https://www.cbsnews.com/news/edgar-maddison-welch-charges-filed-against-suspected-pizzagate-comet-ping-pong-gunman/ (detailing the charges against the man who entered a D.C. pizzeria and fired several rounds based on a conspiracy theory that the pizzeria was the base of a child sex-trafficking ring); Eli Rosenberg, *Prominent Conspiracy Theorist Says He's Sorry for Promoting 'Pizzagate' Hoax*, N.Y. TIMES, Mar. 26, 2017, at A22 (describing Jones's involvement in spreading the 'Pizzagate' conspiracy theory).

[4] Corky Siemaszko, *InfoWars' Alex Jones Is a 'Performance Artist,' His Lawyer Says in Divorce Hearing*, NBC NEWS (Apr. 17, 2017, 4:03 PM), https://www.nbcnews.com/news/us-news/not-fake-news-infowars-alex-jones-performance-artist-n747491.

[5] Callum Borchers, *Alex Jones Should Not Be Taken Seriously, According to Alex Jones's Lawyers*, WASH. POST (Apr. 17, 2017, 11:16 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/04/17/trump-called-alex-jones-amazing-joness-own-lawyer-calls-him-a-performance-artist/?noredirect=on. Satire is a colorable defense in a defamation lawsuit, but whether or not the potentially satirical statement can be taken as a statement of fact depends on the publishing source itself and whether the statement "would be understood by the readers to whom it was addressed." Farah v. Esquire Magazine, 736 F.3d 528, 535 (D.C. Cir. 2013) (citing Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 655 (D.C. Cir. 1966) (en banc)).

"doxxing" prevalent in modern online culture.[6] His broadcasts are described by critics as "false, cruel and dangerous,"[7] and practically defamatory.[8]

Jones is currently facing several defamation lawsuits brought by the parents of children killed in the 2012 Sandy Hook school shooting.[9] In the aftermath of the shooting, Jones, and other commentators on Infowars, spread unsubstantiated theories that the massacre was "staged by the government and victims' families [as] part of an elaborate plot to confiscate Americans' firearms."[10] In 2018, several family members filed suit, asserting that Jones and his website allowed and encouraged harassment of the families due to their supposed involvement in a cover-up.[11] While Jones has attempted to walk back some of his statements,[12] if a court holds him liable for defamation, what is an appropriate punishment?

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[6] *See* Megan Garber, *The Lasting Trauma of Alex Jones's Lies*, ATLANTIC (Aug. 3, 2018), https://www.theatlantic.com/entertainment/archive/2018/08/the-lasting-trauma-of-alex-joness-lies/566573/ (detailing harms attributed to Jones's shows).

[7] *Conspiracy Theorist Alex Jones Seeks to Dismiss Sandy Hook Defamation Lawsuit*, GUARDIAN (Aug. 1, 2018, 10:56 AM), https://www.theguardian.com/world/2018/aug/01/alex-jones-conspiracy-theorist-sandy-hook-defamation-lawsuit.

[8] *See Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.").

[9] *See* Daniella Silva, *Texas Judge Allows Alex Jones Defamation Suit to Move Forward*, NBC NEWS (Sept. 3, 2018, 8:50 AM), https://www.nbcnews.com/news/us-news/texas-judge-allows-alex-jones-defamation-suit-move-forward-n905121 (discussing the suit brought by the families of victims of the Sandy Hook mass shooting against Jones). In a 2019 deposition for the Sandy Hook defamation case, Jones claimed his statements were the result of "a form of psychosis back in [his] past where [he] basically thought everything was staged," even as he later in the same deposition suggested that one of the Sandy Hook parents' suicide could have actually been a murder by "some anti-gun guy." Jonathan Tilove, *Alex Jones Blames 'Psychosis' for Sandy Hook Hoax Claim*, STATESMAN (Mar. 29, 2019, 6:59 PM), https://www.statesman.com/news/20190329/alex-jones-blames-psychosis-for-sandy-hook-hoax-claim.

[10] Elizabeth Williamson, *With the Aid of Infowars, He Waged a Campaign to Hound Sandy Hook Families*, N.Y. TIMES, Mar. 30, 2019, at A17.

[11] *See, e.g.*, Complaint at 2–14, Heslin v. Jones, No. D-1-GN-18-001835, 2018 WL 4620309 (W.D. Tex. Aug. 31, 2018) (detailing Jones' actions over the past five years that led to Neil Heslin, a father of a slain Sandy Hook student, filing his suit). Lenny Pozner, Veronique De La Rosa, and Scarlett Lewis are among the plaintiffs who brought the defamation suits. *See* Susan Svrluga, *First, They Lost Their Children. Then the Conspiracy Theories Started. Now, the Parents of Newtown Are Fighting Back.*, WASH. POST (Jul. 8, 2019, 4:57 PM), https://www.washingtonpost.com/local/education/first-they-lost-their-children-then-the-conspiracies-started-now-the-parents-of-newtown-are-fighting-back/2019/07/08/f167b880-9cef-11e9-9ed4-c9089972ad5a_story.html.

[12] *See* Tilove, *supra* note 9 (claiming the statements were the result of "a form of psychosis back in [his] past where [he] basically thought everything was staged," even as he later in the

While most courts historically award monetary damages in defamation cases, a modern trend suggests courts should grant a remedy once thought impossible to reconcile with the concept of free speech: a permanent injunction.[13] This stronger remedy is meant to prevent someone found guilty of defamation from repeating such conduct again, preventing prolonged harmful effects of that defamation.[14] The possibility of Jones receiving this penalty, however, is quite low as many courts consider injunctions on speech a type of prior restraint, and the U.S. Supreme Court has declared prior restraints to be "the most serious and the least tolerable infringement on First Amendment rights."[15] An exact definition of what constitutes a "prior restraint" on speech is somewhat unclear,[16] but Rodney A. Smolla defined it as "a term of art referring to judicial orders or administrative rules that operate to forbid expression before it takes place."[17]

The stance that all injunctions are prior restraints in violation of free speech, however, is under re-examination as some legal theorists reevaluate the effectiveness of injunctions as a remedy.[18] Courts are increasingly willing to enjoin speakers from repeating content that was previously adjudicated as defamatory as a method of distancing injunctions from the prior restraint moniker.[19] Defamatory content is false content, and its potential value as

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same deposition suggested that one of the Sandy Hook parents' suicide could have actually been a murder by "some anti-gun guy").

[13] *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 52–58 (2013) (analyzing what form an injunction must take to not violate that right).

[14] *Id.* at 82 (citing cases to argue that an injunction might be the most effective way to prevent a defendant from continuing to defame a plaintiff).

[15] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[16] John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 420 (1983) (discussing the difficulties of working from an unclear definition).

[17] 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15:1 (Westlaw 2011) (1994).

[18] *See* Ardia, *supra* note 13, at 36–38 (distinguishing injunctions issued prior to publication from ones issued as subsequent sanctions); Jeffries, *supra* note 16, at 416–19 (questioning the rationales put forth by the U.S. Supreme Court for claiming all injunctions are prior restraints).

[19] *See generally* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007) (holding an injunction may stand when issued "to prevent a defendant from repeating statements that have been judicially determined to be defamatory"). *But see* McCarthy v. Fuller, 810 F.3d 456, 463 (7th Cir. 2015) (refusing to uphold the lower court's injunction).

speech is thus lesser as compared to its potential harm.[20] Injunctions are likewise available as remedies in different legal fields outside defamation,[21] so the concept of injunctions in itself is not inherently unlawful. Further, unprecedented changes in communication technology[22] and new understandings of human reactions to false material suggest that injunctions may be a more effective and practical solution to defamation over levying monetary damages on the defamer.[23] The facts surrounding the suits against Jones are perfect illustrations of how the doctrines of permanent injunctions and prior restraints must change to address the expanding dangers of continuous defamation.

Looking at those changes in legal thought and society since the U.S. Supreme Court's first decision concerning prior restraints,[24] this Note explores how permanent injunctions can serve as an effective and constitutional remedy in defamation cases. To support this analysis, Part II of this Note dissects fundamental issues of free speech and the scholarly debate surrounding the status of injunctions as prior restraints, as well as how those beliefs have shaped judicial decisions on permanent injunctions. Part III considers scenarios in which courts see injunctions as a proper method of relief, as well as when they find other forms of remedy, such as monetary damages, more acceptable. This Part also examines modern studies of cognitive reasoning and the online media landscape to expose the shortcomings of monetary relief and the ways injunctions can address those failings. Part IV establishes a refined method of using permanent injunctions, creating guidelines for crafting a workable injunction in any case that does not overstep the U.S. Constitution. Finally, Part V concludes by arguing that because of changes in technology and new understandings of human behavior, permanent injunctions are sometimes necessary to prevent defendants from engaging in future

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[20] For a discussion on theories supporting the protection of free speech rights, see *infra* Section II.A.

[21] *See* Warner Bros. Records, Inc. v. Briones, No. SA-05-CA-0075-XR, 2005 WL 2645012, at *3–4 (W.D. Tex. Sept. 20, 2005) (discussing when injunctions are permissible in copyright cases); *see also* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (holding that the decision to grant a permanent injunction in a patent infringement case "rests within the equitable discretion of the district courts").

[22] *See* discussion *infra* Sections III.A.4, III.C.

[23] *See* discussion *infra* Section III.B.

[24] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 722 (1931) (ruling that a Minnesota statute permitting injunctions against certain newspapers violated the freedom of the press).

defamatory conduct meant to harass a victim, so long as a court has already found their previous statements to stem from the same defamatory intent.

II. THE HISTORY OF INJUNCTIONS

The U.S. Constitution affords extensive protections to the right of free speech, and defenses of this right are pervasive and compelling.[25] This Part will first outline rationales advanced by legal scholars and judges for the traditional protection free speech enjoys. It will then analyze how courts have applied these concepts of free speech to either grant or deny permanent injunctions in defamation cases.

A. CONSTITUTIONAL ANALYSIS

The First Amendment to the U.S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[26] This provision is meant to codify the right to speak freely that post-Revolutionary War American citizens felt was lacking under British rule.[27] After the Revolutionary War, states, such as Virginia and Pennsylvania, inserted freedom of press clauses into their state constitutions, with Maryland proclaiming that "the constitutional preservation of this great and fundamental right may prove invaluable."[28] But despite how strongly these freedoms are defended today, they were rarely subject to judicial thought before the twentieth century outside of extreme circumstances such as the Alien and Sedition Acts or President Lincoln's suppression of "disloyal press."[29]

No more passionate defense of free speech exists than that extoled by Justice Brandeis in *Whitney v. California*.[30] In his

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[25] *See, e.g.*, Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–86 (1963) (defending the freedoms of speech and expression as necessary for the functioning of a democratic society).

[26] U.S. CONST. amend. I.

[27] *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 22 (Harvard Univ. Press 1946) (explaining the Framers' repudiation of the English common law of sedition).

[28] *Id.* at 17 (quoting 2 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 511 (2d. ed. 1836)).

[29] *Id.* at 105.

[30] *See generally* Whitney v. California, 274 U.S. 357 (1927) (upholding the conviction of a member of the Communist Labor Party under the Criminal Syndicalism Act).

concurrence, Justice Brandeis defended free speech as imperative to the survival of the democratic process, arguing that it allows for the exchange of thoughts to combat toxic ideology and that fear alone is no basis for removing a person's ability to express him- or herself.[31] Justice Brandeis's articulations on the dangers of even minor infringements on free speech are still repeated in court proceedings nearly 100 years later.[32]

Generally, defenses of the freedom of speech are split into four commonly accepted broad categories: (1) to facilitate self-governance, (2) to advance one's own personal autonomy, (3) to promote tolerance, and (4) to allow the "marketplace of ideas" to sift through falsehoods to arrive at truth.[33] Each of these rationales implicitly condemns the idea of any one individual possessing the right to be the ultimate arbiter about which speech is allowed and which speech is not.[34] These justifications for freedom of speech, however, are not without their criticisms, the more substantial of which will be discussed later in this Note.[35] Continual debate on the free speech doctrine is healthy and necessary for it to survive the changing landscape in which it is employed.

While courts tend to favor unfettered speech, defamation does not enjoy the same protection as other forms of speech. A false statement has less value to the public discourse than a true

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[31] *Id.* at 375–76 (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government . . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

[32] *See* Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing whether corporations have similar rights to free speech as an individual); Hill v. Colorado, 530 U.S. 703, 788 (2000) (Kennedy, J., dissenting) (defending the right of protestors to make their protests known); Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000) (discussing the right of organizations to deny membership based on sexual orientation if in line with the stated values of the organization).

[33] *See*, *e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1238–42 (5th ed. 2017) (outlining four of the most commons defenses of freedom of speech).

[34] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *152 ("To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man . . . .").

[35] *See* discussion *infra* Section III.A.4.

statement does,[36] so courts are willing to waive protections in the name of deterring the spread of malicious and defamatory content.[37] While some protections do exist for "erroneous statement[s],"[38] in other circumstances, a court can find those statements defamatory even without a defendant's prior knowledge that they were false.[39] Even so, despite the reputational harm a statement may create, "truth is a complete defense" against claims of libel or slander.[40]

Regardless of the qualifiers for false and defamatory speech, it is understandable why the denial of a person's speech by the government is antithetical to the idea of free expression. Courts, therefore, are understandably reluctant to waver on the belief that curtailments of that right are unconstitutional prior restraints.[41] Beyond the implications on speech rights, courts are further hesitant to grant injunctions due to the "collateral bar rule," which denies challenging a court order if the party "disobeys the order before first challenging it in court."[42] So while the speech in question may actually be protected, violating the court ordered injunction

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[36] *See* Rosenbloom v. Metromedia, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting) (writing that there is "no identifiable value worthy of constitutional protection in the publication of falsehoods").

[37] New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (allowing a public official to recover damages for a "defamatory falsehood . . . [if] he proves that the statement was made with 'actual malice'").

[38] *Id.* at 271–72 (conceding that because false statements are "inevitable in free debate" there must be some leeway granted based on the circumstances).

[39] Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 763 (1985) (finding such a circumstance exists when the plaintiff is a private figure and the statements "do not involve matters of public concern").

[40] *Rosenbloom*, 403 U.S. at 64 (Harlan, J., dissenting).

[41] *See* Sindi v. El-Moslimany, 896 F.3d 1, 30–31 (1st Cir. 2018) (vacating an injunction as it was "a paradigmatic example of a prior restraint" because it did not account for contextual variations of the enjoined statements); McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015) ("An injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression."); Unified Sch. Dist. v. McKinney, 689 P.2d 860, 870 (Kan. 1984) (finding that an injunction against a teacher and her husband which prevented them from commenting on matters concerning the school "suprresse[d] speech in advance of actual expression").

[42] *First Amendment: Freedom of Speech Prior Restraint*, CONST. L. REP., https://constitutionallawreporter.com/amendment-01/prior-restraint/ (last visited Jan. 20, 2020).

would prevent a plaintiff from addressing the constitutionality of the order and the validity of his or her speech.[43]

Injunctions are thus subject to a "presumption of unconstitutionality" as improper prior restraints on speech.[44] Further, an old maxim in American law is that "equity will not enjoin a libel or slander,"[45] and injunctions "are limited to rights that are without an adequate remedy at law."[46] Since monetary damages are considered to be an adequate remedy in defamation cases, [47] injunctions are an unnecessary penalty. The party seeking injunctive relief, therefore, must prove a "constitutionally acceptable basis" to overcome that presumption.[48]

The preeminent example of judicial hostility to prior restraints is the U.S. Supreme Court case *Near v. Minnesota*.[49] At issue was a Minnesota statute authorizing the "permanent[] enjoining" of persons deemed to have published or circulated periodicals that contained "obscene [and] lewd" or "malicious, scandalous and defamatory" materials from publishing such things again.[50] The Court found the statute permitted a perpetual ban on a paper previously deemed to have been "a public nuisance" without needing to review any new material the paper intended to publish.[51] Under the statute, the paper appellee was also incapable of showing that any new articles were "true . . . [or] published with good motives and for justifiable ends" in defense of future publication.[52] For those reasons, the Court found the statute unconstitutional as "an infringement of the liberty of the press."[53] The Court's ruling in *Near* set a precedent for prior restraint doctrine in the decades to

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[43] *See generally* Walker v. City of Birmingham, 388 U.S. 307 (1967) (preventing petitioners from challenging the constitutionality of a temporary injunction as vague and overbroad after violating said injunction).

[44] Jeffries, *supra* note 16, at 426.

[45] *See* Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 746 (Neb. 1997); *see also* First Am. Bank & Trust Co. v. Sawyer, 865 P.2d 347, 352 (Okla. Civ. App. 1993) ("[E]quity will not restrain libel or slander.").

[46] Metropolitan Opera Ass'n v. Local 100, Hotel Emps. & Rest Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001).

[47] *See* Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 114 (Del. Ch. 2017) (holding that injuries caused by defamation could be remedied through a monetary award).

[48] Jeffries, *supra* note 16, at 426.

[49] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[50] *Id.* at 702–03.

[51] *Id.* at 701.

[52] *Id.* at 721.

[53] *Id.* at 722–23.

come,[54] but it was not the end of the discussion on permanent injunctions.

B. INJUNCTIONS AFTER *NEAR*

The development of the prior restraint doctrine to be more lenient on permanent injunctions can actually be traced to *Near* itself, as Justice Hughes's majority opinion admits that the supposed absolute bar on prior restraints "is not absolutely unlimited."[55] Listing several examples that may clear this bar,[56] the Court suggested that an injunction may be suitable under the right circumstance.

One such circumstance was present in *Kingsley Books, Inc. v. Brown*, where at issue was a state law "authorizing the chief executive, or legal officer, of a municipality to invoke a 'limited injunctive remedy' . . . against the sale and distribution of written and printed matter found after due trial to be obscene."[57] Here, New York officials charged Kingsley Books with displaying and distributing obscene books, with the trial judge supporting those charges by granting an injunction from "further distribution."[58] In response, Kingsley Books claimed that this power "amount[ed] to a prior censorship of literary product" in violation of the freedoms of speech and thought.[59] The Court upheld the injunction because "it studiously withholds restraint upon matters not already published and not yet found to be offensive."[60]

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[54] *See, e.g.*, New York Times v. United States, 403 U.S. 713, 714 (1971) (citing *Near* while holding that the government had overcome its burden in attempting to enjoin the New York Times and the Washington Post); People v. Sequoia Books, Inc., 518 N.E.2d 775, 778 (Ill. App. Ct. 1988) (referencing *Near* while establishing that "prior restraint upon speech is antithetical to the [F]irst [A]mendment"); VI 4D LLLP v. Crucians in Focus, Inc., 57 V.I. 143, 153 (2012) (calling *Near* the "seminal case on prior restraints")

[55] *Near*, 283 U.S. at 716.

[56] *Id.* (recognizing that the government has a substantial interest in restricting some speech during times of war or when seeking to prevent the distribution of obscene materials).

[57] 354 U.S. 436, 437 (1957).

[58] *Id.* at 438–39.

[59] *Id.* at 440.

[60] *Id.* at 445; *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (upholding an injunction because the order was based on past conduct and "swe[pt] no more broadly than necessary"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973) (upholding a Georgia statute enjoining exhibitions of pornographic and obscene movies if they were judicially determined to not be protected by the U.S. Constitution).

While *Kingsley* concerned injunctive relief, it would not be until the 1970s when the viability of injunctions in defamation cases would again be questioned. For example, in *O'Brien v. University Community Tenants Union, Inc.*, the plaintiff-landlord claimed that a tenant union was causing "irreparable injury to his business" by disseminating unverified complaints to prospective tenants to dissuade them from renting from him.[61] The Ohio Supreme Court found that an injunction was permissible in a libel suit when the "[same] speech [was] judicially . . . found libelous."[62] Even though the facts of *O'Brien* did not support injunctive relief in that instance,[63] other state courts adopted similar stances concerning injunctions in defamation cases.[64]

In 2005, the U.S. Supreme Court had the chance to decide whether injunctions were an adequate remedy in defamation cases in *Tory v. Cochran*.[65] Unfortunately, the death of one of the litigants a week after oral arguments led the Court to instead find that the injunction had "lost its underlying rationale" and was now an "overly broad prior restraint,"[66] remanding the case with the appellee's wife as substitute respondent.[67] The Court prolonged the debate by passing on the opportunity to decide "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."[68]

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[61] 327 N.E.2d 753, 753–54 (Ohio 1975).

[62] *Id.* at 755.

[63] *Id.* (denying injunctive relief as landlord had not substantiated his allegations).

[64] *See* Retail Credit Co. v. Russell, 218 S.E.2d 54, 63 (Ga. 1975) (upholding an injunction as the speech had been determined as unprotected by the First Amendment "prior to [its] issuance"); Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984) (allowing suppressions of speech through court order "so long as the suppression is limited to the precise statements found libelous *after* a full and fair adversary proceeding"). *But see* Kinney v. Barnes, 443 S.W.3d 87, 89 (Tex. 2014) (finding an injunction constituted "a prior restraint that impermissibly risks chilling constitutionally protected speech").

[65] Los Angeles lawyer Johnnie Cochran sued Ulysses Tory for "engag[ing] in unlawful defamatory activity" after Tory picketed his offices and insulted Cochran following purported inadequate representation. Tory v. Cochran, 544 U.S. 734, 735 (2005). The California Court of Appeals affirmed the trial court's grant of a permanent injunction against Tory under the reasoning that absent such an order Tory would continue his defamatory conduct. *Id.* at 736.

[66] *Id.* at 738.

[67] *Id.*

[68] *Id.* at 736. While the Court found the injunction to be overly broad, it did not determine if it would have been overly broad if Cochran was still alive. *Id.* at 737–38 (finding that Cochran's death made it unnecessary to consider whether the injunction was improperly tailored).

Two years later, however, *Balboa Island Village Inn, Inc. v. Lemen*, offered an answer to the debate.[69] Defendant Anne Lemen was accused of spreading lies about the operations of the Village Inn hotel and restaurant located in Newport Beach by videotaping customers leaving the building and approaching them to complain about the food and staff. [70] The trial court found Lemen liable for making defamatory comments, including claiming that prostitution and child pornography were going on at the Village Inn.[71] The trial court granted a permanent injunction preventing Lemen from initiating contact with employees of the hotel or making certain defamatory statements about the hotel to third persons.[72] While the California Supreme Court agreed with the Court of Appeals that the granted injunction was an unconstitutional prior restraint and overly broad,[73] it articulated that "a properly limited injunction prohibiting defendant from repeating . . . statements . . . that were determined at trial to be defamatory would not violate defendant's right to free speech."[74]

The court reasoned that prohibiting the repetition of a defamatory statement was "far different" from censuring the person before they even said a possibly defamatory statement.[75] When Lemen asserted that the remedy for defamation is damages, the court countered that such a solution would require a previously defamed party to bring the lawsuit against the defamer every time

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[69] 156 P.3d 339, 341 (Cal. 2007) (holding that a "properly limited injunction" that only prohibits defendant from repeating statements found at trial to be defamatory does not infringe on a defendant's right to free speech).

[70] *Id.* (listing some of Lemen's harassing actions, which included taking photographs of customers inside the Village Inn and contacting the authorities several times to express her concerns about the hotel).

[71] *Id.* 341–42 (finding Lemen's statements, including referring to the owner's wife as "Madam Whore," to be defamatory). Erwin Chemerinsky, the noted legal scholar, current dean of U.C. Berkeley School of Law, and counsel for Tory in the *Cochran* case, also served as counsel for Lemen. *See id.* at 341 (identifying Chemerinsky as counsel for defendant); *Tory*, 544 U.S. at 734 (listing Chemerinsky as the "Counsel of Record" for Tory).

[72] *Balboa*, 156 P.3d at 342 ("Paragraph 4A . . . prohibits defendant from initiating contact with employees of the Village Inn . . . . Paragraph 4B . . . prohibits defendant from repeating certain defamatory statements . . . .").

[73] *Id.* at 352 ("The injunction in the present case is broader than necessary to provide relief to plaintiff while minimizing the restriction of expression."). Specifically, the court stated that applying the injunction to Lemen, "her agents, all persons acting on her behalf[,] . . . and all other persons in active concert . . . with her" was impermissible. *Id.*

[74] *Id.* at 353.

[75] *Id.* at 344–45.

they repeated another libelous or slanderous comment.[76] Finally, the court recognized that if circumstances changed regarding the facts of the case (i.e., the Village Inn admitted it was the location of a secret prostitution ring), Lemen could have moved the court to dissolve or modify the injunction.[77]

What separated the *Balboa* decision from earlier cases on injunctions for speech was how much space each opinion devoted to finding a balance between the defendant defamer's freedom of speech and the plaintiff's right to not feel the harm of that speech. Both Judge Moreno and Judge Kennard took the time to discuss the concerns they each had with the proposed injunction and whether it was an impermissible restriction of future speech upon analysis of "the facts to which [the injunction] refers[] and the precise wording used."[78]

The circuit courts have likewise had difficulty reconciling injunctions in defamation cases without definitive U.S. Supreme Court precedent. Before *Tory*, the U.S. Court of Appeals for the Sixth Circuit addressed the issue briefly in *Lothschuetz v. Carpenter*.[79] On appeal from a district court that did not permit injunctive relief as a remedy for plaintiffs' libel claims, Judge Wellford wrote in his part concurrence and part dissent that he would grant an injunction as it was "necessary to prevent future injury to [the plaintiff's] personal reputation and business relations."[80] This was Judge Wellford's only disagreement with the majority opinion,[81] but because he was joined in that dissenting

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[76] *Id.* at 351 (stating that damages are an inappropriate remedy). The judicial thought underlying the need to bring continual lawsuits is that the first award of damages was itself insufficient to deter the person from continuing his defamatory actions, or that the defendant himself is "judgment proof." For further discussion on this concern, see *infra* Part III.

[77] *Balboa*, 156 P.3d at 353 ("[T]he court may modify or dissolve a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted . . . ." (quoting CAL. CIV. CODE § 3424 (a))).

[78] *Id.* at 356 (Kennard, J., concurring in part and dissenting in part); *see also id.* at 351 (majority opinion) ("We recognize, of course, that a court must tread lightly and carefully when issuing an order that prohibits speech.").

[79] 898 F.2d 1200 (6th Cir. 1990) (explaining that attorney-plaintiffs brought this libel suit after defendant James Carpenter accused them and the company that they were working for of engaging in ethical violations and destroying Carpenter's family business).

[80] *Id.* at 1209 (Wellford, J., concurring in part and dissenting in part).

[81] *Id.* at 1208 ("I agree in all respects with the disposition of the majority with one exception in part II C.").

opinion by Judge Hull, it was the opinion of the court.[82] While a majority of Judges recognized plaintiffs could demand a permanent injunction, they did not focus on the merits of injunctive relief, nor did Judge Guy explain his rationale for agreeing with the district court.[83]

In contrast, in *Kramer v. Thompson*, the U.S. Court of Appeals for the Third Circuit used several factors to overturn an injunction issued by the district court in response to defendant's allegedly libelous letters concerning the effectiveness of his lawyer.[84] Holding that the common-law maxim of "equity will not enjoin a libel" was still valid under Pennsylvania case law,[85] the Third Circuit found that it was impermissible for a court, absent a jury, to make a "determination regarding the libelous nature of the defendant's statements."[86] But the most important factor upon which Judge Becker based his opinion was that "the adequate remedy doctrine" supported adjudicated monetary damages as a sufficient remedy.[87] While the Third Circuit case merely attempted to apply Pennsylvania law at the time, the court's rationales for denying an injunction are mirrored in many other court decisions.[88]

After *Tory*, the U.S. Court of Appeals for the Seventh Circuit became the next court to hear a case regarding permanent injunctions in defamation cases.[89] At issue were reputational attacks made by defendants Patricia Fuller and Paul Hartman on Kevin McCarthy and Albert Langsenkamp after the three, excluding Hartman, had initially worked together maintaining the mission and property of a Catholic sister.[90] The jury found

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[82] *Id.* at 1206 ("Judge Wellford, joined by Judge Hill, is of a contrary view and thus the dissent becomes the opinion of the court on this issue.").

[83] *Id.* (showing the court's limited discussion of this issue).

[84] 947 F.2d 666, 677–80 (3rd Cir. 1991) (detailing the five factors).

[85] *Id.* at 677.

[86] *Id.* at 679.

[87] *Id.*

[88] *See, e.g.*, Am. Univ. of Antigua Coll. of Med. v. Woodward, 837 F. Supp. 2d 686, 701 (E.D. Mich. 2011) (restating the "usual rule that equity does not enjoin libel or slander"); Tilton v. Capital Cities/ABC Inc., 827 F. Supp. 674, 681 (N.D. Okla. 1993) (emphasizing that in Oklahoma and Texas "monetary damages are an adequate and appropriate remedy[, such] that injunctive relief is not available").

[89] *See generally* McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015).

[90] *Id.* at 457–58. Statements included claims that plaintiffs "swindled an[] estimated $750,000 from Sister Mary Joseph Therese." *Id.* at 458.

defendant's reputational attacks to be defamatory, and the judge awarded damages and a permanent injunction.[91]

On appeal, Judge Posner found that the injunction prohibiting defendants from "publishing . . . [certain defamatory] statements, as well as any similar statements that contain the same sorts of allegations or inferences"[92] was "improper."[93] The Seventh Circuit accordingly vacated the injunction as the jury had also not indicated which of the listed statements were defamatory.[94] However, building on logic espoused in *Balboa*,[95] Judge Posner did not dismiss injunctions out of hand and warned of the "impecunious defamer" who would not be deterred by mere monetary damages.[96] If the defendants were unable to pay what the judge ordered,[97] they would be "free to repeat all their defamatory statements with impunity" absent a different remedy, and a permanent injunction could be acceptable as that different remedy.[98]

In her concurring opinion, Judge Sykes likewise recognized the "modern trend" of "narrowly tailored permanent injuncti[ons],"[99] but she criticized the majority opinion for its tacit endorsement of the idea.[100] Judge Sykes also criticized the concept of impecunious defamers[101] and objected to relying on a case like *Kingsley Books* for

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[91] *Id.* at 460 (describing the kinds of statements the defendants could not say without violating the injunction).

[92] *Id.*

[93] *Id.* at 460–61 ("An injunction must be specific about the acts that it prohibits. How could such vague terms as 'similar' and 'same sorts' provide guidance to the scope of the injunction?" (citing FED. R. CIV. P. 65(d)(1))).

[94] *Id.* (finding that the trial judge "on his own" enjoined defendants from statements "that the jury had not even been asked to consider").

[95] *See* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 351 (Cal. 2007) ("[A] judgment for monetary damages will not always give the plaintiff effective relief . . . .").

[96] *McCarthy*, 810 F.3d at 462.

[97] This was a likely prospect because the punitive and compensatory awards totaled $350,000, not including an additional $300,000 in attorney's fees and other costs. *Id.* at 459.

[98] *Id.* at 462.

[99] *Id.* at 464 (Sykes, J., concurring). *See, e.g.*, Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308–09 (Ky. 2010) (holding that enjoining defamatory speech is permissible after a trial court determined, under a preponderance standard, that the speech at issue was false).

[100] *McCarthy*, 810 F.3d at 466 (Sykes, J., concurring) ("[M]y colleagues imply that such a remedy is constitutionally permissible . . . . I cannot join this part of the court's opinion."). Judge Sykes likewise criticized the trial judge for issuing the injunction when the plaintiffs had not asked for "'statement specific' defamation findings." *Id.* at 463.

[101] *Id.* at 466 (arguing that allowing permanent injunctions "wrongly implies that a core liberty secured by the First Amendment . . . does not protect people who lack the means to pay a judgment").

a decision when it did not involve defamatory material.[102] She wrote that whereas a book or pamphlet can be readily determined to be obscene, "defamation . . . is highly contextual," and a blanket ban cannot account for different times or circumstances in which phrasing of the words in a statement may not be defamatory.[103]

Recently, *Sindi v. El-Moslimany* saw the U.S. Court of Appeals for the First Circuit vacate a permanent injunction for failing "to account for contextual variation[s]."[104] Here, defendants Samia El-Moslimany and her mother allegedly spread disparaging and false statements about plaintiff Dr. Hayat Sindi's academic credentials after Samia "came to believe that her husband and Dr. Sindi were engaged in a meretricious relationship."[105] Upon reviewing the injunction, the First Circuit vacated it and refused to allow any restriction of speech unless "less intrusive remedies [were] unavailable."[106] The majority opinion also found that the practical effects of a permanent injunction on a defendant—requiring them to go to a judge in order to modify it—amounted to a requirement of a "judicial permission slip to engage in truthful speech[;] . . . the epitome of censorship."[107]

In his dissent, Judge Barron was more concerned than the majority with the unique harms of an unchecked defamation campaign.[108] Judge Barron stated that the a denial of injunctive relief could cause plaintiffs "irreparable harm" due to previously adjudicated defamatory statements.[109] The dissent further invoked precedent for the validity of injunctions related to speech, both in

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[102] *Id.* at 465 ("Defamation is materially different from obscenity.").

[103] *Id.*

[104] Sindi v. El-Moslimany, 896 F.3d 1, 30 (1st Cir. 2018).

[105] *Id.* at 11. The statements at issue consisted of online reviews, social media posts, and emails to other professionals in the scientific community for a period of five years. *Id.* at 50–58 app. A.

[106] *Id.* at 35.

[107] *Id.*

[108] *Id.* at 37 (Barron, J., dissenting) ("We live in a world in which defamation campaigns may reach millions in an instant and essentially for free.")

[109] *Id.* at 37 (discussing his concerns that defamers would continue their actions if victims lacked the resources and "energy to . . . prove actual defamation all over again"). The district court found El-Moslimany liable for "defamation, tortious interference with contract, and tortious interference with advantageous relations." *Id.* at 11 (majority opinion). For that reason, Judge Barron's concerns about irreparable harm were based on a judicial determination. Judge Barron does refrain from definitively saying the injunction as presented was "sufficiently narrowly tailored," but he still argues that the majority rushed to its conclusions on the validity of an injunction. *Id.* at 47 (Barron, J., dissenting).

the U.S. Court of Appeals for the First Circuit and the U.S. Supreme Court to bolster the position that injunctions were deserving of lessened scrutiny. [110] If not bound to a strict scrutiny analysis, the dissent suggested that the majority

> [erroneously] equate[d] an injunction that ha[d] been crafted as a prophylactic means of stopping the *likely recurrence* of speech that ha[d] already been found to have been expressed in an unprotected manner with a regulation to restrict the expression of offensive but protected speech from ever being uttered at all.[111]

Inconsistencies on enjoining speech from the various levels of the judicial system show that this issue is far from settled. True, injunctions for defamation suits are controversial, but judicial rulings since *Near* have shown that the courts are willing to question the doctrine without abandoning it entirely.[112] With the various courts' framing of the discussion, it is now easier to analyze how a permanent injunction might possibly be written to avoid classification as a prior restraint.

C. OVERCOMING THE PRIOR RESTRAINT

Academic thought on the prior restraint doctrine demonstrates that courts may not have the necessary legal support to automatically dismiss injunctions as a suitable remedy in defamation cases.[113] U.S. Supreme Court cases invalidating injunctions as prior restraints do not make it clear whether the speech could be reined in with subsequent punishment, making it difficult to ascertain whether the doctrine of prior restraints was necessary or merely "convenient rhetoric."[114] Professor Emerson

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[110] *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 762 (1994) (finding that an injunction preventing anti-abortion protestors from demonstrating in certain places was valid as only applied to that group "and perhaps the speech[] of that group . . . because of the group's past actions in the context of a specific dispute between real parties"); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993) (suggesting that a final adjudication that the speech "is unprotected" can overcome the presumption that the injunction is an unconstitutional prior restraint).

[111] *Sindi*, 896 F.3d at 47 (Barron, J., dissenting) (emphasis added).

[112] *See* discussion *supra* Section II.B.

[113] *See* discussion *infra* Section II.C.

[114] Jeffries, *supra* note 16, at 418.

finds the doctrine unintelligible and decries that "[t]here is . . . no common understanding as to what constitutes 'prior restraint.'"[115] While the doctrine of prior restraints arose at a time when the founders believed it necessary to ensure freedom of the press in contrast to the licensing system of England,[116] today the concept has become one of "honored past[,] but contemporary irrelevance."[117]

The *Near* opinion's hostility toward considering injunctions as anything other than prior restraints has infected almost every subsequent case on this issue.[118] The presumption of unconstitutionality is offered to explain the "absence of a single Supreme Court decision approving a prior restraint as a remedy in a defamation case,"[119] even if their most recent case did not explicitly create a precedent.[120] Examination of the doctrine by scholars, however, suggests that injunctions may not bear sufficient similarity to licensing systems that the prior restraint doctrine was meant to address.[121]

The prior restraint doctrine has moved away from its original intent: to serve as a check on any system of administrative preclearance that explicitly censors speech unless a government official approves it before its publication.[122] Under that theory, there should not be a burden "on the would-be speaker to vindicate his right" to speak freely and overcome any objections of a government censor with ineffectively-checked authority.[123] Such a system was expressly ruled an unconstitutional prior restraint in *Shuttlesworth v. City of Birmingham* when the Court struck down a permit law that effectively "empower[ed] . . . licensing officials to . . . dispens[e] or withhold[] permission to speak . . . according to their own opinions . . . [on] the 'welfare,' 'decency,' or 'morals' of the

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115 Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 655 (1955).

116 CHAFEE, *supra* note 27, at 22.

117 Jeffries, *supra* note 16, at 420.

118 *See* discussion *supra* Section II.B.

119 Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167 (2007).

120 *See* Tory v. Cochran, 544 U.S. 734, 738 (2005) (remanding the case because the injunction had "lost its underlying rationale").

121 *See* Jeffries, *supra* note 16, at 427–28 (analyzing injunctions as a system of subsequent punishment).

122 *See* Emerson, *supra* note 115, at 655 (describing English licensing laws as "[t]he clearest form of prior restraint").

123 Jeffries, *supra* note 16, at 422.

community."[124] A court choosing to forbid all prior restraints is a straightforward way to prevent the overreaching of a government and is a relatively easy metric to apply.

A court's reliance on the prior restraint doctrine functions as a crutch, though, when injunctions are involved. Professor Redish writes that the rationale of the doctrine is to ensure that "a full and fair judicial hearing [occurs] *prior* to any abridgment," allowing the government to restrict a person's speech if they have a compelling interest.[125] If after a trial with full procedural protections guaranteed to a defendant the court still found the defendant's actions to constitute defamation, handing down a permanent injunction would not violate the prior restraint doctrine because the defendant was afforded due process.[126]

The differences between decisionmakers who award licenses and those who grant injunctions further illustrate how injunctions may not fall into the general guidelines of prior restraints. The licensing institution incentivizes the censor to "find[] things to suppress" because it is his very function in the system.[127] Judges, however, "have no vested interest in the suppression of speech,"[128] and juries further check judges by serving as the ultimate arbiter on the defamatory nature of the speech in question.[129] Properly granted, a permanent injunction will not anticipate and silence future defamatory conduct but instead prevent the continued dissemination of existing material.

A properly tailored injunction will likewise not be an impermissible deterrence of lawful acts so long as its effect is "narrowly confined."[130] If granted after adjudication, a permanent injunction does not "threat[en] . . . punishment . . . before publication" for the very fact that it was the defendant's previous

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124 394 U.S. 147, 153 (1969).

125 *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 83 (1984) (emphasis added).

126 *Id.* at 89 (defending permanent injunctions as an appropriate remedy if prior restraint questions are "question[s] of process, not substance").

127 Emerson, *supra* note 115, at 659.

128 Jeffries, *supra* note 16, at 426–27.

129 *See* MacLeod v. Tribune Publ'g Co., 343 P.2d 36, 41 (Cal. 1959) (determining whether the defendant's article was defamatory was a question for the jury).

130 *See* Jeffries, *supra* note 16, at 429; *see also* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 47–49 (1981) (arguing that injunctions are no more dangerous for the chilling of speech than subsequent punishments because of their definitiveness).

defamatory publications that provided the basis for the injunction.[131] The collateral bar rule may also discourage the use of injunctions, but the viability of the doctrine has been questioned since *Walker*.[132]

Reflecting on the purpose and procedure of granting injunctions, the assertion that they are always prior restraints does not withstand closer scrutiny. Courts that support permanent injunctions in defamation cases believe that they are only imposing the restriction after a judicial finding of defamation, not before.[133] The court has a duty to prevent conduct it has already deemed harmfully defamatory, and as such, equating injunctions as prior restraints handicaps their use as an acceptable remedy.

The history of this issue is rife with arguments about the permissible relaxation of the right to free speech in exchange for protecting a victim of defamation from reputational harms.[134] Nearly one-hundred years of case law offers examples of powerful arguments repeated and built on by judicial and academic thinkers, but the recent change in technology might be the biggest factor motivating the doctrine's shift.[135] If Jones is guilty of defamation, certain realities of the Internet age may result in a court taking measures once thought untenable to ensure the plaintiffs in these lawsuits receive justice.

III. THE ADEQUACIES OF RELIEF

As the case law shows, there is inconsistent guidance on the permissible scope of permanent injunctive relief in defamation cases.[136] Without clear court precedent, but with an understanding

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131 Jeffries, *supra* note 16, at 427.

132 *See In re* Providence Journal Co., 820 F.2d 1342, 1347 (1st Cir. 1986) (finding that the collateral bar rule can be ignored if the court "act[ed] so far in excess of its authority" as to render the order "transparently invalid"); Randall Kennedy, Walker v. City of Birmingham *Revisited*, 2017 SUP. CT. REV. 313, 321–23 (2017) (discussing the rule's use in quelling labor strikes for violations of court orders).

133 *See supra* note 64 and accompanying text.

134 *See, e.g.*, Emerson, *supra* note 115, at 648 (distinguishing prior restraint from subsequent punishments); Ann C. Motto, *"Equity Will Not Enjoin a Libel": Well, Actually, Yes, It Will*, 11 SEVENTH CIRCUIT REV. 271, 281–86 (2016) (criticizing the modern trend of allowing narrowly tailored injunctions in defamation cases).

135 *See* discussion *supra* Sections II.A–B; *see also* Ardia, *supra* note 13, at 16–18 (discussing how companies like Facebook and Google make "the lifespan of a defamatory statement . . . essentially infinite").

136 *See* discussion *supra* Part II.

that injunctions may not be prior restraints, there must be a re-consideration of the basic qualities of injunctive relief. By recontextualizing the effectiveness of permanent injunctions in other areas, there is a viable argument that injunctions are an admissible remedy in defamation cases as long as they are narrowly tailored.

A. A FOUR-FACTOR TEST

Outside defamation, injunctions are common in intellectual property cases for claims of copyright and patent infringement.[137] How courts justify injunctions in intellectual property cases provides a roadmap for justifying injunctions in defamation cases. By applying those rationales and modifying tests adopted in intellectual property cases,[138] I believe that courts should use a four-factor test to determine if a permanent injunction is permissible in a defamation case. Specifically, the test involves the following four factors: (1) there is a substantial threat of irreparable injury to the plaintiff, (2) other remedies are inadequate to compensate for that injury, (3) the threatened damage to the plaintiff outweighs any hardship on the defendant, and (4) the public interest would not be disserved by a permanent injunction.

The four-factor test I propose is a modification of tests that exist. I simply suggest that courts apply the logic supporting them to defamation cases. For example, copyright law has a generally accepted test that places the burden on the plaintiff to demonstrate, amongst other factors, "a substantial threat of irreparable injury if the injunction is not issued; . . . that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and . . . that the injunction will not disserve the public interest."[139]

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[137] *See, e.g.*, Warner Bros. Records, Inc. v. Briones, No. SA-05-CA-0075-XR, 2005 WL 2645012, at *3–4 (W.D. Tex. Sept. 20, 2005) (granting a permanent injunction when the court found that the defendant knowingly infringed the copyrights of recorded performances and that there was no evidence that the defendant had stopped the unauthorized activities).

[138] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test . . . ."); Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., Inc., 807 F.2d 1256, 1259 (5th Cir. 1987) ("[T]he movant has the burden of proving four elements . . . .").

[139] *Plains Cotton*, 807 F.2d at 1259 (citing Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985)).

Comparing this to copyright injunctions is appropriate as copyright is another manner of speech that the U.S. Constitution protects.[140] In copyright cases, there is a balance between affording the copyright holder full protection and rights to disseminate his or her ideas, and the right of citizens to speak on that work through parody or critique.[141] This balance is applicable to defamation cases and injunctions for the same reason: the right to speech is broad, but there are instances in which it should be restricted if it infringes on the rights of another, namely the right to not experience unfounded reputational harm.

The remaining factor for the defamation test comes from the area of patent infringement, specifically the case *eBay Inc. v. MercExchange, L.L.C.*[142] The test adopted there offers similar factors to the copyright test, but it contains one difference: *eBay*'s test involves a determination into whether "[other] remedies . . . are inadequate to compensate for that injury."[143] Even though patents are not the same as copyrights, adopting this factor would be relevant to defamation cases as courts have often rejected injunctive relief because of the possibility of the imposition of monetary damages.[144] While patents are not speech in themselves, patent protection is justifiable under similar logic to copyrights as they ensure protection for someone to use a creation in exchange for disclosing it to the public.[145] We can thus easily incorporate that factor into our defamation injunction test.

1. Substantial Threat of Irreparable Injury.

When a party is adjudicated as a victim of a libelous or slanderous statement, courts have recognized two distinct forms of injuries from which the party may suffer: monetary harm and

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[140] *See* U.S. CONST. art. I, § 8, cl. 8 ("[S]ecuring for limited Times . . . the exclusive Right to [authors' and inventors'] . . . Writings and Discoveries."); Derek E. Bambauer, *Copyright = Speech*, 65 EMORY L.J. 199, 200 (2015) (defending copyright as speech protected by the First Amendment).

[141] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (holding that parody can constitute a fair use defense against copyright infringement).

[142] 547 U.S. 388, 390–91 (2006) (deciding whether eBay's infringement of MercExchange's patents justified injunctive relief).

[143] *Id.* at 391.

[144] *See, e.g.*, Kramer v. Thompson, 947 F.2d 666, 679 (3d Cir. 1991) (continuing the adherence of the court to the "adequate remedy doctrine" for denying injunctive relief).

[145] *See* Brian F. Landenberg, *Unilateral Refusals to Deal in Intellectual Property After* Image Technical Services, Inc. v. Eastman Kodak Co., 73 WASH. L. REV. 1079, 1088 (1998).

reputational harm.[146] Monetary harm, as it relates to defamation cases, is the economic loss suffered by a plaintiff because of the false or disparaging comments.[147] Reputational harm, however, is a "socially constructed injury"[148] that can include elements such as "impairment of . . . standing in the community, personal humiliation, and mental anguish and suffering."[149] Showing specific instances of harm that have resulted from defamatory statements is sufficient to warrant a remedy,[150] but a court must also determine if failing to grant a permanent injunction at this stage will lead to future instances of harm. That judgment will be based on the current spread of defamatory statements and how concerned the court is with the defendant continuing his or her slanderous or libelous speech.

2. Other Remedies Are Inadequate to Compensate for Injury.

In applying the second factors, courts inquire into whether there is a more effective or less intrusive way to remedy the defamed plaintiff's harm. This is an especially important metric because it is the most commonly cited reason why a court denies an injunction as a remedy.[151] Since injunctions are generally disfavored, and criminal defamation laws in the United States are practically non-existent,[152] monetary damages are the preferred remedy by

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146 *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.2 (3d ed. 2018) (identifying that defamation law is meant redress the losses associated with the reputational harm, both economic and "presumed"). This Note uses the term "reputational" to refer to damages a harmed individual feels personally or internally and the term "monetary" to refer to quantifiable economic damages.

147 *See* RESTATEMENT (SECOND) OF TORTS §575 (AM. LAW INST. 1977) (providing the example of a Catholic priest falsely saying a merchant has been excommunicated, causing the merchant to lose Catholic customers).

148 David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 296 (2010).

149 Draghetti v. Chmielewski, 626 N.E.2d 862, 868 (Mass. 1994).

150 *See e.g.*, Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 341 (Cal. 2007) (noting one of the harms caused after defendant approached potential customers "more than 100 times, causing many of them to turn away").

151 *See* Watson v. McGuire, No. 15-1043 (RMC), 2016 WL 7839114, at *3 (D.D.C. June 2, 2016) (holding that injunctions would only be permissible if the "irreparable harm [was] not compensable through monetary damages" (citing Guttenberg v. Emery, 26 F. Supp. 3d 88, 103 (D.D.C. 2014))); *Guttenberg*, 26 F. Supp. 3d at 102 (finding that by estimating the amount of compensatory damages for their alleged irreparable harm plaintiffs indicated a monetary award is sufficient).

152 *See Criminal Defamation Laws in North America*, COMMITTEE TO PROTECT JOURNALISTS (Mar. 2, 2016, 11:00 AM), https://cpj.org/reports/2016/03/north-america.php

every court for defamation actions. While it is hard to quantify damage to one's reputation, "the law often relies on monetary damages to partially recompense a loss even when those damages cannot perfectly repair the damage done,"[153] and the Court generally believes that monetary penalties are sufficient to deter defamation.[154]

Some view the rationales for imposing monetary damages as weak. Most arguments advocating for monetary damages over injunctive relief do so because of the perceived failings of injunctions, specifically that they are prima facie impermissible,[155] and that it is better to receive some compensation rather than none.[156] But even Professor Chemerinsky concedes that placing a monetary value on lost reputation from defamation is "inherently speculative,"[157] so the money received may be inadequate regardless. Other critics argue that monetary damages fail to grant effective relief if the defendant is either so "impecunious as to be 'judgment proof'" or wealthy enough that a monetary penalty fails to deter them from future defamation.[158] In addition, a look at the history of defamation suits shows a vast majority of plaintiffs do not sue with a stated goal of monetary relief.[159] Preventing the

(discussing the lack of federal criminal defamation laws and the potential unconstitutionality of existing state criminal defamation laws).

153 Smith & Nephew, Inc. v. Interlace Medical, Inc., 955 F. Supp. 2d 69, 78 (D. Mass. 2013).

154 *See* New York Times v. Sullivan, 376 U.S. 254, 277 (1964) (noting that damages are "more inhibiting than a fear of prosecution").

155 *See* Motto, *supra* note 134, at 296 (arguing that injunctions are unable to properly restrict only disparaging uses of adjudicated defamatory comments).

156 *See Smith & Nephew*, 955 F. Supp. 2d at 79 (disfavoring a permanent injunction because even though monetary damages will probably not fully repair the harm suffered by plaintiff they can "substantially mitigate [their] losses").

157 Chemerinsky, *supra* note 119, at 170.

158 Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 351 (Cal. 2007). This concern is noticeable in the Jones defamation cases: testimony given in 2014 provides that Jones receives more than $20 million a year in revenue, suggesting he could weather most monetary judgments against him or has the resources to complete an appeal process. Elizabeth Williamson & Emily Steel, *Reckoning Imperils Infowars Founder's Soapbox, and His Empire*, N.Y. TIMES, Sept. 8, 2018, at A1.

159 *See* Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 215, 229 (1985) (finding that because only about 10 percent of plaintiffs bring these cases there must be some form of vindication plaintiffs want to bring out through the judicial process).

repetition of harmful speech is more important to them because of the lasting reputational harm they can suffer.[160]

The Internet has also fundamentally changed the impact of defamation because printed and written statements, once only accessible in a locally printed newspaper for one day, can now spread over Facebook, Twitter, or YouTube far beyond the purview of the original poster. These online content providers are likewise not monetarily liable for comments made by third-parties on their services,[161] though they have implemented systems to flag posts with harassing, false, or hateful speech.[162] While these systems for monitoring and flagging harmful conduct may theoretically be a remedy that mitigates the need for an injunction, the effectiveness of those systems has been subject to much scrutiny.[163] Leaving it to these services to effectively self-police the content on their sites will leave a plaintiff without true relief if the judicially determined defamatory content slips past those moderators.

3. Threatened Damage to Plaintiff Outweighs Hardship on Defendant.

Injunctions impose a restriction on a defendant's right to free speech that courts generally find so onerous that it outweighs the

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[160] *See* Garber, *supra* note 6 ("As a result of [Jones's conspiracy theories], Noah Pozner's family says, they have been stalked and subjected to death threats . . . forc[ing] them to move seven times over the past five years, ever farther away from the body of their slain son.").

[161] *See* 47 U.S.C. § 230 (c)(2)(A) ("No provider . . . of an interactive computer service shall be held liable on account of . . . availability of material that the provider or user considers to be . . . objectionable . . . .").

[162] *See, e.g.*, *Hateful Conduct Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Jan. 19, 2020).

[163] *See* Mark Scott, *Twitter Fails E.U. Standard on Removing Hate Speech Online*, N.Y. TIMES, June 1, 2017, at B5 (noting that "Twitter removed hate speech from its network less than 40 percent of the time after such content [was] flagged"); Tess Owen, *Facebook Is Letting White Nationalist Hate Groups Operate in the Open*, VICE NEWS (Apr. 19, 2018, 3:45 PM), https://news.vice.com/en_us/article/d35jwz/facebook-is-letting-white-nationalist-hate-groups-operate-in-the-open (suggesting that Facebook has failed to meaningfully restrict hate groups from operating on the site). As private websites and not public forums, social media platforms impose self-created "community standards" that users are not allowed to violate if they wish to remain on the platform. *Cf.* Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018) (determining that President Trump's personal Twitter handle (which was activated before he was President but is still used frequently in office to disseminate information about his Administration) is a public forum and thus cannot block users from following the account).

plaintiff's right to recover for defamation.[164] Before an adjudication of defamation, the plaintiff bears the burden of proving all of the elements that support such a finding.[165] If the plaintiff "thrust[s] themselves to the forefront of particular public controversies," the court will consider them a "public figure" and the burden of proving defamation is even higher.[166] Not only must the plaintiff show the statements in question are false, but he or she must further prove that the statements were made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[167] These standards of proof are, appropriately, high: plaintiffs must show that defendants, with "clear and convincing proof,"[168] had a "high degree of awareness of their [statements'] probable falsity" to prove malice.[169] Alternatively, to show recklessness, the defendant must have at least "entertained serious doubts as to the truth of his [statements]."[170] Private individuals, or even public individuals so long as it relates to private or personal matters, need only show that the statements were false and the defendant acted at least negligently to prove defamation.[171]

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164 *See* Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (finding that nothing about the defamation was so severe "as to justify the invasion of constitutional freedoms").

165 *See, e.g.*, Bierman v. Weier, 826 N.W.2d 436, 443 (Iowa 2013) (listing common law elements of proving defamation).

166 Gertz v. Welch, 418 U.S. 323, 345 (1974). Outside of those running for public office, there is no defined scope of public officials. *See* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (holding that public officials are those who "appear to the public to have[] substantial responsibility for or control over the conduct of governmental affairs"); Stevens v. Tillman, 855 F.2d 394, 403 (7th Cir. 1988) (determining that elementary school principals are public officials); McKinley v. Baden, 777 F.2d 1017, 1021 (5th Cir. 1985) (finding police officers are public officials).

167 New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

168 *Gertz*, 418 U.S. at 342.

169 Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

170 St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

171 *Gertz*, 418 U.S. at 353 (Blackmun, J., concurring) (joining the Court's opinion but writing separately to differentiate defamation "by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard").

To contrast, a defendant has several methods of defending his or her speech as non-defamatory: truth,[172] privilege,[173] and opinion.[174] Additionally, in the time it takes the defendant and plaintiff to collect evidence for their cases, the plaintiff may still be facing consequences of the alleged defamation campaign.[175] Judges are also predisposed to temper jury awards to defamation victims "[b]ecause of constitutional considerations."[176]

In the Pozners' suit against Jones, Jones' lawyer argued in part that the plaintiffs are public figures and thus must show Jones defamed them with actual malice.[177] Each court for each suit will likely agree and find that all plaintiffs are, at least, "limited-purpose public figures" and will need to prove Jones spoke with actual malice.[178] These standards exist because public figures, whether they received that designation through tragedy or willing acceptance, should be open to criticism or discussion, and the dangers of preventing such speech is a fundamental concern for free speech advocates.[179] Even if a court does find that a defendant spoke with sufficient malice for defamation, if the bar against injunctions remains, a monetary judgment will be the end of the court's

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[172] *See, e.g.*, Emde v. San Joaquin Cty. Cent. Lab. Council, 143 P.2d 20, 28 (Cal. 1943) (requiring a showing that the "imputation" of the alleged defamatory statement is "substantially true so as to justify the . . . [tenor] of the remark").

[173] *See, e.g.*, Beasley v. St. Mary's Hosp. of Centralia, 558 N.E.2d 677, 684 (Ill. App. Ct. 1990) (listing elements of privileged statements, including "limited in scope to [a duty to be upheld]" and "publication . . . to proper parties only").

[174] *But see* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990) (concluding that a defamer cannot avoid punishment by claiming his statements were opinions, even if he states the incomplete or erroneous facts which the opinion is based). Before *Milkovich*, the doctrine of opinion was often cited in motions to dismiss as an out for judges to quickly "dispose of cases they considered unmeritorious." David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 507 (1991).

[175] For example, in *Sindi*, Dr. Sindi brought suit in January 2013 but went to trial in 2016 after extensive discovery. During that time, the defamation campaign cost Dr. Sindi's i2 Institute $10,000 monthly salary for almost three years. Sindi v. El-Moslimany, 896 F.3d 1, 11–12, 24–25 (1st Cir. 2018).

[176] Stone v. Essex Cty. Newspapers, Inc., 330 N.E.2d 161, 170 (Mass. 1975) (finding that "both trial and appellate judges have a special duty of vigilance in . . . reviewing verdicts to see that damages are no more than compensatory").

[177] *Sandy Hook Families v Alex Jones: Defamation Case Explained*, BBC NEWS (Aug. 31, 2018), https://www.bbc.com/news/world-us-canada-45358890.

[178] *Id.* Similarly, Sindi conceded that, due to her status as a goodwill ambassador and political appointee, she is a limited-purpose public figure. *Sindi*, 896 F.3d at 15.

[179] *See* discussion *infra* Section III.A.4.

enforcement of that ruling. With such a ruling, all the problems with an impecunious defamer continue.[180]

The most significant penalty faced by a defendant is the possibility of being held in contempt for violating the injunction—a sentence that carries the possibility of imprisonment.[181] But even then, a defendant still has due process rights to go to court and defend his or her alleged violation.[182] Although the burden has shifted to the defendant in a defamation case, it is not truly an undue hardship to make the defamer prove their speech is no longer deleterious given the injuries to reputation or economic stability already suffered by the plaintiff for the defendant's past conduct.

4. The Public Interest Would Not Be Disserved by a Permanent Injunction.

But despite the support for free speech without restrictions, is the public actually disserved by preventing the repetition of defamatory conduct that hurts or disparages a person or persons? Various legal theories supporting free speech as a fundamental right seemingly preclude injunctions as an appropriate remedy in any situation.[183] The public has the right to speak freely without danger of illegitimate censorship, and other members of the public have the right to hear their speech.[184] Upon closer examination, however, these justifications for absolute free speech may not be satisfactory for excusing the repetition of defamatory speech.

Many of the theories that advance total free speech often fail to account for the unique form of speech that is defamation. Regarding the theory of self-governance, the U.S. Supreme Court in *New York Times v. Sullivan* actually qualified the speech citizens can use to criticize their elected public officials, even if the barrier for such speech is very high.[185] A person might also try defending his or her

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[180] McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015) (discussing the futility of suing a defendant who has no money).

[181] Blasi, *supra* note 130, at 27.

[182] *See supra* notes 125–26 and accompanying text.

[183] *See* discussion *supra* Section II.A.

[184] *See* Jeffries, *supra* note 16, at 426 ("[B]ecause an injunction must be sought in open court, the character of the government's claims remain subject to public scrutiny and debate."); Ardia, *supra* note 13, at 23 (noting that elements such as the presence of juries in libel cases ensures the public can restrict the ability of the government to censor speech).

[185] 376 U.S. 254, 279–80 (1964) (holding that a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'").

allegedly defamatory conduct as advancing his or her own personal autonomy, but many have criticized the "advancing autonomy" rationale as insensitive to those harmed by such conduct, particularly if such statements rise to the level of racist or hate speech.[186] This criticism also applies towards defending speech in promotion of tolerance, with some arguing that tolerating the repetition of falsehoods is not inherently valuable to the public.[187]

The best enunciation of the "marketplace of ideas" justification for allowing free speech comes from Justice Holmes in the 1919 U.S. Supreme Court case *Abrams v. United States*.[188] His belief in this market to filter out bad ideas and select a better truth is in direct opposition to injunctions, as that remedy would deny the public the ability to collectively decide what they should see or believe. Additionally, erring on the side of more market openness lessens any impact of the chilling effect over-deterring those engaged in acceptable speech from speaking out of fear of liability.[189]

Professor Baker criticized the belief that the truth will win out in the marketplace because "people consistently respond to emotional or 'irrational' appeals" and because the truth of any issue is in danger if its opponent defends their position passionately enough.[190] Others have warned that unacceptable harms may occur before the truth wins out,[191] while Professor Redish bluntly suggests

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[186] *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179–81 (1982) (suggesting a potential cause of action for racist speech because of its negative effects); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 771 (1942) (arguing for the restriction of hate speech due to the "devastating harm caused to racial or cultural minorities"). The First Amendment protects hate speech, but such speech could be defamatory if it is comprised of blatant falsehoods or debunked pseudo-science. *Cf. Why Hate Speech Is Protected under the Law*, WBUR (Feb. 20, 2017, 4:13 PM), http://www.wbur.org/hereandnow/2017/02/20/hate-speech-law (explaining that hate speech is protected because it is "opinion. It may be despicable opinion, but they're not *false statements of fact*" (emphasis added)). That description indicates a hateful false statement of fact might be actionable.

[187] *See* David Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485, 1505–06 (criticizing Lee Bollinger for never explaining in his book why tolerance is valuable to democracy).

[188] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[189] Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1950 (2013) ("[I]t is . . . a better bargain to allow more speech, even if society must endure some of that speech's undesirable consequences.").

[190] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 15 (1989).

[191] *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1277–

that if the less valuable forms of speech are not protected by the First Amendment, there is a "question [of] whether *any* harm of constitutional magnitude [even] occurs" when that speech is kept from the marketplace.[192] Criticisms of the impact of overbroad laws chilling speech believe that the chilling-effect doctrine itself is based on "unsubstantiated empirical judgments" rather than credible findings.[193]

The "marketplace of ideas" metaphor is probably the best defense of free speech, though, because the public is theoretically able to access the market whenever they want and access all information flowing through it. While the ability to do so might have been more difficult in the past,[194] accessing a vastly more open marketplace of ideas has become exponentially easier in the age of the Internet. Jones built his media empire on the fact that he can publish stories on his website and share them to his followers over the Internet. Without significant barriers to entry, a person has equal access to any piece of information—so if Jones's stories are wrong or false, consumers could theoretically find more reputable sources that check his statements.

In 2012, Eli Pariser wrote that major online websites (Amazon, Facebook, Google, etc.) have inadvertently created "filter bubbles" that show users personalized content at the expense of providing

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78 n.151 (1992) (examining how often the public took offensive speech about minorities as true); David Shih, *Hate Speech and The Misnomer Of 'The Marketplace of Ideas,'* NPR (May 3, 2017, 3:22 PM), https://www.npr.org/sections/codeswitch/2017/05/03/483264173/hate-speech-and-the-misnomer-of-the-marketplace-of-ideas (listing examples of "unabated" harmful speech stemming from "faith in a flawed metaphor"). Current climate change debate is illustrative of this concern. While scientific consensus suggests human activity causes rising global temperatures, public debate, which determines policy decisions more than scientific consensus, continues on whether the cause of higher temperatures is man-made or not. *Compare Scientific Consensus: Earth's Climate Is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ (last visited Jan. 20, 2020), *with* A. LEISEROWITZ ET AL., CLIMATE CHANGE IN THE AMERICAN MIND: PUBLIC SUPPORT FOR CLIMATE & ENERGY POLICIES IN MARCH 2012 (2012), http://environment.yale.edu/climate-communication-OFF/files/Policy-Support-March-2012.pdf.

192 Redish, *supra* note 125, at 59–60 (emphasis added).

193 Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1657 (2013).

194 *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 42 (2004) (warning that markets can be "inegalitarian in that . . . [they] greatly facilitate the leveraging of . . . wealth and economic savvy"); *120 Years of Literacy*, NAT. CTR. FOR EDUC. STAT., https://nces.ed.gov/naal/lit_history.asp (last visited Jan. 19, 2020) (showing the U.S. illiteracy rate shrunk from 20 percent in 1870 to less than 1 percent by 1979, reflecting the increasing ability of persons to obtain information from the marketplace on their own).

other information.[195] He warns that Internet filter bubbles "alter our sense of the map" and remove the ability to understand the "immense [and] varied continent" of content that might upset our preconceived notions on any subject.[196] Pariser recounts that, despite having both conservative and liberal friends on Facebook, engaging more with his liberal friends' posts told Facebook's algorithm to hide updates from his conservative friends from his media feed.[197] The impact of these un-opted for content filters is especially pronounced now as Americans increasingly choose to get their information and news primarily from the Internet.[198]

If this algorithmic filtering is as impactful as Pariser suggests, the consequences for the viability of the marketplace of ideas are apparent: how can there be a free exchange of ideas when certain ideas are filtered out because you "liked" a certain page on Twitter and you instead become "indoctrinate[ed] . . . with [your] own ideas[?]"[199] In another upsetting development, research has shown that algorithms that emphasize total viewing time over other metrics, primarily seen on content-driven sites like YouTube, can encourage the spread of unverified hoaxes and fictitious videos.[200]

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[195] ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK 14–16 (2012).

[196] *Id.* at 106–07.

[197] Eli Pariser, *Beware Online "Filter Bubbles,"* TED (Mar. 2011), https://www.ted.com/talks/eli_pariser_beware_online_filter_bubbles.

[198] Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use Is Closing in on TV News Use*, PEW RESEARCH CTR. (Sept. 7, 2017), http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/ (showing that 43 percent of U.S. adults often get news from online sources in 2017, compared to 38 percent in 2016).

[199] PARISER, *supra* note 195, at 15.

[200] *See* Max Fisher & Amanda Taub, *With YouTube as Guide, Brazil Moves Far Right*, N.Y. TIMES, Aug. 13, 2019, at A1 ("A team at Harvard's Berkman Klein Center . . . programmed a Brazil-based server to enter a popular channel or search term, then open YouTube's top recommendations, then follow the recommendations on each of those, and so on . . . . They found that after users watched a video about politics or even entertainment, YouTube's recommendations often favored right-wing, conspiracy channels like [Nando] Moura's," an amateur guitar teacher who "accused feminists, teachers and mainstream politicians of waging vast conspiracies."); Guillaume Chaslot, *How YouTube's A.I. Boosts Alternative Facts*, MEDIUM (Mar. 31, 2017), https://medium.com/@guillaumechaslot/how-youtubes-a-i-boosts-alternative-facts-3cc276f47cf7 (discussing YouTube's algorithms). For his article, Chaslot created a "recommendation explorer" to show that YouTube algorithms are designed to keep viewers engaged on the site, which encourages longer videos, regardless of the video's "likes" and "dislikes" ratios. *Id.* For their part, YouTube has recognized this issue and is taking steps to address it. *See Continuing Our Work to Improve Recommendations on YouTube*, YOUTUBE OFFICIAL BLOG (Jan. 25, 2019), https://youtube.googleblog.com/2019/01/continuing-our-work-

Because of an uncontrollable computer algorithm that returns only what it thinks that user wants, a user may never hear commentary contrary to that which supports Jones's credibility, regardless of his statement's truth. It is hard for people to break out of this bubble because we often see every news story as biased in some way.[201]

The First Amendment is meant to protect ideas that have "even the slightest redeeming social importance," but no theory appears to justify defamation as valuable to the public.[202] Without such value, enjoining the defamatory statement may be effective in preventing its dissemination amongst the discourse if there are fears that no corrective information may reach the person trapped in their own filter bubble.

B. DEFAMATION, ENTRENCHMENT, AND SOCIAL MEDIA

Suppose one of the Sandy Hook cases against Jones ends with a court holding Jones liable for defamation. In the absence of injunctive relief, the court will most likely award damages meant to compensate for the emotional and reputational damage felt by the parents, as well as the economic costs associated with moving residences because of threats made by Jones's followers who learned their home address.[203] One could believe that after this ruling Jones would accept that his statements were false and will not repeat them, lest he be sued again. This, however, may not be such a reasonable assumption, as Jones may reveal himself to be a devil C.S. Lewis was warning us about.[204]

In the wake of public backlash and social media bans prompted by some of Infowars's more controversial statements,[205] Jones does

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to-improve.html. *But see supra* text accompanying note 163 (questioning the effectiveness of online tools to adequately identify false or harassing content).

201 *See* Jeffrey M. Jones, *Americans See More News Bias; Most Can't Name Neutral Source*, GALLUP (Jan. 17, 2018), https://news.gallup.com/poll/225755/americans-news-bias-name-neutral-source.aspx (stating that around 55 percent of Americans cannot name an unbiased news source and further noting that Americans that did claim they knew objective sources chose widely different outlets).

202 Roth v. United States, 354 U.S. 476, 484 (1957) (holding there is no First Amendment protection for obscene speech).

203 *See* Garber, *supra* note 6 (detailing how one family was forced to move seven times in five years as a result of Jones's "legions of epistemically gullible yet digitally savvy followers").

204 *See supra* note 1 and accompanying text.

205 *See* Jack Nicas, *Tech Giants Push Infowars Off Digital Soapbox*, N.Y. TIMES, Aug. 7 , 2018, at A1 (reporting that websites like Facebook, YouTube, and Spotify have restricted Jones' access to their sites for violations of policies on hate speech and glorifying violence).

not appear to believe his statements are disparaging or wrong, instead claiming that "[t]he more I'm persecuted, the stronger I get."[206] This suggests that even if a court were to rule against Jones and find some of his content defamatory, he may not accept the results (much like the other 40.9 percent of trial litigants who appeal the rulings in their own cases).[207] If Jones refuses to waver from his assertions despite a court ruling that they are not fact, he could repeat these remarks with more aggression and determination than before.

The "backfire effect" refers to the sociological phenomenon where, upon receiving information that challenges one's opinion or belief, a person may "come to support their original opinion *even more strongly*."[208] While variations in how to present the corrective information may help,[209] scientific evidence broadly suggests that people are relatively close-minded when it comes to accepting new information as fact.[210] In one notable study, researchers analyzed subjects receiving news stories about the existence of weapons of mass destruction (WMD) in Iraq, along with corrective information pointing out where those previous stories were wrong.[211] Results showed that if the participants initially believed there were WMD, they "were *more* likely to believe that Iraq had WMD" after receiving the corrective information that no such weapons were found.[212] Current literature suggest that people like those in the

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206 Jack Nicas, *Bans Will Make Me Stronger, Infowars Founder Said. No, They Didn't*, N.Y. TIMES, Sept. 4, 2018, at B2.

207 *See* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 660 (2004) (analyzing the outcomes of appeals in cases based on whether they go to trial, receive definitive judgments, or reach settlements).

208 Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010).

209 *See* Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 803–05 (2000) (showing that when citizens receive two questions about the percentage of the national budget that goes to welfare before receiving the correct information they are more open to the correct information).

210 *See, e.g.*, Nyhan et al., *Effective Messages in Vaccine Promotion*, 51 INDIAN PEDIATRICS 491, 491 (2014) (finding the methods used by the Centers for Disease Control and Prevention to inform parents about the link between vaccines and autism only increased the parents' reported belief in serious vaccine side effects).

211 Nyhan & Reifler, *supra* note 208, at 311–18.

212 *Id.* at 315. While the results suggested a partisan explanation (i.e., conservative subjects were more likely than liberal subjects to believe the Republican administration saying there were WMD in Iraq), the control group (also made up of participants from different ideological

study engage in "motivated reasoning" to support their pre-conceived notions.[213] Research conducted by Professors Campbell and Friesen explains this by concluding that the brain is very good at rejecting the "relevance of facts" if the facts do not fit with previously held beliefs.[214]

The Internet amplifies this problem by removing the barriers associated with disseminating information, increasing the audience that someone like Jones can reach if he starts to double down on his defamatory statements. Commenters on his videos and posts will still likely choose to find ways to ignore or devalue incongruent information or will repeat only information that falls in line with their accepted beliefs.[215] Without face-to-face interactions, a person writing on the Internet is able to "write lengthy monologues[] which [can] entrench them in their extreme viewpoint," especially if responding to someone else who challenges his or her assertions.[216]

In the hands of more sinister agents, the Internet is an effective tool for building on this hostility towards accepting new information to create weaponized vitriol. As the Russian social media campaigns of the 2016 U.S. Presidential election showed, untruthful information and "fake news" can spread quickly over the Internet, often with little interference.[217] Russian troll farms created fake social media pages meant to stir animosity between political parties and social groups in America, promoting certain candidates solely

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spectrums), which received no corrective information, did not experience a similar change in the intensity of their beliefs. *Id.*

213 *Id.* at 323. Another experiment, this time regarding whether tax cuts essentially "pay for themselves" or that such a claim is "empirically implausible," produced similar findings. *Id.* at 319–20.

214 Troy Campbell & Justin Friesen, *Why People "Fly from Facts,"* SCI. AM. (Mar. 3, 2015), https://www.scientificamerican.com/article/why-people-fly-from-facts/ (showing participants' acceptance of supposed scientific evidence concerning child-rearing in same-sex marriages differed based on whether they support same-sex marriage).

215 *See* David P. Redlawsk, *Hot Cognition or Cool Consideration? Testing the Effects of Motivated Reasoning on Political Decision Making*, 64 J. POL. 1021, 1040–41 (2002) (finding that even accuracy-motivated subjects, who were able to accept information at odds with their beliefs, still preferred searching for information that supported their chosen political candidate in an experimental election).

216 Natalie Wolchover, *Why Is Everyone on the Internet So Angry?*, SCI. AM. (July 25, 2012), https://www.scientificamerican.com/article/why-is-everyone-on-the-internet-so-angry/.

217 *See* Kari Paul, *False News Stories Are 70% More Likely to Be Retweeted on Twitter than True Ones*, MARKETWATCH (Oct. 25, 2018, 10:18 AM), https://www.marketwatch.com/story/fake-news-spreads-more-quickly-on-twitter-than-real-news-2018-03-08 (noting the prevailing preference for fabricated stories among Twitter users).

to "generat[e] a backlash" and create potentially disastrous confrontations.[218] Those committed to their beliefs are resistant to listening to an untrusted source for new information,[219] so changing the mind of someone who believes the speech of a Russian bot is difficult unless that same source retracts the statement.

Understanding all of this makes the possibility that Jones will not personally accept a court finding him liable for defamation a cognizable fear. Without an injunction preventing repetition of defamatory content, there is little to prevent a defamer from continuing to spread the defamatory material and even less to remove it.[220] If a court finds Jones liable, but he continues to defame the families bringing suit against him, the families will have to repeat the same court process they undertook in the previous defamation case. They will collect examples of the defamation and provide proof that Jones is damaging their reputation, which is not only redundant, but likely very costly for the families.

The combination of confirmation biases, ineffective corrective measures, spread of false stories over the Internet, and a potential judgment-proof defendant creates valid apprehension that a defendant will avoid meaningful consequences for their defamation upon adjudication absent an injunction.[221] Additionally, there is a danger that they will now more strongly believe in their convictions that their defamatory comments are in fact not defamatory after the court's ruling. While the defamer may feel emboldened to continue repeating his adjudicated false beliefs, violating a permanent injunction will create more serious consequences than even he might be willing to accept.[222] An injunction can deny a defamer the

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[218] Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html (hypothesizing that Russian social media accounts tried to cause violent riots by promoting fake stories).

[219] *See* Adam J. Berinsky, *Rumors and Health Care Reform: Experiments in Political Misinformation*, 47 BRIT. J. POL. SCI. 241, 245 (2015) (showing that corrective information may only be effective if it comes from a co-partisan that the audience already believes).

[220] For example, as of November 2019, a 2012 children's biography of the plaintiff in *Sindi* still has defamatory statements from a photographybysamia user review on its Amazon page, assuming this user is the defendant Samia El-Moslimany. *Hayat Sindi: Brilliant Biochemist (Women in Science)*, AMAZON, https://www.amazon.com/Hayat-Sindi-Brilliant-Biochemist-Science/dp/1617834505 (last visited Jan. 19, 2020).

[221] *See* discussion *supra* Sections III.A.4, III.B.

[222] *See* Keys v. Alligood, 100 S.E. 113, 114 (N.C. 1919) (finding that a court may give the defendant the chance to "undo the wrongful act committed by them in violation of [an

ability to continue distributing defamatory material, regardless of whether he or she believes it is true.

C. THE EFFECTIVENESS OF SILENCING SPEECH

If monetary damages are incapable of deterring defamation, why are permanent injunctions a more effective solution? The lack of case law approving permanent injunctions limits analyzing the doctrine, but there is a possible alternative for determining the effectiveness of limiting the reach of a person's speech.

The past few years have seen a rise in social media sites trying to remove groups and people that violate their community standards from their platforms, despite the associated difficulties.[223] Similarly, corporations and organizations, spurred by social movements such as #MeToo, have been more willing to remove offenders from their positions rather than be seen as condoning their offensive behavior.[224] Sometimes, these removals demonstrate the backfire effect, as many times the more vocal of removed-persons express their disbelief that they did something wrong rather than accept the consequences of their actions.[225]

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injunction]" before adding to their penalties); *see also* Blasi, *supra* note 130, at 43–47 (discussing how to hold a defendant in contempt for violating an injunction).

[223] *See supra* notes 162–63.

[224] *See* Tiffany Hsu & Alexandra Alter, *Exposing Feud, Ex-Chief Sues Barnes & Noble*, N.Y. TIMES, Aug. 29, 2018, at B1 (explaining the Barnes & Noble C.E.O.'s departure for sexual harassment); Erik Ortiz & Corky Siemaszko, *NBC News Fires Matt Lauer After Sexual Misconduct Review*, NBC NEWS (Nov. 30, 2017, 7:39 AM), https://www.nbcnews.com/storyline/sexual-misconduct/nbc-news-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831 (detailing the firing of former NBC anchorman Matt Lauer).

[225] *See* Erin Donnelly, *Roseanne Barr Claims ABC Fired Her Because She Voted for Donald Trump*, YAHOO! ENT. (July 20, 2018), https://www.yahoo.com/entertainment/roseanne-barr-claims-tweet-got-fired-wasnt-racist-thought-valerie-jarrett-white-141002285.html (reporting on Roseanne Barr defending her tweets as not racist); Chuck Barney, *Defiant Bill O'Reilly Responds After Being Fired at Fox News*, MERCURY NEWS (Apr. 24, 2017, 9:41 AM), https://www.mercurynews.com/2017/04/19/bill-oreilly-out-at-fox-news-report-says/ (repeating former Fox News personality Bill O'Reilly's statements that the sexual harassment claims against him were "unfounded"). Sometimes, this self-assuredness carries over even when there are judicially-imposed sanctions. *See, e.g.*, Ryan Lucas, *Roger Stone Barred from Using Social Media as Judge Tightens Gag Order*, NPR (July 16, 2019, 3:50 PM), https://www.npr.org/2019/07/16/742333663/roger-stone-barred-from-using-social-media-as-judge-tightens-gag-order (detailing how Roger Stone, an InfoWars contributor and longtime informal adviser to President Trump who is currently facing criminal charges related to his testimony before Congress on Russian interference in the 2016 presidential election, continually violated a judicially-imposed gag order by defending himself and discrediting other witnesses on Twitter).

For certain personalities, the loss of a platform cuts them off from easy access to the marketplace of ideas since "a majority (64%) [of online users] get news on just one [social media site]," a site they are no longer on.[226] Research has shown that "deplatforming" limits the spread of a person's message,[227] as Jones experienced after major media platforms banned his channels for community standards violations.[228] There are concerns, however, that "deplatforming," much like censorship in general, will only make those already invested in the censored speech more extreme and further radicalize them to those beliefs.[229] If speech is being used to harm someone or their reputation, however, "deplatforming" that individual may work more effectively than hoping another user's speech buries the disparaging comments.[230]

Even though a court has not found Jones liable for defamation nor enjoined him from repeating any statements in the Sandy Hook cases, his ban from most major social media platforms shows the potential results of a permanent injunction. If his statements are adjudicated as defamatory, a permanent injunction would be able to sharply decrease their dissemination, likely decreasing the harm the plaintiffs have felt from his statements. However, if a court instigated this social media ban, it would clearly be a prior restraint as it used Jones's past actions and words to permanently restrict his future speech.[231] This is why the concept of 'narrow tailoring' is so important to a court-ordered permanent injunction, as a permanent injunction requires precision crafting to ensure that it only prevents the repetition of adjudicated defamatory content without infringing on the defamer's free speech rights.[232]

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[226] Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CTR. (May 26, 2016), http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/.

[227] Jason Koebler, *Deplatforming Works*, VICE (Aug. 10, 2018, 1:02 PM), https://motherboard.vice.com/en_us/article/bjbp9d/do-social-media-bans-work (explaining research that despite an initial surge in traffic searches for blocked sites taper off relatively quickly).

[228] Nicas, *supra* note 206 (noting that visits to Jones's media channels fell from 1.4 million daily visits to 715,000 over three weeks).

[229] Koebler, *supra* note 227 (questioning which outcome is more harmful to society).

[230] For a discussion on the effectiveness of correcting information, see *supra* Section III.B.

[231] *See supra* notes 41–45.

[232] *See supra* note 130.

IV. DRAFTING A PERMANENT INJUNCTION

This Note has defended permanent injunctions as an acceptable remedy in defamation cases in several ways. It has shown the failings of monetary damages, highlighting the futility of trying to obtain recompense from a defendant who is judgment-proof or otherwise unable to pay such damages.[233] It has criticized labeling injunctions as prior restraints by questioning whether the process for awarding injunctions even fits within that concept.[234] It has discussed the defenses of unfettered free speech and why the general criticism to those defenses is much more persuasive in the Internet age to suggest that denying the defamer the ability to repeat defamatory material ultimately serves the public.[235] It also describes the backfire effect to explain why a court order is not an effective measure since it may "backfire," causing the defamer to become further entrenched in his or her judicially-determined falsehood and thus be more likely to repeat it.[236]

Even if a court is open to crafting an injunction in a defamation suit, there is still a question as to what it should look like. Most courts approving injunctive relief use the phrase "narrowly tailored" as a metric for a proper permanent injunction but provide no other guidelines.[237] To ensure a permissible scope, this Note advocates for a two-criteria test that any permanent injunction must satisfy to be considered narrowly tailored yet still effective: (1) restrict no speech other than what was adjudicated as defamatory and (2) prevent the continuation of harmful effects to the plaintiff caused by the defamation. Beyond the injunction itself, respecting the process to grant injunctions requires affording defendants all their constitutional rights before handing down a permissible injunction.

A. THE INJUNCTION

The proposed criteria balance each other to create a permanent injunction that will prevent the harm felt by the plaintiff in a defamation case but not unduly restrict the defendant's future

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233 *See* discussion *supra* Section III.A.2.
234 *See* discussion *supra* Section II.C.
235 *See* discussion *supra* Section III.A.4.
236 *See* discussion *supra* Section III.B.
237 *See* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 347 (Cal. 2007); Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 309 (Ky. 2010).

speech. Whereas the first criterion addresses the actual comments enjoined by the injunction, the second criterion reminds those crafting injunctions that it must be effective in preventing the repetition of proven harmful statements.

1. Restrict Only Speech Adjudicated Defamatory.

The first criterion is self-explanatory, as its goal is to ensure any injunction is not a prior restraint. A permanent injunction in these cases must only prohibit a defendant "from repeating . . . statements . . . that were determined at trial to be defamatory."[238] For example, the *Sindi* injunction only enjoined six particular statements deemed defamatory at trial.[239] The court struck down the injunction because it was too broad in restricting the repetition of statements that the trial court had found defamatory.[240] If the injunction barred defendants from saying that Sindi had cheated on her taxes, for example, that would go beyond the permissible scope of an injunction since the court had not found the defendants made such statements. Additionally, the defendants would take refuge by claiming the court did not properly give them notice that those statements would subject them to liability.[241]

Determining which statements may be enjoined is the biggest challenge for any permissible injunction. In Professor Ardia's discussion of the categories of injunctions, he ultimately concludes that only an injunction that lays out very specific statements may be proper, using the *Balboa* injunction as an example of one that sets acceptable boundaries.[242] But this list is so focused and specific, that if other injunctions follow this model, they will be completely ineffective.[243] Instead, by determining the purpose behind those

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[238] *Balboa*, 156 P.3d at 342.

[239] Sindi v. El-Moslimany, 896 F.3d 1, 27 (1st Cir. 2018) (listing six claims made by the defendant that the court found defamatory, including "Hayat Sindi is an academic and scientific fraud" and "Sindi did not conduct the research and writing of her dissertation").

[240] *Id.* at 33 (vacating the injunction because it did not account for contextual variations in repeating the statements and concluding "that the injunction punish[ed] future conduct that may be constitutionally protected").

[241] *See* Ardia, *supra* note 13, at 53–54 (suggesting such injunctions are overbroad).

[242] *See id.* at 52–57, 67–68 (describing his various types of injunctions, finding only Type IV to be properly tailored); *see also supra* notes 69–77.

[243] For example, one of the six defamatory statements listed in the injunction was "Plaintiff stays open until 6:00 a.m." *Balboa*, 156 P.3d at 342. Under the narrowest possible reading, the defendant could say the plaintiff remains open until 6:01 a.m. without violating the injunction.

defamatory words, the injunction may be more properly tailored to catch harmful phrases and prevent them from enacting continuing harm.

Sindi offers a more effective injunction on which to base any future defamation injunctions. The injunction simplified the exhaustive list of defamatory comments to six statements that covered recurring themes in the defendants' libelous conduct.[244] Statement number two—that is, "Sindi received awards meant for young scholars or other youth by lying about her age"[245]—adequately addresses several posts by defendants while not improperly preventing defendants from asserting anything about plaintiff's age unless it relates to Sindi's awards. If the defendant continues to repeat this statement, the injunction means they now have the burden to prove the comment is now true or else face the consequences of violating a court ordered injunction.[246]

2. Tailor to Only Prevent Damaging Uses of Defamatory Content.

The second criterion is meant to address another major concern of injunctions: that they fail to account for contextual variations.[247] Defamation not only requires making a false statement, but also causing a "legally cognizable harm associated with [that] false statement."[248] Any defamation injunction would need to contain language qualifying that only the repetition of a defamatory comment, for the purposes of inflicting reputational harm, economic distress, or other forms of harm punishable under the law, is prohibited. This will ensure the contextual stability of the

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244 *See Sindi*, 896 F.3d at 27 ("[T]he court found that six specific statements were false, defamatory, and made with actual malice and that, absent an injunction, the appellants were likely to repeat them.").

245 *Id.*

246 Blasi, *supra* note 130, at 43–44 (noting that injunctions are enforced through contempt proceedings and that "[t]he swiftness and sureness of [such] sanctions, not to mention the unpleasantness of the enforcement proceedings themselves, would seem to be factors that should influence the behavior of potential speakers").

247 *See* Motto, *supra* note 134, at 286 (arguing that permanent injunctions serve as "blanket prohibition[s] in perpetuity").

248 United States v. Alvarez, 567 U.S. 709, 719 (2012).

permanent injunction and address the fears of courts of making an injunction overly broad.[249]

The backfire effect also informs the rationale for the second criterion.[250] A permanent injunction is a harsh sentence, and a person who is subject to one may want to speak out not only to denounce it, but to test its bite. But what an injunction does is provide immediate grounds for relief if a defamer violates it. With monetary damages, that resentment and animosity can also lead to further repetition of the defamatory statements, except with no quick way to stop it. The threat of finding a defendant in contempt, where imprisonment is a possibility, can be a stronger method to prevent the repetition of defamatory comments than monetary damages alone.[251]

B. JUDICIAL PROCEDURE

Even with these criteria, a judge must still recognize appropriate judicial process considerations before granting an injunction.[252] While a court may have the authority to grant an injunction, it is still meant to be an extreme remedy only available when other forms of relief, such as monetary damages, are inadequate. [253] For any case where injunctive relief is a possibility, the court must afford the defendants a jury trial as a way to support the credibility of the defamation adjudication. The court should likewise ensure that any granted injunction is not overly broad as to make it invalid and subject to dismissal by a higher court.[254] If the defendant does violate the injunction, another jury trial is necessary for further enforcement, specifically as a means of further distancing injunctions from prior restraints.[255]

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249 *See Sindi*, 896 F.3d at 34 (suggesting the injunction prohibited the appellants from apologizing for their past statements).

250 *See* discussion *supra* Section III.B.

251 *See* Blasi, *supra* note 130, at 44 ("The swiftness and sureness of sanctions, not to mention the unpleasantness of the enforcement proceedings themselves, would seem to be factors that should influence the behavior of potential speakers.").

252 *See supra* notes 125–26 and accompanying text.

253 *See* discussion *supra* Section III.A.2.

254 *See, e.g.*, Tory v. Cochran, 544 U.S. 734, 734 (2005) (calling the injunction against Tory "overly broad").

255 *See* Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868,* 56 BUFF. L. REV. 655, 735 (2008) (finding the presence of the jury distinguishes subsequent punishments from prior restraints).

If the suits against Jones do result in a court-granted injunction, following all of these steps might ensure that the injunction is acceptable. Using one of the Sandy Hook suits as a basis, any injunction must only prevent Jones from repeating false statements related to calling the plaintiffs "crisis actors" or that the massacre was a government hoax.[256] The injunction must also restrict those phrases only in instances that would harm the plaintiffs, while affording him the use of those messages for other means such as an apology.[257] But if the plaintiffs feel Jones is violating the injunction and is still defaming the plaintiffs, the injunction will place the burden on Jones to prove his use of those statements falls into one of those acceptable categories. The goal of that procedure is to protect the First Amendment rights of any defamer, while at the same time respecting the court's adjudication that the plaintiff has suffered because of the defendant's statements and deserves further protection.

V. CONCLUSION

Defamatory speech is less valuable speech that does not deserve protection from a doctrine like prior restraint if a court has judged that speech to be harmful and malicious. A permanent injunction is not the correct solution for every instance of defamation, but the facts surrounding Jones' alleged defamation may be the best demonstration of how an injunction can properly answer the harms of defamation that monetary damages cannot satisfy alone. Because of Jones' resources, network of internet sites, and devoted followers, if a court finds that he is defaming the families of Sandy Hook victims, that only effective solution will be to stop him completely from saying those things. Courts refusing to consider this solution are ignoring not only the technological advances of the twenty-first century, but the human element that allow false and defamatory speech to root itself in the cultural zeitgeist. Alex Jones' voice is one of those cultural amplifiers, and if his speech is defamatory, courts

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256 Amanda Sakuma, *Alex Jones Blames "Psychosis" for His Sandy Hook Conspiracies*, VOX (Mar. 31, 2019, 12:34 PM), https://www.vox.com/2019/3/31/18289271/alex-jones-psychosis-conspiracies-sandy-hook-hoax.

257 Cezary Podkul & Shelby Holliday, *Roger Stone Admits Spreading Lies on InfoWars*, WALL ST. J. (Dec. 18, 2018, 11:44 AM), https://www.wsj.com/articles/roger-stone-admits-spreading-lies-on-infowars-11545093097 (settling a defamation suit against Roger Stone in exchange for the publishing of an official retraction in widely-read newspapers).

should not be afraid to implement a solution that many private companies use to prevent hurtful, hateful, and false information from needlessly spreading over the Internet.

A permanent injunction, if only meant to prevent the repetition of defamatory comments, may prevent new people from seeing this material absent appropriate context. While there should always be concerns about restricting someone's right to speak, the lessened value of defamatory speech means that enjoining its repetition can help repair the reputational damage suffered by the victim, address the fears of someone believing that speech, and ensure that Americans are not denied their constitutional freedom to express opinions and non-malicious speech.