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YOUR LIFE IS 'HOT NEWS': HOW DEVELOPMENTS IN TECHNOLOGY AND LAW
COULD DECIMATE THE LAW OF DEFAMATION

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INTRODUCTION

On the morning of January 22, 2010, a third-year law student (let's call him "Mr. Bader-Stevens") awoke to what was, at least to him, appalling news. The previous day, the United States Supreme Court had handed down its opinion in *Citizens United v. Federal Election Commission*, a case striking down limitations on campaign contributions by corporations.¹ Incensed, he immediately pulled up his Facebook account and tapped out a stinging rebuke of Justice Kennedy's majority opinion. Unable to contain his rage, the student continued to vent his frustration on his Facebook wall for the next week, occasionally engaging in vigorous debate with his strict-constructionist Facebook friends over the constitutional merits of granting full Free Speech rights to corporations. Eventually his anger subsided and the student returned to posting on topics better suited to social-networking users of his age. As far as he knew, his rants about the Court were forgotten.

But what if the story did not end there? What if, perchance, one of his strict-constructionist friends ("Mr. Scalito") operated a blog focused on "Saving America's Constitution from Judicial Activism"? And suppose that, after a particularly heated exchange with the student, he immediately posted on his blog the following: "Take for instance one Mr. Bader-Stevens, who has for the last week been using his Facebook wall to pillory our brave Court for its courageous decision to uphold the original meaning of the First Amendment. By now it should be clear to everyone that Mr. Bader-Stevens and his cronies intend to march on the Capitol by force, tear the Constitution to shreds, and topple America itself. In short, they hate liberty."

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¹ 130 S. Ct. 876 (2010).

Assuming that Mr. Scalito's statements were both untrue and defamatory, what are Mr. Bader-Stevens' chances of recovery under our current defamation laws? Courts have not yet expended much time or analysis on the question of defamation in cyberspace,² but given the current state of American libel law, Mr. Bader-Stevens may not have much luck in the courts, given the current state of defamation law and his foray into on-line political commentary.

Successful defamation suits are already rare in the United States compared to its common-law counterparts,³ and American defamation plaintiffs face significant deterrents just to filing suit.⁴ But even more importantly, recent court decisions indicate that virtually anyone can become, even involuntarily, a limited purpose public figure, a class of persons the Supreme Court has required to prove "actual malice" to recover from their alleged defamers. This risk is exacerbated by the emergence of weblogs, social-networking and other websites like Facebook, Twitter and YouTube, and "reality" television. Meanwhile, the hyper-compression of publication deadlines in the latest iterations of the information age arguably make everything "hot news," making it exceptionally difficult to prove actual malice under the public figure defamation approaches of many jurisdictions. The combined effect of these developments is that, for an ever-increasing segment of the population, defamation suits will not serve as a remedy to improperly published personal information. Given the already difficult position facing American defamation plaintiffs, these developments call into question the continued viability of the defamation cause of action itself.

Part I of this Comment explores the history of the defamation cause of action, from its common law roots to the constitutionalization of defamation law in mid-twentieth century

² See *infra* Parts II & III.

³ See *infra* note 192.

⁴ Clay Travis, *Deadspin's Barrage on ESPN Raises Legal Questions*, October 21, 2009, <http://backporch.fanhouse.com/2009/10/21/espn-horndog-dossier-deadspin-espn-fight-raises-legal-question/> (last visited March 16, 2010) (stating that many lawyers advise their clients against filing defamation suits because of the risk of revealing embarrassing personal information in the course of discovery).

American jurisprudence, and examines the theoretical underpinnings of the defamation remedy. Part II catalogues developments in “limited purpose public figure” status, while Part III tracks the historical course of the “hot news” doctrine. In Part IV, the paper explains how current developments in technology combine with previous legal developments to expose an expanding segment of the population to public figure status. Part V argues that the internet has so compressed publications deadlines that all news is now “hot.” Part VI asserts that the combination of these developments grants virtual immunity to defamation defendants, and asks whether anything can prevent the ultimate demise of the defamation remedy, and whether Americans should care.

I. A HISTORY OF DEFAMATION AND ITS EVOLUTION IN AMERICAN JURISPRUDENCE

American defamation law has been profoundly influenced by the English common law tradition out of which it emerged. Understanding that history, and the theoretical underpinnings of the defamation remedy itself, are important to any analysis of the continuing viability of defamation in America.

A. Common Law Roots of the Defamation Remedy

Actions for defamation, slander, and the like actually predate the common law.⁵ Depending upon the forum in which such claims were brought, a plaintiff might obtain damages, a religious sanction, or even a criminal penalty.⁶ However, such claims were very limited in scope, and only protected individuals from statements which “concerned . . . the moral bedrock

⁵ See, e.g., LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 68-69 (2007) (noting that reputation was protected outside the common law from the twelfth to the sixteenth centuries, and tracing roots of defamation actions to local manor courts, ecclesiastical courts, and actions under *scandalum magnatum* statutes, all predating the fourteenth century). In fact, actions for libel would lie under fourth century Roman law, though they were apparently rarely used. *Id.* at 88-89 & n.41.

⁶ *Id.* at 69-79 (local courts awarded damages, ecclesiastical courts entertained actions for the “correction of a sin,” and *scandalum magnatum* laws carried with them alternative civil or criminal penalties).

of reputation.”⁷ After a brief stint in the fifteenth century in which actions for reputation had become almost exclusively the province of the ecclesiastical courts, common law courts began entertaining defamation actions in the sixteenth century, although the grounds upon which such claims could be based remained relatively narrow.⁸ Early in the sixteenth century, the Court of Star Chamber created a new law of criminal libel aimed at preserving public peace by maintaining political order and suppressing criticism of magistrates or public persons.⁹ The Star Chamber’s law of criminal libel was assumed by the common law courts when the Chamber was abolished in 1641, and the tort of libel gradually developed over the course of the next 170 years, ultimately being solidified in the English courts in the case of *Thorley v. Kerry* in 1812.¹⁰

Until the Court decided *New York Times v. Sullivan* in 1964, American defamation law essentially tracked its English counterpart and predecessor.¹¹ The common law struck the balance between reputation and free speech decidedly in favor of reputation, imposing strict liability, presuming damages, and allocating the burden of proof on truth to the defendant.¹² The contours of defamation law were left predominantly to the states; the First Amendment had not yet been incorporated against them, and the courts viewed defamatory speech as constitutionally unprotected in any event.¹³ The Court eventually ruled in 1940 in the case of *Cantwell v. Connecticut* that the Fourteenth Amendment had incorporated the First Amendment against the states,¹⁴ setting the stage for its decision in *Sullivan* twenty-four years later.

⁷ *Id.* at 79.

⁸ *Id.* at 82-84 (explaining that only statements falling within certain defamatory categories were actionable, such as accusations of criminal conduct or of carrying a “loathsome disease”).

⁹ MCNAMARA, *supra* note 5, at 87-88 (but noting that such actions were limited to written, as opposed to oral, defamation).

¹⁰ *Id.* at 89-91.

¹¹ Russel L. Weaver et al., *The Right to Speak Ill: Defamation, Reputation and Free Speech* 17 (2006).

¹² *Id.* at 17-18. The common law and many states did, however, recognize various privileges against defamation. *Id.* at 39.

¹³ *Id.* at 35.

¹⁴ 310 U.S. 296, 303 (1940).

B. Theoretical Underpinnings of the Defamation Remedy

Understanding the theoretical justifications for providing a remedy for defamation is important if one is interested in evaluating defamation's continued role and viability in twenty-first century America. Robert Post has provided the seminal work on the foundations of defamation law.¹⁵ Post argues that the defamation remedy is ultimately predicated on the protection of reputation, which the common law, while obviously giving special esteem, never bothered to define.¹⁶ Post posits three conceptions of reputation: "reputation as property, as honor, and as dignity."¹⁷ Reputation as property assumes that reputation can be a form of intangible property "akin to goodwill."¹⁸ A person must expend considerable effort and resources to obtain his good name, so a wrongful injury to that name should be compensated.¹⁹ Post says that this conception of reputation is underlain by an "implicit image of a . . . 'market society,'"²⁰ an image that is perhaps particularly appropriate in America.

While Post argues that reputation as property can provide "a powerful and internally coherent account of defamation law,"²¹ he notes that the common law does not square very well with this concept. First, it only compensates injuries flowing from "defamatory" statements,²² but non-defamatory statements can obviously also injure reputation. Second, damages were

¹⁵ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

¹⁶ *Id.* at 692 ("It is all too easy to assume that everyone knows the value of reputation, and to let the matter drop with the obligatory reference to Shakespeare's characterization of a 'good name' as the 'immediate jewel' of the soul.").

¹⁷ *Id.* at 693.

¹⁸ *Id.*

¹⁹ *Id.* at 694.

²⁰ *Id.* Members of a market society possess identities distinct from that of society itself, their reputations are "valued" according to principles of supply and demand, and they are "equal" before the laws of the market; that is, they have no inherent right to reputation, but neither can they be prevented from "entering" the market to create whatever reputation they can. *Id.* at 695.

²¹ Post, *supra* note 15, at 696.

²² *Id.* at 697. For instance, Post says, one could prematurely publish news of another person's death. While the statement would certainly be both false and injurious, it is not defamatory. *Id.*

absolutely presumed at common law,²³ which indicates that reputation has some “inherent” value, as opposed to a market-derived value. However, these objections are probably minor, especially in the modern American context. The law rarely provides a remedy for *every* injury to property; the injury must usually at least have been *wrongful* in some way.²⁴ And American courts have significantly curtailed the presumption of damages.²⁵ As such, and particularly in America, the concept of reputation as property may be particularly appropriate.

Post’s second view of reputation is reputation as honor. Honor can be understood as “a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimate that society accords to that role.”²⁶ But honor assumes a system of stratification and “presupposes that individuals are unequal.”²⁷ Hence, this concept of reputation was better suited for pre-industrial England’s feudal caste system than modern day America. While deep social inequalities persist in the United States, American jurisprudence is steeped in the language of equality before the law. Reputation as honor is therefore ill-suited for describing the importance of defamation law in America today.

The final concept of reputation advanced by Post is that of reputation as dignity. Post points to the oft-cited language of Justice Stewart’s concurrence in *Rosenblatt v. Baer* as evidence of this strand in American law:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any

²³ *Id.* at 698. Under a fully consistent application of reputation as property, one would expect the plaintiff to have to prove an actual injury, as in other damage-to-property actions.

²⁴ Consider the requirement of fault in negligence actions. The exercise of due care will relieve the alleged tortfeasor of any liability for damages.

²⁵ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (limiting the presumption of damages to cases where the plaintiff can prove “actual malice” on the part of the defendant).

²⁶ Post, *supra* note 15, at 699-700.

²⁷ *Id.* at 700.

decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.²⁸

Because individuals form their sense of self, to a large degree, based upon the perceptions of others, when those perceptions are negatively impacted by defamatory statements, the individual suffers.²⁹ Hence, defamation law protects “the respect (and self-respect) that arises from full membership in society.”³⁰ Maintaining these social boundaries not only protects individuals, but preserves “cultural identity” and the very “stability of social life.”³¹

Reputation as dignity faces two challenges in the American context. Post argues that reputation as dignity assumes a “communitarian society,” which he argues is in most respects “radically different” from a “market society.”³² Assuming that America is more a “market society” than a “communitarian” one, reputation as dignity may not be the best justification for defamation law in America. Additionally, even though the Court has recognized the constitutional importance of private personality,³³ it does not view reputation as co-equal with

²⁸ 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

²⁹ Post, *supra* note 15, at 709.

³⁰ *Id.* at 711.

³¹ *Id.*

³² *Id.* at 716. A communitarian society is one in which the members’ identities are inextricably intertwined with those of the community, making reputation both a public and private good and making it impossible to reduce to a monetary “value.” *Id.* at 716-17.

³³ See *supra* note 28 and accompanying text; Post, *supra* note 15, at 707 n.98. The “ordered liberty” language contained in Justice Stewart’s concurrence in *Rosenblatt* tracks the sort of rhetoric the Court had used to fashion the doctrine of substantive due process. See, e.g., *Palko v. Conn.*, 302 U.S. 319, 324-25 (1937) (“In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states.”) (emphasis added). It also tracked the language of Justice Goldberg’s concurrence just one year earlier in *Griswold v. Connecticut*, which argued that a right of privacy was contained within the Ninth Amendment. 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (“In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) . . . as to be ranked as fundamental.’ The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”) (citations omitted). Of course, Justice Stewart had dissented in *Griswold*. *Id.* at 527. In any event, one might plausibly argue that reputation should be afforded first-order constitutional importance because of its importance in the scheme of ordered liberty. But the Court has in fact

the right of Free Speech under the First Amendment.³⁴ Hence, when the interest in reputation collides with the First Amendment, Free Speech generally wins.

Post concludes that the common law “bears the influence of both the concept of reputation as property and reputation as dignity.”³⁵ Given that neither of these concepts provides a perfect explanation of the contours of American defamation law, one must consider both justifications in exploring how defamation law has evolved over the past fifty years, and where it should go from here. While the common law dramatically influenced defamation law in America, the Supreme Court would substantially depart from it in the mid-twentieth century.

II. PUBLIC FIGURES AND ACTUAL MALICE

The Supreme Court’s decision in *Sullivan* to inject constitutional protections into defamation law set in motion a chain of legal holdings that revolutionized the cause of action in the United States, turning the common law on its head in many instances. Over time, the protections afforded to the media for statements made about government officials have been extended significantly, so that some level of constitutional protection is now afforded to defamation defendants in every claim.

explicitly rejected this position. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that “[one’s] interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any “liberty” or “property” recognized by state or federal law, nor has it worked any change of respondent’s status as theretofore recognized under the State’s laws. For these reasons we hold that the interest in reputation asserted in this case is neither “liberty” nor “property” guaranteed against state deprivation without due process of law”). The protection of reputation is thus left to the states, which of course cannot thereby impinge upon First Amendment protections.

³⁴ See, e.g., *Gertz*, 418 U.S. at 342 (“As Mr. Justice Harlan stated, ‘some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.’ In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood.”) (citations omitted).

³⁵ Post, *supra* note 15, at 717.

A. The Constitutionalization of American Defamation Law: Public Officials to Public Figures

In *New York Times v. Sullivan*,³⁶ the Court first held that “libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”³⁷ Sullivan, an elected City Commissioner of Montgomery, Alabama sought and won damages at trial for the New York Times’ publication of an “editorial advertisement” criticizing the Montgomery police, and as Sullivan argued, him by extension, for their treatment of black protestors in Montgomery.³⁸ The Court overturned the award and held that fully protecting the First Amendment rights of free speech and the press required “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁹ Actual malice must be proved with “convincing clarity.”⁴⁰ Public figure status creates a difficult task for a defamation plaintiff.

The Court has justified the imposition of this new heightened standard because it is important on the one hand to protect speech about persons affecting issues of public concern,⁴¹ and because it is fair, on the other, to subject public figures to greater scrutiny because they have exposed themselves to public criticism and they have greater access to the media to rebut falsehoods.⁴² But one of the central challenges presented by *Sullivan* and its progeny has been that separating public figures from private ones “is much like trying to nail a jelly fish to the wall.” *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D. Ga. 1976), *aff’d*, 580

³⁶ 376 U.S. 254 (1964).

³⁷ *Id.* at 268.

³⁸ *Id.* at 256-57.

³⁹ *Id.* at 279.

⁴⁰ *Id.* at 285-86.

⁴¹ *Id.* at 270-76.

⁴² *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979).

F.2d 859 (5th Cir.1978). The Court added complexity to this process in *Curtis Publishing Co. v. Butts*.⁴³ There, Butts, the athletic director at the University of Georgia, sought and won a judgment against the publishers of the Saturday Evening Post, a weekly magazine, for an article printed therein which accused him and other officials at the Universities of Alabama and Georgia of “fixing” a football game between the two schools.⁴⁴

A central dispute in the case was whether the “actual malice” standard of *Sullivan* should be applied to Butts, who was admittedly not a public official.⁴⁵ Therefore, the Court said it would “seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another,” and held that “a ‘public figure’ . . . may also recover damages for a defamatory falsehood . . . on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”⁴⁶ The Court held that Butts was such a public figure, but because the Post’s article “was in no sense ‘hot news’ . . . [and] the editors of the magazine recognized the need for a thorough investigation of the serious charges [but nevertheless ignored e]lementary precautions,” the Court found its newly announced standard had been met and affirmed the judgment.⁴⁷

Seven years later the Court made significant strides in defining public figure status in *Gertz v. Robert Welch, Inc.*⁴⁸ Gertz, a lawyer who served as counsel for plaintiffs suing a police officer for the wrongful death of a family member, sued the defendant magazine for libel arising out of an article that claimed he was a communist conspirator who aimed to discredit the

⁴³ 388 U.S. 130 (1967).

⁴⁴ *Id.* at 135.

⁴⁵ *Id.* at 154.

⁴⁶ *Id.* at 154, 155.

⁴⁷ *Id.* at 157.

⁴⁸ 418 U.S. 323 (1974).

police.⁴⁹ Among the most important holdings in the case were the Court’s definition of and distinction between “general purpose” and “limited purpose public figures”:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.⁵⁰

Gertz fit neither of these categories. He had not “thrust himself into the vortex” of the controversy at issue, he was not generally well known in the community, and he did not “engage the public’s attention in an attempt to influence the outcome” of the controversy.⁵¹ The floodgates of “public figure” status, if not yet opened, had at least been unlocked.

C. Further Developments in the Understanding of “Limited Purpose Public Figures”

Since *Gertz*, the Supreme Court and the Federal Circuits have made extensive progress in fleshing out the analysis used in determining when a person becomes a limited purpose public figure.

1. *Supreme Court Roots*

The Court’s seminal outline of limited purpose public figure status in *Gertz* was expanded in the cases of *Time Inc. v. Firestone*⁵² and *Hutchinson v. Proxmire*.⁵³ In *Firestone*, the ex-wife of a wealthy industrial scion sued Time Magazine for its publication an article recounting the decree of the court which granted her divorce; the article named her as an adulterer who had engaged in “extramarital adventures” that would “make Dr. Freud’s hair curl.”⁵⁴ The Court held that Ms. Firestone did not meet the criteria for public figure status laid

⁴⁹ *Id.* at 326.

⁵⁰ *Id.* at 351. This was not the only landmark holding of this case, however. *Gertz* is a veritable gold-mine of modern American defamation rules. The Court forbade states from imposing liability without fault in defamation actions brought by private persons. *Id.* at 347. And it overturned the common law presumption of damages rule, except where the plaintiff can show actual malice. *Id.* at 349-50.

⁵¹ *Id.* at 352.

⁵² 424 U.S. 448 (1976).

⁵³ 443 U.S. 111 (1979).

⁵⁴ *Firestone*, 424 U.S. at 452.

out in *Gertz* because she “did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.”⁵⁵ Despite the fact that the Firestone divorce had become a “cause celebre,” this was not enough to elevate it to a public controversy; doing so would “equate ‘public controversy’ with all controversies of interest to the public,” reviving the reasoning of the plurality opinion in *Rosenbloom v. Metromedia, Inc.*,⁵⁶ which the Court explicitly rejected in *Gertz*.⁵⁷ Nevertheless, this case may be somewhat limited by its facts: since Ms. Firestone had no choice *but* to go to court to obtain a divorce, the Court may have been more unwilling to find that she had embroiled herself in a “public” controversy.

In *Hutchinson*, the plaintiff sued a United States Senator after the Senator published a press release and newsletter ridiculing the plaintiff’s research on monkeys for NASA and the Navy as a useless waste of taxpayers’ money.⁵⁸ Hutchinson lost on summary judgment because the trial court concluded he was a limited purpose public figure.⁵⁹ The Court overturned that finding, arguing that Hutchinson had no access to the media prior to his identification by Senator Proxmire in his newsletter and press release and that his research had never been of public controversy prior to the publication of the same.⁶⁰ Even after gaining such notoriety, he lacked the “regular and continuing access to the media that is one of the accouterments of having become a public figure.”⁶¹ Hutchinson had not thrust himself or his views into public controversy to influence others, and Proxmire failed to point out a public controversy.⁶² And

⁵⁵ *Id.* at 453.

⁵⁶ 403 U.S. 29 (1971) (holding that the *New York Times* privilege should be extended to private persons whenever the alleged defamatory statements concerned matters of general or public interest).

⁵⁷ *Firestone*, 424 U.S. at 454 (citing *Gertz*, 418 U.S. at 346).

⁵⁸ *Hutchinson*, 443 U.S. at 116-17.

⁵⁹ *Id.* at 119.

⁶⁰ *Id.* at 134-35.

⁶¹ *Id.* at 136.

⁶² *Id.* at 135.

even if such a controversy existed with respect to the general expenditure of public funds, Hutchinson had not assumed a special role in that controversy, nor had his applications for federal grants invited the public attention necessary to render him a public figure.⁶³ As the 1970s came to a close, the Supreme Court had made significant headway in clarifying how courts should determine which defamation plaintiffs should and should not be considered public figures. But substantial questions remained.

2. Circuit Court Approaches

In an attempt to bring further clarity to the law of limited purpose public figure status, numerous circuit courts have adopted their own refinements of the Court's basic outline in *Gertz*.⁶⁴ The most influential of these approaches has probably been the opinion of the D.C. Circuit in *Waldbaum v. Fairchild Publications*.⁶⁵ Waldbaum, the former president and CEO of a major agricultural cooperative, sued the publisher of a trade publication when the magazine reported on his ouster from the company with a statement that the company had been "losing money the last year and retrenching."⁶⁶ The circuit court upheld the trial judge's ruling that Waldbaum was a limited purpose public figure, announcing a three part test for such status:

- (1) There must be "[a] public controversy [that] is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way."⁶⁷
- (2) "[P]laintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. They must have achieved a 'special prominence' in the debate."⁶⁸

⁶³ *Id.*

⁶⁴ *See, e.g.*, *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir.1994); *Avins v. White*, 627 F.2d 637 (3d Cir. 1985).

⁶⁵ 627 F.2d 1287 (D.C. Cir. 1980). Professor Joseph King has characterized the *Waldbaum* decision as "influential." Joseph H. King, Jr., *Deus Ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for all Seasons*, 95 KY. L.J. 649, 668 & n.106 (2007).

⁶⁶ 627 F.2d at 1290.

⁶⁷ *Id.* at 1296. Newsworthiness alone does not create a public controversy, but courts must not "question the legitimacy of the public's concern. *Id.* at 1296-97. The test is "whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." *Id.* at 1297.

(3) The alleged defamatory statements must be germane to the controversy.⁶⁹

Waldbaum satisfied these elements. A public controversy existed as to the cooperative's pricing policies; it was the second largest cooperative in the nation and was at the forefront of such policies.⁷⁰ Waldbaum thrust himself to the forefront of this controversy via his role as a "mover and shaper" of innovative policy decisions at the cooperative, he closely oversaw the company's production of its own newsletter, he had prior dealings with the media, and he "project[ed] his own image" onto the company and into the marketplace.⁷¹ The satisfaction of the third element was apparently so obvious to the court that it did not address it.

The D.C. Circuit took the somewhat extraordinary step of holding a plaintiff to be an involuntary limited purpose public figure in *Dameron v. Washington Magazine, Inc.*⁷² Dameron was the sole air traffic controller on duty at Washington Dulles airport the day of a nearby plane crash that killed ninety-two people.⁷³ He sued the Washington Magazine for defamation after it published an article that attributed "partial blame" to "controller errors" for the accident, even though the report relied upon in investigating the story referred to "air control failures."⁷⁴ Applying a modified version of its approach in *Waldbaum*, the court held that, even where a plaintiff does not inject himself into a public controversy willingly, he can be caught up in it against his will and become a public figure.⁷⁵ While Dameron was otherwise completely unknown to the public and had never sought any attention for his role in the plane crash, the facts

⁶⁸ *Id.* at 1297. "Trivial or tangential participation is not enough. . . . The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution . . . a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements." *Id.* at 1298.

⁶⁹ 627 F.2d at 1298.

⁷⁰ *Id.* at 1300.

⁷¹ *Id.*

⁷² 779 F.2d 736 (D.C. Cir. 1985).

⁷³ *Id.* at 738.

⁷⁴ *Id.*

⁷⁵ *Id.* at 741.

of his situation so strongly fulfilled the *Waldbaum* criteria that he could not be excused from public figure status on the basis of his “relatively passive involvement in the controversy.”⁷⁶ The fact that he was the only air traffic controller on duty on the night of such a famous plane crash, which generated such controversy about the air traffic control system generally, was enough to trap Dameron in a media storm that was not of his own making. *Dameron* remains a rare example of “involuntary” limited purpose public figure status.

More recently, in *Lohrenz v. Donnelly*,⁷⁷ the circuit decided a case that, while not holding the plaintiff to be an involuntary limited purpose public figure, probably pushes the outer limits of voluntary limited purpose public figure status. Lohrenz was (at the time), the nation’s only female combat fighter pilot.⁷⁸ She came under attack in a newsletter published by Donnelly, who was opposed to women holding combat roles in the military; the newsletter alleged that Lohrenz was not qualified to be a combat pilot and held her position as the result of favorable treatment by the Navy.⁷⁹ Lohrenz brought suit for defamation, but lost on summary judgment when the court found she was a limited purpose public figure.⁸⁰ Writing for the court, then Judge John Roberts held that Lohrenz satisfied the requirements of *Waldbaum* as a result of her notoriety as America’s only female combat fighter pilot at that time, and affirmed.⁸¹ Under the circumstances existing at the time, Lohrenz’s decision to “suit up” as the Navy’s only woman fighter pilot was sufficient “voluntary action” placing her at the center of the controversy because a reasonable person in her position would have concluded that she would play or was seeking to play a significant role in the resolution of the controversy over women in combat

⁷⁶ 779 F.2d at 741.

⁷⁷ 350 F.3d 1272 (D.C. Cir. 2003).

⁷⁸ *Id.* at 1276.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1278.

⁸¹ *Id.* at 1291.

positions.⁸² The influential approach of the D.C. Circuit in *Waldbaum* appears to sweep more potential defamation plaintiffs into its ambit with each passing year.

D. The “Actual Malice” Requirement

Before moving on, a quick word on the “actual malice” standard itself is appropriate. The Court at first established divergent tests for actual malice depending on the status of the plaintiff, requiring at least reckless disregard for the truth in public official cases under *Sullivan*,⁸³ while only requiring an extreme departure from usual investigatory and reporting standards for public figure plaintiffs under *Butts*.⁸⁴ The Court quickly unified its approach in favor of the *Sullivan* standard in *St. Amant v. Thompson*.⁸⁵ “[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,” the Court stated. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”⁸⁶ Even if such a rule creates an incentive not to investigate, the Court found this risk acceptable in relation to public’s right and need to be informed on issues of public concern.⁸⁷ Still, the Court identified five examples of circumstances in which a defendant’s protestations of good faith in choosing not to investigate will probably not be found persuasive:

- (1) Where a story is fabricated by the defendant,
- (2) It is the product of the defendant’s imagination,
- (3) It is based wholly on an unverified anonymous telephone call,
- (4) When the publisher's allegations are so inherently improbable that only a reckless person would have put them in circulation.
- (5) Where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.⁸⁸

⁸² 350 F.3d at 1281.

⁸³ *Sullivan*, 376 U.S. at 279.

⁸⁴ *Butts*, 388 U.S. at 155.

⁸⁵ 390 U.S. 727 (1968).

⁸⁶ *Id.* at 731.

⁸⁷ *Id.*

⁸⁸ *Id.* at 732.

The requirement of actual knowledge of falsehood or reckless disregard for the truth remains the standard of judging actual malice in all public official and public figure defamation cases in the United States.

III. THE “HOT NEWS” DOCTRINE

Public figure defamation plaintiffs face an additional hurdle where the publication they attack as defamatory falls in the category of “hot news.” “Courts frequently take into account the presence or absence of time pressure in assessing the existence of actual malice, evidence a much greater tendency to excuse errors made in a ‘hot news’ situation.”⁸⁹ Most media outlets face pressure to publish information on a daily, hourly, or even minute-by-minute basis. As courts have repeatedly recited, “Particularly deserving of First Amendment protection are reports of ‘hot news,’ items of possible immediate public concern or interest. The need for constitutional protection is much greater under these circumstances, where deadlines must be met and quick decisions made, than in cases where more considered editorial judgments are possible.”⁹⁰

However, Robert Sack has argued that this focus is often unwarranted:

Whether or not a communication is “hot news” ought not to be overemphasized. No publication is made without time pressure or with the ability to ascertain absolutely every statement Rare, indeed, is the document that is error-free, irrespective of the relative leisure in which it was composed.⁹¹

Still, courts may give the presence or absence of deadline pressure special prominence in their analyses “because it represents one of the more tangible elements of proof often available.”⁹²

Compounding the strength of the “hot news” defense is that the presence of deadline

⁸⁹ Rodney A. Smolla, *Effect of Deadline Pressure on Actual Malice*, 1 LAW OF DEFAMATION § 3.75 (2d. ed 2009). The presence or absence of deadline pressure is also considered by many courts as a factor in establishing a media defendant’s negligence in an action for defamation by private persons. NEIL J. ROSINI, THE PRACTICAL GUIDE TO LIBEL LAW 93-95 (1991) (citing Restatement (Second) of Torts §508B comment h (1977)).

⁹⁰ *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34, 38 (Cal. 1971) (citing *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 895-96 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971)).

⁹¹ Robert Sack, LIBEL, SLANDER AND RELATED PROBLEMS 285 n.257 (2d ed. 1994).

⁹² Rodney A. Smolla, *Effect of Deadline Pressure on Actual Malice – “Hot News” vs. Time to Investigate*, 1 LAW OF DEFAMATION § 3.76 (2d. ed 2009). See also ROSINI, *supra* note 89 at 94 (“[W]hether the defamatory statement is ‘hot news’ or not, is often given special emphasis.”).

pressure virtually always helps the defendant and its absence rarely hurts it; this is so because “no court has held that actual malice may be inferred solely from the fact that a poorly investigated, defamatory article was not ‘hot news.’”⁹³ In other words, the plaintiff must still prove the defendant maintained actual, subjective doubt as to the veracity of the challenged statement, even where the defendant had substantial time to investigate.⁹⁴ Increased time for investigation certainly affords the opportunity for self-doubt to creep in and new facts to “muddy the waters.” And more than one circuit has argued that, when an article is not hot news, “actual malice may be inferred when the investigation for a story . . . was grossly-inadequate in the circumstances.”⁹⁵ But courts will not entertain a presumption that a time lag between discovery and publication, by itself, causes or should cause a reporter to doubt the accuracy of a statement; some other factors must give rise to circumstances which would call into question the veracity of the defamatory statement, necessitating further investigation.⁹⁶

A. The Courts’ News Thermometer: Is it “Hot” or Not?⁹⁷

⁹³ *McNabb v. Oregonian Publ’g Co.*, 685 P.2d 458, 461 (Or. 1984). *But see* *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (Tex. Ct. App. 1983) (finding that fact that defendant had sufficient time to investigate the truth of the challenged statements was one factor supporting jury’s finding that defendant acted with reckless disregard for the truth).

⁹⁴ *St. Amant*, 390 U.S. at 731 (“[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”).

⁹⁵ *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (citing *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1975); *see also* *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

⁹⁶ *Ryan*, 634 U.S. at 733 (“We recognize that the book was not “hot news,” and a more thorough investigation should be expected in these circumstances than in the preparation of a news story under deadline pressure. . . . Certainly where there was no reason to doubt the accuracy of the sources used, the failure to investigate further, even if time was available, cannot amount to reckless conduct.”); *St. Amant*, 390 U.S. at 733 (“Failure to investigate does not in itself establish bad faith.”). While the Court later held in *Harte-Hanks Communication, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) that evidence the defendant had engaged in “purposeful avoidance of the truth” would support a finding of actual malice, the defendant in that case had refused to interview material witnesses of which it was aware, did not account in its story for the contradictory testimony of five other witnesses, and no one at the paper other than the reporter who wrote the story listened to the tape recordings of the interview upon which the article was substantially based. *Id.* at 689-91. The story was investigated and written over a span of four days. *Id.* at 670.

⁹⁷ This subheading is a shameless allusion to the (rather shameless) website HotorNot.com, where people can go to view pictures of single men and women and rate them as “hot” or “not.”

Courts have not created bright lines by which to judge whether news is “hot” or not. As one commentator argues:

Urgency of publication is a marketplace definition, not a defendant definition. Just because the defendant wants to publish something by 9:00 a.m. tomorrow morning and may feel it's urgent to get it out, that does not meet the “hot news” definition. It is a more objective test: would failure to get it to press timely affect the value of the news?⁹⁸

This view is confirmed in the opinion of the D.C. Circuit in *Washington Post Co. v. Keogh*, where it noted that “news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost.”⁹⁹ This places the publisher in the unenviable position of deciding between shielding itself from potential liability through time-consuming verification on the one hand, and losing the commercial advantages of getting a scoop on the other.¹⁰⁰ Allowing for leeway in the actual malice standard based upon deadline pressure helps alleviate this dilemma.

As the Third Circuit stated during its stage of the proceedings in the case of *Rosenbloom v. Metromedia, Inc.*, the primary value of “hot news” items “is in conveying the latest news as promptly as possible so that [the public] has the opportunity to be informed of news items of possible immediate public concern.”¹⁰¹ In *Rosenbloom*, the court found that radio news reports given every half hour fell in the category of “hot news.”¹⁰² In *Keogh*, deadline pressure imposed by the publication of a daily paper was considered sufficient to be relevant.¹⁰³ In *Simonson v. United Press International*, the court held that wire reports distributed within hours of obtaining the information contained in them were hot news, and that the nature of those reports and the

⁹⁸ Stephen Henninger, *Panel 1: Defamation in Sports*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 335, 339 (Winter 2005).

⁹⁹ *Washington Post Co. v. Keogh*, 365 F.2d 965, 972 (D.C. Cir. 1966) (applying analysis with regard to publication of daily newspaper).

¹⁰⁰ *Id.*

¹⁰¹ *Rosenbloom*, 415 F.2d at 895.

¹⁰² *Id.*

¹⁰³ *Keogh*, 365 F.2d at 972.

sources relied upon to create them made investigation and corroboration essentially impossible.¹⁰⁴

Cases in which courts have held that news was not hot involved longer time periods. For instance, in *Butts*, the Court held that a story published in a weekly magazine, which had apparently been in production for weeks, if not months, was not hot news.¹⁰⁵ In *Hunt v. Liberty Lobby*, the Eleventh Circuit argued that an article published in a weekly newspaper, which the paper had had in its possession for days or possibly weeks, was also not hot news.¹⁰⁶

In a very recent case presenting one of the closest questions in the literature, the First Circuit held that statements made on a daily morning cable news show were not hot news.¹⁰⁷ A plaintiff school principal sued Fox News for statements made by the hosts of one of its shows concerning his handling of the harassment of Muslim Somali students at his school.¹⁰⁸ Fox received its news second-hand from an online source, which had, to put it mildly, satirized the principal's handling of the situation.¹⁰⁹ Despite investigating the article through Google searches for about three hours, the Fox News Research Department failed to realize that parts of the story were fabricated.¹¹⁰ Later that morning, the hosts of the news show, relying on the article, proceeded to ridicule the principal in front of the nation.¹¹¹ The court's finding that the story was not "hot news" was conclusory in nature; it then proceeded to note that the cable show was more timely than the stories in *Hunt* and *Butts*, but did not explain what, if any, relevance this fact had

¹⁰⁴ 500 F. Supp. 1261, 12__ (E.D. Wis. 1980), *aff'd*, 654 F.2d 478 (7th Cir. 1981).

¹⁰⁵ 388 U.S. at 157. Contrast this with the Court's finding in the companion case of *Associated Press v. Walker* that a relatively instantaneous dispatch of an eyewitness account from a reliable source "required immediate dissemination" and the decision not to further corroborate the story was in line with "accepted publishing standards." *Id.* at 158-59.

¹⁰⁶ 720 F.2d at 641.

¹⁰⁷ *Levesque v. Doocy*, 560 F.3d 82 (1st Cir. 2009).

¹⁰⁸ *Id.* at 86.

¹⁰⁹ *Id.* at 85.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 85-86.

to its analysis.¹¹² The fact that the anchors' report was a recitation of yet another "report" of a news event (the satirical article), and not a direct report on the news event itself (the principal's response to the harassment) may have played a role here; perhaps the court thought that secondary reports of this nature could not satisfying the "hot news" requirement. It is true that the Fox show aired quite some time after the actual underlying events.

There is clearly no brightline rule delineating when news "cools." The *Levesque* decision may indicate that courts are adjusting their view of when news is hot based upon the new technologies; it may no longer make sense to think of a daily newspaper as hot news. But given the existing case law, it seems reasonable to assume that news published within at least one to two hours of the media outlet's discovery of the underlying events will probably be sufficient to receive additional leeway.

B. Using "Hot News" Misappropriation Claims to Understand "Hot News" Arguments in Defamation Suits

Despite a somewhat puzzling absence of more recent caselaw on the "hot news" element in defamation claims,¹¹³ the concept of "hot news" has been more recently applied in the context of online news in cases of "hot news misappropriation" claims under the common law of some states.¹¹⁴ Such cases may help shed some light on hot news in the defamation context. To succeed on a misappropriation claim, a plaintiff must show a number of elements; the most significant of which for purposes of this analysis is the time sensitive nature of the information

¹¹² *Id.* at 91 & n.9.

¹¹³ See *infra* Part VI for a discussion of possible explanations for this scarcity of precedent, especially the difficulty in bringing defamation actions generally and the relatively low number of defamation suits that make it to trial annually.

¹¹⁴ Claims for misappropriation of time sensitive news were first recognized by the Supreme Court as a matter of federal common law in *International News Service v. The Associated Press*, 248 U.S. 215 (1918). VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 3 (2005). But after the Court's rejection of federal common law in *Erie Railroad Co. v. Tompkins*, the doctrine survives only in fourteen states which have adopted it as part of their state common law. *Id.* at 96 The purpose of the doctrine is to protect the original work product of news gathering organizations, while preserving free access to the underlying facts contained within a particular news story. *Id.* at 4.

the plaintiff seeks to protect.¹¹⁵ While courts have not completely defined the time element, essentially leaving open the question how long news “stays hot,” Victoria Ekstrad has noted that one of the fundamental assumptions underlying the doctrine is that “the most updated news [is] the most commercially valuable.”¹¹⁶ And as noted by the Court in *INS*, the protection afforded by a misappropriation claim endures “only to the extent necessary to prevent [a] competitor from reaping the fruits” of the plaintiff’s labor.¹¹⁷ These formulations bear a striking resemblance to the “marketplace definition” of hot news in defamation suits identified by Stephen Heninger¹¹⁸ and by the D.C. Circuit in *Keogh*.¹¹⁹ To the extent that courts use similar reasoning to determine when news is “hot” in defamation and misappropriation cases, decisions from each context may be instructive in the other.

A trio of recent misappropriation cases shed significant light on how courts are likely to view the timeliness of news in the internet context. In *Pollstar v. Gigmania*,¹²⁰ the creator of a website containing concert information (Pollstar) sued a competitor website (Gigmania), alleging that it had misappropriated and re-posted information gained from Pollstar’s website. Pollstar alleged that its website contained “up-to-the-day time sensitive concert information,” which it gathered at considerable cost. Gigmania moved to dismiss for failure to state a claim, arguing that the concert information was not “hot news” as a matter of law.¹²¹ The court rejected the motion, and held that Pollstar had pled a misappropriation claim with sufficiency under the *NBA*

¹¹⁵ See *Nat’l Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (“[A] ‘hot-news’ *INS*-like claim is limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.”).

¹¹⁶ EKSTRAD, *supra* note 114 at 7, 154-55, 161.

¹¹⁷ *INS*, 248 U.S. at 241.

¹¹⁸ See *supra* note 98 and accompanying text.

¹¹⁹ See *supra* notes 99-100 and accompanying text.

¹²⁰ 170 F. Supp. 2d 974 (E.D. Cal. 2000).

¹²¹ *Id.* at 976.

test.¹²² While the court essentially “punted” on the issue of the concert information’s status as “hot news,”¹²³ it showed a willingness to at least permit further development of the argument.

In *Morris Communications Corp. v. PGA Tour Inc.*, the Eleventh Circuit held that the PGA had a valid interest in real-time golf scores posted on its website, and could delay competitors from re-posting such scores.¹²⁴ The applicability of this case in other contexts may be somewhat limited by the special circumstances which granted the PGA a strong property interest in its scores,¹²⁵ but the court’s holding indicates that the “news” of golf scores stayed “hot,” until at least thirty minutes following the shot itself or the publication of the scores on the PGA’s official website.¹²⁶

Most recently, and perhaps most relevantly, the Southern District of New York refused to dismiss a hot news misappropriation claims brought by the Associated Press against All Headline News Corporation, an online company that distributes news reports, including breaking news, to its customer web sites.¹²⁷ The AP alleged that AHN undertook no actual reporting of its own, but rather copied or rewrote breaking AP news stories obtained from the internet, then marketed them as original AHN work and sold them to customers under the AHN banner.¹²⁸ The court held that AP had successfully pled a cause of action under the *NBA* test and rejected AHN’s 12(b)(6) motion as to that claim.¹²⁹

¹²² *Id.* at 979-80.

¹²³ *Id.* at 980 (“Although the defendant is correct in stating that there is no case that has held that information of the kind at issue is protectable as “hot news,” the court declines to decide this issue at the present time.”).

¹²⁴ 364 F.3d 1288, 1296 (11th Cir. 2004) (holding that Morris could not “free ride” off of the Tour’s Real Time Scoring System (RTSS)).

¹²⁵ Because the Tour bans the use of cell phones and other handheld devices on the course during its tournaments, making it impossible for non-licensed media to report those scores instantaneously, the RTSS was the only source for up-to-the-minute scores. The court held that the PGA had a right to sell compiled golf scores on the Internet. *Id.* at 1291, 1296.

¹²⁶ *Id.* at 1291 (noting that the Tour enforced this restriction by means of a license agreement it required all credentialed media members to sign in order to gain admission to PGA events).

¹²⁷ *Assoc. Press v. All Headlines News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).

¹²⁸ *Id.* at 457-58.

¹²⁹ *Id.*

While the court’s opinion offers no additional insight into how quickly AP articles were originally posted, copied by AHN, and then re-posted on AHN customer websites, AP alleged in its complaint that AP publishes stories on a “continuous basis – 24 hours a day, 365 days a year,”¹³⁰ that AHN employed writers to surf the web for and copy “hot” news stories,¹³¹ that each AHN writer created ten to fifteen stories a day using such methods,¹³² and that these stories were transmitted to AHN customers within fifteen minutes of being uploaded to AHN’s website.¹³³ If AP’s allegations were found to be true, it is reasonable to assume that AHN might copy and redistribute a particular article within a matter of minutes or hours. It seems difficult to argue that such news is anything other than “hot.”

Based upon the existing case law, stories which are published within minutes or even hours of the events giving rise to them are likely to be considered hot news, while stories that include a more significant lag time between underlying events and publications will not. Because the ability to publish breaking news virtually instantaneously and world wide on the internet further enhances such news’ commercial value, courts may be even more receptive to hot news arguments in the online context.

IV. LAW AND TECHNOLOGY EXPOSE MOST PEOPLE TO LIMITED PURPOSE PUBLIC FIGURE STATUS

Developments in case law opened the door to the possibility of limited purpose public figure status, even for people that did nothing more than do their jobs.¹³⁴ Subsequent developments in technology are set to push an even larger number of people over the same threshold. More than ever before, individuals have the opportunity to expose their opinions, personal information, and day-to-day activities to the public. Three of these developments are of

¹³⁰ Complaint at ¶ 37, *Assoc. Press v. All Headlines News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 108CV00323), 2008 WL 887245.

¹³¹ *Id.* at ¶ 54

¹³² *Id.* at ¶ 56.

¹³³ *Id.* at ¶ 57.

¹³⁴ *See supra* Subsection II.C.2.

particular interest: “reality” television, web logs (“blogs”), and social networking sites like Facebook and MySpace.

A. “Reality” Television

Whether or not one believes that there is anything “real” about reality television,¹³⁵ one cannot deny the place it has assumed in the program offerings of virtually all present day networks. By one count, over 850 reality TV shows have been aired.¹³⁶ This phenomenon has produced a “new class of celebrities” out of otherwise everyday people.¹³⁷ While reality TV stars are likely to remain small as a proportion of the population, the ease of signing up for a show presents a relatively low bar to participation.¹³⁸ Given the myriad of show topics, one wonders whether anyone need even have any special talent or attribute to gain membership.¹³⁹

At least one commentator has argued that reality TV participants should be considered limited purpose public figures.¹⁴⁰ Indeed, many of these individuals easily satisfy the relevant *Waldbaum* factors. First, there must be a public controversy. Before one dismisses out of hand that anything on reality TV could be considered of genuine public import, consider two popular series on The Learning Channel: “Jon & Kate Plus 8” and “19 Kids and Counting.” The first show chronicles the everyday trials of Jon and Kate Gosselin and their eight children (twins and sextuplets), born as a result of the couple’s decision to undergo assisted reproductive therapy

¹³⁵ Associated Press, *Survey Says: Too Many Reality TV Shows*, Sept. 21, 2005, <http://www.msnbc.msn.com/id/9315503/> (last visited Mar. 30, 2010) (reporting results of AP-TV Guide poll finding that 82% of Americans believed that reality shows are made up or distorted).

¹³⁶ RealityTVWorld.com, All Shows Listed Alphabetically, <http://www.realitytvworld.com/realitytvworld/allshows.shtml> (last visited Mar. 30, 2010) (providing list of 853 reality TV shows).

¹³⁷ Darby Green, Comment, *Almost Famous: Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94, 95 (2003-2004).

¹³⁸ For instance, one can sign up for e-mail notifications of casting call opportunities and apply online for a huge variety of reality TV opportunities with just a few clicks of a mouse. See, e.g., RealityCastingCall.com, Free Reality TV Casting Call Notices (last visited April 2, 2010).

¹³⁹ Consider participants you may have seen on CBS’s “Survivor,” ABC’s “Wife Swap,” and MTV’s “The Real World,” to name just a few, as examples of this fact.

¹⁴⁰ Green, *supra* note 137, at 106-07.

(ART). This one show potentially contains issues of the proper use of ART, parenting, exploitation of children, societal gender roles, and divorce. “19 Kids and Counting” documents the Duggar family, an Arkansan family which follows the “quiver full” movement of Christianity and currently has, as the show’s title suggests, nineteen children. Controversies surrounding family planning, contraception, overpopulation and the like readily come to mind. And even when the show does not touch so obviously on a hot-button social issue, reality TV as a genre may itself provide a sufficient public controversy.¹⁴¹ And one must remember that, while a “cause celebre” is not enough in and of itself to create a public controversy,¹⁴² courts are not to sit in judgment of the public’s interests.¹⁴³ The public controversy requirement is likely met.

The next *Waldbaum* element requires plaintiffs to play a significant role in the controversy so as to influence its resolution; in short, to have “achieved a ‘special prominence’ in the debate.”¹⁴⁴ While at first blush this factor would seem to militate against LPPF status for many reality TV participants, especially those that only participate for a short time, this has not proven to be an overly high bar in many jurisdictions.¹⁴⁵ Reality TV participants willingly sign up for the show, sign contracts, and put themselves in the public eye.¹⁴⁶ Given the willingness of courts to ascribe LPPF status to individuals that have so exposed themselves to public comment, reality TV stars are unlikely to be saved by an argument that their role in the controversy at issue was merely “tangential.” Reality TV has made the dream of “being in pictures” real for more

¹⁴¹ Green, *supra* note 137, at 106 (“... reality television arguably satisfies the criteria of a public controversy because of the ongoing debate regarding the advantages and disadvantages of the entire programming genre.”).

¹⁴² *Firestone*, 424 U.S. at 454.

¹⁴³ *Waldbaum*, 627 F.2d at 1296-97.

¹⁴⁴ *Id.* at 1297.

¹⁴⁵ See Anthony Ciolli, Comment, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 271 (2007) (noting that in “liberal jurisdictions,” courts hold that this element is met whenever an individual “engages in behavior that will receive attention and comment, regardless of whether the individual wants that attention”).

¹⁴⁶ Green, *supra* note 137, at 106.

people than ever before, but it has also exposed each actual participant to limited purpose public figure status.

B. Web Logs

An even stronger argument can be made that writers of web logs (“blogs”) are limited purpose public figures. This form of “amateur journalism” has proliferated exponentially in the past decade.¹⁴⁷ The proliferation of these sites in recent years has provided unparalleled opportunities for the dissemination of information, opinions and ideas.¹⁴⁸ It seems safe to assume that many—if not most—bloggers will use their blogs as a forum for discussion of matters of public controversy. Hence, a blogger’s status as an LPPF would hinge on a court’s view of the blogger’s role in the controversy.

Professor Ribstein has argued that courts should consider a blog’s popularity and accessibility to the public when determining whether to treat a blogger as a LPPF.¹⁴⁹ If no one reads your blog, your role in the controversy seems quite limited. Nevertheless, it seems likely that a blogger will virtually always be found to have invited public attention and comment; as long as the blog is accessible by persons other than the blogger, what else would be the purpose of blogging?¹⁵⁰

¹⁴⁷ Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 187-88 (“According to one survey, there are over 35.3 million blogs, with the number doubling every six months.”).

¹⁴⁸ Ciolli, *supra* note 145, at 255 (“An increasing number of commentators have proclaimed a “blogging revolution” which they purport is changing not only journalism, but also politics, business, academia, and other aspects of everyday life.”).

¹⁴⁹ Ribstein, *supra* note 147, at 230 (“Bloggers’ public access, however, may be more apparent than real because it depends not just on being able to plug into the Internet, but also on the informal screening of Google and other search engines that enable readers to find the blog. The courts might take blog rankings into account for purposes of determining public figure status and damages, or emphasize the blog’s importance within a subcommunity that is relevant for reputation purposes.”).

¹⁵⁰ Ciolli, *supra* note 145, at 271 (“[A] blogger-plaintiff, through the very act of blogging, seeks both influence and attention.”).

Perhaps even more importantly, bloggers have ongoing access to the media and opportunity for rebuttal.¹⁵¹ This is not just theory; courts agree. The Ninth Circuit has held that owners of website are “owners of media outlets.”¹⁵² And in a breathtakingly on-point passage in the case of *Doe v. Cahill*, the Delaware Supreme Court ruled that an internet service provider did not have to disclose the identity of anonymous posters on the “comments” section of a blog who had posted defamatory statements about the plaintiff; the court reasoned:

The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.¹⁵³

Given that opportunity for rebuttal has long served as one of the strongest indicator's of a plaintiff's LPPF status, if more courts take the position of the court in *Cahill*, bloggers are going to have a very difficult time avoiding categorization as LPPFs.

C. Social Networking Users

The use of so-called “social networking” websites like Facebook, MySpace and Twitter has grown enormously in recent years. Social networking is now the most popular web activity, surpassing even e-mail.¹⁵⁴ If social network users can become limited purpose public figures as a result of their activities on these sites, the potential

¹⁵¹ *Id.* at 272 (“A blogger . . . has the ability to mitigate damage to her reputation through her own blog—whether that blog has a large or small audience—since those who hold the blogger in esteem can visit her blog to obtain her side of the story.”).

¹⁵² *Tipton v. Warshavsky*, 32 Fed. Appx. 293, 295 (9th Cir. 2002) (holding that owner of pornographic website was limited purpose public figure).

¹⁵³ 884 A.2d 451, 464 (Del. 2005).

¹⁵⁴ *Social Networking is the Most Popular Web Activity*, Communications Daily, 2009 WLNR 4849355, March 11, 2009.

impact on defamation law is enormous. Granted, the majority of chatter that occurs on Twitter feeds and Facebook walls is likely to be of little or no genuine public concern. But consider once again the case of *Mssrs. Bader-Stevens and Scalito*.¹⁵⁵ Where a user *does* use the site to comment on a matter of public controversy, the site becomes more akin to a blog.

Mr. Bader-Stevens might attempt to argue that his Facebook wall was not even a public forum, since his Facebook settings only allowed “friends” to view statements he placed there. But this argument is unlikely to succeed for two reasons. First, even where an account is kept wholly anonymous, it is ultimately very difficult to conceal one’s identity.¹⁵⁶ Second, the average Facebook user has 130 “friends” and makes twenty-five comments on the site each month.¹⁵⁷ So even if one’s comments are “private” within a group of friends, this may mean relatively little; in what other context can one tell 130 people twenty-five things in one month and expect *all* of them to remain private?¹⁵⁸

Assuming that social networking sites are public forums,¹⁵⁹ and that users of those sites will sometimes make statements regarding matters of public controversy, what is the likelihood that they will be found to be public figures on this basis alone? Again, one would expect that the language in *Waldbaum* to the effect that plaintiffs must have assumed a meaningful role in the controversy would prevent the casual Facebook commenter from achieving public figure status.

¹⁵⁵ See *supra* Introduction.

¹⁵⁶ BBC, *Social Sites Dent Privacy Efforts*, March 27, 2009, available at <http://news.bbc.co.uk/2/hi/technology/7967648.stm> (reporting results of study finding that it is very difficult to conceal one’s identity on sites like Facebook and Twitter, even when using “anonymous” settings).

¹⁵⁷ Facebook.com, Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited Apr. 2, 2010).

¹⁵⁸ See, e.g., Patricia S. Abril et al., *Famous for Fifteen Minutes: IP and Internet Social Networking*, 6 NW. J. TECH. & INTELL. PROP. 355, 357 (2007-2008) (“[D]igital natives claim to have a . . . contextual expectation of privacy. I put this up on the net because I think my friends, my 3,000 Facebook, quote-unquote, friends are going to think that I’m cool because of this and not even thinking that maybe those 3,000 Facebook friends each have another 3,000 Facebook friends, among which might be someone that you would not want to see you doing a keg stand.”). One is also reminded of Benjamin Franklin’s infamous quote: “Three can keep a secret if two of them are dead.”

¹⁵⁹ See *supra* notes 156-56 and accompanying text.

But it has already been established that this language does not provide as much of a check as one might expect.¹⁶⁰ And such a commenter clearly invites attention and comment, like a blogger. This is probably especially true where the commenter, like Mr. Bader-Stevens, engages in protracted comment and debate on an issue over the course of multiple days. Even less-savvy internet users should by now be aware that material from one web location can “go viral” and be replicated almost infinitely and instantaneously around the globe.¹⁶¹ So the argument that “I only made one comment,” may not hold much water once the cyber-cat is out of the bag. And finally, a social networking user will have ongoing opportunities for rebuttal, just like a blogger. Mr. Bader-Stevens can respond in real time to Mr. Scalito’s slanderous assertions.

At least one court has applied LPPF status to a plaintiff in a case in which Facebook figured prominently. In *Key v. Robertson*, the plaintiff Key sued Pat Robertson and Regent University for defamation after they expelled him from the school.¹⁶² Key set in motion a chain of events leading to his expulsion by posting a screen-capture on his Facebook profile of a video he found on YouTube of a speech given by Robertson; the picture portrayed Robertson as “flipping the bird” to his audience (Robertson had been scratching his nose with his middle finger).¹⁶³ After being asked to remove the picture from his Facebook profile by the school, Key did so, but immediately reposted the picture on a school e-mail list serve.¹⁶⁴ A dispute between the school and Key ensued and, after Key began displaying increasingly erratic and disturbing behavior, ultimately resulted in Key’s suspension.¹⁶⁵

¹⁶⁰ See *supra* note 141 and accompanying text.

¹⁶¹ Phyllis E. Bernard, *Eliminationist Discourse in a Conflicted Society: Lessons for America from Africa?*, 93 Marq. L. Rev. 173, 206 (2009) (“Today, [person-to-person] connections can “go viral” almost instantaneously, spreading through the personal technology of smartphones, netbooks, laptops, and personal computers. The co-founders of Facebook and Twitter recognized this as a potent marketing dynamic.”).

¹⁶² 626 F. Supp. 2d 566 (E.D. Va. 2009).

¹⁶³ *Id.* at 570.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 572.

An article about the expulsion appeared in the paper and Robertson issued a press release about the incident stating that, while he supported free speech rights, he did not believe those rights included “the deliberate manipulation of television images to transform an innocent gesture into something obscene.”¹⁶⁶ Key responded to this press release with his own press release, contacted the media extensively, and ultimately brought the lawsuit, alleging defamation among other things.¹⁶⁷ In granting summary judgment for Robertson, one of the court’s holdings was that Key had assumed limited purpose public figure status when he had issued his own press release and had ongoing contact with the media concerning his suspension.¹⁶⁸ While Key’s use of Facebook did not figure into the court’s analysis, it is interesting to note that it was posting a profile picture that set the chain of events in motion. Notwithstanding that Key escalated the conflict publicly and dramatically and acted very foolishly in doing so, this case may serve as a warning to those who try to use their Facebook profiles as a means of social commentary.

Given the public nature of social networking sites, the inevitable conclusion that social networking users engage in social networking for the very purpose of gaining attention, and access to a forum for rebuttal that social networking provides, social networking users face a significant risk of being labeled as limited purpose public figures as the result of very minimal effort on their parts. Indeed, the prevalence and ease of exposing huge volumes of heretofore private information, opinions and thought-processes has led one commentator to argue that, given the difficulty of drawing the line between public and private on sites like Twitter and Facebook, “there’s almost a default presumption that we’re all public figures now.”¹⁶⁹

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 574.

¹⁶⁸ *Id.* at 583.

¹⁶⁹ Clay Travis, *Deadspin’s Barrage on ESPN Raises Legal Questions*, <http://backporch.fanhouse.com/2009/10/21/espn-horndog-dossier-deadspin-espn-fight-raises-legal-question/> (last visited Apr. 15, 2010).

The impact of information posted by or about an individual on the net is amplified by current reporting conventions, since even traditional news outlets rely significantly on internet research for their stories.¹⁷⁰ This outcome played out significantly in the case of *Thomas v. Patton*.¹⁷¹ There, Elizabeth Thomas, who was involved in a hotly contested dispute with her mother-in-law concerning the guardianship of her incapacitated husband, sued local television stations for reports they ran about the ongoing litigation.¹⁷² Mrs. Thomas was under investigation by the State Attorney's office for her potential involvement in the injuries that resulted in her husband's incapacitation, and sought to have her husband's feeding tube removed.¹⁷³

Citing internet news reports that had been published about Mrs. Thomas prior to the airing of the television reports, and noting that the stations had given her the opportunity to respond prior to running the stories, the court held that Mrs. Thomas was a limited purpose public figure.¹⁷⁴ The outcome was apparently so clear that when Mrs. Thomas appealed, the reviewing court not only upheld the judgment *per curiam* and without comment, but also awarded attorneys fees to the appellees as a sanction for Mrs. Thomas' decision to bring a frivolous appeal!¹⁷⁵ The outcome of the *Thomas* case lead one reporter to wonder, once again, if virtually anyone can become an involuntary limited purpose public figure as a result of internet news coverage.¹⁷⁶ Notwithstanding that one law professor described the trial judge's decision in *Thomas* as a "bad decision" since Thomas had not injected herself into a public controversy,¹⁷⁷

¹⁷⁰ *Id.*; Michael Bugeja, Deadline Every Login: What has and hasn't Changed in Newsrooms, Association for Education in Journalism and Mass Communication, <http://aejmc.org/topics/2009/11/deadline-every-login-what-has-and-hasn%E2%80%99t-changed-in-newsrooms/> (last visited Apr. 15, 2010) ("Any story about anyone now includes googling them and often checking their facebook page . . .").

¹⁷¹ No. 162005CA003777XXXMA, 2005 WL 3048033 (Fla. Cir. Ct. Oct. 21, 2005).

¹⁷² *Id.* at *1.

¹⁷³ *Id.* at *2.

¹⁷⁴ *Id.* at *3.

¹⁷⁵ *Thomas v. Patton*, 939 So.2d 139 (Fla. App. 1 Dist. 2006).

¹⁷⁶ Randy Dotinga, *Are You a 'Public Figure'?*, WIRED.COM, Nov. 9, 2005 ("Can being mentioned on the net turn an ordinary citizen into a public figure with severely limited abilities to fight libel and defamation lawsuits?").

¹⁷⁷ *Id.* (reporting comments of Randall Bezanson, a law professor and media expert at the University of Iowa).

the treatment of the case on appeal should give pause to those that would dismiss the case as an anomaly. Coming as the case did on the heels of the infamous Terry Schaivo case, and given the suspicious nature of the facts,¹⁷⁸ Mrs. Thomas was probably not a sympathetic plaintiff. But until a court says otherwise, the case has both precedential and persuasive value.

Even so, the average amateur blogger or social-networking user should be saved from public figure status by *Waldbaum*'s requirement that her involvement in the controversy must have been more than "trivial or tangential."¹⁷⁹ Even assuming that such a user posts on topics that are in the nature of a true "public controversy," analogizing to non-internet cases on this prong would lead one to expect that posting only a handful of comments on Facebook or Twitter would clearly not lead one to reasonably expect to actually influence the outcome of the controversy.¹⁸⁰

Still, one can envision a scenario without too much difficulty in which the impassioned Facebook user or blogger might go beyond making a few casual comments and instead attempt to use the forum as a means of organizing support or opposition to a particular issue of public concern. Given the surprising success of the "Tea Party" movement in using the net to organize opposition to the bank bailouts of 2008 and 2009 and the Obama administration's health reform initiative, there can be little doubt that it is easier than ever for the "average citizen" to have a meaningful impact on a public debate. Moreover, some jurisdictions set an even lower bar on

¹⁷⁸ Mrs. Thomas was home at the time her husband was injured, and claimed he had tripped over the dog while in their kitchen. *Id.*

¹⁷⁹ 627 F.2d at 1297.

¹⁸⁰ *See, e.g., Fleming v. Moore*, 275 S.E.2d 632, 637 (Va. 1981) (holding that individual who spoke twice at a planning meeting in opposition to a development project, had not spoken with the media about the project, and had organized any opposition to the project, was not a limited purpose public figure). One commentator has argued, in the context of defamation on internet bulletin boards, that

If the maligned individual and others on the board are "average citizens," the public-figure doctrine does not seem to be implicated. However, if the same statement is made on a similar board frequented only by Fortune 500 executives, the public-figure doctrine is probably applicable because the plaintiff would be one of the few major players capable of altering national policy.

Thomas D. Brooks, Comment, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Internet Message Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 468 (1995).

this element than did the court in *Waldbaum*, requiring only that the plaintiff have engaged in behavior that will receive attention and comment.¹⁸¹ Noting once again that the publication of a blog or the act of posting on Facebook are inherently attention-seeking in nature, social-networking users that post more than occasionally on issues of public concern are at least at-risk for classification as limited purpose public figures.

Given that the trend in the law is decidedly towards finding more individuals to be public figures than less, the potential impact of personal blogs and social networking sites on the defamation remedy cannot be dismissed out-of-hand. Wittingly or no, individuals like Mr. Bader-Stevens may be thrusting themselves into the vortex of public comment and debate, with all the attendant legal ramifications that such action brings.

V. INFINITE NEWS CYCLES? ON THE INTERNET, ALL NEWS IS HOT

Having established that more individuals than ever before may be classified as limited purpose public figures, one must consider an additional difficulty such plaintiffs would face in defamation lawsuits: proving actual malice in a world in which all news is hot. Now that news travels in near-real time, almost no publication is produced without deadline pressure, especially when that news is distributed by means of the internet.

In one sense, the ubiquitous influence of deadline pressure on the news media is nothing new. Over fifty years ago, many journalists already operated in an environment characterized as a “Deadline Every Minute.”¹⁸² But virtually all journalists now face the same pressure that only those writing for wire services faced decades ago, and the press for information has only

¹⁸¹ Ciolli, *supra* note 145, at 271 (“If a court finds that a public controversy exists, it must determine whether the plaintiff voluntarily rose to the forefront of that controversy. A defendant could prove this element against a blogger-plaintiff with little difficulty in liberal jurisdictions, such as the Third and Fifth Circuits. These courts have held that this element is met if an individual engages in behavior that will receive attention and comment, regardless of whether the individual wants that attention.”) (citing *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985); *Rosanova v. Playboy Enter., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978)).

¹⁸² Bugeja, *supra* note 170 (describing working for the United Press International wire service in the 1970s) (citing *JOE ALEX MORRIS, A DEADLINE EVERY MINUTE* (1957)).

increased. Many traditional news outlets now operate “continuous news desks” designed to compete around-the-clock with extremely nimble web-based providers.¹⁸³ This is also sometimes described as a “24/7 Newsroom.”¹⁸⁴ The pace of the news is even described by some journalists in a short-hand formulation appropriate to the internet age: “4/5, 24/7—or four paragraphs online within five minutes of knowing something, around the clock.”¹⁸⁵ One blogger even argues that we now live in a world of “one minute news cycles” and are only “inches away from the real-time news cycle.”¹⁸⁶

In a world of literally infinite news cycles, opportunities for pre-publication verification of the information contained in news reports will be non-existent. That traditional news outlets have embraced the continuous news desk and around-the-clock reporting is a clear nod to the commercial value of hot news as noted by the D.C. Circuit in *Koegh*. The fact that all news is hot does not change the underlying rationale for affording news outlets additional leeway under an actual malice analysis when they were faced with deadline pressure: they are still caught on the horns of the dilemma whether to publish without verification or risk losing the commercial benefit of the news, and the public still has an interest in hearing the news in a timely manner. What it does do is call into question the continuing relevance of deadline pressure. Robert Sack’s argument that no story is published without some deadline pressure, penned some thirty years ago, will only continue to grow in force over time.

News published within five minutes of knowing the underlying facts would be hot under any case analyzed in this paper. While the presence of deadline pressure is not determinative of an actual malice inquiry, it continues to be given significant weight by the courts. If that trend

¹⁸³ Steve Outing, *News is Really Continuous at washingtonpost.com*, Editor & Publisher, Jan. 14, 2004.

¹⁸⁴ Reynolds Journalism Institute, Webinar: Journalists’ Felt “24/7 Newsroom” Improved Journalism.

¹⁸⁵ Bugeja, *supra* note 170.

¹⁸⁶ Mitch Joel, Welcome to the Sixty Second News Cycle – Death to the Twenty-Four Hour News Cycle,

continues, defamation plaintiffs challenging assertions made about them in internet publications are likely to be at a severe disadvantage in winning their cases.

VI. CAN ANYTHING PREVENT DEFAMATION FROM BECOMING *DAMNUM ABSQUE INJURIA*?¹⁸⁷

If truly anyone can become a limited purpose public figure, and all news is hot, it stands to reason that the number of cases for which an injured plaintiff can obtain a recovery will shrink dramatically, since it is extraordinarily difficult to meet the actual malice standard when the defendant faced deadline pressure. On the one hand, defamation plaintiffs since *Sullivan* and *Gertz* have always faced an uphill battle. Anecdotal evidence suggests that the threat of defamation suits already has a marginal impact on media behavior in the United States.¹⁸⁸ A significant reason for this is that American media outlets are sued much less often than their counterparts in other common law countries.¹⁸⁹

Another factor contributing to the relatively low level of defamation litigation in the United States relative to England is the “American rule” on attorney fees; this lack of incentive for plaintiffs’ attorneys to take defamation cases, coupled with the general difficulty of winning a defamation suit at all, has produced a virtual absence of a professional defamation plaintiff’s bar in the United States.¹⁹⁰ One commentator states that the Court’s decision in *Sullivan* has “changed the culture of defamation law in the United States.”¹⁹¹ Another has gone as far as to argue that the “*New York/Gertz* constitutional regime has provided the media with something

¹⁸⁷ *Damnum absque injuria* is Latin for “an injury for which there is no remedy.”

¹⁸⁸ WEAVER ET AL., *supra* note 11, at 183-86 (recounting numerous interviews with major media outlets and individual reporters in which those interviewed stated that defamation law had a minimal impact on their decision-making).

¹⁸⁹ *Id.* at 185.

¹⁹⁰ *Id.* at 250.

¹⁹¹ *Id.* at 246.

approaching an absolute privilege to defame; a reasonable publisher should worry about having to pay substantial libel damages as much as she worries about being struck by lightning.”¹⁹²

The arguments laid out in this Comment are only another layer on top of the already bleak picture for defamation plaintiffs. Courts could address these issues by constricting their tests for limited purpose public figures and by dropping the “hot news” defense to actual malice. Abandoning the “hot news” framework may actually make sense. First, the fact that all news is hot clearly calls into question the relevance of such an inquiry in comparing one case to another. Second, and ironically, the internet may actually be *minimizing* the commercial value of breaking news. Since it will be virtually impossible to scoop every amateur with a camera-phone and an internet connection, and given the glut of news available to the average consumer, the most accurate news may become the most valuable.¹⁹³ This argument is in some respects counter-intuitive, and flies in the face of the “Continuous News Desk” and “4/5, 24/7” rule, and

¹⁹² David A. Logan, *Libel Law in the Trenches: Reflections on the Current Data on Libel Litigation*, 87 VA. L. REV. 503, 519 (2001). The data confirms this surprisingly strong statement:

Claims brought by plaintiffs who were public figures or public officials--who must satisfy the highest standards of proof--were thrown out at a very high rate (85%), but even claims brought by private figures were unlikely to survive motions to dismiss or for summary judgment (68%). The plaintiffs' success rate for the most recent reporting period, a mere 17.7%, was the lowest for any of the combined periods.

...

Remarkably, for . . . 1999, there were only eleven libel trials involving the media in the state and federal courts combined. This was the second lowest number of trials in the 1990s, with the total fluctuating between nine and twenty-six. The average for the 1990s was 17.7 trials per year, substantially lower than the rate for the 1980s, which averaged 26.1 per year. Over the entire twenty-year period, the New York Times/Gertz regime resulted in the media having to try a total of 438 cases nationwide, an average of 21.9 per year. Compare this to the frequency of trials of tort claims generally: There were 120 tort cases tried to verdict in a four-year period in just four counties in Georgia. Obviously, a libel trial is a singularly rare event for the media.

Media defendants won 36.4% of the libel trials in 1999. While this is a decrease from immediately preceding years, the difference is not statistically significant. Defendants won 39.1% of the trials in the 1990s, and 36.9% of the trials during the entire twenty-year reporting period. To put this success rate in context, if forced to go to trial, media defendants are about as likely to win as are defendants in auto crash litigation (around 35%), slightly less successful than defendants in premises liability actions (around 45%), and much less successful than physicians sued for malpractice (around 75%).

Id. at 509.

¹⁹³ Joel, *supra* note 186 (“It's no longer about which outlet breaks the new or how fast, it's going to be about how well they can report on something that everybody has already seen.”).

consumers will undoubtedly continue to crave ever-more instant news, but it is probably time to reconsider “hot news.”

Constricting the definition of public figure would be more problematic. It seems likely that the internet will continue to blur the lines between public and private. Indeed, one commentator argues that the meanings of “public figure” and “public official” “are likely to have less salience in a world of wide, rapid, and active creation of new culture.”¹⁹⁴ There is simply no turning back the clock on individuals’ ability to put more of their lives into the public sphere.

The practical distinction between public and private figures in defamation cases may erode in any case. Any trial lawyer knows that a judgment is only as good as the ability to collect upon it. With information increasingly released by “micro-media” outlets or bloggers, which are likely to be judgment-proof or close to it, what valuable recourse does *any* defamation plaintiff, even a non-public figure, have against such tortfeasors? In this perhaps most significant way, saving an individual from public figure status may accomplish little on that person’s behalf, unless he is lucky enough to have suffered a defamatory comment at the hands of a “deep-pocketed” media conglomerate.

Indeed, the real losers in any retrenchment from the progression of public figure defamation law would probably be traditional media outlets. They face a greater risk of suit on the basis of defamation because they have the “deep pockets,” and this risk militates in favor of delaying publication to double- and triple-check facts. But such delay only reinforces many of the characteristics quickly propelling internet media past its traditional counterparts: most notably cost and instant availability. So strengthening protections for “private” individuals might simply speed the demise of traditional media while ultimately doing little to preserve the defamation cause of action.

¹⁹⁴ WEAVER ET AL., *supra* note 11, at 262.

Perhaps courts should reconsider whether reputation really has the same value in modern society that gave it such prominent protection in the common law of sixteenth century England. As one Australian media executive wondered, “In this day and age it is hard to believe that people can be held up to hatred, ridicule and contempt by a light-hearted, gossipy paragraph. When did we last see someone drummed out of polite society because of something written about them?”¹⁹⁵ While an individual who has suffered a legitimate defamation of her character is likely to have a different view of things than the media executive whose bottom line might be affected by a defamation lawsuit, the question is valid. But assuming that society continues to believe that a person’s reputation is deserving of protection, and in the face of the difficulties presented here, what *can* be a remedy?

States could consider imposing criminal penalties for defamation, and would find historical precedent for doing so in the common law.¹⁹⁶ But one assumes this would have an even greater chilling effect on Free Speech than damage actions, so it is unlikely that the Court would allow such laws to stand. And in any case, the prospect of jailing people in 2010 for defamation seems fairly absurd.

A more attractive option would be empowering courts to issue declaratory judgments that would state the truth of the facts asserted by the plaintiff.¹⁹⁷ This remedy does not rely upon the financial solvency of the defendant, and would not have a chilling effect on Free Speech. However, the practical value of such statements is likely to be limited; there is no way to “un-ring the bell” once false statements about an individual have been put into the public sphere, and a court’s declaration is unlikely to receive much enduring public attention.

¹⁹⁵ John Hartigan, *Press Freedom Under Attack*, AUSTRALIAN PRESS COUNCIL NEWS, February 2004, at 1.

¹⁹⁶ *Butts*, 388 U.S. at 151 (“Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words.”).

¹⁹⁷ See Dario Milo, *Defamation and Freedom of Speech* 267-78 (2008).

Ultimately, if nothing can prevent the fall of defamation, perhaps the very force driving its demise (the internet) will provide a new remedy out of defamation's ashes: increased self-help for all. If people are defamed as a result of what they say on Facebook, they at least have their wall to respond. A reprisal is only a blog-post or YouTube production away. Russell Weaver has argued that society needs a new institution to sort "rubbish from truth. Litigation and adjudication will be too lethargic to the task."¹⁹⁸ Perhaps the internet will prove itself more nimble here, as it has in so many other arenas, than the institutions it is so rapidly supplanting.

CONCLUSION

Developments in the law and technology have conspired to make an already difficult task for defamation plaintiffs even more daunting. As more individuals become limited purpose public figures because of their involvement in internet activities and deadline pressures on the media increase as a result of real-time online reporting, defamation will not provide a remedy under the current American legal framework for those whose reputations are injured. If the law cannot effectively respond to this challenge, Americans may be required to seek out a new conception of self, one less dependent than ever before on the thoughts and opinions of others. If we must now submit our very identities to the marketplace of ideas, we surely must heed Robert Post's words:

The ultimate metaphor of our national political life is that of public debate leading to the informed and personal consent of the governed. The metaphor assumes an image of mature and independent individuals mutually agreeing to together live a good life, rather than that of individuals socialized by a community into a commonly accepted vision of a good life. The differences between these two images are fundamental, and even if they are acknowledged it is not clear how they can ever be resolved.¹⁹⁹

¹⁹⁸ WEAVER ET AL., *supra* note 11, at 262.

¹⁹⁹ Post, *supra* note 15, at 739.

If the time is coming when we all must “grow up,” then perhaps we must be less concerned with the composition of our laws than with the constitution of our selves.