THE EROSION OF COMMON LAW PRIVACY AND DEFAMATION: RECONSIDERING THE LAW'S BALANCING OF SPEECH, PRIVACY, AND REPUTATION

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ABSTRACT

Privacy and reputation have come under siege because of new technologies, the general communications practices of society, and the changing journalism environment. At the same time, the common law's ability to provide an effective remedy for privacy and reputation harms has diminished. A major reason for this shortcoming is that the common law does not give enough weight to privacy and reputation when balanced against speech interests. Even in common law torts,—where the constitutional protections of speech may not apply—free speech is seen as a vital foundation in the structure of democratic society. This Article argues that privacy and reputation are also vital foundations. What common law courts almost always fail to recognize are the broader social underpinnings of privacy and reputation, and how a healthy democratic society depends on a vibrant respect for individual privacy and

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reputation. Therefore, as this Article argues, courts should reconsider the common law's overweighing of speech in both privacy and defamation torts, because privacy and reputation (like speech) serve vital social roles and important individual interests.

I. INTRODUCTION

As speech has flourished amidst the rapidly expanding media environment, privacy and reputation have correspondingly suffered. A near constant current of public concern and criticism pushes against the privacy practices of social networking companies and Internet service providers. Stories of individuals whose private information has been disclosed or misappropriated appear regularly. In response, public demand for greater regulation of these media and technology companies intensify.

An array of social commentary addresses all the ways in which social media and communications technologies facilitate intrusions into privacy and disparagements of reputation. However, the fact that technology threatens privacy and reputation is a different issue from that of the law's capacity to combat those threats. This Article will argue that, just as communications technologies increasingly erode privacy and reputation, the common law's ability to remedy privacy and reputational injuries has diminished. Although an intricate web of state and federal statutes addresses very specific privacy issues, this Article will focus on the general common law of privacy and defamation and the capacity of that common law to meet the privacy and defamation problems the current media environment poses.

The ineffective state of privacy and defamation common law has resulted from the inevitable intersection with the protective moat surrounding speech; because at the intersection of privacy and free speech, the courts frequently give the latter the right of way. Even in common law torts, where the constitutional protections of speech sometimes do not apply, free speech is seen as a vital foundation in the structure of democratic society. However, as this Article will argue, privacy and reputation are also vital foundations, even if those foundations have been largely ignored in common law jurisprudence.

Part II of this Article provides a brief discussion of how current communications technologies have caused increasing violations of privacy interests. Part III will then discuss the common law of privacy and defamation, focusing on how that common law has become less effective in providing a remedy to the increasing intrusions into privacy and abuses of reputation. This Part will examine how the courts have

consistently favored speech over privacy and reputation in the common law. Part IV explores the wide array of values privacy serves. In contrast to the narrow, consumerist view of privacy often portrayed in many regulatory campaigns, this Article will discuss the multi-dimensional social values served by privacy. Part V undertakes a similar analysis regarding reputation, examining the many social and public values served by the protection of reputation. Consequently, like privacy, reputation is more than just an individual interest. Indeed, in many ways, privacy and reputation may be as important for the health of democratic society as free speech. Therefore, as Part VI argues, in the future, courts should reconsider the common law's overweighting of speech interests in both privacy and defamation torts because privacy and reputation—like speech—serve vital societal roles as well as important individual interests.

II. THE TECHNOLOGICAL EROSION OF PRIVACY

Individual privacy has come under assault from numerous fronts.[1] Not only are people fearful of privacy invasions, but also surveys show that an overwhelming majority of people continually take actions aimed at covering their digital footprints.[2] According to Adam Schwartz at the Electronic Frontier Foundation, "Companies are collecting too much information about consumers in the name of convenience and microtargeting."[3]

Professor Lori Andrews outlines the privacy dangers data-mining technologies pose and how Internet technologies exploit personal information.[4] Andrews argues that individuals are largely ignorant of what happens to their personal information and that any self-help efforts to protect privacy are overwhelmed by the sheer number of actions that must be taken to protect it.[5]

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1. *See* Elizabeth Dwoskin, *Give Me Back My Privacy*, WALL ST. J., Mar. 24, 2014, at R1.

2. *See id.*

3. Scott McCartney, *The Privacy Debate is About to Take Flight,* WALL ST. J., May 16, 2019, at A10.

4. *See generally* LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY (2011). For a detailed discussion of the explosion of information brought on by the digital age, as well as the unprecedented scale of networked communications and media and technological convergence, see Adam Thierer, *The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARV. J. L. & PUB. POL'Y 409, 424–36 (2013).

5. *See generally* ANDREWS, *supra* note 4.

As one commentator has noted, "Personal data is the oil that greases the Internet."[6] Personal data underlies the multi-hundred-billion-dollar business of targeted advertising, and the advertising industry spends billions to acquire and exploit this data.[7] Aside from advertising, personal data can also be used for other purposes such as employer decisions on hiring and even child custody battles.

Video voyeurism, or the secret videotaping of others, has also become a serious privacy concern.[8] Privacy violations occur twice: first, with the secretive taping and second, when the video images are posted on the Internet.[9] Indeed, once the images make it onto the Internet, the aggrieved person has little ability to remove or control those images.[10] As one scholar explains:

> Data in video formats is generally more accessible and presents additional problems in terms of the ease of public access, lack of contextual information, increased threat of viral dissemination, added challenges in detecting accuracy, and most notably, the image subject's inability to control who has access to the image once it reaches cyberspace.[11]

Companies like Amazon, Google, and Facebook not only amass a great amount of personal data, but also constantly work to find new ways to use, manipulate, and market that data.[12] Moreover, individuals cannot delete or alter any data previously disclosed, even if that data was a mistake or a misstatement.[13] While the Fourth Amendment puts limitations on the data-gathering activities of government, businesses that use Internet platforms "regularly gather private information, for which they would require a warrant if they were state actors, run it through algorithms, categorize persons on the basis of predetermined stereotypes, conduct statistical analyses on their data, and formulate business models."[14] Companies can retain such data in digital databases

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6. Somini Sengupta, *Should Personal Data Be Personal?*, N.Y. TIMES, Feb. 5, 2012, at SR7.

7. *Id.*

8. Maayan Y. Vodovis, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet,* 40 HOFSTRA L. REV. 811, 829 (2012).

9. *See id.* at 829–30.

10. *Id.* at 830.

11. *Id.*

12. *See* Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data,* 49 WAKE FOREST L. REV. 433, 437 (2014).

13. *Id.* ("The Internet TCP/IP protocol is built to allow cookies of information to be left on users' computers with or without their knowledge.").

14. *Id.* at 440.

for unlimited lengths of time.[15] Moreover, that data can be accumulated without the knowledge of the individual, who inadvertently may be giving up data by browsing Internet websites.[16] Indeed, browsing or viewing patterns on the Internet can yield much private information about a person.[17]

Social networking adds additional threats to individual privacy. Facebook, for instance, "has been remarkably successful in convincing users to publicly divulge information."[18] The collector can store and exploit such information in whatever manner the company desires.[19] But even the data compiled by companies like Google and Facebook under promises of privacy have been disclosed in various incidents where Google and Facebook inadvertently released personal information about millions of their users.[20] Social networking sites continue to evolve from purely social communication venues to entities for collecting and distributing personal data.[21] Thus, as these channels of communication increasingly dominate our lives, expectations of privacy seem to have steadily declined.

It is impossible to adequately discuss all the ways in which the Internet poses unprecedented privacy threats and challenges. Aside from social networking sites, search engines store queries for years, connecting them to the computer over which they were sent and to the registered user of that computer.[22] Individual websites collect information on their visitors, either directly through specific requests for data like driver's license numbers and addresses, or indirectly through the use of "cookies" and other technologies that can trace user activity.[23] Then there are data brokers that purchase the personal information the

15. *Id.* at 437.

16. *Id.*

17. *Id.* at 441–42 ("[P]ersons searching for political information or making sense of physical or mental conditions are often unaware of the extent to which their information is collected, disseminated, and sold, and how much of their histories can be traced at a speed only limited by technologies."); *see also id.* at 451–58 (discussing ways in which technology has increased individuals' data vulnerability).

18. *Id.* at 447.

19. *See id.* at 449.

20. *Id.* (stating that corporations "amass treasure troves from people posting intimate details about their daily lives, without making clear what, if anything, will be resold to third parties"). Facebook, Inc. reported strong earnings, pushing its stock price up, at the same time that it was settling a record fine of $5 billion for privacy violations—exemplifying the profitability of exploiting personal data and the privacy violations endemic to that exploitation. Jeff Horwitz, *Facebook Posts Big Earnings, Brushing Off Fine*, WALL ST. J., July 25, 2019, at A1.

21. *See* Tsesis, *supra* note 12, at 449.

22. *Id.* at 437–38.

23. *Id.*

websites collect.[24] As one commentator has aptly observed, "The Internet has become Janus-faced. On one hand, it appears to offer great freedom and anonymity. On the other, it ferrets out and stores everything from our most banal behaviors to our deepest secrets."[25]

Dataveillance poses yet another threat to privacy. Dataveillance, a function now common during the era of Big Data, is the process of collecting and processing seemingly innocuous information in ways that can disclose personal information that the individual has not intended to disclose.[26] For instance, by collecting data on a person's pharmacy purchases and online searches, dataveillance might uncover the fact that the individual is suffering from a particular physical disease or emotional trauma.[27] Because modern life requires individuals to operate their cell phones or log onto the Internet on an hourly, if not minute-by-minute basis, "vast amounts of private and public records supply the raw data on which dataveillance runs."[28]

Dataveillance takes information "voluntarily" given and produces information never willingly disclosed. Traditionally, privacy expectations can never apply to information that individuals have voluntarily divulged for third-party use.[29] The problem is that whenever someone interacts with a website or a service on the Internet, that person has probably "consented" to however that website or service wishes to make use of their information.[30] And that "consent" occurs when the person is forced to check some box as a precursor to getting to the transaction or website they need to access.[31] Consequently, "many of the things that feel like privacy violations are 'authorized' in some fine print

24. Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 443–51 (2011) (discussing various privacy threats).

25. *Id.* at 439.

26. *See, e.g.*, Benjamin Zhu, Note, *A Traditional Tort For a Modern Threat: Applying Intrusion Upon Seclusion to Dataveillance Observations*, 89 N.Y.U. L. REV. 2381, 2383–84 (2014) ("Dataveillance undermines [individual control over their private information] by allowing the discovery of personal information that individuals never consensually divulged.").

27. *Id.* at 2390.

28. *Id.* at 2389. For further discussion of big data and its impact on and threats to individual privacy, see generally Joseph Jerome, *Big Data: Catalyst for a Privacy Conversation*, 48 IND. L. REV. 213 (2014).

29. *See* Zhu, *supra* note 26, at 2396.

30. *See* Jerome, *supra* note 28, at 229–30 (describing the fictional operation of the "notice and choice" model).

31. *Id.*

somewhere."[32] However, in reality, people have not truly or "fully consented to these authorized intrusions."[33]

Not only is the privacy "consent" given by Internet users often not a true or fully informed consent, it can also be a consent that the giver has been duped into providing because of some false sense of security. Social networking sites, for instance, "create an 'intimate, confidential, and safe setting' which breeds a natural ground for socialization."[34] Consequently, many social network users conclude that since half a billion other people have engaged in the same activities, those activities must be sufficiently protective of their privacy.[35] There is also the probability factor, whereby a user thinks his private information will never get chosen out of the data of all the hundreds of millions of other users.[36] Moreover, the perceived privacy controls available on social networking sites may foster a false sense of security and induce "consent."[37] As a result of all these supposed controls, "users may feel they are effectively blocking any

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32. Julia Angwin, *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance,* 12 COLO. TECH. L. J. 291, 292 (2014).

33. *Id.* Because of all the information gathered, in part because of this false consent, we have come to live in a "Dragnet Nation – a world of indiscriminate tracking where institutions are stockpiling data about individuals at an unprecedented pace. The rise of indiscriminate tracking is powered by the same forces that have brought us the technology we love so much – powerful computing on our desktops, laptops, tablets and smartphones." *Id.* at 293. The "fiction" of consent is also highlighted by a commentator who notes:

> One result of framing technological engagement as voluntary rather than necessary is that when users disclose personal information in the course of normal online activity, that too is viewed as a voluntary disclosure, even when users are completely unaware that any information exchange is occurring. For example, third-party "cookies"—or "tracking cookies"—allow major marketing and advertising companies to, in essence, tag a computer so that as a user navigates the Internet, her identity can be recognized and her activity can be associated with her identity. As a result, the third-party advertising content provider that surreptitiously plants a cookie is able to assemble a profile of a user's interests based on what she reads, clicks on, and purchases, without ever having to get her affirmative consent.

Devin W. Ness, Note, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy as We Know It,* 31 CARDOZO ARTS & ENT. L. J. 925, 929 (2013).

34. Kelly Ann Bub, Comment, *Privacy's Role in the Discovery of Social Networking Site Information,* 64 SMU L. Rev. 1434, 1436 (2011) (quoting James Grimmelmann, *Saving Facebook,* 94 IOWA L. REV. 1137, 1159–60 (2009)).

35. *Id.*

36. *Id.*

37. *Id.*

unwanted viewers from accessing their information, and therefore, they maintain at least some expectation of privacy."[38]

An endless cycle has developed in the social use of communications technologies. The more information that gets disclosed, the more technology can collect and process that information, leading more people to feel vulnerable in their privacy—while at the same time continuing to use communications technology and to divulge personal data.[39] On one hand, data collectors argue that people voluntarily relinquish their privacy by continuing to use the technologies that collect their data; but on the other hand, people are simply doing what they need to do to live in this digitally connected society. Social media fuels this strange—almost hyperactive—and contradictory behavior of people who feel their privacy threatened and yet continue to plug into social media. Essentially, social media has created a culture in which people fear that a digitally unconnected life is not a true or fulfilling life. And so, the cycle

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38. *Id.* For further examination of the notion of consent in connection with Internet usage, see Omer Tene, *Privacy Law's Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws,* 74 OHIO ST. L.J. 1217, 1245–48 (2013); *see also* Connie Davis Powell, *"You Already Have Zero Privacy, Get Over It!" Would Warren and Brandeis Argue for Privacy for Social Networking?,* 31 PACE L. REV. 146, 165–70 (2011) (discussing how consent regarding social networking sites has to be understood in its own context). Powell notes that social networks can change their privacy policies "after users have disclosed personal information. . . . [and that] [t]hese 'bait and switch' tactics employed by social networking have resulted in user confusion as to what information is accessible to the public, thus exposing them to unnecessary risk of harm." Powell, *supra,* at 169. As Powell explains:

> Arguably, users who are uncomfortable with a particular social network provider's privacy policy could stop using the services and delete their profile. However, discontinuing use of the services does not eliminate the problem. The problem remains that the social networking website has the ability to continue to use and/or capitalize on information previously acquired by virtue of use of its services.

Id. at 170.

39. *See, e.g.*, Kate Murphy, *We Want Privacy, but Can't Stop Sharing,* N.Y. TIMES, Oct. 4, 2014, at SR4 (observing that the more people feel their privacy threatened by technology, the more they continue "to participate because they [are] afraid of being left out or judged by others as unplugged and unengaged losers. So the cycle of disclosure followed by feelings of vulnerability and general dissatisfaction continue[s]."); *see also* Anita Allen, Lecture, *What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure,* 25 ST. THOMAS L. REV. 1, 1 (2012) ("We live at a historical moment characterized by the wide availability of multiple modes of communication and stored data, easily and frequently accessed. Our communications are capable of disclosing breadths and depths of personal, personally identifiable, and sensitive information to many people rapidly. . . . many of us are losing our sense of privacy, our taste for privacy, and our willingness to respect privacy.").

continues: personal engagement in social media escalates with a corresponding growth in privacy concerns.[40]

Reputation is another casualty of the digital communications age. The ability to easily and widely proliferate anonymous defamations and the Internet's encouragement of anonymous communication constitute an assault on reputation like society has never experienced before.[41] The social media culture of people rushing to issue their strident opinions, without any consultation of the facts, also fuels a coinciding defamatory culture where virulent attacks on supposed opponents are seen as a sign of virtue.[42]

III. THE EROSION OF COMMON LAW REMEDIES

A. The Inadequacy of Privacy Torts

An array of federal and state statutes cover specific privacy issues, but those statutes will not be discussed in this Article.[43] As particular privacy issues arise with new technologies or business practices, new statutes may be enacted to address those issues. However, the most general and all-encompassing legal remedies for privacy violations remain in the common law privacy torts.

The privacy torts are not confined to specific types or instances of privacy violations or intrusions.[44] Instead, those torts are meant to generally apply to privacy in whatever manner it may be threatened or violated.[45] As the discussion in Part I demonstrates, communications technologies pose a serious and unprecedented threat to privacy. However, those technologies are not the only threat. Privacy continues to

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40. *See, e.g.*, Grant Gross, *Momentum Builds for National Privacy Law*, WASH. EXAMINER, Mar. 12, 2019, at 28.

41. *See* Jarrod F. Reich & Freddie Wolf, *Online Libel*, FREEDOM F. INST. (Sept. 18, 2017), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/online-libel/ [http://web.archive.org/web/20191118223449/https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/online-libel/] (discussing how anonymity encourages a "willingness to criticize . . . and increase[s] boldness in doing so.").

42. *See id.*

43. For a reference to some of these statutes, see, e.g., Bilyana Petkova, *The Safeguards of Privacy Federalism*, 20 LEWIS & CLARK L. REV. 595 (2016).

44. *See* William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (describing "a complex" of torts that are comprehended by the law of privacy, but that "have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'" (citation omitted)).

45. *See id.*

come under assault from many different directions: the aggressive reporting habits of bloggers, the divisive and combative cable news environment, eavesdropping technologies, and a society and culture that seems to prize combat and political victory over civility and personal dignity. The question becomes can common law privacy torts remain viable legal remedies for privacy violations in modern society.

Although four different common law privacy torts exist, this Article will examine only two of them: publication of private facts and intrusion into privacy.[46] These two torts are the most applicable to the types of actions and abuses most commonly thought of as personal privacy violations.[47]

The common law privacy torts owe their origins to a famous article written in 1890 by Samuel Warren and future Supreme Court Justice Louis Brandeis, titled *The Right to Privacy*.[48] Focusing on the sensationalist journalism of the late nineteenth century, as well as the intrusive power of photography, Warren and Brandeis argued that the common law should generally recognize the "right to be let alone."[49] Warren and Brandeis sought a defense against the intrusive power of the media:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[50]

The right of privacy advocated by Warren and Brandeis arose in response to the growing power of the media, equipped with the new technology of photography, to intrude into the private affairs of increasingly powerless individuals.[51] As one commentator notes, Warren

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46. *See id.*

47. *See id.* at 389–98.

48. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. *Id.* at 193.

50. *Id.* at 196.

51. *Id.* Warren and Brandeis described the press as "overstepping in every direction the obvious bounds of propriety and decency." *Id.* Warren and Brandeis' proposed tort sought to protect a person's right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 198.

and Brandeis "did not purport to establish a new body of law, but rather sought for the courts to recognize the underlying principle that formed the basis of many decisions made by the judiciary and then expand existing law to encompass this underlying principle."[52]

It took years for courts to adopt the right of privacy advocated by Warren and Brandeis as common law cause of action in tort.[53] The Restatement now defines these torts. The Restatement (Second) of Torts (Restatement) defines public disclosure of private facts as: "One who gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[54] Intrusion upon seclusion is also explained in the Restatement as: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[55]

In many ways, privacy law "has failed to keep pace with technology."[56] And yet, as Warren and Brandeis noted in their groundbreaking article, privacy protections should keep up with "modern enterprise and invention."[57] However, the Articles takes the position that the torts of intrusion and publication of private facts have been so diluted by exceptions or privileges that they may be inadequate to address even the more traditional types of privacy violations.

For example, according to one of the leading cases on privacy, *Shulman v. Group W Productions, Inc.*, an intrusion claim must satisfy two elements: (1) "intrusion into a private place, conversation or matter" and (2) must be conducted "in a manner highly offensive to a reasonable person."[58] To prevail on an intrusion claim, the plaintiff "must show the defendant penetrated some zone of physical or sensory privacy

52. Powell, *supra* note 38, at 152 ("[I]t was recognition by the courts of this 'right to privacy' that Warren and Brandeis sought.").

53. It was William Prosser who set out the four different torts embodying the right of privacy, two of which are intrusion and publication of private facts, and all four sought to protect a person's "right to be let alone." Prosser, *supra* note 44, at 389.

54. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977). According to comment (b), "there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." *Id.* at § 652D cmt. b.

55. *Id.* at § 652B.

56. Powell, *supra* note 38, at 162.

57. Warren & Brandeis, *supra* note 48, at 196.

58. Shulman v. Group W Productions, Inc., 955 P.2d 469, 490 (Cal. 1998). Note that under Prosser's view, the intrusion tort can apply to nonphysical intrusions, such as wiretapping or other forms of surveillance. Prosser, *supra* note 44, at 390.

surrounding, or obtained unwanted access to data about, the plaintiff."[59] Some courts, for instance, require a physical intrusion into a physical space, such as invading plaintiff's home.[60] In this respect, intrusion resembles trespass.[61] Renowned scholar William Prosser noted that intrusion "has been used chiefly to fill in the gaps left by trespass."[62]

The challenge arising from this linkage between intrusion and trespass is that, within the context of electronic communications technologies, an individual's private information may be acquired and exploited without physical trespass.[63] To the courts, digitized data may not constitute a legally-recognized safe zone where a person should be protected from the intrusions of outsiders.[64] If a data marketer uses the personal information of a social networking user who is unaware of the usage, a court might not find that the user has suffered some unwanted intrusion from an uninvited intruder.[65]

The reasonable expectation of privacy element is perhaps the major obstacle to asserting a privacy tort in connection with the use of personal information entered digitally on a website or social networking site. Privacy defendants often argue that facts are not private if the plaintiff has voluntarily divulged them on a website.[66] For instance, in *Pietrylo v. Hillstone Restaurant Group*, the jury found that plaintiffs did not have a

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59. *Id.* In *Schulman,* a nurse in an ambulance helicopter wore a microphone that picked up conversations between the nurse and the injured plaintiff. *Id.* at 475–76.

60. *See* Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991); Hillman v. Columbia County, 474 N.W.2d 913, 916 (Wis. Ct. App. 1991); Eli A. Meltz, Note, *No Harm, No Foul? "Attempted" Invasion of Privacy and The Tort of Intrusion Upon Seclusion,* 83 FORDHAM L. REV. 3431, 3448–50 (2015). Some states require the intrusion to result in discovering private, personal information about the plaintiff. *See, e.g., Snakenberg v. Harford Cas. Ins. Co.*, 383 S.E.2d 2, 4, 8 (S.C. Ct. App. 1989); Meltz, *supra*, at 3449–50. Although this is not a uniform rule, various courts have held that an intrusion claim requires that the plaintiff be heard or viewed. *See* Meltz, *supra*, at 3458–60. On the other hand, some courts have held that intrusion does not require the acquisition of information about the plaintiff—for example, that the plaintiff be heard or viewed. *See id.* at 3454–56.

61. *See trespass*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both courts and commentators have noted the similarities between trespass and intrusion. *See* Meltz, *supra* note 60, at 3452.

62. Prosser, *supra* note 44, at 392.

63. *See, e.g.*, Tsesis, *supra* note 12, at 437 (discussing "cookies" that are used by websites to track personal information about a user).

64. *See* Daniel Solove, *A Taxonomy of Privacy,* 154 U. PA. L. REV. 477, 552 (2006) (asserting that the tort of intrusion should protect some area or zone of seclusion, like a home, where a person can be safe from unwelcome intrusions).

65. *Id.* at 553 (suggesting that the damage by an intrusion comes when one's life and behavior is altered by that intrusion).

66. *See, e.g.*, Moreno v. Hanford Sentinel Inc., 91 Cal. Rptr. 3d 858, 862–63 (Cal. Ct. App. 2009) (holding that once information is posted on a social network, it is public information, regardless of the fact that the plaintiff expected only a limited audience).

reasonable expectation of privacy in their posts to a group on MySpace, even though the group was "a place of solitude and seclusion which was designed to protect the plaintiffs' private affairs and concerns."[67] Despite this result, commentators have continued to argue that traditional notions of privacy are inappropriate for social networks, and that other notions of privacy, such as a network theory, should be used.[68] Under this theory, if a person harbors a reasonable belief that certain information posted over a limited and supposedly confidential network will remain within the network, then the acquisition and use of that information by outsiders might qualify as an actionable intrusion.

In another case, the Eastern District Court of Pennsylvania found no reasonable expectation of privacy in email communications made by an employee over the employer's email system, notwithstanding previous assurances from the employer that emails would not be monitored by management.[69] Once the plaintiff sent the email to another person, he lost the kind of control necessary for a reasonable expectation of privacy.[70] Similarly, in *Thygeson v. U.S. Bancorp*, the District Court of Oregon held that even if an employee marked a computer file as "personal," but did not restrict it with a password, he had no reasonable expectation of privacy in that file.[71]

Similarly, courts have held that users do not have a reasonable expectation of privacy in social media sites because the information has been openly shared.[72] Activating restrictive privacy settings is not sufficient to confer a reasonable expectation of privacy in a user's social media data.[73]

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67. Jury Verdict, Pietrylo v. Hillstone Rest. Grp., No. 2:06-cv-05754-FSH-PS (D.N.J. June 16, 2009), ECF No. 61 at PID 843.

68. *See, e.g.*, Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1142 (2002) (discussing how privacy is conceptualized generally); Lior Jacob Strahilevits, *A Networked Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005) (describing a social network theory of privacy).

69. Smyth v. Pillsbury Co., 914 F. Supp. 97, 98–99 (E.D. Pa. 1996). Other courts have found a reasonable expectation of privacy in email correspondence over employer-owned networks as long as there existed a reasonable belief that the emails would continue to be treated as private. *See, e.g.*, Wilson v. Moreau, 440 F. Supp. 2d 81, 103 (D.R.I. 2006).

70. *Smyth*, 914 F. Supp. at 101.

71. Thygeson v. U.S. Bancorp, No. CV-03-467-ST, 2004 WL 2066746, at *17 (D. Or. Sept. 15, 2004).

72. *See, e.g.*, Cohen v. Facebook, 798 F. Supp. 2d 1090, 1096 (N.D. Cal. 2011); *see also* Rachel E. Lusk, Comment, *Facebook's Newest Friend–Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 737–38 (2014).

73. Patterson v. Turner Constr. Co., 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011); *see also* Lusk, *supra* note 72, at 738.

In *Maremont v. Susan Fredman Design Group*, the Northern District Court of Illinois ruled that no intrusion occurred when defendant used plaintiff's username and password to access plaintiff's Facebook account without consent because plaintiff had no reasonable expectation of privacy in that information.[74] According to the court, since plaintiff had a thousand or more followers with access to that information, plaintiff could not expect the information to remain private.[75]

In *Busse v. Motorola*, plaintiffs brought an intrusion lawsuit against a private research firm that had acquired customer data without consent from mobile service providers to use in a study on the connection between cell phone use and mortality.[76] The Illinois Court of Appeals held that data such as addresses, dates of birth, Social Security numbers, and details about customer's wireless service account were not private.[77] According to the court, none of the informational elements standing alone constituted private facts, even though the aggregation of that data with other public and consumer data could lead to the composition of private information that the individual had never disclosed.[78]

In *Dwyer v. American Express Co.*, the Illinois Court of Appeals ruled that credit cardholders' production of account histories to a credit card company precluded an intrusion action when that company sold the information to other parties.[79] The court held this even though the company aggregated the data and created profiles of cardholders based on their "behavioral characteristics and spending histories."[80]

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74. Maremont v. Susan Fredman Design Grp., Ltd., No. 10-C-7811, 2011 WL 6101949, at *7–8 (N.D. Ill. 2011); Lusk, *supra* note 72, at 741.

75. *Maremont*, 2011 WL 6101949, at *7–8. Other courts have ruled that no expectation of privacy can exist with information posted on Internet sites. *See, e.g.*, Yath v. Fairview Clinics, 767 N.W.2d 34, 44 (Minn. Ct. App. 2009); Lusk, *supra* note 72, at 741. *But see* Sanders v. Am. Broad. Cos., 978 P.2d 67, 72 (Cal. 1999) (indicating that even though an individual may not have complete or absolute privacy, existence of some limited privacy is not precluded).

76. Busse v. Motorla, 813 N.E.2d 1013, 1015 (Ill. App. Ct. 2004).

77. *Id.*; *see also* Zhu, *supra* note 26, at 2398.

78. *Busse*, 813 N.E.2d at 1017–18; Zhu, *supra* note 26, at 2398–99.

79. Dwyer v. Am. Express Co., 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1995).

80. *Id.*; *see also* Zhu, *supra* note 26, at 2399–2400. Aside from the reasonable expectation of privacy element, the offensiveness element also forms an obstacle to intrusion actions against Internet data collectors. In *Busse*, for instance, the court found that the individual information items—addresses, dates of birth, cell phone numbers and accounts—are neither "facially revealing, compromising or embarrassing." *Busse*, 813 N.E.2d at 1018. Thus, the court examined the potential offensiveness of the intrusion by looking at each item of information in isolation, not at how all those items might be aggregated to produce previously personal and undisclosed information of the cardholder. *Id.* As Daniel Solove explains, if data collection privacy suits are examined according to each single instance of fact collection, the collection can be seen as "often small and

Even when a person does have a reasonable expectation of privacy for some information, an action for public disclosure of private information may not lie if that information is not sufficiently embarrassing or does not expose that person to sufficient public disapproval.[81] In *Matson v. Board of Education*, the defendant publicly disclosed that plaintiff suffered from the disease of fibromyalgia, yet the Second Circuit held that no invasion of privacy occurred.[82] According to the court, fibromyalgia was not a disease, like HIV, that exposed the plaintiff to hostility or discrimination.[83] The court found that no "social discrimination and intolerance" targeted people with fibromyalgia.[84]

One of the most significant obstacles to recovery in an action for invasion of privacy is the so-called "newsworthy" defense, which confers upon defendants a privilege to publicize private information if it is newsworthy or a matter of public concern.[85] The U.S. Supreme Court's decision in *Snyder v. Phelps* illustrates the public concern privilege.[86] In that case, the plaintiff brought an intrusion action against protestors at the funeral of his son, a Marine who was killed in the line of duty.[87] The protestors picketed the funeral with signs claiming that American soldiers were killed because of America's tolerance of homosexuality.[88] The Court denied plaintiff's intrusion claim, holding, among other things, that the picketing was speech on a matter of public concern.[89]

Under the newsworthy privilege, the private facts of any person can be disclosed—usually by the media—if those facts have some relation to a matter of legitimate public concern.[90] The scope of legitimate public

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innocuous" and lacking in the offensiveness needed for the tort of intrusion. DANIEL SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 59 (2004).

81. *See, e.g.*, Matson v. Bd. of Educ., 631 F.3d 57, 69 (2d Cir. 2011).

82. *Id.*

83. *Id.* at 62.

84. *Id.* at 68.

85. *See, e.g.*, Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet, in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 174, 192 (Saul Levmore & Martha C. Nussbaum eds., 2010) (noting how far-reaching the newsworthy defense may be "in the world of the Internet [where] it is no longer possible to segregate audiences based on the immediate relevance of information to the community").

86. *See* Snyder v. Phelps, 562 U.S. 443 (2011).

87. *Id.* at 459.

88. *Id.* at 454–55.

89. *Id.* at 453, 459 (stating that speech "deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (internal citations omitted)).

90. *See generally* PETER KUTNER & OSBORNE REYNOLDS, ADVANCED TORTS (2013).

concern can be quite wide, immunizing any private fact relating to a subject of public concern from a privacy challenge.[91]

Not only is the newsworthy privilege part of the common law on privacy, but it also has been constitutionalized to provide further protections for speech.[92] In *Time, Inc. v. Hill*, the United States Supreme Court held that the First Amendment's speech protections mean that even false reports on matters of public interest are not actionable, unless those reports were made with actual malice.[93] The original lawsuit in *Hill* involved *Life* magazine's story about a play based on a real life hostage incident involving the Hill family.[94] In 1952, escaped convicts took the Hill family hostage in their home.[95] The convicts treated the family kindly and courteously during the almost twenty hours of confinement.[96] More than a year later, a bestselling novel was published about the incident, but the novel turned the hostage situation into one of violence and abuse.[97] The novel was made into a Broadway play and then into a motion picture.[98]

Three years after the hostage incident, *Life* magazine published an article on the opening of the Broadway play, falsely describing it as a "reenactment" of the Hill family's experience and using a picture of the

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91. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1222–23 (7th Cir. 1993) (finding that a private individual's private information about intimate details of his personal and family life were of public concern because those details were used by the author of the book *Promised Land* to illustrate the effects of the African-American migration to northern cities during the post-war period); Showler v. Harper's Magazine Found., No. 06-7001, 2007 WL 867188, *6 (10th Cir. Mar. 23, 2007) (holding that an open casket photograph of a soldier killed in Iraq was newsworthy, even though the family requested that no photos be taken); Wilson v. Grant, 687 A.2d 1009, 1016 (N.J. Super. Ct. App. Dev. 1996) (finding newsworthiness where a caller to a radio talk show participated in a debate with the host); Pontbriand v. Sundlun, 699 A.2d 856 (R.I. 1997) (holding, in a privacy suit by bank depositors that the mere possibility of the release of information at some point in the future, and for a limited, legitimate purpose, does in fact render the information public for all purposes, thus precluding a tort action for publication of private facts). As some commentators have observed, courts are generally reluctant to limit the scope of the newsworthy defense. *See* Linda Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 186 (1979). For a more comprehensive and expansive coverage of the newsworthy defense, see generally KUTNER & REYNOLDS, *supra* note 90.

92. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).

93. *Id.* at 387–88.

94. *Id.* at 375.

95. *Id.*

96. *Id.*

97. Samantha Barbas, *When Privacy Almost Won: Time, Inc. v. Hill*, 18 U. PA. J. CONST. L. 505, 506 (2015).

98. *Id.*

Hill family home.[99] The family claimed to have suffered great emotional harm from this false and embarrassing portrayal, and they successfully sued for invasion of privacy in New York state court.[100] On appeal to the U.S. Supreme Court, *Time* (publisher of *Life* magazine[101]) successfully argued that the judgment violated the First Amendment.[102] This marked the first instance in which the Court addressed the conflict between privacy and speech and in doing so, "substantially diminished privacy rights; [such that] today it is difficult if not impossible to recover against the press for the publication of nondefamatory private facts."[103]

In *Hill*, the Court prioritized newsworthy speech, or speech about matters of public concern, above privacy concerns of private citizens. But of course, this concept tended to be self-defining. If the press publishes information, then by definition it must be newsworthy—otherwise the press would not waste its valuable time and space to publish that information.[104] Under the common law, private citizens waived any rights to privacy if they became involved—either voluntarily or involuntarily—in events that were of public interest.[105] In *Hill*, the Court barely mentioned the Hill family's privacy, other than to state that:

> Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[106]

Thus, the Hills' privacy was not balanced with speech and press freedoms, and hence privacy rights gave way when a conflict between the two arose.[107] According to one commentator, "[T]he Court missed the chance to seriously contemplate the rights of private persons against the press, [and to consider] whether and how ordinary people should be

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99. *Id.*

100. *Id.*

101. *Hill*, 385 U.S. at 376.

102. *Id.* at 374; *see also* Barbas, *supra* note 97, at 506–07.

103. Barbas, *supra* note 97, at 507.

104. The newsworthy privilege was established before a constitutional privilege was articulated in *Time v. Hill*. *See id.* at 522–23. Even under early common law cases on newsworthiness, a video of an overweight woman in an exercise course and embarrassing material in a gossip column were deemed newsworthy. *See* Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (E.D.N.Y. 1936); Smith v. Doss, 37 So. 2d 118, 121 (Ala. 1948).

105. Barbas, *supra* note 97, at 522.

106. *Hill*, 385 U.S. at 388.

107. Barbas, *supra* note 97, at 577. In his *Hill* dissent, Justice Fortas criticized the Court for treating privacy with such dismissiveness. *Hill*, 385 U.S. at 416 (Fortas, J., dissenting).

able to use the law to protect themselves against unwanted and injurious media publicity."[108]

The legacy of *Hill* has been significant and enduring. By requiring private persons to prove actual malice, the Court greatly diminished the remedies available to people whose privacy has been invaded.[109] The decision limited liability for common law privacy to cases involving the publication of private facts, and by describing newsworthiness as a constitutional value, "the Court strengthened the news privilege in common law privacy cases."[110] As one commentator observes, "The newsworthiness privilege has become so expansive since *Hill* that the tort is today nearly moribund."[111] Moreover, newsworthiness can often just be a ruse for publishing shocking and controversial images or matters.[112]

B. The Erosion of Defamation Tort Actions

The discussion above reveals how inadequate common law privacy tort actions have become for remedying privacy invasions—particularly those invasions occurring through the newest communications technologies.[113] Likewise, defamation actions have become an inadequate means to redress aggrieved plaintiffs. Even though defamation is a centuries-old tort, reaching back to medieval England, it has withered in its effectiveness as a remedy for reputational damage.[114] Because of the various constitutional doctrines and common law privileges, which will be discussed below, defamation actions "are hard to win but easy to bring."[115]

With the obstacles constructed by civil tort law—even before the constitutional doctrines further raised the barriers to recovery—only a

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108. Barbas, *supra* note 97, at 581 (stating "by refusing to engage with privacy," the Court gave "short shrift to an issue that deserved more attention and reasoned consideration").

109. *Id.* at 584.

110. *Id.* at 586 ("In the first few years after the decision, state courts deemed a wide array of material to be newsworthy and exempt from liability for invasion of privacy.").

111. *Id.*

112. *See* Maayan Y. Vodovis, Note, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 819 (2012).

113. *See supra* Part III.A.

114. *See* Silvano Domenico Orsi, *Defamation: Tort or Crime? A Comparison of Common Law and Civil Jurisdictions*, 9 DARTMOUTH L. REV. 19, 20 (2011) (tracing the origins of defamation law back to 130 A.D. under Roman Law's Praetorian Edicts).

115. Lyrissa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 883 (2000).

small fraction of lawsuits are successful.[116] According to the Media Law Resource Center, the number of defamation and privacy trials against the media fell from 266 in the 1980s to 192 in the 1990s, and to 124 in the 2000s.[117] In 2009, only nine trials occurred.[118] According to one media lawyer, "the [defamation] law is simply unfriendly to plaintiffs."[119]

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116. *Id.* at 874–75; *see also* David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1050 (2006) ("[The] [r]easons for the demise of defamation litigation are many and varied.").

117. Ed Finkel, *Libel-less*, ABA JOURNAL (Oct. 1, 2010, 8:50 AM), http://www.abajournal.com/magazine/article/libel-less [http://web.archive.org/web/20170610103157/http://www.abajournal.com/magazine/article/libel-less/].

118. *Id.*; Daniel J. Solove, *The Slow Demise of Defamation and the Privacy Torts*, HUFFPOST (Oct. 11, 2010, 5:02 PM), https://www.huffpost.com/entry/the-slow-demise-of-defama_b_758570 [http://web.archive.org/web/20191102153402/https://www.huffpost.com/entry/the-slow-demise-of-defama_b_758570] (stating that only 13 percent of defamation lawsuits are successful and that privacy lawsuits are also difficult to win, given that privacy torts have not evolved to address modern privacy problems).

119. Finkel, *supra* note 117. A survey of defamation litigation in various jurisdictions demonstrates the relative rarity of plaintiff victories in such litigation. For instance, a survey of defamation lawsuits brought against media defendants in the state and federal courts of the Ninth Circuit during the twenty-year period from 1990 to 2010 found that in only five cases did the plaintiff achieve a substantive victory in a verdict or judgment (not counting procedural victories occurring, for instance, when the media defendant simply lost a summary judgment motion). *See* Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997); Khawar v. Globe Intern., Inc., 965 P.2d 696 (Cal. 1998); O'Hara v. Storer Commc'ns, Inc., 282 Cal. Rptr. 712 (Cal. Ct. App. 1991); Weller v. Am. Broad. Cos., 283 Cal. Rptr. 644 (Cal. Ct. App. 1991); Kurth v. Great Falls Tribune Co., 804 P.2d 393 (Mont. 1991). Likewise, over a twenty-year period from 1990 to 2010, in the state and federal courts of the Fourth Circuit, plaintiffs prevailed in only five defamation cases against media defendants. *See* Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994); Wiest v. E-Fense, Inc., 356 F. Supp. 2d 604 (E.D. Va. 2005); Neill Grading & Constr. Co. v. Lingafelt, 606 S.E.2d 734 (N.C. Ct. App. 2005); Erickson v. Jones St. Publishers LLC, 629 S.E.2d 653 (S.C. 2006); Hinerman v. Daily Gazette Co., 423 S.E.2d 560 (W. Va. 1992). In the federal courts of the Second Circuit, in only one case was a defamation plaintiff able to ultimately prevail against a media defendant. *See* Celle v. Filipino Reporter Enter., Inc., 209 F.3d 163 (2d Cir. 2000). Similarly, in only one defamation case in the state and federal courts of the Fifth Circuit was a plaintiff able to sustain a verdict against a media defendant, even though that verdict was ultimately reduced on appeal. *See* Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002). Over a twenty-five-year period from 1982 to 2007, the Eighth Circuit saw only two defamation cases against the media that resulted in verdict awards for plaintiffs. *See* Lundell Mfg. Co. v. Am. Broad. Cos., 98 F.3d 351 (8th Cir. 1996); Peoples Band & Trust Co. of Mountain Home v. Globe Intern. Pub., Inc., 978 F.2d 1065 (8th Cir. 1992). From 1982 to 2007, only one reported case in the Wisconsin state courts resulted in a judgment for a plaintiff against a media defendant—with all the other defamation cases against the media dismissed prior to trial. *See* Macquire v. Journal Sentinel, Inc., 605 N.W.2d 881 (Wis. Ct. App. 1999). In state court cases within the Eighth Circuit over a twenty-five-year period

Defamation law seeks to provide a remedy for reputational harms caused by defamatory statements, defined as statements that so "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[120] To recover on a defamation claim, a plaintiff must prove that the defendant published a false and defamatory statement concerning the plaintiff that injured that plaintiff.[121]

The defendant must have acted with actual malice when the plaintiff is a public figure, as the Court in *New York Times v. Sullivan* held.[122] According to the Court, the First Amendment required this heightened fault standard to protect the marketplace of ideas by allowing people to criticize public officials without worrying whether the criticism is true.[123] Actual malice requires that the defamatory statement be made with actual knowledge of its falsity or with reckless disregard for whether the statement was true or false—a requirement that makes recovery in defamation by public officials very difficult.[124]

The *Sullivan* actual malice requirement has also been applied to limited-purpose public figures.[125] These are plaintiffs who qualify as a public figure only for certain types of roles or activities or for certain limited time periods in which the plaintiff is serving some public role.[126]

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from 1982 to 2007, defamation plaintiffs obtained verdicts against media defendants in only three cases. *See* Little Rock Newspapers, Inc. v. Fitzhugh, 954 S.W.2d 914 (Ark. 1997); LeDoux v. Nw. Pub., Inc., 521 N.W.2d 59 (Minn. Ct. App. 1994); Englezos v. Newspress & Gazette Co., 980 S.W.2d 25 (Mo. Ct. App. 1998). From 1990 to 2010, only one defamation plaintiff prevailed against a media defendant in Illinois state courts, and only one prevailed in Indiana state courts. *See* Rosner v. Field Enter., Inc., 564 N.E.2d 131 (Ill. App. Ct. 1990); Bandido's, Inc. v. Journal Gazette Co., 575 N.E.2d 324 (Ind. Ct. App. 1991). In the First Circuit, plaintiffs prevail against media defendants in only two federal cases during the period from 1990 to 2010; in the Third Circuit only one plaintiff prevailed against a media defendant. *See* Stanton v. Metro Corp., 438 F.3d 119 (1st Cir. 2005); Sprague v. Am. Bar Ass'n, 276 F. Supp. 2d 365 (E.D. Pa. 2003); Diaz Rodriguez v. Torres Martir, 394 F. Supp. 2d 389 (D.P.R. 2005).

120. RESTATEMENT (SECOND) OF TORTS, § 559 (AM. LAW INST. 1977). During the same time period, only two plaintiffs in state courts in the Tenth Circuit prevailed against media defendants. *See* Mitchell v. Griffin Television, L.L.C., 60 P.3d 1058 (Okla. Civ. App. 2002); Valdez v. Emmis Commc'ns, 229 P.3d 389 (Kan. 2010).

121. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

122. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

123. *Id.* at 270–71.

124. *See* Cory Batza, *The Role of Defamation Law in Remedying Harm From Social Media Backlash*, 44 PEPP. L. REV. 429, 445 (2017). Private figures, on the other hand, often only need to meet a negligence fault standard. *See id.* at 429.

125. *Id.* at 446–47.

126. *Id.* at 447 (stating such figures "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, inviting attention and comment" (internal quotation marks omitted)).

Various tests have arisen for determining when a person is a public figure or limited-purpose public figure, including whether the person has a unique access to the media to address any defamations made against her, or whether the individual has voluntarily thrust herself into a public controversy.[127]

In determining whether a person has voluntarily assumed public scrutiny, thereby becoming a limited-purpose public figure, some courts have ruled that because the Internet is a public forum, online speakers become public figures simply because of their activity on the Internet.[128] In *Tipton v. Warshavsky*, the Ninth Circuit found a website content provider to be a limited-purpose public figure because the provider willingly thrust himself into public attention by encouraging dialogue on a website.[129] Likewise, in another case, the Minnesota Court of Appeals found limited-purpose public figure status because of the plaintiff's voluntary initiation of an online chatroom dedicated to an issue of public interest.[130] In a non-Internet case in the First Circuit, private plaintiffs who hired a public relations firm in response to a critical documentary and publicized their own response to the documentary were held to be limited-purpose public figures.[131]

In *LaChance v. Boston Herald*, the Massachusetts Court of Appeals held that a convicted felon's online dating activities were a subject of public interest, and that the convict was a limited-purpose public figure,

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127. *See id.* at 450. Of course, defining when a public controversy exists can be a difficult and uncertain process. Incidents of such controversies occur "merely if the events in question have generated widespread public interest." *Id.* at 451 (internal quotation marks omitted).

128. *Id.* at 470.

129. Tipton v. Warshavsky, 32 F. App'x 293, 295 (9th Cir. 2002).

130. Bieter v. Fetzer, No. A04-1034, 2005 WL 89484, at *3 (Minn. Ct. App. Jan. 18, 2005) (finding that statements regarding theories that Republican government officials were involved in staging a plane crash to be a matter of public interest).

131. Lluberes v. Uncommon Prods. LLC, 663 F.3d 6, 17 (1st Cir. 2011) (stating that the plaintiffs' actions "went well beyond any reasonable measure of self-defense"). Moreover, an owner of land surrounding a lake was found to be a limited-purpose public figure for purposes of a controversy regarding lake pollution—even though the owner did not voluntarily inject himself into the controversy—because the owner was charged with contributing to the pollution by not practicing erosion control. Wiegel v. Capital Times Co., 426 N.W.2d 43, 51 (Wis. Ct. App. 1988). Likewise, in *Bay View Packing Co. v. Taff*, a plaintiff was found to be a limited-purpose public figure solely because as a food producer he had a significant role in a water pollution controversy. 543 N.W. 2d 522, 531–34 (Wis. Ct. App. 1995). In *Carr v. Forbes, Inc.*, an engineer was held to be a limited-purpose public figure because he was working on a new public sewer system. 259 F. 3d 273, 282–83 (4th Cir. 2001). In addition, a physician was found to be a limited-purpose public figure because he claimed to be a co-inventor of the Heimlich maneuver and hence was seen to have thrust himself into the public spotlight. Patrick v. Cleveland Scene Pub., 582 F. Supp. 2d 939, 948 (N.D. Ohio 2008).

given the public's concern about the risks of interacting with violent felons.[132] The court suggested that its finding may have been influenced by the fact that the defendant sought to educate the public as to these risks.[133] Thus, the "good motives" of the defendant helped in converting the plaintiff to a limited-purpose public figure, which burdened his claims by imposing the actual malice requirement.[134]

While the actual malice fault standard applicable to public figures essentially amounts to a constitutional privilege, a wide array of common law qualified privileges exist, even against private figure plaintiffs.[135] When applicable, these so-called qualified privileges establish that defamation liability can only be imposed if the defendant meets the actual malice standard.[136] Qualified privileges are not based on the identity of the plaintiff, as under the *New York Times v. Sullivan* standard, but are based on the nature of the speech involved.[137] Qualified privileges are "based on the idea that the social utility of certain communications outweighs the reputational harm that may accompany their dissemination."[138]

These privileges are expansive and loosely defined.[139] They basically apply whenever a social utility or benefit can be found in the type or category of speech. For instance, because society wants to encourage communications between individuals and law enforcement agencies, a public interest privilege exists to shield suspicions expressed to police.[140] Further, because society wishes to encourage honesty and efficiency in the workplace, a common interest privilege shields statements made about the performance and employability of workers within the workplace.[141]

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132. LaChance v. Boston Herald, 942 N.E.2d 185, 188 (Mass. App. Ct. 2011).

133. *Id.* at 188–89.

134. *Id.*

135. *See* Bryson Kern, Note, *Reputational Injury Without a Reputational Attack: Addressing Negligence Claims for Pure Reputational Harm*, 83 FORDHAM L. REV. 253, 269 (2014).

136. *See id.*

137. *Id.* at 265.

138. *Id.*

139. *See id.*; DAN DOBBS ET AL., THE LAW OF TORTS § 544 (2d ed. 2019).

140. James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News- A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331, 337–38(2002).

141. For a survey of the wide array of qualified privileges, and how leniently they are applied, see generally KUTNER & REYNOLDS, *supra* note 90; see also, e.g., Theisen v. Covenant Med. Ctr., Inc., 636 N.W.2d 74, 84 (Iowa 2001) (explaining how a qualified privilege in an employment setting protects statements made about an employee's termination); Kliebenstein v. Iowa Conf. of United Methodist Church, 663 N.W.2d 404,

The Restatement (Second) of Torts lists various scenarios in which a defamatory statement might receive a qualified privilege—for example, when the speaker attempts to protect his or her own interests, or when the speaker attempts to protect the interests of a third person.[142] These categories encompass a broad spectrum of speech and have led to the creation of many different qualified privileges that impose the actual malice standard on the plaintiff.[143] The wide array of broadly encompassing interests that might support a qualified privilege range from the self-interest of the speaker and the interest of the receiver of the speech to the common interests of speaker and receiver, family and organizational relationships, and even the broader spectrum of pubic interests.[144]

While the constitutional protections found in *New York Times v. Sullivan* protect speech involving public figures and speech about public concerns, the common law qualified privileges protect speech involved in purely private disputes or matters.[145] If one of the numerous qualified privilege applies, then a plaintiff in a purely private defamation lawsuit faces the same nearly insurmountable headwinds that a plaintiff in a case involving the most prominent public leaders.[146] As one commentator has written, "it will be a rare case in which an occasion for the invocation of a qualified privilege will not be present."[147]

In the past, the common law removed a qualified privilege if a plaintiff demonstrated the defendant's ill motives in publishing the defamatory speech.[148] However, courts have increasingly moved away from a bad motive requirement and have exclusively adopted the actual malice standard, which focuses on knowledge about truth and not the speaker's motives.[149] Consequently, spite or bad motive on the part of the speaker will not by itself subject that speaker to liability.[150]

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406 (Iowa 2003) (stating that comments concerning a congregation member qualified for the common interest privilege).

142. RESTATEMENT (SECOND) OF TORTS §§ 594–98 (AM. LAW INST. 1977).

143. *See* DOBBS, *supra* note 139.

144. *See* RESTATEMENT (SECOND) OF TORTS §§ 594–98 (AM. LAW INST. 1977).

145. *See* Kern, *supra* note 135, at 265.

146. *See* Patrick J. McNulty & Adam D. Zenor, *Iowa Defamation Law Redux: Sixteen Years After*, 60 DRAKE L. REV. 365, 372–73 (2012).

147. *See id.* at 373.

148. *See* Kern, *supra* note 135, at 266; DOBBS, *supra* note 139.

149. *See* RESTATEMENT (SECOND) OF TORTS § 600 (AM. LAW INST. 1977). Some jurisdictions still require that plaintiff show the defendant had some intent to injure in order to defeat a qualified privilege. *See, e.g.*, Kuwik v. Starmark Star Mktg. and Admin., Inc., 619 N.E.2d 129 (Ill. 1993).

150. *See, e.g.*, Barreca v. Nickolas, 683 N.W.2d 111, 121–22 (Iowa 2004) (stating that spite or ill will no longer meet the required standard; only actual malice does). This

Courts have great discretion in granting qualified privileges. In *Norman v. Borison*, for instance, the Maryland Supreme Court extended a privilege to the media defendants for publishing defamatory material concerning an upcoming class action litigation.[151] Even though the reporter's privilege against defamation liability did not technically arise until the litigation had actually commenced—which it had not—the court nonetheless granted the privilege because the publication "could be seen as a tool assisting in the notification to potential class members of the contemplated proceedings."[152]

While qualified privileges provide a near impregnable defense to a wide array of defamation actions, numerous other defenses operate to further make defamation recovery very difficult for plaintiffs. For instance, only factual statements can be defamatory; opinion is not actionable.[153] Under this rule, courts have fairly wide latitude to determine whether a statement is one of opinion or one of fact, and statements of opinion are not actionable.[154]

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decision caused one commentator to remark that, at least in Iowa, the court has "effectively completed the transformation of the defamation tort from one based on strict liability and improper purpose to one based on fault." McNulty & Zenor, *supra* note 146, at 367. In abandoning the improper motive test, the court transitioned away from a defamation law that for a century had focused on defendants' motives toward plaintiffs, but that now did not look at punishing bad intent. *Id.* at 369–71.

151. Norman v. Borison, 17 A.3d 697 (Md. 2011).

152. *Id.* at 716. The plaintiff argued that the complaint circulated to the press prior to commencement of a class action, that alleged that plaintiff participated "in the single largest mortgage scam in Maryland history" defamed him. *Id.* at 701. Plaintiff argued that the privilege did not cover the publication of the complaint because the complaint had not yet been filed. *Id.* But the court took a fluid view of the elements of the privilege and found that the statements in the complaint were nonetheless made "during the course of the putative class action." *Id.* at 716. In another case, a newspaper was granted a privilege in a subsequent defamation suit after it used a document entered into the record of a murder trial to speculate that the plaintiff—who was never charged for that murder—had in fact been involved in the homicide. Piscatelli v. Smith, 35 A.3d 1140, 1144 (Md. 2012). According to the court, the privilege applied because the document was part of the official record of the trial, and hence a public record. *Id.* As this Article focuses only on common law privileges or defenses to defamation actions, it will not discuss the privileges and defenses accorded to Internet communications by the Communications Decency Act, which provides defamation immunity to online service providers. *See* 47 U.S.C. § 230(c) (2018).

153. *See* Anderson, *supra* note 116, at 1051 ("Defamation couched as satire, hyperbole, opinion, or conjecture is likely to be constitutionally protected on the ground that it is not capable of being proved true or false.").

154. *See* Eric Scott Fulcher, Note, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L. REV. 717, 750–51 (2004) (discussing the broad discretion afforded to judicial determinations concerning whether an allegedly defamatory statement is a statement of fact, opinion, or rhetorical hyperbole).

The opinion defense shields many alleged defamations published over social media.[155] For instance, because of Twitter's length limitations on posts which limits user's ability provide facts underlying accusations or criticisms, courts tend to view isolated tweets as opinions.[156] In *Feld v. Conway*, the Massachusetts District Court held a tweet qualified as an opinion after finding that the larger thread of tweets comprised an emotional debate.[157] Thus, the individual tweet was seen not as a statement of fact but as an opinion about the larger debate.[158] The court used the context of the entire chain of tweets, viewing that chain as an emotional and opinionated discourse, to turn an allegedly defamatory single tweet into an expression of opinion.[159] Somewhat similarly, in *Redmond v. Gawker Media*, the California Court of Appeals ruled that email accusations of a scam constituted opinion, in part because of the nature of the blog and its writing style.[160]

In *Finkel v. Dauber*, the New York Supreme Court found the following Facebook posts between a group of adolescent members of a secret Facebook group nonactionable because they did not contain statements of fact: the plaintiff "was seen [having sexual relations with] a

155. *See, e.g.*, Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155 (2016).

156. *Id.* at 161 ("Therefore, to determine whether the defendant's tweet was constitutionally protected opinion, a court should examine the defendant's entire string of tweets and the tweets to which she was responding.").

157. Feld v. Conaway, 16 F. Supp. 3d 1, 4 (D. Mass. 2014).

158. *Id.*

159. *See id.*

160. Redmond v. Gawker Media, LLC, No. A132785, 2012 WL 3243507, at *4–7 (Cal. Ct. App. Aug. 10, 2012). According to the court, the "casual first-person style" of the posts portrayed "little pretense of objectivity." *Id.* at *6. Finally, the placement of hyperlinks throughout the posts also contributed to a finding of opinion, since the use of those links invited readers to draw their own conclusions. *Id.* Likewise, other courts have suggested that the casual nature of various social media sites supports findings that statements made are opinion rather than fact. In *Giduck v. Niblett*, the court ruled that statements were opinions, based on their "content, tone, and context" and that the Facebook posts were "subjective judgments expressed in 'imaginative and hyperbolic terms' which neither contain nor imply verifiable fact." 408 P.3d 856, 868 (Colo. App. 2014). And in *Rochester City Lines, Co. v. City of Rochester*, the court stated that the context of the posts "was inherently informal," which led to categorizing them as "opinion and hyperbole, and not statements of fact." 846 N.W.2d 444, 466 (Minn. Ct. App. 2014). Yet, while courts may tend to find that social media posts are mere opinions, the typical social media defendant may be more prone to publish defamatory material. Lidsky & Jones, *supra* note 155, at 174 ("The typical social-media defendant is less likely to carefully analyze primary sources before publishing . . . [and] has no fact-checker, editor or legal counsel and is less likely than institutional-media publishers to have either special training in gauging the credibility of sources or professional ethics that prize accuracy over speed.").

horse," "acquired AIDS while on a cruise to Africa," contracted HIV and other sexually transmitted diseases from "a male prostitute" and "from sharing needles with different heroin addicts," which was "[so] bad that she [morphed] into[] [t]he devil."[161] As the court stated, "The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor."[162]

Even outside social media, the opinion versus fact issue has proved a difficult one for defamation plaintiffs to overcome. A radio program host's accusations of an acquitted defendant as a "cold-blooded" murderer, occurring during a program focused on the high-profile murder case, was held to be nonactionable opinion.[163] The New York Supreme Court Appellate Division ruled that, as a matter of law, these statements—while "harsh and intemperate"—were nonetheless opinions because the statements occurred during a combative and emotional radio show debate on a notorious crime case.[164]

According to the court, the radio show "used a call-in format and generally provided a forum for public debate on newsworthy topics, and his statements were made during an on-air debate with his listeners regarding plaintiff's culpability and whether the jury had properly acquitted plaintiff."[165] Thus, to this court, the more emotional, heated, and controversial the setting, the more likely a defamation would occur and the more likely the allegedly defamatory statements will be judged as protected opinion.[166]

Courts have also held that website comments accusing plaintiffs of waging fraudulent litigation in the auto finance industry were protected

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161. Finkel v. Dauber, 906 N.Y.S.2d 697, 700 (N.Y. Sup. Ct. 2010).

162. *Id.* at 702.

163. Gisel v. Clear Channel Commc's, Inc., 942 N.Y.S.2d 751, 752 (N.Y. App. Div. 2012) (stating that the host also claimed that the death of the victim "could not have been an accident").

164. *Id.* at 752–53. The court stated that the defendant's statements could not be objectively proven true or false. *Id.* at 753. To reach its conclusion as to the opinion privilege, the court applied a four-part test promulgated in *Steinhilber v. Alphonse*: 1) whether the language has a precise, readily understood meaning; 2) whether the statement could be objectively characterized as provably true or false; 3) the context of the statement; and 4) the broader social context of the communication. *Id.* at 752; Steinhilber v. Alphonse, 501 N.E.2d 550, 554 (N.Y. 1986). A similar four-factor test articulated in *Ollman v. Evans* directs a court to consider: 1) whether the words as commonly used have a meaning that expresses a specific meaning; 2) whether the statement was verifiable; 3) whether the context in which the statement appeared colored the understanding of the statement; and 4) whether the social context in which the statement appeared transformed readers' perception of literally factual assertions. Ollman v. Evans, 750 F.2d 970, 979–84 (D.C. Cir. 1984).

165. *Gisel*, 942 N.Y.S.2d at 753.

166. *Id.*

opinions.[167] The Eastern District Court of New York labeled these accusations as "rhetorical opinions rather than facts" because the accusations were "full of qualifiers—such as 'reputation,' 'word of the street,' and 'whispered'—which make clear that her statement is one of opinion."[168] The court likened the site's comments sections to the Letters to the Editor section of a newspaper.[169]

In addition, in *Prince v. Fox Television Stations, Inc.*, a reporter's false description of the caloric and sugar content of ice cream still was protected opinion because the reporter's repeated disclosure of the nutritional content of the ice cream allowed the reader "to reach his or her own opinion regarding the health of the product."[170]

Under the opinion rule, slurs and insults, no matter how harmful—are not actionable. Courts have held that the pejorative uses of terms like "bully," "moral crusader," and "corrupted" all fall under the opinion umbrella because none of these terms or characterizations can be objectively proven.[171] In *Daniels v. Metro Magazine Holding Co.*, the court found that an article about the author's experience with an insurance adjuster, stating that the adjuster "hinted that I had stolen my own car," was an "expression of outrage," and hence an opinion.[172]

Similarly, negative statements made about a lawyer's handling of a case have been ruled as opinions, given that such statements are not susceptible to objective proof.[173] Accusations that a doctor gives "excessive" treatment are also not subject to objective proof and are thereby statements of opinion.[174] Other statements that courts have ruled cannot be objectively proved or disproved include: the portrayal of a public official's negotiating style as "legalized blackmail;"[175] a claim

167. Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC, 151 F. Supp. 3d 287, 290 (E.D.N.Y. 2015).

168. *Id.* at 294.

169. *Id.* at 295 n.1.

170. Prince v. Fox Television Stations, Inc., 137 A.D.3d 486, 488 (N.Y. App. Div. 2016).

171. *See* Klein v. Victor, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995); Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1216 (D. Md. 1993); Hupp v. Sasser, 490 S.E.2d 880, 887 (W. Va. 1997); *see also* Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 129–30 (1st Cir. 1997) (ruling that a description of a store as "trashy" was an unactionable opinion because trashy "possesses a multitude of fairly ascribable meanings" and hence did not have an easily ascertainable and objectively verifiable meaning).

172. Daniels v. Metro Magazine Holding Co., 634 S.E.2d 586, 591–92 (N.C. Ct. App. 2006).

173. Partington v. Bugliosi, 56 F.3d 1147, 1157 (9th Cir. 1995).

174. Woodward v. Weiss, 932 F. Supp 723, 726 (D.S.C. 1996).

175. Fasi v. Gannett Co., 930 F. Supp. 1403, 1410 (D. Haw. 1995).

that someone "was not a fit mother;"[176] and an accusation that a business "denigrated" the building it occupied.[177]

As the case law demonstrates, the opinion category has a broad scope, and courts have great discretion in their capacity to dismiss defamation actions on the basis of protected opinion.[178] In addition, the wide array of qualified privileges and the constitutional privilege of *New York Times v. Sullivan* have the effect of removing a defamation action as a means of recovery for many potential or actual plaintiffs.[179] At a time when defamations are occurring more widely and immediately through the Internet, the legal recourse seems to be diminishing. Reputation, like privacy, is becoming more threatened. Just as newsworthiness insulates many privacy invasions from legal recourse, so too does opinion and qualified privileges insulate many attacks on reputation.

Particularly with respect to defamations published over the Internet, speaker anonymity makes defamation recovery even more difficult. Courts have recognized that the anonymity made possible by the Internet often opens the door to defamations, the effects of which spread much faster and farther than with more traditional media.[180] When a John Doe lawsuit is commenced because of an anonymous defamation, courts have developed various tests to determine whether to order the Internet site where the speech appeared to disclose the identity of the speaker.[181] These tests attempt to balance the freedom to speak anonymously with

176. Ireland v. Edwards, 584 N.W.2d 632, 637–38 (Mich. Ct. App. 1998).

177. 600 W. 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 936 (N.Y. 1992). A defendant's statements that plaintiff was an "uncompromising, vengeful and often tyrannical 'symbol' of the conservative movement" were held to be opinion. Weyrich v. The New Republic, 235 F.3d 617, 620 (D.C. Cir. 2001). A radio talk show host's descriptions of local restaurant owners as "pigs" and "unconscionably rude and vulgar people" were also held to be opinion. Pritsker v. Brudnoy, 452 N.E.2d 227 (Mass. 1983). And a defendant's use of terms like "rotten" and "unethical" and "sometimes illegal" to describe activities of plaintiff, whose agents were also described as "crooks" and "liars," was held to be protected opinion. Lauderback v. Am. Broad. Cos., 741 F.2d 193 (8th Cir. 1984).

178. *See* Fulcher, *supra* note 154, at 750–51.

179. Kern, *supra* note 135, at 265–69.

180. Bryce Donohue, Note & Comment, *Independent Newspapers, Inc. v. Brodie: Maryland's Precarious Balance Between Internet Defamation and the Right to Anonymity*, 6 J. BUS & TECH. L. 197, 206–207 (2011). By allowing speakers to anonymously communicate instantly with large numbers of people, the Internet "may also lead to abuses and conversations that resemble little more than verbal mud-slinging." *Id.* at 207. The 'anything goes' nature of the Internet can resemble a "frontier society free from the conventions and constraints that limit discourse in the real world." *Id.* at 206.

181. *See* Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

the interest in protecting reputation.[182] Although the tests might seem straightforward, a plaintiff seeking to unmask an anonymous defamer faces an uphill battle.[183] And, if the plaintiff does not discover the identity of the anonymous source, no defamation remedy will be available.[184]

The legal barriers to unmasking an anonymous source arise because of judicial hesitancy to interfere with the Internet—where freedom of anonymous speech is essential to maintaining a vibrant forum for public discourse.[185] According to one commentator, courts have been consistently reluctant "to allow expansive encroachments on online anonymity."[186]

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182. *See id.* The court employed a four-part test to effectuate this balance. *Id.* at 760–61. First, the plaintiff must attempt to notify the anonymous sources that a lawsuit has been started, giving them a chance to respond. *Id.* at 760. Second, the plaintiff must identify the precise statements alleged to be defamatory. *Id.* Third, the plaintiff must establish a prima facie case against the anonymous source. *Id.* Finally, the court must balance the source's speech rights against the necessity of disclosure and the strength of the prima facie case. *Id.* at 761.

Additionally, the Delaware Supreme Court, concerned about protecting anonymous speech, required plaintiff to satisfy a summary judgment standard. Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Del. 2005). Thus, the *Cahill* court used a variation of the *Dendrite* test, utilizing the first and third prongs, requiring the plaintiff to make reasonable efforts to notify the defendant and to satisfy the summary judgment standard. *Id.* at 461. Some courts, recognizing the difficulty a plaintiff might have in notifying the defendant, do not require that plaintiffs meet the first prong of the *Dendrite* test. Donohue, *supra* note 180, at 208.

183. Bryant Storm, *The Man Behind the Mask: Defamed Without a Remedy*, 33 N. ILL. U. L. REV. 393, 402 (2013).

184. The Communications Decency Act provides immunity to the Internet service provider over whose network the defamation occurred. *See* Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997).

185. Donohue, *supra* note 180, at 203; *see also* Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 502–03 (2013) (stating the "Internet has made anonymity seem like an entitlement" and "anonymity has been a longstanding attribute of the Internet").

186. Choi, *supra* note 185, at 508. Section 230 of the Communications Decency Act immunizes any "interactive computer service" from liability for third-party defamations, and as a result of this immunity, "it has become exceedingly easy to publish offensive statements online, and exceedingly difficult to expunge them from the record once they are posted—a problem that is further compounded by the Internet's broad reach." *Id.* at 530–32.

IV. THE VALUE OF PRIVACY TO DEMOCRATIC SOCIETY

A. The Conflict with Speech

A concern for and value of reputation has existed for centuries, while that of individual privacy is a much more modern concern initiated by the expanded intrusions of an ever-larger central government and data-collecting social media corporations.[187] Nonetheless, judicial prioritization of speech has eroded both defamation and privacy torts.

The First Amendment protects speech rights vis à vis the government, and in both the privacy and defamation areas, the Court has issued constitutional rules that govern certain aspects of these torts—e.g., the *New York Times v. Sullivan* actual malice rule pertaining to defamation suits brought by public figures.[188] However, this Article does not aim to discuss the constitutional rules regarding defamation and privacy torts. Instead, the Article only focuses on the common law aspects.

Even in these aspects, where the First Amendment does not apply, a concern for free speech trumps concerns for reputation and privacy, as reflected in the newsworthy privilege in privacy law and the wide array of qualified privileges in defamation law.[189] These privileges are not constitutional mandates or rules nor do they flow from the First Amendment.[190] They instead are a product of common law and a judicial concern with crafting privacy and defamation torts that do not exert a chilling effect on perceived important speech interests.[191]

With defamation torts, the First Amendment requires a showing of actual malice by a public figure plaintiff; but, the actual malice requirement for a common interest qualified privilege does not arise from the First Amendment—it is a creation of the common law.[192] Likewise, the newsworthy defense in privacy cases is not a First Amendment mandate; it is a reflection of the judicial concern that privacy interests should not put a chilling effect on reporting matters of public interest.[193]

In the creation of these various common law privileges pertaining to privacy and defamation actions, the courts have given primacy to certain broad categories of speech in any conflict with privacy or reputational

187 *See* Solove, *supra* note 68, at 1100–02.
188. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).
189 *See supra* Part III.
190 *See supra* Part III.
191 *See supra* Part III.
192. *See N.Y. Times*, 376 U.S. at 279–80.
193. *See* Stone, *supra* note 85, at 192.

interests.[194] This primacy stretches back to Justice Holmes' "free trade in ideas" metaphor articulated in his *Abrams* dissent; specifically, that free speech is a vital foundation to the structure of democratic society.[195] While this Article will not dispute that view, it will seek to demonstrate that privacy and reputation are also vital pillars. Frequently, privacy and reputation are cast as purely individual interests, but as this Article will argue, privacy and reputation also provide essential foundations for a true and stable democracy.

B. The Narrow View of Privacy

In recent decades, a shallow view of privacy has have taken hold. Only a transactional or consumer view of privacy has often been asserted in connection with some particular issue (e.g., health care, employment, or voting) or some aspect of communications technology (e.g., social media's selling of user data). Reflecting this consumer view of privacy, the means taken to protect privacy interests involved are done so to reassure consumers in their continued participation in the service or purchase of the product.[196] In a way, the privacy measures taken serve the technology entities more than the individual because the measures are taken to perpetuate the individual's role as a consumer. This consumer or transactional view of privacy also tends to flow from a more materialistic or utilitarian view of the individual, seeing the individual as a necessary cog in the wheels of modern technology and consumer economics.

Aside from these narrow consumer or transactional views of privacy, there are deeper views that connect privacy to individual dignity and the kind of social relations a healthy democracy needs.[197] An array of justifications has been offered for a right of privacy, ranging from individual needs of autonomy, dignity, and self-actualization to privacy as an essential need for social and professional relationships and a

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194. *See supra* Part III.

195. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *New York Times v. Sullivan*, the Court emphasized, as a value transcending reputation, the public's ability to criticize public officials and the right of the public to engage in a vigorous discussion of public affairs. *N.Y. Times*, 376 U.S. at 268, 273, 275, 279, 282. The actual malice requirement was seen as necessary to protect the duties of the "citizen-critic of government." *Id.* at 282. For a discussion of Holmes' marketplace metaphor, see Patrick M. Garry, *Oliver Wendell Holmes and the Democratic Foundations of the First Amendment*, *in* GREAT JUSTICES OF THE U.S. SUPREME COURT (1993).

196. *See* Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 151 (2010) (describing privacy as a "purchasable commodity: as with other products, individuals have varying preferences and abilities to pay for more or less privacy").

197. *See generally* Solove, *supra* note 68, at 1087.

healthy and vibrant democratic community.[198] But there is little agreement among privacy scholars about which theory or justification to adopt. As Professor Daniel Solove has noted, privacy is a "concept in disarray" immersed within a "conceptual jungle."[199] Privacy can be a subjective and ambiguous philosophical notion, with few universal rules or norms.[200] As Judith Jarvis Thomson once noted, "[p]erhaps the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is."[201] Therefore, privacy is not amenable to a simple and easy set of rules and proscriptions.[202]

In their 1890 article urging for the formal recognition of a right to privacy under common law, Warren and Brandeis described it as the right to be let alone.[203] While previous commentators had written of privacy as a protection against the government, Warren and Brandeis focused on privacy intrusions from private actors armed with the latest technological innovation of the day: the camera, which made it much easier and cheaper to reproduce and publish people's images.[204] Warren and Brandeis were reacting to the technological changes and journalism practices of the time, which were changes and practices that in many ways previewed the conditions of modern society.

C. Privacy and Individual Sovereignty

This conception of privacy—the right to be let alone—reflects the basic type of liberty found in the various provisions of the Bill of Rights: a negative liberty creating a wall of protection against government

198. *Id.* at 1099–1121. Solove lists six ways to understand privacy: 1) a right to be let alone; 2) a measure of self-autonomy; 3) a means of maintaining secrecy or concealment of discreditable information; 4) control over one's personal information; 5) a means of achieving personhood and protecting dignity; and 6) a means of intimacy and facilitation of relationships. *Id.*

199. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 196 (2008).

200. DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 77 (1998).

201. Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975).

202. Anita L. Allen, a privacy expert, lists an array of values and purposes privacy serves: self-expression, good reputation, repose, intellectual life, intimacy, formality, civility, human dignity, limited government, toleration, autonomy, and individualism. Anita L. Allen, Lecture, *What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure*, 25 ST. THOMAS L. REV. 1, 5–6 (2012). However, some technology theorists writing about privacy "are dismissive of privacy [and] . . . find it annoying." *Id.* at 5. "They see it as a dead, unwanted value." *Id.*

203. Warren & Brandeis, *supra* note 48, at 205.

204. Ignacio N. Cofone & Adriana Z. Robertson, *Privacy Harms*, 69 HASTINGS L. J. 1039, 1045 (2018).

intrusion.[205] However, rather than simply seeing privacy as a freedom from government intrusion, later views of privacy envisioned privacy as a trait that enabled individual independence and self-determination and understood that privacy could be threatened by the government, the media, or private technologies.[206] Privacy may be a necessary means to create the conditions for the individual's freedom to fully develop as an autonomous person.[207] This view closely resembles the dignity view of privacy, which sees privacy as promoting individual dignity and self-definition.[208]

Privacy can be characterized as "control over one's personal information"; this characterization sees privacy not as the absence of personal information in the public marketplace, but as the control that an individual has over their personal information.[209] Under this view, privacy becomes the freedom to choose what we become, how we interact with the world, and what we do with our lives.[210]

Some see privacy as essential to self-identity, while others view privacy as defining the boundaries between private and social life.[211] Privacy can shield information that can create and exploit vulnerability; and in this way, privacy can "minimize the exploitation and rendering of vulnerability by hiding the vulnerability itself . . . or by protecting the information that, if known, would render us vulnerable in the moment."[212] Thus, privacy can help shield the individual from discrimination or social ostracizing that might occur if his or her privacy were invaded.[213]

These views of privacy all envision that privacy must be protected in both the private and public sector, both in connection with government intrusions and private intrusions through technology and information collection.

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205. *See generally* U.S. CONST. amend. I–X.

206. Cofone & Robertson, *supra* note 204, at 1045–46.

207. *Id.* at 1045 (stating that this conception of privacy required secrecy, anonymity, and solitude, each of which was jointly necessary and sufficient for privacy).

208. *See* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 165–70 (2015).

209. Cofone & Robertson, *supra* note 204, at 1046.

210. *Id.*

211. *Id.* at 1046–47.

212. Ryan Calo, *Privacy, Vulnerability, and Affordance*, 66 DEPAUL L. REV. 591, 595 (2016).

213. Skinner-Thomson, *supra* note 208, at 175–76.

D. Privacy and Democratic Society

Robert Post views privacy in a broad context, as something seeking to safeguard certain civility norms and cultural standards.[214] Privacy may be an important means for a society to achieve the Declaration of Independence's "pursuit of happiness."[215] The individual "time and space to be free with their own thoughts" may be a prerequisite for the happiness that any healthy society would want for its members.[216]

Another somewhat related and yet quite fluid view sees privacy not in terms of individual traits such as autonomy or solitude, but in terms of relationships of trust among individuals and between individuals and institutions.[217] Under this view, the way to protect privacy is to protect relationships of trust.[218]

Unlike the view of privacy as the right to be let alone, this view of privacy as trust is not a rights-based view, nor does it put the individual "as the locus of privacy rights," seeing individual freedom as the ultimate goal of privacy.[219] A privacy-as-trust view does not use privacy rights to achieve individual seclusion or retreat from the world. Instead, it sees privacy as empowering us "to do things and maintain relationships we would not otherwise be able to in a world of complete knowledge."[220] Privacy "involves our relationship to society, not our departure from it."[221] Therefore, privacy does not separate people from society, but rather enables and empowers individuals to cooperate with others and build stronger social institutions.[222]

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214. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959–86 (1989); Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 601, 624, 634 (1990) (characterizing common law torts as addressing harms caused by uncivil behavior and protecting "'generally accepted standards of decency and morality' that define for us the meaning of life in a 'civilized community'" (citation omitted)).

215. Adam Thierer, *The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARV. J. L. & PUB. POL'Y 409, 416 (2013).

216. *Id.*

217. Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 561 (2015) ("[W]e retain privacy rights . . . in contexts of trust . . . [and] what makes expectations of privacy reasonable are expectations of trust.").

218. *Id.* at 564.

219. *Id.* at 567.

220. *Id.* at 577.

221. *Id.* at 591, 595–99 ("[A] private context is a trusting context. . . . [and] invasions of privacy are based on erosions of expectations of trust.").

222. *Id.* at 601–03, 611–12 ("On the micro level, social interaction with strangers can help the unemployed find jobs, expand opportunities for love, and create successful and

Finally, privacy is very much tied to the goal of limited government set out in the U.S. Constitution.[223] While the constitutional principle of limited government operates on the political level (acting as a check on the power and activities of the various branches of government), privacy operates on an individual level, creating a realm in which the individual is free to live outside the encroachment of government. Privacy emanates from the individual, limiting the power of the state and further reinforcing the structural provisions of the Constitution that seek to do the same.[224] In this respect, privacy becomes an essential tool in maintaining limited government.[225] It becomes even more essential when we consider that recently, "the boundaries between the private and public realms have been greatly diminished, both in general and in matters concerning privacy in particular."[226]

Privacy also contributes to limited government insofar as privacy "is essential for political dissent," and hence an important means for individuals to resist the unwanted reach of government.[227] Even more generally than serving the cause of limited government, privacy facilitates democratic action by "creating space for the formation and nurturing of political thought."[228] As Professor Griffin notes, "[If] our deliberation and decisions about how to live were open to public scrutiny, our imperative for self-censorship and self-defense would come feverishly into action."[229] Indeed, "[a]utonomy is a feature of deliberation and decision."[230]

The privacy-as-precursor-to-constitutional-democracy and the privacy-as-trust arguments, as well as many of the other views and arguments set forth above, reveal the broader and more complex dimensions of privacy. Under the rights-based view first articulated by Warren and Brandeis, privacy was seen as an individual interest.[231] But

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enduring affiliations. . . . On a macro level, it encourages tolerance, it socializes young people to the wider world, and it educates in areas that classroom study cannot.").

223. For a discussion of limited government in the U.S. constitutional scheme, see PATRICK M. GARRY, LIMITED GOVERNMENT AND THE BILL OF RIGHTS 19 (1st ed. 2012).

224. James P. Nehf, *Recognizing the Societal Value in Information Privacy,* WASH. L. REV. 1, 71 (2003).

225. *See id.*

226. Amitai Etzioni, *A Liberal Communitarian Conception of Privacy*, 29 J. MARSHALL J. COMPUT. & INFO. L. 419, 458 (2012).

227. *Id.* at 460.

228. Skinner-Thomson, *supra* note 208, at 162.

229. James Griffin, *The Human Right to Privacy*, 44 SAN DIEGO L. REV. 697, 700 (2007).

230. *Id.* at 701–02 ("There are a few people courageous enough or self-confident enough, or just exhibitionist enough, to thrive in full public gaze.").

231. *See* Warren & Brandeis, *supra* note 48.

as Daniel Solove argues, "framing privacy in individualistic terms risks undervaluing it."[232] According to Solove, "to fully capture the privacy harms suffered by individuals, we must demonstrate the benefits to society of rectifying them."[233]

Privacy may well be a social interest, not solely an individual interest, because privacy interests and values affect the nature of social interaction. Therefore, as Solove implies, without understanding the role of privacy in social life and institutions, our laws and practices may fail to sufficiently protect it in all the various ways it needs protection.[234]

Because of the social value of privacy, its weight should be increased when set against interests of free speech in privacy common law. Newsworthiness has become a near absolute defense to invasions of privacy; this newsworthiness defense is really a free speech defense.[235] Because this Article only focuses on the common law of privacy and defamation, it will not argue for any change in constitutional principles or for an establishment of new constitutional rights regarding privacy. Moreover, the Article will not argue that the social value of privacy should trump free speech in every constitutional equation. This Article only argues that insofar as the common law is concerned, the social and public sides of privacy should factor into the determination as to whether newsworthiness should exert the superseding effect it often does over privacy interests.[236]

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232. Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1113 (2010) ("Individual privacy harms generally fare poorly when weighed against society's interest in national security, law enforcement, or free speech. . . .").

233. *Id.*

234. *See id.*

235. *See* Stone, *supra* note 85, at 192.

236. This footnote will only very briefly highlight various constitutional aspects of privacy. Although privacy is never mentioned in the Constitution, several provisions in the Bill of Rights cover aspects of privacy. Roe v. Wade, 410 U.S. 113, 152 (1973).

The Third Amendment encompasses privacy for the home, stating that no "soldier shall, in time of peace, be quartered in any house, without the consent of the owner. . . ." U.S. CONST. amend. III. The Fourth Amendment, with its protections of reasonable expectation of privacy of person and possessions, states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV; *see Katz v. United States*, 389 U.S. 347, 361–2 (1967) (articulating the reasonable expectation of privacy). The Fifth Amendment addresses privacy of thoughts, information, and beliefs from compulsory government invasion, stating:

> [n]o person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury[;] . . . nor shall be compelled in any criminal case to be a witness against himself[;] nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The Fourteenth Amendment contains what the Supreme Court has recognized as a substantive due process right to privacy. U.S. CONST. amend. XIV, § 1. *See generally*. Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas statute on the ground that it violated the defendant's substantive due process right to privacy and holding that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

The First Amendment also contains privacy provisions. *See* U.S. CONST. amend. I. For instance, in *Stanley v. Georgia*, the United States Supreme Court relied on a notion of privacy when it ruled that a person had a right to view obscenity in the privacy of his own home. 394 U.S. 557 (1969). The First Amendment also protects associational privacy (e.g., protecting forced disclosures of group membership lists) as well as intellectual privacy (e.g., the freedom of thought and the freedom to teach). *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that freedom of association includes the freedom to exclude others from membership or participation in private groups); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding that the First Amendment protects the right of anonymous speech); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (holding that associational rights are protected by the First Amendment); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 466 (1958) (holding that the freedom of association includes the freedom to keep membership lists confidential).

The Supreme Court ultimately did find a limited constitutional right to privacy in *Griswold v. Connecticut*, where the Court held that a law prohibiting the use and dissemination of birth control violated the Fourteenth Amendment right to privacy. 381 U.S. 479, 485 (1965) The Supreme Court relied on a newly articulated right of privacy, arising out of the "penumbra" of the Bill of Rights, in striking down a Connecticut law criminalizing the use of contraception by married couples. *Id.* at 483. Although the Court conceded that there was no specific mention in the Constitution of a right of privacy, it held that various provisions of the Bill of Rights created "zones of privacy." *Id.* at 484.

In *Roe v. Wade*, the Supreme Court held that a right of privacy protected a women's choice to obtain an abortion, and that this right of privacy is contained in the due process clause of the Fourteenth Amendment. *Roe*, 410 U.S. at 154. In *Lawrence v. Texas*, the Court struck down a criminal statute penalizing homosexual sexual activity. *Lawrence*, 538 U.S. at 578. Although usually considered a liberty or substantive due process case, *Lawrence* can also be seen as a privacy case, protecting sexual conduct between consenting adults within one's private home. *See id.* ("The petitioners are entitled to respect for their private lives."). In *Obergefell v. Hodges*, the Court held that the right to choose whom to marry was a private decision that could not be dictated by government. 135 S. Ct. 2584, 2604–05 (2015). Privacy considerations also played a role in *Loving v. Virginia,* which struck down interracial marriage restrictions. 388 U.S. 1 (1967).

The United States Supreme Court has never ruled that a constitutional right to informational privacy exists. For a discussion of cases that presented such an issue to the Court, see Skinner-Thompson, *supra* note 208, at 177–84; *see also* Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L. J. 135, 150–51 (2018) (arguing for a constitutional right of informational privacy, finding that the U.S. Supreme Court's decision in *Whalen v. Roe* provides one of the strongest opinions in favor of recognizing such a right (citing Whalen v. Roe, 429 U.S. 589 (1977))). Even though the Court upheld a New York statute requiring the collection of a doctor's drug prescriptions against a privacy challenge by patients, the Court appeared to recognize that the

V. THE SOCIAL VALUES OF REPUTATION

A. The Roles of Reputation

The common law of defamation seeks to protect reputation from the false and injurious statements of others. Speech interests have in many respects downgraded defamation to a tort that rarely offers a meaningful remedy for reputational harm.[237] This may result not only from an overvaluing of speech, but also from an undervaluing of reputation.

Reputation becomes how the outside community views the identity of the individual. Reputation is the means by which individuals are defined by the world around them.[238] But similar to privacy, reputation has both individual and social aspects—although reputation is more socially-based because reputation is not self-determined but community-determined.[239]

Just as privacy can make for a more healthy society, reputation paves the way for free and cooperative social interaction because it "allows us to make assessments about individuals . . . we cannot directly observe."[240] Modern social systems depend on individuals' ability to deal with others whom they have never met, and reputation becomes the

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Fourteenth Amendment might include a constitutional right to informational privacy. *See Whalen*, 429 U.S. 589; Pittman, *supra,* at 151–53.

237. The actual malice fault standard, applicable as a constitutional rule in public figure defamation actions and as a common law rule pertaining to qualified privileges, makes it virtually impossible for a plaintiff to prevail. A primary concern for protecting speech underlies this actual malice rule. In articulating the constitutional actual malice standard in *New York Times v. Sullivan*, the Supreme Court did not want public officials to chill debate and discussion of public issues by threatening their opponents with defamation lawsuits. 376 U.S. 254, 271–72 (1964). However, the Court has leaned toward protecting reputation in certain limited circumstances. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court did not require the plaintiff to establish actual malice in defamation actions involving a private figure plaintiff when they involve only statements of private concern. 472 U.S. 749, 760 (1985).

238. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 264 (2010) ("Reputation plays an integral role in how others see us and how we see ourselves in the world.").

239. Though reputation involves how a person is perceived by the outside world, privacy torts have involved the right to be let alone and to lead a life separate from the outside world. Contrary to privacy actions, defamation suits do not focus on the effect of the statements on the plaintiff; instead, the focus is on the effect of the defendant's statements on the plaintiff's community. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 6 (1996).

240. Ardia, *supra* note 238, at 264, 273 (noting that reputation allows for complex social arrangements to occur and acts "as a form of 'social currency'").

means by which distant and diverse peoples can know and cooperate with each other.[241]

The courts have found it difficult to define reputation; the common law has not even attempted to define it.[242] Courts have demonstrated "relatively little discussion of the nature and importance of 'the State's interest' in protecting reputation."[243] However, in an effort to understand reputation, Robert Post has outlined three different views of reputation.[244] These views see reputation as honor, dignity, and property.[245]

Reputation as a reflection of honor is the oldest view of reputation.[246] It stretches all the way back to feudal England, which defined honor as an array of normative traits.[247] Honor had its basis in moral and religious principles—principles that contributed to character—and was used in defamation cases before the ecclesiastical courts of early England.[248]

While honor is helpful in understanding the early history and evolution of defamation, it was more prominent in defining reputation in those previous honor-based societies, including the pre-Civil War United States.[249] Honor as a measure or reflection of reputation is less useful in diverse modern societies that have abandoned any consensus on traits or virtues that might make up what was once called honor.

Post's second view of reputation involves dignity.[250] The notion of dignity possesses a communal or social foundation.[251] Thus, dignity involves "the aspects of personal identity that stem from membership" in

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241. *Id.* at 267 ("This reputational information is distinguishable from other behavioral cues in that it allows third parties—who have had no previous involvement with the original parties—to make assessments about the characteristics (e.g., honesty, skill, kindness) of others.").

242. *Id.* at 265. And yet, "as more and more activity is conducted on the Internet, reputation will further increase in importance as a means of communicating complex social information." *Id.* at 277.

243. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 692 (1986).

244. *Id.* at 693–719.

245. *Id.*

246. *Id.*

247. *See generally* Pat O'Malley, *From Feudal Honour to Bourgeois Reputation: Ideology, Law and the Rise of Industrial Capitalism*, 15 SOC. 79 (1981).

248. *See* Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J. L. & ARTS 17, 25 (2011).

249. Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 103–04 (2009).

250. Post, *supra* note 243, at 693–719.

251. *Id.* at 711 (arguing that individual dignity arises from a society's "rules of civility," through which society protects the dignity of its members).

a community defined by its rules of civility, which defamation law in turn seeks to enforce.[252]

The dignity view fixes the meaning of reputation largely in social or communal terms, making reputation reliant on a relationship between social decorum and an individual's reputational identity.[253] Because membership in society is defined by "rules of civility," a breach of those rules devalues social membership and, hence, dignity.[254] Therefore, because dignity arises from social membership, and reputation is equated with dignity, reputation rests on a social foundation.[255]

However, because civility rules may evolve over time as society changes, the dignity model of reputation can be uncertain. Moreover, if civility rules change to the point of essentially disappearing, then the dignity view of reputation loses much of its meaning. This in fact may be occurring in contemporary America, amidst the constant barrage of complaints about the disappearance of civility and social courtesy. Indeed, the dignity view may implicitly assume a relatively stable, static, and homogenous society—one that forms and adheres to shared uniform civility rules, but one that might not characterize contemporary America.[256]

The third view of reputation equates it to property.[257] According to Post, under this view, reputational harm is "determined by the marketplace in exactly the same manner that the marketplace determines the cash value of any property loss."[258] This view of reputation resembles intellectual property, as if reputation is personal property that the holder builds and maintains through personal labor and investment.

Unlike the dignity view, the property view incorporates more of an individualistic identity, envisioning individuals competing in the

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252. *Id.* at 715.

253. *Id.*

254. *Id.* at 711; s*ee also* Mitnick, *supra* note 249, at 105 ("[S]ince reputational harm as a breach of civility degrades communal membership, and communal membership constitutes individual identity, then individual dignity suffers too in the event of reputational harm.").

255. *See* Post, *supra* note 214, at 711, 716. Because rules of civility mark social boundaries, with society depending on those rules and on the individual possessing dignity due to their membership in that society, then reputational harm occurs when those rules are violated—giving rise to an action for defamation. *Id.*

256. *See* Lidsky, *supra* note 239, at 38.

257. Post, *supra* note 243, at 693–719.

258. *Id.* at 694; *see also* Mitnick, *supra* note 249, at 102 (explaining that the "conception of reputation as property thus invites thoughts of atomized individuals, functioning in a market economy, seeking to protect a particular social vision of themselves which they have endeavored to construct").

marketplace with the reputations they have created.[259] This view of reputation has less social grounding than the other two views; however, it does rely on a properly functioning marketplace in society to create and maintain reputational value.

B. Reputation and Community

Defamation requires a statement that injures plaintiff's reputation "in the estimation of the community."[260] Thus, the issue arising in defamation actions is how to identify the relevant community. However, courts have provided little guidance on this issue, and the Restatement simply directs that the designated community to be "substantial and respectable."[261] The "substantial and respectable" designation leaves much discretion to the court.

Communities were much easier to define when they were measured in geographic terms and characterized by little or no mobility. A small town in which a person lived their whole life was an easy community to define. However, in a highly mobile society with a great deal of human interactions taking place over the Internet, community becomes a highly fluid and unknown concept.

Professor Lidsky's "myth of community" seems highly relevant in the current age. Lidsky's myth is the idea that a community of "like-minded individuals" with "similar values and norms" really does exist.[262] Contrary to this myth, according to David Ardia, "our networked society is comprised of countless communities and subcommunities, many of which are 'diffuse, sparsely knit, with vague, overlapping, social and spatial boundaries."[263] As Ardia notes:

> Throughout human history the scope of an individual's reputation was defined by physical geography and the limits of communication technology. With the introduction of low-cost

259. *See* Post, *supra* note 243, at 695 (stating that under the property conception of reputation "individuals are connected to each other through the institution of the market"). Robert Bellah suggests that the property view of reputation is an individualistic view "rooted in our cultural emphasis on the autonomy, independence, and achievements of individuals." Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 743 (1986).

260. RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community. . . .").

261. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (AM. LAW INST. 1977).

262. Lidsky, *supra* note 239, at 38.

263. Ardia, *supra* note 238, at 302 (noting "we are likely to be members of multiple communities").

> global communication systems such as the Internet, identity and reputation are increasingly being decoupled from physical space. In addition, the ubiquity of cheap cameras and Internet-enabled video is blurring the line between public and private behavior. As a consequence, our reputational spheres are expanding coincident with the reductions in privacy we are experiencing in the online and offline worlds. Powerful search technologies coupled with commercial databases that unrelentingly collect, aggregate, and distribute information about us . . . are extending public scrutiny into areas that have traditionally been private.[264]

This reality of community has done much to render defamation law incapable of truly remedying reputational injury in the contemporary United States of America.[265]

Regardless of how current defamation law is suited to the realities of the modern communications world, reputation is an interest and value that has great importance not only for the individual, but also for society as a whole. Its social importance is aptly summarized as follows:

> [L]egal protections against unjustified injury to reputation benefit not only the individual himself but also society as a whole. Society also suffers harm from an injury to an individual's reputation in the form of unduly diminished interaction. Unjust damage to reputation also imposes heightened search costs on society, as people frequently rely on reputation in choosing their friends and conducting business. It has further been argued that protecting reputation against unjust attack is essential to encouraging good behavior and maintaining social cohesion.[266]

Given the social and individual importance of reputation, the courts should rethink the priorities that produce qualified privileges that, when applicable, make it almost impossible for a defamation action to succeed.[267] As it stands now, the construction of those qualified

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264. *Id.* at 306.

265. *See* Rodney Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11 (1983) (noting that defamation law has not adapted to the realities of the Internet world and how it affects reputation).

266. Kern, *supra* note 135, at 257–58.

267. With respect to the current inadequacies of defamation law, Cass Sunstein argues that more needs to be done to protect individuals against "unjustified damage to their reputations," which in turn will strengthen democratic society. Cass R. Sunstein, *Believing False Rumors*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND

privileges rests on the assumption that free speech is a vital tool for society and democracy, as if reputation is simply an individual concern or interest. The one-sided focus on the public value of speech does great harm not only to the tort of defamation but also to society as a whole.

VI. CONCLUSION: PRIVACY AND REPUTATION AS FOUNDATIONS FOR DEMOCRACY

Privacy and reputation have come under siege not only by new technologies, but also by the general communications practices of society and the changing journalism environment. At the same time, the common law's ability to provide an effective remedy for privacy and reputation harms has diminished.

In the privacy field, a plethora of regulations—both state and federal—govern specific issues of privacy, usually involving the collection and usage of particular types of information—e.g., health records and credit card information. These regulations primarily exist to reassure customers in their use of a particular product or service that such usage will not threaten certain personal information.

The whole fabric of these laws and regulations approach privacy from a consumer standpoint, as if privacy is just another factor that consumers take into account when choosing a product or service, like interest rates or account fees. These laws and regulations essentially try to achieve privacy "on the cheap," without ever having to really confront the true meaning of individual privacy in modern society. Privacy becomes subordinate to technology. We know technology will invade privacy, but then we use whatever technological means are available to cushion those violations as much as is economically feasible.

Only the common law approaches privacy and reputation from a general, all-encompassing direction. Common law privacy, for instance, is not concerned with specific types of information, but with any matter that might be covered by a reasonable expectation of privacy. The common law provides the only real protection for reputation. But, as this Article demonstrates, the common law does not give enough weight to privacy and reputation when balanced against speech interests.

In constitutional law cases, speech naturally takes priority, because it is explicitly protected in the First Amendment, whereas neither privacy nor reputation receive such express constitutional recognition.[268] But this

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REPUTATION 91, 106 (Saul Levmore & Martha C. Nussbaum, eds., Harvard Univ. Press reprt. ed. 2010).

268. John Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 27–28 (2012) (noting that while free expression is protected by the Constitution,

Article addresses the common law, not constitutional law. With the torts of privacy and defamation, courts have not had to articulate or apply constitutional principles; rather, they have constructed a common law that seeks to protect privacy and reputation while not unduly burdening speech.

Yet under this construction, courts have gone too far in protecting speech, and in the process have downgraded privacy and reputation as simple individual interests that cannot hold up to all the larger social and political justifications for free speech. With all the various privileges meant to protect speech, the courts have relied on the assumption that speech is more than just an individual interest—it is a foundational value for democratic society. Consequently, speech rises to the level of a right or duty, whereas privacy and defamation remain simply individual interests.

It is this balancing, not any constitutional formulas, that is the subject of this Article. For instance, by so broadly applying the wide array of qualified privileges in defamation law, the court greatly erodes the availability of defamation remedies to injured parties. But, common law courts almost never recognize the broader social underpinnings of privacy and reputation, and how a healthy democratic society depends on a vibrant respect for individual privacy and reputation.[269]

Recognizing how speech interests have overly diluted the tort of defamation, Justice Thomas recently suggested that the Supreme Court "should reconsider" its jurisprudence concerning the reach of the *New York Times v. Sullivan* actual malice rule.[270] Furthermore, in somewhat

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privacy interests are generally protected through state and federal statutes and the common law).

269. The argument can be made that privacy is a precondition to free speech; thus, a desire to protect free speech requires a prior protection of privacy. *See id.* at 29–30 (stating "the interest in free expression may itself justify a degree of privacy protection in order to further the 'interest . . . in fostering free speech'").

270. *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) ("The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area."). Discussing the legacy of the *Sullivan* actual malice rule, Justice Thomas opined that the "constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *Id.* at 678. Justice Thomas further explained that "[h]istorical practice further suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel." *Id.* at 681. Moreover, "there appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment." *Id.* at 682.

of a contradiction, the Court in *New York Times v. Sullivan* used the First Amendment to essentially gut defamation suits brought by public officials, while at the same time adhering to the doctrine that defamation was outside the protective ambit of the First Amendment.[271] Therefore, although Justice Thomas was referring to constitutional law regarding defamation, many of his same concerns apply to the state of the common law.

What is needed is a greater understanding of and appreciation for the values of privacy and reputation to democratic society. The value of free speech is well known and continually articulated. Indeed, the "political" rights or activities—e.g., speech, association, and voting—are given almost exclusive focus with respect to the individual rights, traits, or activities needed to maintain a healthy democracy. Too little attention has been given to those traits and values underlying the exercise of the more political activities.

Ultimately, democracy depends on the sovereignty of the individual. And to sustain that sovereignty, a certain individual independence and dignity must be preserved. Privacy and reputation are essential ingredients of such independence and dignity. As the eminent historian Gordon Wood argues, individual virtue was a bedrock of the building of the American republic.[272]

If privacy and reputation are eroded, free speech and political association will be eroded. Community will be eroded and then constitutional democracy will be eroded, because values and traits like privacy and reputation are the first bulwark of the individual, who in turn, is the bulwark of democratic society.

The decline of the common law actions of privacy and defamation may very well reflect a decline or weakening of individual dignity within society and the legal culture. Privacy and defamation become less protected in the common law as society wavers in its respect for individual dignity and independence. In this respect, privacy and defamation serve as a kind of canary-in-the-coal-mine when society becomes too callous or toxic toward individual dignity.

Privacy builds and protects dignity, which is required prior to any democratic institution or processes. In our modern media society, individuals belong to virtual communities but have lost physical

271. Defamation is one of the categorical exceptions to speech protected by the First Amendment, as is, obscenity, fraud, and incitement. As the Court has held, defamation is one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

272. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969).

communities, which have always been at the seat of democracy. In a world of constant media connection, people have little privacy but much loneliness.

Perhaps it is because all the incessant communication fails to build any lasting community. It is in a personal community that people learn the traits that make for a healthy, respectful society—traits like forgiveness, cooperation, true tolerance, the desire to heal wounds, and the ability to work through differences. While a personal community requires real personal connection, it also allows rest and retirement. The individual can retreat from the physical community, but the virtual community rarely lets people slip away for a restful rejuvenation.

The more people seem to connect and interact through electronic media, the more anxiety and alienation seems to occur. The rise of cynicism, anger, and envy have accompanied the evolution of the virtual village. While individuals have become experts at operating technology, they have lost sovereignty over their own identities and experiences. But all the self-exposure seems not to produce any real self-discovery, which is needed for a zone of individual privacy.

Without any privacy, an individual can hardly possess their own life. Only in a place of privacy can the individual find and confront the truth about themselves, which is a vital first step for that individual to participate honestly and with enlightenment in the public arena. Perhaps the dizzying pace of technological innovation has created such an all-consuming, seductive cult of the media that privacy and reputation have become lost in the cloud.