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## **TWIBEL LAW: WHAT DEFAMATION AND ITS REMEDIES LOOK LIKE IN THE AGE OF TWITTER**

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## ABSTRACT

In six years, the Twitter audience has quickly grown to more than 140 million users<sup>2</sup> who can instantly publish to a global audience. The informal nature of conversations on Twitter makes it a ripe environment for the spreading of rumors and potential falsehoods. While a few Twibel suits have been brought to the forefront, the courts have yet to rule on a case in the United States. This article presents a hypothetical situation where an influential Twitter user posts false content about a local restaurant that rapidly spreads online. This results in the restaurant's demise. The defamed party considers bringing a defamation claim, but realizes the remedy would not provide proper relief for the damage that has already been done via social networks. Throughout its history, defamation law has aimed to strike a balance between free speech and protecting the reputations of others. Especially in the past half-century, the courts have looked specifically at the role and status of the defamed. Applying traditional defamation law to Twitter requires classifying online users and their speech in new ways that have yet to be clarified. Second, the article explores the passive publication process of traditional media, and how Twitter has changed this process by inviting a new class of publishers who, as a result, have increased the pressure of being first to publish, often to the detriment of truth and accuracy. Third, while traditional methods may be adequate when the defendant is a mainstream media organization, the existing legal framework is less effective in the Twitter environment, one that is fast, flexible and free. Further, the global reach of Twitter means international law may impact domestic Twibel decisions. This article concludes that it is necessary to find a remedy for Twibel that uses defamation law as a tool and not an obstacle. Twibel needs an adaptable remedy that encourages civil discourse among users and deters defamatory speech on Twitter. It is crucial that this remedy considers how technology has fundamentally changed the way people create and consume news and information.

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<sup>2</sup> See @TWITTER, *Twitter Blog: Twitter Turns Six*, Mar. 21, 2012, archived at [www.webcitation.org/6EmPqJkEd](http://www.webcitation.org/6EmPqJkEd) (declaring Twitter having reached 140 million active users).

## I. INTRODUCTION

Since the micro-blogging site Twitter launched in 2006, it has changed the way we share information, reveal and define our communities and ourselves. Now, more than 200 million users<sup>3</sup> send “tweets,” publicly broadcasted messages of 140-characters or fewer, to their followers.<sup>4</sup> Twitter has lowered the barrier of entry for publishers to include virtually everyone.<sup>5</sup> Anyone with access to a computer or cell phone can create a Twitter account for free.<sup>6</sup> Once they become Twitter users, people have access to a limitless mouthpiece and platform to share unfettered and unlimited free speech in short bursts.<sup>7</sup> The Twitter community has thrived on this quick, short and open exchange of information, creating a conversational and casual tenor for communication between all users -- from celebrities to ordinary individuals.<sup>8</sup>

Thus, Twitter has created a global audience of content creators who can publish information instantly bypassing traditional publishing practices, which often include involved process for vetting information. As a result, the creation and spreading of defamatory content to large audiences is more likely than in the past. The informal nature of conversation on Twitter tends to encourage people to talk more freely about others, including the spreading of rumors and potential falsehoods. Such informal chatter could have potentially serious consequences.

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<sup>3</sup> See @TWITTER, *Twitter Blog: Celebrating #Twitter7*, Mar.21,2013, <https://blog.twitter.com/2013/celebrating-twitter7>

<sup>4</sup> See @TWITTER, *Twitter Blog: One Hundred Million Voices*, Sept. 8, 2011, archived at [www.webcitation.org/6EmRixu5z](http://www.webcitation.org/6EmRixu5z) (describing why users sign in to Twitter each day).

<sup>5</sup> See Matthew Ingram, *Twitter and the Power of Giving People a Voice*, Nov. 18, 2010 archived at [www.webcitation.org/6EmV188Hy](http://www.webcitation.org/6EmV188Hy) (expounding on the effects Twitter has on the barriers to publication and printing).

<sup>6</sup> See Twitter, *About Twitter*, TWITTER, Feb. 28, 2013, archived at [www.webcitation.org/6EmVjKSSI](http://www.webcitation.org/6EmVjKSSI) (introducing methods by which users may access Twitter).

<sup>7</sup> See *id.* (expounding on the ways Twitter may be used).

<sup>8</sup> See @TWITTER, *supra* note 2 (asserting that Twitter’s micro-blogging platform has contributed to the social networking site’s popularity).

### A. HYPOTHETICAL: BEST BURGERS EVER AND @SOCIALBUTTERFLY3

Let us explore a hypothetical, yet likely, situation that could happen between two Twitter users. A college student @SocialButterfly3 posts a tweet to her 58,000 followers, "OMG Gross. @BestBurgersEver serves rat meat in burgers! DON'T EAT THERE! <http://t.co/ratpic> <http://www.donteatrats.com>." She includes a link to a picture of rats in cages behind a building, as well as a link to a blog where she expands on how she saw Best Burgers Ever employees capture rats and take them inside to the kitchen.<sup>9</sup>

Best Burgers Ever has been a local staple in the community for seventy-five years. The restaurant is known for being packed and having long waits for tables to the point that it commonly uses the tagline "being worth the wait," featuring positive customer testimonials, in its advertisements. The restaurant has garnered the attention of the national food community by earning awards for its quality of food. In fact, @SocialButterfly3 posted her tweet a week before a national cable network planned on recording an episode featuring Best Burgers Ever on a show that highlights popular locally-owned restaurants.

When her friends ask her how she knows the employees took the rats into the kitchen to make the meat for the burgers, she replies via Twitter, "A friend of a friend who used to work there told me. He swore he'd never eat that rat meat again." She follows up the tweets with blog posts including recipes for rat burgers allegedly used by the restaurant, more pictures and "first-hand accounts" from former employees and disgruntled customers.

Her 58,000 followers start a viral campaign against Best Burgers Ever. They create a hashtag<sup>10</sup>, #bestburgersnever. The hashtag

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<sup>9</sup> Hypothetical created for illustration.

<sup>10</sup> See Twitter, *What are Hashtags ("#" Symbols)?*, TWITTER Mar. 4, 2013, archived at [www.webcitation.org/6EsC0N9Zm](http://www.webcitation.org/6EsC0N9Zm) (defining hashtag as a word preceded by a number sign (#)). Hashtags mark key words or topics in a tweet.

is an immediate Trending Topic<sup>11</sup> on Twitter. As a result, the national cable network cancels plans to record the show, and within three months, Best Burgers Ever is forced to shut its doors. The owners of Best Burgers Ever are devastated. They had invested their life's savings in the restaurant and the lost profits on top of a horrible job market leave the entire family bankrupt and unemployed. Plus, no other companies will hire anyone from the family because of the extensive damage done to their reputation. The owners decide to seek out the advice of the company's lawyers to explore any options that will allow them to somehow salvage any hope of a future. The owners offer up overwhelming evidence that the information @SocialButterfly3 tweeted was false—including monthly health department reports from the restaurant's entire history boasting the premium level of cleanliness and quality, the official recipe used to make burgers, and proof that the photos posted to Twitter were not, in fact, even taken behind their restaurant.

This issue perplexes the lawyer. In traditional defamation cases, plaintiffs seek redress for damage to reputation from publications made by large media companies that have deep pockets to satisfy judgments.<sup>12</sup> In the past, public figure plaintiffs and large media defendants enjoyed more access to large audiences in comparison to the general public.<sup>13</sup> Because private plaintiffs did

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*See id.* (describing hashtags). They are used to help Twitter users follow conversations. *See id.* (illustrating the purpose of hashtags). Hashtags were "created organically by Twitter users as a way to categorize messages." *Id.* People use the hashtag symbol, "#", so tweets "show [up] more easily in Twitter Search." *Id.* "Hashtagged words that become very popular are often Trending Topics." *Id.*

<sup>11</sup> *See* Twitter, *FAQs About Twitter Trends*, TWITTER, Mar. 4, 2013, archived at [www.webcitation.org/6EsD7NXMr](http://www.webcitation.org/6EsD7NXMr) (explaining how Trending Topics highlight the most tweeted-about topics on Twitter). "[Twitter's Trending Topics] algorithm identifies topics that are immediately popular" and helps inform people of many breaking news stories from across the world. *See id.* (describing the use of Trending Topics).

<sup>12</sup> *See infra* Part III. Defamation And The Traditional Media (discussing defamation suits against large media companies).

<sup>13</sup> *See* Rebecca Phillips, *Constitutional Protection for Nonmedia Defendants: Should There Be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV.

not have direct access to an audience to correct the published falsehood, a practical remedy did not exist to correct reputational damage.<sup>14</sup> Inequality of access to a public platform was a primary concern.<sup>15</sup> Defamation law was a tool to equalize this imbalance.<sup>16</sup> Therefore, when a person thought they had been defamed, a lengthy court case ensued and if found liable, the large media defendant paid the plaintiff a large sum of punitive damages.<sup>17</sup>

The courts have never ruled on a case of defamation on Twitter, a community known for its brevity and informal nature.<sup>18</sup> Several novel questions are likely to be raised by a case of Twibel like the one described in the foregoing hypothetical including: Do cases of libel on Twitter have merit?<sup>19</sup> Who is responsible for the tweet? Only @SocialButterfly3? Or, would everyone who passed on her message via a retweet<sup>20</sup> be responsible? Where would the courts look to how Best Burgers Ever's reputation had been harmed? Since the defamation happened on Twitter would it be relevant to look only at the harm done to Best Burgers Ever in the

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173, 178 (2010) (drawing a distinction between public officials and private individuals and their access to public communication).

<sup>14</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (establishing higher burden for private plaintiffs seeking damages for defamation).

<sup>15</sup> See Phillips, *supra* note 13, at 178 (recognizing how public access affect plaintiffs' legal obstacles).

<sup>16</sup> See Phillips, *supra* note 13, at 179 (equalizing standards of proof for private versus public individuals).

<sup>17</sup> See Phillips, *supra* note 13, at 179 (stating that a private figure harmed by a statement can recover presumed and punitive damages).

<sup>18</sup> See, e.g., Dejin Zhao & Mary Beth Rosson, *How and Why People Twitter: The Role that Micro-blogging Plays in Informal Communication at Work*, GROUP 2009 CONFERENCE, at 247-49, May 15, 2013, *archived at* [www.webcitation.org/6GdjQXrBD](http://www.webcitation.org/6GdjQXrBD) (describing Twitter's technological features).

<sup>19</sup> See Phillips, *supra* note 13, at 190-91 (questioning how private individuals with access to informal public platforms may be treated by courts).

<sup>20</sup> See Twitter, *The Twitter Glossary*, TWITTER, Mar. 6, 2013, *archived at* [www.webcitation.org/6Eu16O6mD](http://www.webcitation.org/6Eu16O6mD) (defining retweet in both noun and verb formats and usages). Retweeting, indicated by including "RT:" and an attribution to the tweet originator, is the convention used by Twitter users pass on another user's tweets to their followers. See *id.*

Twitter community, or the damage done to its entire online reputation? Since the harm extended beyond the web, how will the courts distinguish the difference between Best Burgers Ever's reputation and resulting harm in the virtual world and the actual world? What standard would be necessary to use to prove fault? Would the owners be considered public figures and therefore have to prove actual malice? And who is considered a public figure on Twitter? Should non-media defendants, like those most likely to be involved in Twitter libel cases, be treated the same as media defendants have been in the past?<sup>21</sup>

Does it even make sense for the owners of Best Burgers Ever to bring suit against @SocialButterfly3, a college student who frequently tweets about being "a broke college girl?" If money damages aren't an option, what other remedies exist that could put Best Burgers Ever back in its rightful position? What punishment would prevent @SocialButterfly3, or any Twitter user for that matter, from tweeting harmful content about others?

#### B. OVERVIEW OF TWIBEL CHALLENGES

Existing defamation doctrine appears cumbersome and ill-suited to keep up with the likely flood of disputes over allegedly defamatory speech on Twitter.<sup>22</sup> The inevitable tension exists between the inalienable rights to free speech provided by the First Amendment and the need to discourage speech that harms the

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<sup>21</sup> See Phillips, *supra* note 13, at 177 (articulating purpose of Comment is to review applicability of current libel case law to social media).

<sup>22</sup> See, e.g., Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM. L & POL'Y 1, 3-4 (2009) (highlighting difficulties that lower courts have had while applying Supreme Court case law in defamation actions); see also Victoria Cioppettini, *Modern Difficulties in Resolving Old Problems: Does the Actual Malice Standard Apply to Celebrity Gossip Blogs?*, 19 SETON HALL J. SPORTS & ENT. L. 221, 234 (2009) (observing difficulty courts have had in applying defamation doctrine to the Internet); see also Phillips, *supra* note 13, at 175-76 (laying out difficulties courts have encountered in distinguishing between media and non-media defendants).



reputations of others.<sup>23</sup> When it comes to social media, especially Twitter, encouraging unencumbered free speech is paramount to the nature of these communities where "freedom of expression is essential."<sup>24</sup> In order to provide a remedy that promotes rather than chills free speech, the law needs to evolve so it can best handle many of the challenges Twitter presents.<sup>25</sup>

As highlighted earlier, one challenge facing the Twitter community related to defamation law is establishing a proper remedy for handling false, defamatory content on Twitter.<sup>26</sup> It's not practical for one Twitter user to endure a lengthy and likely expensive, lawsuit against another Twitter user who has defamed them even after severe damage has been done to the defamed's reputation.<sup>27</sup> Twitter itself provides all users the same opportunity to publish, and therefore offers an opportunity for self-correction.<sup>28</sup> However, an imbalance of influence and audience still exists between users with varying numbers of followers.<sup>29</sup>

The resulting challenge is to strike a reasonable balance that encourages civil discourse and discourages harmful diatribes on Twitter. An ideal remedy would utilize the aforementioned tools: the law, technology and the community to create a flexible solution that encourages unencumbered free speech while deterring

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<sup>23</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) [hereinafter *New York Times*] (expounding on the tension between freedom of speech and public reputation).

<sup>24</sup> See @biz & @amac, *Twitter Blog: The Tweets Must Flow*, Jan. 28, 2011, archived at [www.webcitation.org/6Eu6Hpv9M](http://www.webcitation.org/6Eu6Hpv9M) (claiming freedom of expression to be essential to Twitter's mission to connect people to what is meaningful to them).

<sup>25</sup> See *infra* Part V (positing remedies to Twibel).

<sup>26</sup> See Phillips, *supra* note 13, at 174-75 (observing a need for Twibel remedies).

<sup>27</sup> See Phillips, *supra* note 13, at 174-75 (reporting high damages sought for allegedly defamatory tweet).

<sup>28</sup> See Twitter, *How to Delete a Tweet*, TWITTER, Mar. 6, 2013, archived at [www.webcitation.org/6Eu8vBmDY](http://www.webcitation.org/6Eu8vBmDY) (instructing users on how to delete errant tweets); see also Twitter, *supra* note 20 (describing how to modify a tweet, abbreviated in glossary as "MT" placed before a modified tweet).

<sup>29</sup> See *An Exhaustive Study of Twitter Users Across the World*, BEEVOLVE TECHNOLOGIES, Oct. 10, 2010, archived at [www.webcitation.org/6EuAYBEq6](http://www.webcitation.org/6EuAYBEq6) (finding majority of Twitter users have less than fifty followers).

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defamatory speech on Twitter. This analysis of Twitter libel combines a history and exploration of the developments in law, communication and technology. It also proposes potential remedies for Twitter users harmed by defamatory tweets.

Part II of this article provides a brief history of defamation law and the developments that have guided the courts in rulings from common law to the present. Through the history of defamation law the courts have aimed to strike a balance between free speech and protecting the reputation of others. In so doing, the Supreme Court has emphasized the role and status of the defamed, specifically examining if or how they have interjected themselves into the forefront of an issue or community. The Court has established stringent fault requirements applicable to public officials and public-figure plaintiffs to help strike a balance between reputation and first amendment freedoms.

Part III examines the role of traditional media and defamation. It deconstructs the traditional editing process in a typical newsroom -- and the checks for accuracy and quality it adds along the way. And yet, even with procedures like these in place, defamation still occurred. Today, people rely on social media for news and communication as much as, if not more than they do traditional media. As technology has developed, so has the news cycle. Media has transitioned from a network of passive publications, to interactive entities with which audiences engage. This section also explains the rapidly developing technology that is being used to communicate in ways judges could never have imagined when the laws governing today's Twitter libel cases were created. Since Twitter began, the Twitter community has created conventions to extend the impact of tweets to enhance its effectiveness. As the number of people using Twitter continues to grow, what happens on Twitter will have a growing impact on communications as a whole. Twitter has sped up the rate that information is exchanged, not just on Twitter itself, but also in general. In addition to the benefits of Twitter and its expedited information transfer, it also brings with it potential challenges. Without proper checks in place, it is very easy for Twitter users to publish incorrect or knee-jerk reactions that are easily circu-

lated with the damage spreading to an exponentially larger audience. As technology has pushed the news cycle to evolve, applying existing legal standards in this ever-changing online environment has also proved to be a challenge.

Part IV examines traditional defamation standards and their application to Twibel. It explains how the changing and expanding groups of publishers in part are contributing to the inadequacies of applying existing defamation doctrine Twibel cases. For example, some of these technological changes have resulted in aspects of defamation law such as the private/public distinction becoming “unworkable and unfair.”<sup>30</sup> An explanation of the Twitter community will help show how the nature of this fast-paced interactive community is a contributing factor to why traditional defamation law does not work as a proper remedy in many situations involving libel on Twitter. It highlights the few cases of Twibel that have been filed and settled out of court including cases involving both celebrities, like Courtney Love, and ordinary private individuals.<sup>31</sup> It also addresses how the global nature of Twitter could create complicated international multijurisdictional cases. It further suggests that the Twitter community itself should find a more flexible and efficient way to solve these types of problems in a way that coincides with the unique nature of this rapidly-moving interactive international community because those in the Twitter community are accustomed to engaging with others internationally. Traditional defamation litigation may work in some cases when more traditional media is involved, but alternative solutions would likely work better between typical Twitter users.

Part V identifies those who may have an interest in regulating defamatory content in tweets and examines possibilities for how defamatory tweets should be regulated. While some self-help

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<sup>30</sup> See Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH & POL’Y 249, 251 (2011) (acknowledging that distinction between public and private no longer works).

<sup>31</sup> See Sam Bayard, *First Twitter Libel Suit, Starring Courtney Love*, DIGITAL MEDIA LAW PROJECT, Mar. 30, 2009, archived at [www.webcitation.org/6EvGziH3k](http://www.webcitation.org/6EvGziH3k) (providing first examples of Twibel lawsuits).

remedies do exist for people to rebuild reputations that have been damaged by social media, Twitter does not have a go-to forum for resolving conflicts between Twitter users who have potential claims for defamation because the Communications Decency Act protects Twitter, an internet service provider, from liability.<sup>32</sup>

Finally, this article proposes a few hybrid solutions for deterring defamatory content on Twitter. These solutions depend on invested stakeholders including, the Twitter community, and Twitter doing some initial leg work of their own before seeking legal remedies like alternative dispute resolution forums and traditional defamation suits. Private third parties have created a new option for possible defamation plaintiffs by creating businesses focused on helping people repair their online reputation, or take steps protect it from potential harm. In Twibel cases, the First Amendment can be a tool and not an obstacle. The First Amendment encourages people to freely exchange information and ideas. By encouraging more people to take advantage of their ability to fight bad speech with more speech, for example, by correcting false or misleading information, Twitter users can use this new reputation repairing tool to defend their reputations from as much damage as possible.

Since Twitter grants all users the same access to a public audience and an equal opportunity to develop this limitless audience, it has minimized the need for defamation law, the primary remedy to correct the logistical imbalance the limits of publication presented in the past. However, Twitter has harnessed the power of the social media revolution to empower its users to discover solutions for the problems it has created.

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<sup>32</sup> See, e.g., 47 U.S.C. § 230 (1998) (explaining how internet service providers are protected from civil liability under the Communications Decency Act).

## II. HISTORY OF DEFAMATION

Defamation is a legal claim for injury to a person's reputation as the result of false speech that is either written (libel) or spoken (slander) to another.<sup>33</sup> Since the tort of defamation regulates and punishes speech, First Amendment principles are paramount in the adjudication of a defamation claim.<sup>34</sup> State law controls the basic requirements of defamation law and specific elements of a defamation claim.<sup>35</sup> When courts handle Twibel suits, they "must navigate not only through decades of case law precedent, but also must adjust to our ever changing society and the new ways that we communicate."<sup>36</sup>

### A. COMMON LAW DEFAMATION

Prior to 1964, common law defined defamatory speech as the publication of a statement, which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person.<sup>37</sup> To bring a defamation claim, a plaintiff would have to prove a statement was a 1) defamatory statement, 2) made about another person by someone who had the intent to publish without any applicable privilege, or at least was negligent in publishing, and 3) this statement resulted in damages and/or harm to the subject's rep-

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<sup>33</sup> See RESTATEMENT (SECOND) OF TORTS § 568 (1977) (distinguishing between libel and slander as forms of defamatory communications).

<sup>34</sup> See RESTATEMENT (SECOND) OF TORTS: SPECIAL NOTE ON THE IMPACT OF THE FIRST AMENDMENT OF THE CONSTITUTION ON THE LAW OF DEFAMATION (DIVISION FIVE CH. 24-27) (1977) (explaining recent application of First Amendment case law to defamation cases following *New York Times* decision).

<sup>35</sup> See *Defamation*, DIGITAL MEDIA LAW PROJECT, Mar. 7, 2013, archived at [www.webcitation.org/6Ex5l3Ayq](http://www.webcitation.org/6Ex5l3Ayq) (defining defamation and explaining its basis in state law despite First Amendment implications).

<sup>36</sup> Phillips, *supra* note 13, at 180.

<sup>37</sup> See *New York Times*, 376 U.S. at 256 (stating the extent to which the First Amendment applied to defamation actions was of first impression before the Court); P. H. WINFIELD, A TEXT-BOOK OF THE LAW OF TORT, 242 (5th ed. 1950) (explaining common law defamation).

utation.<sup>38</sup> Under common law, truth was a defense a defendant could prove.<sup>39</sup>

B. THE FIRST AMENDMENT AND DEFAMATION: *NEW YORK TIMES V. SULLIVAN* AND ACTUAL MALICE

In 1964, the Supreme Court ruled in *New York Times* that state libel laws were subject to First Amendment restraints.<sup>40</sup> For this reason, the Court established a requirement that public official plaintiffs prove that the defendant published a defamatory statement with some level of fault.<sup>41</sup> Specifically, *New York Times* created the "actual malice" standard for speech about public officials, politicians and high-ranking governmental figures -- those who the public has an interest in holding accountable.<sup>42</sup> Therefore, defamatory statements about those classified as public officials must meet the actual malice standard with clear and convincing evidence for liability to attach.<sup>43</sup> When applying an actual malice standard, the burden of proof shifts to the plaintiff, who must first prove that the statement is false.<sup>44</sup> In a later case, the Court extended the actual malice standard to defamation cases brought by public figure plaintiffs as well.<sup>45</sup>

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<sup>38</sup> See RESTATEMENT (SECOND) OF TORTS § 558 (1977) (laying out the elements necessary for a claim of defamation).

<sup>39</sup> See *id.* (providing case examples where truth constituted an absolute defense to defamation).

<sup>40</sup> See *New York Times*, 376 U.S. at 298 (reversing State Supreme Court's finding that Respondent was defamed by advertisement).

<sup>41</sup> See *id.* at 283-84 (establishing requirement for demonstration of malice by publisher of allegedly defamatory statement in order for a plaintiff to prevail).

<sup>42</sup> See *id.* at 281-83 (expounding on reasons for requiring actual malice standard for public officials).

<sup>43</sup> See *Proving Fault: Actual Malice and Negligence*, DIGITAL MEDIA LAW PROJECT, Mar. 7, 2013, archived at [www.webcitation.org/6ExAOhmgW](http://www.webcitation.org/6ExAOhmgW) (laying out requirements for actual malice as it relates to defamation of a public official).

<sup>44</sup> See 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 111 (2011) (providing that plaintiff bears burden of proving actual malice when defense of privileged communication is made).

<sup>45</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that non-public official public figures may recover damages for defamatory falsehood under this standard).

The actual malice standard applies to statements published by someone who knew the statements were false or by a publisher who acted with a reckless disregard for the truth, or entertained serious doubts about the truth of the published statement.<sup>46</sup> Actual malice has less to do with ill will or wishing harm on a person, and is more focused on the actual intent to cause plaintiff harm by publishing a false statement or wanton disregard for its truth.<sup>47</sup> One aim of the actual malice standard is to achieve a balance between free speech and protection of individual reputation.<sup>48</sup> However, the clash of these "admittedly ambiguous societal values" presents an interesting challenge in defamation law.<sup>49</sup> The First Amendment ensures that "debate on public issues [is] uninhibited [and] robust" with the understanding that this may at times include "vehement, caustic, and sometimes unpleasant sharp attacks."<sup>50</sup> As a result, because public officials have a platform to speak from, a public official needs to prove a very high standard to bring a defamation claim.<sup>51</sup>

The courts have held the very high standard of actual malice has been met in only a few cases. For example, in *Solano v. Playgirl, Inc.*,<sup>52</sup> a former Baywatch actor brought a claim of false light against the magazine for using photos of him shirtless on the cover of the magazine because Playgirl "deliberately created the false impression" that he agreed to pose for photos and do an in-

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<sup>46</sup> See *New York Times*, 376 U.S. at 280 (defining actual malice).

<sup>47</sup> See *id.* at 283-84 n.24 (explaining requirement for actual intent in proving actual malice).

<sup>48</sup> See *id.* at 304 (describing the relationship between constitutional speech and personal reputation).

<sup>49</sup> See David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 280 (2010) (acknowledging the conflicting connection between defamation and the First Amendment).

<sup>50</sup> See *Watts v. United States*, 394 U.S. 705, 708 (1969) (acknowledging the national commitment to free speech regarding public issues).

<sup>51</sup> See *Gertz v. Welch, Inc.*, 418 U.S. 323, 342 (1974) (describing how the "*New York Times* standard" requires "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth" for suits involving public officials).

<sup>52</sup> 292 F.3d 1078 (9th Cir. 2002).

interview when he, in fact, did not.<sup>53</sup> Although this was a false light claim and not defamation, the appeals court overturned the lower court's dismissal holding that the "evidence [was] sufficient to satisfy the actual malice standard" and that a jury could conclude Playgirl's editors knowingly or recklessly published the misleading cover because they actually discussed the false implications of the cover during editorial meetings.<sup>54</sup> When a court chooses to apply the actual malice standard, it can make a plaintiff's case nearly impossible to prove and win since necessary evidence to prove it is very difficult to obtain and because actual malice requires such a high standard.<sup>55</sup>

#### C. PUBLIC FIGURES, ALL-PURPOSE PUBLIC FIGURES AND LIMITED-PURPOSE PUBLIC FIGURES

The high standard for actual malice set by *New York Times* resulted in devastating effects on recovery in defamation cases. From there it became evident that courts still needed to provide more direction regarding which plaintiffs had to satisfy the actual malice standard.

*Gertz v. Welch, Inc.*<sup>56</sup> established the modern definition of "public figure" for which the actual malice standard applies.<sup>57</sup> In doing so, the Court sought to balance "uninhibited public debate" with

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<sup>53</sup> See *id.* at 1080 (describing case facts and reason plaintiff brought the claim).

<sup>54</sup> See *id.* at 1086-87 (illustrating court's reasoning for reversing trial court's decision).

<sup>55</sup> See *id.* at 1084-85 (laying out the type of evidence required to successfully show actual malice).

<sup>56</sup> 418 U.S. at 343-44 (overruling the decision in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971)). In *Rosenbloom*, rather than determining whether the plaintiff was a public or private figure, the plurality focused on the topic of the speech and whether it was of public or general concern. See *Rosenbloom*, 403 U.S. at 44. For issues of public interest, actual malice applied, but because this plurality did not define what is considered a "matter of public or general concern," Justice Marshall noted in his dissent that people would not have clear indication whether or not their statements involved a matter of "public or general concern" until after the fact and this ambiguous standard could have a chilling effect on speech. See *Rosenbloom*, 403 U.S. at 79-80 (Marshall, J., dissenting).

<sup>57</sup> See Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 264 (2007) (summarizing the *Gertz* decision).



"the compensation of individuals for harm" from defamatory speech.<sup>58</sup> In addition the *Gertz* court further defined the categories for classifying public and private figures.<sup>59</sup>

In addition to public officials, the actual malice standard applies to the two types of public figures: all-purpose public figures and limited-purpose public figures.<sup>60</sup> All-purpose public figures include those in "positions of such persuasive power and influence that they are deemed public figures for all purposes. . . . [T]hey invite attention and comment."<sup>61</sup> All-purpose public figures are household names like celebrities, athletes and even an evangelical fundamentalist pastor.<sup>62</sup> Society expects the public to discuss and critique these people and, therefore, the much higher actual malice standard applies.<sup>63</sup>

Limited-purpose public figures are those who "have thrust themselves into the forefront of particular controversies in order to influence the resolution of the issues involved."<sup>64</sup> Limited-purpose public figures include those who "deliberately shape debate on particular public issues, especially those who use the media to influence that debate."<sup>65</sup> The actual malice standard applies to limited-public figures only when the defamatory subject matter pertains to a topic about which they are considered a public figure.<sup>66</sup> The three-part *Trotter/Waldbaum* test, used by many lower courts, determines who specifically is a limited-purpose public

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<sup>58</sup> See *Ardia*, *supra* note 49, at 281 (distinguishing between public debate and private harm).

<sup>59</sup> See *Gertz*, 418 U.S. at 344-45 (describing different options available to private and public figures to correct inaccurate information).

<sup>60</sup> See *id.* at 345 (acknowledge two types of public figures).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (finding Pastor Jerry Falwell to be an all-purpose public figure).

<sup>63</sup> See *Gertz*, 418 U.S. at 336-37 (arguing that the *New York Times* actual malice test should apply to all-purpose public figures).

<sup>64</sup> *Id.* at 345.

<sup>65</sup> *Proving Fault: Actual Malice and Negligence*, DIGITAL MEDIA LAW PROJECT, Mar. 20, 2013, archived at [www.webcitation.org/6FGUeGiqE](http://www.webcitation.org/6FGUeGiqE).

<sup>66</sup> See *id.* (determining when the actual malice standard applies to limited-purpose public figures).

figure.<sup>67</sup> This test considers if the public is discussing or feels the impact of the controversy, if the person has more than a tangential role in the controversy, and if the alleged defamation is germane to the person's participation in the controversy.<sup>68</sup> Courts have considered a nationally-known college football coach accused of fixing a game,<sup>69</sup> a retired general who advocated on national security issues<sup>70</sup> and a professional belly dancer (concerning a matter related to her performance, of course) to be limited-purpose public figures.<sup>71</sup>

All of this precedent developed in a time of traditional media when the Supreme Court could not possibly have envisioned the contemporary news cycle.<sup>72</sup> To craft an appropriate solution to Twibel, it is important to explore how technology has fundamen-

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<sup>67</sup> See *Trotter v. Jack Anderson Enters.*, 818 F.2d 431, 433 (5th Cir. 1987) (adopting D.C. Circuit's test for determining whether an individual is a public figure); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980) (delineating test for determining public figure status in limited circumstances). In *Waldbaum*, the D.C. Circuit Court created a three-part test widely used for determining who is a limited purpose public figure: (1) the controversy at issue must be public both in that it is generally discussed and persons other than the participants are likely to feel the impact of its resolution; (2) the plaintiff must have played more than a tangential role in the controversy; and (3) the alleged defamation must be rooted in the plaintiff's participation in the controversy. See *Waldbaum*, 627 F.2d at 1296-98. Seven years later in *Trotter*, the Fifth Circuit adopted the *Waldbaum* test stating that this "difficult determination cannot be made by the mechanical application of general rules." 818 F.2d at 433.

<sup>68</sup> See *Waldbaum*, 627 F.2d at 1296-98 (expounding on the application of the test).

<sup>69</sup> See *Curtis Publishing*, 388 U.S. at 154 (concluding that the football coach was public figure).

<sup>70</sup> See *Secord v. Cockburn*, 747 F. Supp. 779, 784 (D.D.C. 1990) (agreeing with plaintiff that he is a public figure).

<sup>71</sup> See *James v. Gannet Co.*, 353 N.E. 2d 834, (N.Y. 1976) (asserting plaintiff is public figure with respect to articles concerning her activities).

<sup>72</sup> See, e.g., *Gertz*, 418 U.S. at 325 (describing media at issue as monthly magazine); *New York Times*, 376 U.S. at 256 (establishing media at issue in case to be an editorial advertisement); see also *Trotter*, 818 F.2d at 433 (stating media at issue were two editorial articles); *Waldbaum*, 627 F.2d at 1290 (describing media at issue as being a trade magazine).

tally altered the creation and dissemination of news.<sup>73</sup> Notably, how has this evolution invited more potential publishers into the fold -- both media and non-media publishers?<sup>74</sup>

Even before the internet, determining whether or not an individual was a public figure has challenged the courts.<sup>75</sup> Neither federal nor state courts have not done of a good job of consistently applying the law or creating a clear distinction between public and private figures.<sup>76</sup> The creation of additional types of public figures has caused confusion.<sup>77</sup> Also, when determining whether a plaintiff is a public or private figure, the courts have been inconsistent in their application of existing standards.<sup>78</sup> Some courts have looked to factors such as "impact on the community, the newsworthiness of the dispute, and whether the plaintiff chose to be in the public eye."<sup>79</sup> The subjective nature of these factors has led to further unpredictability on the part of the journalists' because a judge's editorial judgment would likely differ from an editor's,<sup>80</sup> leaving journalists unsure of whether the subject of their story would be considered a public figure or not, and as to what standard they would be held if this subject were to bring a defamation suit against the journalist.<sup>81</sup>

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<sup>73</sup> See Patrick H. Hunt, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 LA. L. REV. 559, 580 n.164 (2013) (reviewing arguments about how technology has effected defamation law).

<sup>74</sup> See *id.* at 600 (exploring future concerns for defamation and Twibel claims).

<sup>75</sup> See, e.g., *Gertz*, 418 U.S. at 342-45 (examining how the different courts defined public and private figures).

<sup>76</sup> See Kosseff, *supra* note 30, at 251 (highlighting how the internet continues to blur the line between public and private figures).

<sup>77</sup> See Kosseff, *supra* note 30, at 255-56 (creating the distinction between the general-purpose and the limited-purpose public figures).

<sup>78</sup> See Kosseff, *supra* note 30, at 256 (commenting on how state and federal courts have used inconsistent methods).

<sup>79</sup> See Kosseff, *supra* note 30, at 258.

<sup>80</sup> See Kosseff, *supra* note 30, at 260 (explaining the problems created when there are different standards created by different views).

<sup>81</sup> See Kosseff, *supra* note 30, at 260 (citing two cases and how the different standards were applied).

### III. DEFAMATION AND THE TRADITIONAL MEDIA

Traditionally, media organizations have been passive publishers that print or broadcast to an audience who simply reads, listens to or watches the information they provide.<sup>82</sup> Major media companies have been attractive defendants in defamation suits because of the large reach of their audiences -- and the deep pockets of many of these media companies, which have provided monetary remedies for those who have been defamed.<sup>83</sup> On average, libel awards against media defendants result in initial awards of an average of \$2.8 million dollars and \$679,000 in final awards after appeal.<sup>84</sup> Courts have awarded plaintiffs awards as high as \$222 million in initial awards for libel claims.<sup>85</sup>

One of the key reasons the Supreme Court offered for requiring public figures to meet a higher standard in defamation claims was the unique platform they enjoyed that others did not in the traditional news cycle.<sup>86</sup> When a celebrity or politician was the subject of public scrutiny by a published story, the ease of access to the public and ability to reply publicly gave this class of people an advantage over private individuals.<sup>87</sup> Now, with Twitter

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<sup>82</sup> See Kossseff, *supra* note 30, at 250 (discussing traditional media outlets).

<sup>83</sup> See Phillips, *supra* note 13, at 176 (explaining how individuals can recover financially).

<sup>84</sup> See *2010 Report on Trials and Damages*, MEDIA LAW RESOURCE CENTER, May 15, 2013, archived at [www.webcitation.org/6Gdq07m0i](http://www.webcitation.org/6Gdq07m0i) (referencing the Media Law Resource Center's 2010 survey of libel cases against media defendants between 1980 through 2009). The initial awards average is based on 334 cases and 143 final awards after appeals. See *id.* The median for initial awards is \$300,000 and \$100,000 for final awards after appeal. *Id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *Gertz*, 418 U.S. at 363 (stating that "the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.").

<sup>87</sup> See Phillips, *supra* note 13 at 179 (explaining the different channels of communication that are available to private and public individuals).

seemingly private individuals have this same access to publish and reply.<sup>88</sup>

Furthermore, public figures have traditionally assumed a greater risk by volunteering their participation in the open community.<sup>89</sup> Now, the barrier to enter the public eye is so much lower.<sup>90</sup> All it takes is the simple creation of a free Twitter account and anyone can reach an unlimited audience.<sup>91</sup> Before Twitter, defamation claims had not exclusively been directed at national media giants, but the ease of access to social media has made plaintiffs bringing claims for damaging defamatory statements against non-media defendants a more prevalent issue.<sup>92</sup> Online developments have changed the structure of news media, but the “standards governing news gatherers’ largest point of legal vulnerability – defamation – have not evolved similarly.”<sup>93</sup>

#### A. TRADITIONAL MEDIA AND ITS EDITING PROCESS

Before social media, people looked to newspapers, radio broadcasts and television newscasts, as their go-to source for news.<sup>94</sup> These passive publications were a one-way communication where people read, watched, or listened to the news; they consumed news and rarely interacted with the content and its crea-

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<sup>88</sup> See Ingram, *supra* note 5 (quoting Twitter CEO and co-founder Evan Williams as saying that Twitter “lowers the barriers to publishing almost as far as they can go”).

<sup>89</sup> See *New York Times*, 376 U.S. at 292 (recognizing that the public figures are individuals who are known to the community because of their position or role they have in the community).

<sup>90</sup> See Ingram, *supra* note 5 (asserting barriers to publishing are lower than they have ever been before).

<sup>91</sup> See Ingram, *supra* note 5 (expounding on the ease and speed with which users can communicate).

<sup>92</sup> See Phillips, *supra* note 13, at 175-77 (discussing the lack of application of libel to new media technologies).

<sup>93</sup> Kosseff, *supra* note 30, at 250.

<sup>94</sup> See Kosseff, *supra* note 30, at 250 (generalizing the demise of the traditional media outlet following the rise of the Internet).

tor.<sup>95</sup> People depended on iconic journalists like Walter Cronkite to deliver the news of record.<sup>96</sup>

In the world of passive publication, the editorial process provides time, edits and checks for a writer during the storytelling process.<sup>97</sup> Many media companies allocate substantial resources to ensure high journalistic quality and accuracy.<sup>98</sup> Copy editors are specifically devoted to catching and correcting errors; upper-level editors guide the content and help the writer make tough ethical calls prior to publication—especially regarding sensitive content.<sup>99</sup> Many media companies even have lawyers on hand to consult about questionable stories and situations throughout the process and also review stories before publication.<sup>100</sup>

Television stations and newspapers used to operate solely on a broadcast/publication-dependent deadline. Journalists had a set time for completion of the reporting and editing for each day.<sup>101</sup>

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<sup>95</sup> See Jianlan Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension*, 30 U. LA VERNE L. REV. 404, 411 (2009) (commenting upon interactivity of new media versus traditional press).

<sup>96</sup> See Douglas Martin, *Walter Cronkite, 92, Dies; Trusted Voice of TV News*, N.Y. TIMES, July 17, 2009, archived at [www.webcitation.org/6FQ1aIUcb](http://www.webcitation.org/6FQ1aIUcb) (reviewing Cronkite's role in the rise of network news the evening news anchorman). Walter Cronkite was the award-winning television journalist who pioneered the role of television anchor. He is often referred to as the "Most Trusted Man in America." See *id.*; see also Chad Catacchio, *Twitter Isn't the New Cronkite – It Needs the New Cronkite(s)*, THE NEXT WEB, Jan. 9, 2011, archived at [www.webcitation.org/6FQ35v4G4](http://www.webcitation.org/6FQ35v4G4) (commenting on the need for micro-bloggers to assume the mantle of trusted disseminators of news).

<sup>97</sup> Cf. Catacchio, *supra* note 96 (remarking upon Twitter's live response time and how it differs from more edited content from traditional news media).

<sup>98</sup> See Gary Graham and Tracy Thompson, *Inside Newsroom Teams*, NORTHWESTERN UNIVERSITY MANAGEMENT CENTER, Mar. 26, 2013, archived at [www.webcitation.org/6FQ4teXCG](http://www.webcitation.org/6FQ4teXCG) (discussing the team-based work in news production).

<sup>99</sup> See JANET KOLODZY, *CONVERGENCE JOURNALISM: WRITING AND REPORTING ACROSS NEWS MEDIA* 32 (2006) (describing the role of the copyeditor).

<sup>100</sup> See Susan P. Shapiro, *Libel Lawyers as Risk Counselors: Pre-publication and Pre-broadcast Review and the Social Construction of News*, 11 L. & POL'Y 281, 286-87 (1989), archived at [www.webcitation.org/6FR770i4A](http://www.webcitation.org/6FR770i4A) (explaining the importance of having lawyers on hand to assist large media companies).

<sup>101</sup> See KOLODZY, *supra* note 99, at 45 (providing an overview of timelines that media outlets follow).

Television broadcasts focused their efforts on the prime time newscasts at 6, 10 and/or 11 p.m. ET.<sup>102</sup> Newspapers generally had deadlines between 10 p.m. and midnight so they could go to press overnight and be ready for early-morning distribution for subscribers to pick up off their driveway when they woke up.<sup>103</sup> This traditional timetable not only gave publishers a consistent expectation of how much time they had to work on a story, but more importantly, it also limited publication to only these specific times—for both the publishers and their competitors.<sup>104</sup> The consistency helped encourage a process-approach to publishing and gave journalists and editors more time to develop stories and sources before publishing than the evolved instantaneous publication cycle encourages.<sup>105</sup>

#### B. HOW THE FUNCTION OF TWITTER HAS CHANGED THE SPEED OF NEWS

Casual communication is core to the origins of Twitter. One of its creators, Jack Dorsey, has explained how Twitter got its name, "...we came across the word 'twitter', and it was just perfect. The definition was 'a short burst of inconsequential information,' and 'chirps from birds'. And that's exactly what the product was."<sup>106</sup> It has since been called the "SMS of the Internet."<sup>107</sup>

Twitter lets users communicate via messages of 140-characters or fewer.<sup>108</sup> Twitter is based on public streams of information

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<sup>102</sup> See KOLODZY, *supra* note99, at 45 (describing television networks' method of scheduling).

<sup>103</sup> See KOLODZY, *supra* note99, at 44 (describing newspaper deadlines for publication).

<sup>104</sup> See KOLODZY, *supra* note99, at 45 (explaining network postings are focused to the 6:30PM Eastern Time newscast).

<sup>105</sup> See KOLODZY, *supra* note99, at 44 (acknowledging technological advances in the media).

<sup>106</sup> See David Sarno, *Twitter creator Jack Dorsey illuminates the site's founding document*, L. A. TIMES, Feb. 18, 2009, archived at [www.webcitation.org/6FRJxlkS4](http://www.webcitation.org/6FRJxlkS4) [www.webcitation.org/6FRJxlkS4](http://www.webcitation.org/6FRJxlkS4) [www.webcitation.org/6FRJxlkS4](http://www.webcitation.org/6FRJxlkS4). (articulating the idea of tweeting).

<sup>107</sup> See Leslie D'Monte, *Swine flu's tweet causes online flutter*, BUS. STANDARD, Apr. 29, 2009, archived at [www.webcitation.org/6G7t4gFqv](http://www.webcitation.org/6G7t4gFqv) (finding that it is known for its short micro-blogging).

where users follow people and conversations they find compelling.<sup>109</sup> Users can choose to have a public account, or a private, protected account.<sup>110</sup> Most users choose to make their accounts public, which results in their tweet going public instantly to the world and displayed automatically in their followers' twitter stream.<sup>111</sup> The minority of users who choose to make their tweets private must approve followers before granting them access to their tweets.<sup>112</sup>

Users communicate using Twitter in a variety of ways, both publicly and privately. Public conversations among Twitter users and their followers are commonplace.<sup>113</sup> Communicating with others on Twitter relies on mentioning other Twitter users by their twitter usernames instead of using their actual names.<sup>114</sup> Twitter also serves as a private instant messaging service between Twitter users who are following one another.<sup>115</sup>

This public collaborative sharing of information fuels the sense of community on Twitter.<sup>116</sup> Using a retweet, or "RT," Twitter users

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<sup>108</sup> See *About Twitter*, *supra* note 6 [www.webcitation.org/6FRKkMxzZ](http://www.webcitation.org/6FRKkMxzZ) (stating that users may also post photos and videos).

<sup>109</sup> See *About Twitter*, *supra* note 6 (emphasizing on the word "interesting").

<sup>110</sup> See Robert J. Moore, *Twitter Data Analysis: An Investor's Perspective*, TECHCRUNCH, Oct. 5, 2009, archived at [www.webcitation.org/6FRLkQhhL](http://www.webcitation.org/6FRLkQhhL) [www.webcitation.org/6FRLkQhhL](http://www.webcitation.org/6FRLkQhhL) (finding that those who protected their tweets had less followers).

<sup>111</sup> See *id.* (noting that fewer than 10 percent of users on Twitter have private accounts, or "'protect' their tweets").

<sup>112</sup> See *About Public and Protected Tweets*, Twitter, Mar. 27, 2013, archived at [www.webcitation.org/6FRNL1x04](http://www.webcitation.org/6FRNL1x04) [www.webcitation.org/6FRNL1x04](http://www.webcitation.org/6FRNL1x04) (listing this approval requirement).

<sup>113</sup> See *About Twitter*, *supra* note 108 (indicating that one may listen as well as contribute to the information around the world).

<sup>114</sup> See *What are @Replies and Mentions?*, Twitter, Mar. 27, 2013, archived at <http://www.webcitation.org/6FROD62Mb> (noting that Twitter users may use the @sign to indicate their profile in messages i.e. @username.)

<sup>115</sup> See *About Twitter*, *supra* note 6 (mentioning this SMS server). See also *About Public and Protected Tweets*, *supra* note 112 (requiring manual approval from private Twitter users to have access their tweets).

<sup>116</sup> See *About Twitter*, *supra* note 6 (generalizing the ways Twitters user share information and participate in the online community).



pass on another user's tweets word for word to their followers, encouraging the initial tweet to reach more people.<sup>117</sup> A retweet is expected to be a message that is essentially copied verbatim from the original message, though some minor tweaks to shorten the message to fit within the 140 character confines is typically acceptable.<sup>118</sup> Here's an example of a retweet from the hypothetical presented earlier:

**Original Tweet:** "OMG Gross. @BestBurgersEver serves rat meat in burgers! DON'T EAT THERE! <http://t.co/ratpic> <http://www.donteatrats.com>";

**Retweet:** "RT @SocialButterfly3: OMG Gross. @BestBurgersEver serves rat meat in burgers! DON'T EAT THERE! <http://t.co/ratpic> <http://www.donteatrats.com>."<sup>119</sup>

Note that in a retweet, attribution is given to the originator of the tweet by mentioning his or her Twitter handle and the message is forwarded verbatim.<sup>120</sup> This attribution adds 22 characters to the initial tweet, which was only 118 characters, so the retweet still fits the 140-character requirement.<sup>121</sup> Say, however, a forwarded tweet is too long to be retweeted, or the Twitter user has another way to say the message, without substantially changing the meaning of the tweet, then the Twitter user would use a modified tweet, or an "MT."<sup>122</sup>

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<sup>117</sup> See *The Twitter Glossary*, *supra* note 20 (defining retweet and how users may utilize the feature to further share tweets).

<sup>118</sup> See *The Twitter Glossary*, *supra* note 20 (differentiating the act of retweet from the noun of retweet).

<sup>119</sup> See *infra* Part I.A - Hypothetical: Best Burgers Ever and @SocialButterfly3 (imagining a hypothetical Twibel situation concerning hamburgers and rat meat).

<sup>120</sup> See *The Twitter Glossary*, *supra* note 20 (defining Twitter handle as the user's name and a URL tag with no spaces included).

<sup>121</sup> See *infra* Original and Modified Tweet in Part III.B (differentiating the number of characters in the original tweet and in the retweet).

<sup>122</sup> See Lauren Dugan, *Advanced Twitter Terminology to Get You Tweeting Like a Pro*, Jun. 29, 2011, archived at [www.webcitation.org/6FT0hf6Dy](http://www.webcitation.org/6FT0hf6Dy) (defining modified tweet). A RT is signified by "RT @[original handle]:" while a modified tweet is signified by "MT @[original handle]:" *Id.*

A modified tweet designates a tweet that is based on information that someone else has already shared but put into the user's own words or is a truncated version of the message.<sup>123</sup> Using the same hypothetical tweet as the example, this is how a modified tweet would be published in practice:

**Original Tweet:** "OMG Gross. @BestBurgersEver serves rat meat in burgers! DON'T EAT THERE! <http://t.co/ratpic> <http://www.donteatrats.com>";

**Modified Tweet:** "I won't now! MT @SocialButterfly3: @BestBurgersEver serves rat meat in burgers! DON'T EAT THERE! <http://t.co/ratpic> <http://t.co/norats>." <sup>124</sup>

As you can see, the modified tweet eliminated "OMG Gross." from the original tweet, added commentary, and shortened the URL from "<http://www.donteatrats.com>" to "<http://t.co/norats>" using a URL shortener (a common practice used on Twitter).<sup>125</sup> Since these tweaks to the message are minor, it is acceptable to use a modified tweet in this situation.<sup>126</sup>

Hashtags, mentioned in the hypothetical earlier, are another Twitter phenomenon crucial to the Twitter conversation.<sup>127</sup> A

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<sup>123</sup> See Dugan, *supra* note 122 (instructing readers as to what constitutes a modified tweet). The modified tweeter gives attribution to the information's originator by mentioning their Twitter handle. The distinction between a retweet and a modified tweet depends on substance. Minor changes are acceptable by a common community standard in retweets, but more substantial changes or completely rewording a tweet results in a modified tweet. See Dugan, *supra* note 122 (explaining modified tweets.).

<sup>124</sup> See *infra* Part I.A - Hypothetical: Best Burgers Ever and @SocialButterfly3 (demonstrating how original hypothetical tweet would appear as a modified tweet).

<sup>125</sup> See *The Twitter Glossary*, *supra* note 20 (defining a URL shortener as an application used to create a URL link that takes up fewer characters and still redirects users to the originally-intended site).

<sup>126</sup> See *The Twitter Glossary*, *supra* note 20 (characterizing a modified tweet as any other user's original tweet which a second user modifies in some manner, such as shortening or adding content or commentary).

<sup>127</sup> See *The Twitter Glossary*, *supra* note 20 (explaining the use and purpose of hashtag, which is symbolized by the use of "#" before the term).

hashtag can occur anywhere in a tweet and is indicated by a "#."<sup>128</sup> They often flag a tweet with a relevant keyword or topic.<sup>129</sup>

**Example of a hashtag (in bold):** "I refuse to eat rat burgers! Not eating at @BestBurgersEver again!  
**#bestburgersnever**"<sup>130</sup>

Clicking on a hashtag takes you to another page that shows you all other tweets containing that same hashtag making it easy for other Twitter users to search for that keyword.<sup>131</sup> Initially, Twitter users created hashtags to categorize messages and organize conversations around a topic.<sup>132</sup> The function of hashtags in tweets has expanded to include commentary, including opinions, jokes, and has even created a communication-style likened to the "90s air quote."<sup>133</sup> Hashtag use has spread beyond Twitter and connected Twitter communications and real-world communication.<sup>134</sup>

People are "grasping at a way to archive a pace we are only ever just barely keeping up with" because of the amount of information shared on social media and how easy it is to share, how-

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<sup>128</sup> See *The Twitter Glossary*, *supra* note 20 (relating how hashtag may be used in a tweet).

<sup>129</sup> See TWITTER.COM, *Using Hashtags on Twitter*, March 28, 2013, archived at [www.webcitation.org/6FT3LhHjJ](http://www.webcitation.org/6FT3LhHjJ) (explaining various ways and reasons hashtags are used in tweets).

<sup>130</sup> See *infra* Part I.A - Hypothetical: Best Burgers Ever and @SocialButterfly3 (demonstrating use of hashtag from original hypothetical tweet).

<sup>131</sup> See *Using Hashtags on Twitter*, *supra* note 129 (explaining how hashtags are used for a search in a user's tweets).

<sup>132</sup> See, e.g., *Using Hashtags on Twitter*, *supra* note 129 (implying function of hashtag has origins in organization of user tweets and for ease of search).

<sup>133</sup> See *Using Hashtags on Twitter*, *supra* note 129 (illustrating various ways to use hashtags); see also Hannah Daly, *Why We #Hashtag*, THOUGHT CATALOG, Sept. 21, 2011, archived at [www.webcitation.org/6FYj9UovT](http://www.webcitation.org/6FYj9UovT) (comparing hashtags to 90's air quotes). A 90's air quote is an act where a person positions their index and middle fingers of both hands to resemble quote makes usually indicating sarcasm. See *id.* (describing the 90's air quote)..

<sup>134</sup> See *id.* (explaining how hashtags function as a way to connect users to the greater public).

ever hashtags help people cope.<sup>135</sup> The primary issue is not information overload, but more a lack of filtering mechanisms.<sup>136</sup> Hashtags let people filter the information they find on Twitter, and sort out what is most "important, relevant and worth remembering" from an infinite sea of pieces and fragments.<sup>137</sup> As a result, hashtags let people put Twitter messages in the context of their everyday "real" life.<sup>138</sup> In applying this to the hypothetical, the consistent use of the hashtag "#bestburgernever" from the initial tweet, and in subsequent tweets, represents one of the key components that extends the limited power of the initial tweet to create a greater impact of the overall movement on Twitter and in the real world.

### C. THE NEW NEWS CYCLE

With the advent of internet technology and the social media revolution, as illustrated by Twitter, a new news cycle has developed. This new news cycle has created a new category of publishers. Now, both traditional media and non-media private publishers need to be aware of publishing liabilities.

While the public still relies on traditional journalism methods to some extent for information, this new cycle more accurately resembles a "crowdsourced editorial effort."<sup>139</sup> The competition for being the first to break news is much greater because of the sheer numbers of social media users contributing to the constant fire hose of information.<sup>140</sup> In order to stay relevant by publishing information first with so many more voices adding to the

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<sup>135</sup> See *id.* (discussing the current constant flow of information).

<sup>136</sup> See Clay Shirky, *It's Not Information Overload. It's Filter Failure*, YOUTUBE, Sept. 19, 2008, archived at [www.webcitation.org/6FYIj6N3Z](http://www.webcitation.org/6FYIj6N3Z) (addressing the need for filtering functions to respond to the vast and rapid increase of accessible and available information within the last ten years).

<sup>137</sup> See Daly, *supra* note 133 (explaining the function of hashtags).

<sup>138</sup> See Daly, *supra* note 133 (observing the way hashtags allow people to understand the world around them).

<sup>139</sup> See Catacchio, *supra* note 96 (explaining how people who were finding and passing on "the most accurate information of the moment" were a part of one giant newsroom on Twitter).

<sup>140</sup> See Catacchio, *supra* note 96 (highlighting the desire to publish breaking news first).

conversation, traditional journalism outlets feel pressure to publish information more quickly than in the past--at times to the detriment of truth.<sup>141</sup>

The figure below represents the "new news cycle." It indicates how social media has changed the flow of information and transformed passive publications into interactive news applications. News organizations used to be the sole source of news, publishing articles and creating newscasts that the public simply consumed, which permitted little to no interaction.<sup>142</sup> Now, the publishing of a news story is no longer the last step, but instead is much closer to the beginning of the news cycle.<sup>143</sup> News is now interactive: people can comment on, add to, change and share stories via Twitter and other social networks or blogs.<sup>144</sup>

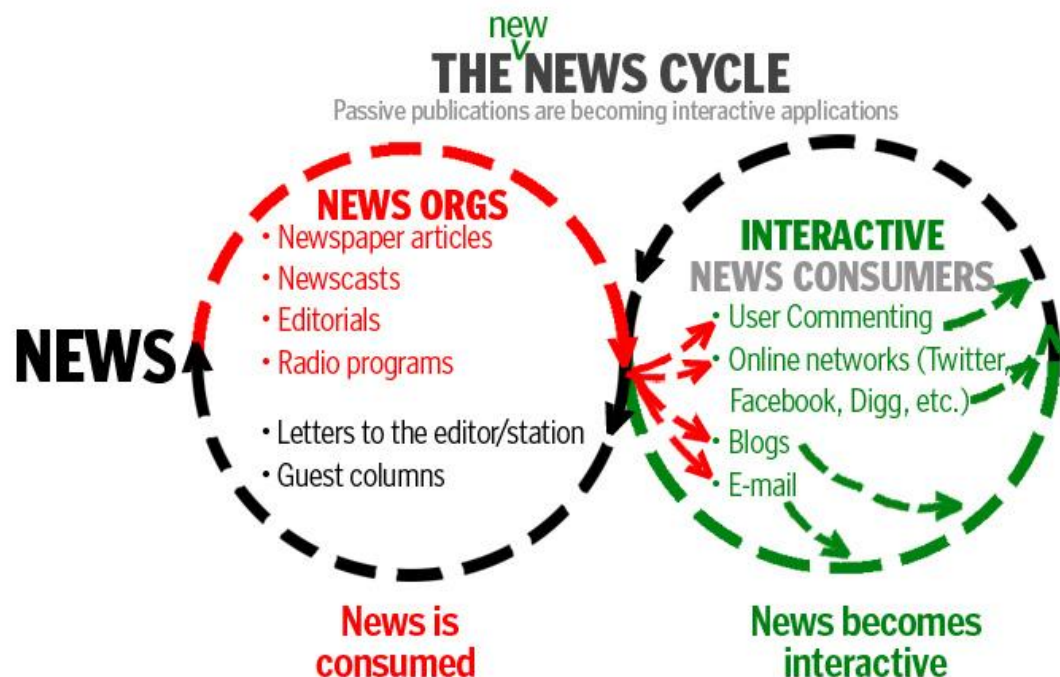
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<sup>141</sup> See Catacchio, *supra* note 96 (highlighting an incident where a major news organization's director's top tweet contained incorrect information, thus silencing other tweets containing correct information about the incident); see also Leann Frola, *Copy Editors: The Missing Link in the Online Newsroom*, POYNTER, Mar. 3, 2011, archived at [www.webcitation.org/6FY01gZYd](http://www.webcitation.org/6FY01gZYd) (discussing how some published information would not pass the "taste test").

<sup>142</sup> See Kosseff, *supra* note 30, at 250 (observing how traditional media outlets were the dominant news source).

<sup>143</sup> See *id.* (stating that the internet has caused major changes to news media).

<sup>144</sup> See Alan J. Bojorquez & Damien Shores, *Open Government and the Net: Bringing Social Media Into the Light*, 11 TEX. TECH, ADMIN. L.J. 45, 47 (2009) (discussing how social media has changed the way the people consume their news).



**Figure 1**<sup>145</sup>

This new news cycle becomes apparent, especially in breaking news stories. One recent example illustrates this. On January 8, 2011 at 1:01 p.m. ET, National Public Radio (NPR) broke the news to its radio audience that Arizona congresswoman, Gabrielle Giffords, had been shot.<sup>146</sup> An hour later, NPR reported that she died.<sup>147</sup> NPR confirmed this news at 2:06 p.m. with an e-mail alert to NPR subscribers.<sup>148</sup> Six minutes later at 2:12 p.m., NPR's social media editor, Andy Carvin tweeted to NPR's two million followers that a gunman had killed Giffords.<sup>149</sup> At 2:15 p.m., NPR's blogger, Mark Memmott also posted the misinformation to

<sup>145</sup> Ellyn Angelotti, *The New News Cycle*, created for the Associated Press Managing Editors NewsTrain conference, Nov. 2009.

<sup>146</sup> Alicia C. Shepard, *NPR's Giffords Mistake: Re-Learning the Lesson of Checking Sources*, NPR, Jan. 11, 2011, archived at [www.webcitation.org/6FYrFazKT](http://www.webcitation.org/6FYrFazKT) (summarizing facts about the Giffords' shooting).

<sup>147</sup> See *id.* (noting NPR's erroneous reporting of Giffords' death).

<sup>148</sup> See *id.* (describing how NPR disclosed this story to its subscribers).

<sup>149</sup> See *id.* (noting how many people NPR reached with this news story).

"The Two-Way" newsblog.<sup>150</sup> The post indicated "a source in the Pima County Sheriff's office" had told Mark Moran, a reporter with the NPR-affiliate station KJZZ that Giffords died.<sup>151</sup> NPR ombudsman Alicia Shepard said Memmott, "handled the news just right, continually cautioning that the story was erupting in the midst of panic and pandemonium and nothing was certain."<sup>152</sup>

In the traditional news cycle, Walter Cronkite would have had a few more hours to verify information and sources before reporting it on the 6 p.m. newscast.<sup>153</sup> Reporters and editors at newspapers would have had time to flesh out the details of the story before going to press much later that night.<sup>154</sup>

However, "[t]he Twittersphere exploded with scores retweeting Giffords' supposed death, exemplifying how news travels in a nanosecond in today's media world before anyone has time to process it."<sup>155</sup> Many news organizations including CNN, the New York Times, Reuters and Fox News retweeted Carvin's tweet with NPR as its source, while others held back on reporting that she had died.<sup>156</sup> Within a half hour, NPR had edited the headline to read that Giffords had been shot instead of reporting she had

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<sup>150</sup> See Mark Memmott, *Rep. Gabrielle Giffords, D-Ariz., Many Others, Shot; At Least Six Dead*, NPR, Jan. 8, 2011, archived at [www.webcitation.org/6FYsEzd8m](http://www.webcitation.org/6FYsEzd8m) (acknowledging the blog's caution to readers that updates were posted as received and that nothing was certain).

<sup>151</sup> See *id.* (noting how blog reporter relied on unknown or unnamed sources to support its update of this incident).

<sup>152</sup> Shepard, *supra* note 146.

<sup>153</sup> See Matthew Ingram, *Twitter and the Incredible Shrinking News Cycle*, Feb. 13, 2012, archived at [www.webcitation.org/6FaYWqSVP](http://www.webcitation.org/6FaYWqSVP) (lamenting the loss of time to verify sources and accuracy before reporting).

<sup>154</sup> See Ingram, *supra* note 153 (commenting on the process of vetting and verifying sources in the traditional news cycle).

<sup>155</sup> Shepard, *supra* note 146.

<sup>156</sup> See Shepard, *supra* note 146 (identifying networks who reported Giffords' death based on NPR's false report).

been killed.<sup>157</sup> But in the meantime, CBS and NBC had featured the headline that Giffords had died.<sup>158</sup>

The following day, NPR's Executive Editor Dick Meyer issued an apology to Giffords, the families of the victims and the listeners and readers.<sup>159</sup> He called the information a "serious and grave error."<sup>160</sup> He noted the organization's "error of judgment in a fast-breaking situation" and pointed out that NPR corrected the error immediately.<sup>161</sup> Meyer said the news organization should have been "more cautious" during the chaos of a situation that was "changing so swiftly."<sup>162</sup>

Given the speed of information exchange on Twitter, media analysts said the conflicting reports were "understandable, but not excusable."<sup>163</sup> This situation isn't unique.<sup>164</sup> Especially in breaking news stories, publishers are forced to balance two sometimes conflicting, ethical pressure points: immediacy and accuracy.<sup>165</sup> After the Gifford's incident, NPR's media critic, David Folkenflik said news organizations should be cognizant of their standards when reporting information.<sup>166</sup> "They need to be clear about

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<sup>157</sup> See Shepard, *supra* note 146 (detailing NPR's revocation of its original news story that Giffords had died)..

<sup>158</sup> See Shepard, *supra* note 146 (commenting on major news networks featuring Giffords' death as their lead story).

<sup>159</sup> See Dick Meyer, *Editor's Note: On NPR's Giffords Coverage*, Jan. 9, 2011, archived at [www.webcitation.org/6G9Ml3pUD](http://www.webcitation.org/6G9Ml3pUD) (apologizing for error in reporting Giffords' death).

<sup>160</sup> Meyer, *supra* note 159.

<sup>161</sup> See Meyer, *supra* note 159 (conveying apology and reason behind the error by NPR).

<sup>162</sup> See Meyer, *supra* note 159 (summarizing Meyer's statements regarding NPR's reporting of Giffords' death).

<sup>163</sup> See Mallary Jean Tenore, *Conflicting Reports of Giffords' Death were Understandable, but not Excusable*, Jan. 11, 2011, archived at [www.webcitation.org/6Faazoauh](http://www.webcitation.org/6Faazoauh) (condoning and condemning the mistakes made by NPR in reporting Giffords' death).

<sup>164</sup> See Tenore, *supra* note 163 (remarking upon predictability of errors in reporting in today's 24-hour news cycle).

<sup>165</sup> See Ingram, *supra* note 154 (observing that in today's fast paced news cycle there is an inherent tension between accuracy of information and immediacy in reporting).

<sup>166</sup> See Tenore, *supra* note 163 (stressing importance of transparency and honesty with readers when reporting mistakes occur).



who they know and what they know if they decide to put it on air or post it or print it," Folkenflik said.<sup>167</sup>

This example illustrates how especially during breaking news stories, Twitter resembles "one giant newsroom."<sup>168</sup> Twitter has even created a website, Twitter for Newsrooms, specifically to help those who use the tool for journalistic purposes.<sup>169</sup> The site shares tips and strategies for finding sources, tweeting effectively and highlights best practices of the use of Twitter in journalism.<sup>170</sup>

While this Giffords situation is not directly a defamatory statement, it reflects the changes in the method and the speed with which people exchange information now as result of social media.<sup>171</sup> The mainstream media and social media have merged.<sup>172</sup> The pressure to be first among an infinite number of online publisher competitors can often come at the expense of being accurate.<sup>173</sup> This pressure poses a major threat for any publisher, even those with editorial safeguards that are often accelerated in time-sensitive situations.<sup>174</sup> Fast-paced, breaking news situa-

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<sup>167</sup> Tenore, *supra* note 163.

<sup>168</sup> See Catachchio, *supra* note 96 (arguing that Twitter users commenting upon breaking, and not-so-breaking, news are part of the 24-hour news cycle).

<sup>169</sup> See TWITTER.COM, *Twitter for Newsrooms*, Apr. 2, 2013, *archived at* [www.webcitation.org/6Fae0PSnd](http://www.webcitation.org/6Fae0PSnd) (assisting newsrooms by designing specialty Twitter tools for media outlets to use for reporting).

<sup>170</sup> See TWITTER.COM, *supra* note 166 (expounding upon how new tool can be used by media outlets and newsrooms). Journalists now use Twitter to find and follow sources related to the stories they write, a tool to disseminate news and stories to their followers, and many organizations have even developed social media strategies and protocols for newsrooms. See Martha Bebinger, *Why it's Worth Developing a Social Media Strategy, Evaluating it Along the Way*, May 9, 2011, *archived at* [www.webcitation.org/6Faf0GuRV](http://www.webcitation.org/6Faf0GuRV) (describing how start-up social media organization used Twitter to expand its sources and resources).

<sup>171</sup> See Ingram, *supra* note 153154 (likening the fast-paced 24-hour news cycle to a "train whose brakes have failed").

<sup>172</sup> See Ingram, *supra* note 153154 (noting the interweaving of news media and social media on Twitter).

<sup>173</sup> See Shepard, *supra* note 146 (vilifying NPR for its speedy and inaccurate reporting of Gifford's death).

<sup>174</sup> See Meyer, *supra* note 159 (cautioning news reporters to be vigilant about sources and verifying them).

tions are fraught with peril when it comes to publishing potentially defamatory content.<sup>175</sup> The lack of clarity related to who is a public figure adds to the difficulty of reporting in stories like this one because if the subject of a story is not considered a public figure, the lower threshold could lead to much greater potential damages for "innocent and inevitable mistakes."<sup>176</sup> While journalists seek to report facts responsibly, no matter what the conditions may be the reality is that today's news gatherers, both in newsrooms and operating on their own, depend on fewer resources than ever before, making it even more difficult to "err on the side of caution and assume that all of their subjects could be seen as private figures under the Gertz analysis."<sup>177</sup>

These challenges hold true whether a publisher works for a large news corporation or a small, independent operation.<sup>178</sup> The distinction between mainstream media, the fourth estate, and this new class of publishers, the fifth estate, was more apparent to the average person.<sup>179</sup> Some may argue that the Supreme Court has not directly recognized a distinction between these "classes" of publishers.<sup>180</sup> In most cases, generally speaking, the Supreme Court has applied First Amendment protection,<sup>181</sup> and liability for

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<sup>175</sup> See Shepard, *supra* note 146 (remarking upon the negative consequences of inaccurate reporting).

<sup>176</sup> See Kosseff, *supra* note 30, at 262 (admonishing newspapers to be fully confident in their stories and sources prior to publication so as to avoid defamation claims).

<sup>177</sup> Kosseff, *supra* note 30, at 265.

<sup>178</sup> See Kosseff, *supra* note 30, at 263 (presenting figures demonstrating the decline in traditional media resources and the effects of decline in readership based on social media).

<sup>179</sup> See Bill Dutton, *Democracy on the Line: the Fifth Estate?*, 21 OXFORD TODAY, no. 2, Jan. 1, 2009, archived at [www.webcitation.org/6FahSfjyB](http://www.webcitation.org/6FahSfjyB) (expounding upon the use of Internet and digital media as creating the Fifth Estate through the participation of the public in reporting news).

<sup>180</sup> See *Ayala v. Washington*, 679 A.2d 1057, 1063 n.2 (D.C. 1996) (noting that "[t]he Supreme Court has not ruled on whether the defendant is properly characterized as a member of the media. This court has concluded, however, that the First Amendment recognizes no such distinction." (citation omitted)).

<sup>181</sup> See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (stating that "[t]he liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

defamation<sup>182</sup> equally to all speakers. However, one may interpret the court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>183</sup> to recognize a different standard for defamation liability for non-media defendants.<sup>184</sup> Actually, the distinction made by the court in this case was not the speaker but the difference in purpose between distributing news for public consumption and providing specialized information to a select audience.<sup>185</sup> By this standard, it is likely that all Twitter users would be treated the same by the court based on their function, even those who do not consider themselves "media" yet publish news and information for public consumption.<sup>186</sup>

In the age of Twitter, the distinction between the title of media and non-media has become less relevant from both a practical and legal perspective.<sup>187</sup> It is more important to look at the actions of the speaker.<sup>188</sup> Both Twitter users who consider themselves "media," (e.g. @NPRNews) and those who consider themselves "non-media" (e.g. @SocialButterfly3) can be influential news sources that break and disseminate news online to a community, which can vary greatly in size and geography.<sup>189</sup> Both

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<sup>182</sup> See *Gertz*, 418 U.S. at 364 (finding the distinction between public and private individuals is a legal fiction).

<sup>183</sup> 472 U.S. 749, 749 (1985).

<sup>184</sup> See *id.* at 761 (holding no requirement of actual malice for statements not involving matters of public concern).

<sup>185</sup> See *id.* at 762 (acknowledging that statement was not a matter of public concern because it could not be disseminated to the public).

<sup>186</sup> See *id.* (differentiating protection afforded speech based on speaker's commercial intent and the ease with which the speech may be verified by other sources).

<sup>187</sup> See Lili Levi, Symposium, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1553 (2012) (observing that the disaggregated news context today resulted from a focus on a journalist's personal brand at the expense of the traditional news media). See also Phillips, *supra* note 13, at 189 (discussing necessity of distinction between media and nonmedia sources in order to settle defamation case law and allow law to adapt to technology).

<sup>188</sup> See Levi, *supra* note 187, at 1576 (proposing that given social media's reliance on content with little context, courts will have no choice but to rely on the speaker as opposed to traditional notions of media and nonmedia).

<sup>189</sup> See Phillips, *supra* note 13, at 189 (noting how technological advances can blur how news sources are defined). See, e.g., Levi, *supra* note 187, at 1583-84 (discussing how First Amendment was designed to protect media institutions more than individual journalists and how the case law surrounding journalists

can also publish defamatory statements.<sup>190</sup> Therefore, all publishers because of their similar function, regardless of their media status would likely be held to same standards when it comes to defamation law.<sup>191</sup> Many challenges exists in applying "legal standards created for the more lucrative, large news corporations"<sup>192</sup> stemming from cases that traditionally involved news-media organizations to this new class of publishers, who are often individuals.<sup>193</sup> The law may need to evolve to apply more appropriately to individuals who, "while stating matters that are significant to them, may harm the reputation of another intentionally or unintentionally by disseminating information that can be read online by people around the world."<sup>194</sup>

#### IV. DEFAMATION AND TWITTER

Traditional defamation law and First Amendment standards have been largely designed to deal with the traditional news cycle and media in its traditional form.<sup>195</sup> Public figures that were most likely to be discussed in traditional media publications brought a majority of the claims against large media defendants.<sup>196</sup> These public figures often had ample funds to pursue lengthy litigation

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as individuals is unsettled regardless of their relationship to the traditional news media).

<sup>190</sup> See Phillips, *supra* note 13, at 189 (noting defendants in defamation suits, regardless of media or nonmedia status, are afforded Constitutional rights).

<sup>191</sup> See Derigan Silver & Ruth Walden, *A Dangerous Distinction: The Deconstitutionalization of Private Speech*, 21 COMMLAW CONSPECTUS 59, 69-70 (2012) (reviewing law on point regarding defamation and how the Supreme Court has yet to distinguish between media and nonmedia speakers when it comes to defamation protection).

<sup>192</sup> Kosseff, *supra* note 30, at 263.

<sup>193</sup> See Kosseff, *supra* note 30, at 250-51 (introducing landmark cases in defamation and how their focus on traditional media has hindered their adaptability to new media technologies).

<sup>194</sup> Phillips, *supra* note 13, at 185.

<sup>195</sup> See Levi, *supra* note 187, at 1583 (positing First Amendment was designed to protect traditional media organizations more than individual journalists).

<sup>196</sup> See Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 95-97 (1987) (reviewing foundational cases and the plaintiffs bringing suit).

that could last for years.<sup>197</sup> Furthermore, large media defendants, who often had deep pockets, could provide plaintiffs a viable remedy by paying monetary judgments.<sup>198</sup> With the broader body of publishers on Twitter come increased responsibilities: legal, in addition to ethical.<sup>199</sup> Now, “the law of defamation, which used to be of interest only to newspapers, book publishers, and broadcasters, [is] a topic of interest for everyone.”<sup>200</sup> Publishers and courts need to examine how to adapt defamation remedies to contemporary realities.<sup>201</sup>

Despite the changes in the news cycle, traditional methods for resolving defamation disputes may be adequate when the defendant is a mainstream media organization with a skilled legal staff and deeper pockets that will provide the proper remedy for a defamed plaintiff.<sup>202</sup> The existing legal framework appears ill-suited for this new class of private publishers.<sup>203</sup> Twitter users often lack knowledge of the law and are likely unaware of the ramifications they could face for publishing defamatory content.<sup>204</sup> In comparison to the traditional editorial processes of mainstream media, Twitter users are able to publish in a vacuum

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<sup>197</sup> Cf. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 26-27 (1983) (applying risk analysis to defamation suits in order to posit why media organizations publish defamatory material about certain types of public officials or public figures).

<sup>198</sup> See *id.* at 27-28 (asserting that media outlets are willing to risk defamation suits because of their deeper pockets and the power imbalance between them and any individual they defame).

<sup>199</sup> See Marko Vesely, *Defamation and Libel Meets Twitter*, WESTERN CANADA BUSINESS LITIGATION BLOG, Sept. 22, 2010, *archived at* [www.webcitation.org/6FbkqBfWY](http://www.webcitation.org/6FbkqBfWY) (warning readers of the expansion of liability for defamation due to increase in social media presence).

<sup>200</sup> *Id.*

<sup>201</sup> See Phillips, *supra* note 13, at 192 (asserting courts need to settle case law and social media users need to be aware of potential liability under current case law).

<sup>202</sup> See Smolla, *supra* note 197, at 27-28 (discussing the power of traditional media outlets due to deep pockets and how the power inequity results in a transfer of wealth to the media because of the claims of defamation which go uncompensated).

<sup>203</sup> See Phillips, *supra* note 13, at 180-81 (commenting upon confusion in the courts due to indecision as to how to treat nonmedia defamation defendants).

<sup>204</sup> See Phillips, *supra* note 13, at 174-75 (noting how all posts and status updates on various social networking sites constitute “publishing”).

with no one responsible or assigned to correcting or fact-checking their posts.<sup>205</sup> As a result, they put themselves at more risk than traditional publishers that have fact-checking and editing systems in place.<sup>206</sup>

While the fundamental foundation of Twitter is fast, free communication, the traditional remedies for defamatory publications remain slow and costly.<sup>207</sup> In an environment defined by its lightning-fast nature of publication, an equally speedy and efficient method of dispute resolution should be created.<sup>208</sup> Financial liability is also a concern because the majority of Twitter users do not have the deep pockets that many plaintiffs seek in traditional defamation suits, and as a result existing traditional remedies are often inadequate.<sup>209</sup>

Additionally, Twitter-created conventions are foreign to the courts' lexicon.<sup>210</sup> How the courts should apply traditional defa-

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<sup>205</sup> See Catacchio, *supra* note 96 (observing how the desire to post quick and up-to-date information affects the quality and accuracy of information).

<sup>206</sup> See Levi, *supra* 187, at 1576 (positing that if case law on point is not settled that courts will base defamation liability on context of report or the lack thereof).

<sup>207</sup> See Kraig J. Marton et al., *Protecting One's Reputation – How to Clear a Name in a World Where Name Calling is so Easy*, 4 PHX. L. REV. 53, 76 (2010) (asserting defamation suits are time-consuming, expensive, and may actually inflict more damage on the defamed party before a remedy, if any, is provided). There are many remedies available to a person who has been defamed including, but not limited to: confrontation, getting the other side of the story, and demanding an apology or retraction letter. *See id.* at 70-71 (describing available remedies to the defamed); *see also id.* at 77 (stating removal of offending or defamatory material is easier in traditional media sources because, in theory, anything published to the Internet can remain there in perpetuity).

<sup>208</sup> See Smolla, *supra* note 197, at 90 (arguing defamation standards should be streamlined in such a manner that they are the same for all defendants regardless of media or nonmedia status).

<sup>209</sup> See Smolla, *supra* note 197, at 27-28 (positing that the majority of individuals do not have the deep pockets of media outlets and therefore do not have the resources for large damages awards).

<sup>210</sup> *See, e.g.,* United States v. Cassidy, 814 F. Supp. 2d 574, 576-77 (D. Md. 2011) (explaining how Twitter works, what tweets are, how users may "follow" or "unfollow" other users, and how direct messages work between "followers"); Dimas-Martinez v. State, 385 S.W.3d 238, 246 (Ark. 2011) (reporting conversation between court and juror who tweeted during proceedings and indicat-

mation standards to Twitter, if at all, is a question the courts have not yet answered.<sup>211</sup> For example, the courts have not determined what the threshold is for the number of Twitter followers needed for a Twitter user to be considered a public figure.<sup>212</sup> Does merely having a Twitter account make all users some sort of public figure?<sup>213</sup> If Twitter users are considered limited-purpose public figures, how does that permeate into the real world?<sup>214</sup> Is the courtroom the most appropriate venue for resolving these issues?<sup>215</sup>

In applying defamation standards to Twitter, it is likely that the courts would consider Twitter users to be limited-purpose public

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ing court's lack of familiarity with Twitter). *See also* Dugan, *supra* note 122 (explaining the Twitter lexicon to the reader).

<sup>211</sup> *See* Phillips, *supra* note 13, at 192 (asserting that the time has come for the courts to decide whether there is a distinction between media and nonmedia sources in defamation case law).

<sup>212</sup> *See* Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199, 216 (2013) (discussing the trouble district courts have in distinguishing between public officials, public figures, and private persons).

<sup>213</sup> *Cf. id.* at 216-17 (indicating most courts focus on a voluntary assumption of risk and that the bar for obtaining such notoriety is generally set very high by courts).

<sup>214</sup> *Cf. id.* at 218-19 (explaining test for limited-purpose public figure and the differing approaches to determining voluntary assumption of risk of notoriety courts use to determine status of defamed individual).

<sup>215</sup> *See* Hunt, *supra* note 73, at 588-89 (suggesting current defamation standards are still workable in the face of evolving technology and the courts are proper places to make distinctions concerning defendant and plaintiff status); *see also* Kosseff, *supra* note 30, at 279 (stressing the importance of black letter law in maintaining the ability of courts to not exceed boundaries of legal authority when determining status of plaintiffs and defendants in defamation cases); *see also* Lafferman, *supra* note 212, at 246-47 (concluding courts should determine status of social media defamers through application of voluntariness test to the defamed individual); *see also* Langvardt, *supra* note 196, at 141 (positing that the Supreme Court should avoid distinguishing between media and nonmedia defendants and instead require the plaintiff prove the falsity of statements at issue, regardless of whether statements dealt with matter of public or private concern and regardless of the status of the defendant);

figures especially those with large numbers of followers.<sup>216</sup> The courts have not ruled specifically on what makes someone a public figure on Twitter.<sup>217</sup> Previous to Twitter, in a slander case where the head coach of the University of the District of Columbia's women's basketball team sued the university and its athletic director, the court held that she was not a limited-purpose public figure because although she had prominence "within women's basketball circle" this did not qualify for a "broader public figure status."<sup>218</sup> Would someone who had prominence within the Twitter community qualify for a similar status?<sup>219</sup> On the other hand, in dealing with blogs, courts have observed that, "blogs . . . can become the modern equivalent of political pamphleteering."<sup>220</sup> A Twitter user, simply by the act of tweeting publicly, seeks both influence and attention through its distribution mechanism.<sup>221</sup> Twitter users do have the option to restrict their tweets to only those they approve, creating a "private dissemination" rather than public publication, but most choose to keep their communications public.<sup>222</sup>

As will be discussed in a later section, this public and consistent access to the media and a broad audience can also provide self-help opportunities to correct one's reputation unlike in the

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<sup>216</sup> See Lafferman, *supra* note 212, at 231-32 (proffering limited-purpose public figure test as most easily adaptable to social media and Twitter related defamation suits, even with the over-inclusive nature of the test).

<sup>217</sup> Cf. Hunt, *supra* note 73, at 571 (outlining trouble courts have had distinguishing between public figures and private figures and that failure of Supreme Court to establish clear test has left the lower courts free to establish their own test to distinguish between the two types of plaintiffs).

<sup>218</sup> See *Moss v. Stockard*, 580 A.2d 1011, 1032-33 (D.C. 1990) (holding the defendant to be a private individual).

<sup>219</sup> Cf. Lafferman, *supra* note 212, at 205-06 (remarking that *Gertz* is relevant to social media in that it allows courts to focus on the voluntary assumption of risk by the plaintiff while asserting courts should avoid defining voluntariness by simple operation or use of a social media site).

<sup>220</sup> See *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (acknowledging that anonymous internet speech in blogs is protected by the First Amendment).

<sup>221</sup> See TWITTER, *supra* note 6 (describing how users can connect to communities and influence others with their tweets).

<sup>222</sup> See *About Public and Protected Tweets*, *supra* note 112 (describing the both private and public nature of Twitter).



past.<sup>223</sup> Because public users explicitly choose to have a voice on Twitter and can potentially shape the debate on issues via their tweets, they would likely be considered some form of public figure and therefore need to prove the high standard of actual malice in a defamation claim.<sup>224</sup>

#### A. CURRENT TWIBEL CASES

Using Twitter makes posting potentially defamatory content much easier because of the lowered barrier to entry for publication.<sup>225</sup> Therefore, it was only a matter of time before Twitter users would begin bringing defamation claims.<sup>226</sup>

A handful of Twibel cases have been filed, but none have actually gone to trial.<sup>227</sup> In 2009 and again in 2012, Courtney Love brought Twibel to the forefront.<sup>228</sup> After a business dispute, musician Courtney Love published comments on Twitter, MySpace

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<sup>223</sup> See Marton, *supra* note 207, at 69 (commenting upon the availability of and purpose behind social media sites' policies and procedures for removing defamatory content).

<sup>224</sup> See Lafferman, *supra* note 212, at 242-44 (postulating that distinguishing between active and passive social media users is easy when contemplated under the public forum doctrine, whereby by passive users simply pass through the environment while active users interact with individuals and the forum).

<sup>225</sup> See Ingram, *supra* note 5 (reporting upon Twitter's popularity is based upon the ease with which individuals can publish their thoughts through the micro-blogging format and that the "tweet can be passed around the world and back before newspaper reporters are even getting their shoes on.").

<sup>226</sup> See *La Russa*, *infra* note 254, at \*4 (claiming defendant defamed La Russa through use of his name and personality in social media); *Horizon Grp. Mgmt., LLC*, *infra* note 254, at 2 (claiming defendant defamed management company through tweets concerning the mold in her apartment). See also Trevino, *infra* note 254, at 62-63 (introducing recent twitter defamation suit); Complaint at 7, *Simorangkir v. Love*, No. BC410593 (Cal. App. Dep't Super. Ct. Mar. 26, 2009), archived at [www.webcitation.org/6GIPk2crp](http://www.webcitation.org/6GIPk2crp) [hereinafter DMLP: Simorangkir Complaint] (alleging Courtney Love defamed plaintiff on Twitter regarding clothing designs).

<sup>227</sup> See Sally Ho, *Oregon's First Twitter Libel Lawsuit Pits Tigard Doctor Against Portland Blogger*, OREGONLIVE, Oct. 10, 2011, [hereinafter *Oregon's first*] archived at [www.webcitation.org/6FbvP7wKv](http://www.webcitation.org/6FbvP7wKv) (stating the lack of legal precedent in this area).

<sup>228</sup> See DMLP: Simorangkir Complaint, *supra* note 229, at 5 (contending Love defamed her and her work through Twitter and other social media platforms).

and the online-shopping site etsy.com about Austin-based fashion designer Dawn Sigmorangkir.<sup>229</sup> Sigmorangkir requested that Love remove the published statements and “publicly acknowledge that her statements were false.”<sup>230</sup> Love ignored these requests, so Sigmorangkir sued Love for both compensatory and punitive damages to compensate for “irreparable damage to her name and reputation” as a result of the “sheer animosity” Love directed at Sigmorangkir.<sup>231</sup>

Love moved to strike asserting that Sigmorangkir’s claim impermissibly targeted her free speech activity protected by California’s Anti-SLAPP law, which protects “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.”<sup>232</sup> “In 1992, California enacted this anti-SLAPP provision in “direct response to the ‘disturbing increase’ in meritless lawsuits meant to ‘chill the valid exercise of the constitutional rights of freedom of speech.’”<sup>233</sup> Since then the California courts have encouraged the courts to “broadly construe”<sup>234</sup> the statute and “whenever possible . . . interpret the First Amendment and section 425.16 in a

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<sup>229</sup> See DMLP: Simorangkir Complaint, *supra* note 229, at 6-7 (stating Sigmorangkir claimed Love tweeted statements on or about March 17, 2009 accusing Sigmorangkir of being a “nasty, lying, hosebag thief”; and that she will be “hunted until your [sic] dead”).

<sup>230</sup> See DMLP: Simorangkir Complaint, *supra* note 229, at 14 (requesting a public retraction).

<sup>231</sup> See DMLP: Simorangkir Complaint, *supra* note 229, at 14-19 (making a demand for relief).

<sup>232</sup> See Special Motion to Strike Pursuant to C.C.P. § 425.16 at 3, *Simorangkir v. Love*, No. BC410593 (Cal. App. Dep’t Super. Ct. Aug. 19, 2009), *archived at* [www.webcitation.org/6Fc3Dim4k](http://www.webcitation.org/6Fc3Dim4k) [hereinafter DMLP: Love’s Motion to Strike] (citing to California’s anti-SLAPP law, C.C.P. § 425.16(b)(1)). The statute also notes that A cause of action against a person arising from any act of that person in furtherance of that person’s right of petition or free speech... shall be subject to a special motion to strike . . .” *Id.*

<sup>233</sup> See *id.* (noting the legislative history); see also *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 576 (Cal. 1999) (speaking about the legislative history).

<sup>234</sup> See *Briggs* 969 P.2d at 573 (finding that the legislature wants to broadly construe the statute).

manner 'favorable to the exercise of freedom of speech, not to its curtailment.'"<sup>235</sup>

The court denied Love's motion to strike because it was a "discrete private dispute"<sup>236</sup> between Love and Simorangkir and not in the public interest protected by anti-SLAPP laws stating that Simorangkir "had shone[sic] a probability of proving her defamation case."<sup>237</sup> Love and Simorangkir settled in court almost two years later for \$430,000 plus interest.<sup>238</sup> It is important to note that the court concluded that Love's tweets were a private dispute despite being published publically on Twitter, with the entire Twitter community able to follow along.<sup>239</sup> An important take-away from this case that could be a factor in the future of Twibel is that just because a tweet is in the public "twittersphere" does not necessarily mean it is automatically in the public interest.<sup>240</sup>

Because of the informal nature of Twitter, reasonable readers of most Twitter feeds "do not understand 'tweets' to be conveying factual information."<sup>241</sup> In evaluating whether Love's comments were factual (and therefore likely libelous), or opinion (which is

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<sup>235</sup> *Id.*

<sup>236</sup> See Matthew Heller, *Judge Allows Twitter-Libel Suit Against Rocker Love*, ON.POINT, Oct. 26, 2009, archived at [www.webcitation.org/6Fc3kq2KJ](http://www.webcitation.org/6Fc3kq2KJ) (denying the motion to dismiss).

<sup>237</sup> See *Simorangkir v. Love*, DIGITAL MEDIA LAW PROJECT, Mar. 30, 2009, archived at [www.webcitation.org/6Fc3Dim4k](http://www.webcitation.org/6Fc3Dim4k) [hereinafter *DMLP: Simorangkir v. Love Summary*] (favoring the plaintiff).

<sup>238</sup> See Matthew Belloni, *Courtney Love to pay \$430,000 to Settle Twitter Defamation Case (Exclusive)*, The Hollywood Reporter, Mar. 3, 2011, archived at [www.webcitation.org/6Fc43RL3X](http://www.webcitation.org/6Fc43RL3X) (stating amount of settlement is about \$430,000).

<sup>239</sup> See *DMLP: Simorangkir v. Love Summary*, *supra* note 238 (reporting judge found tweets were not a matter of public concern and plaintiff had high probability of proving defamation by Love).

<sup>240</sup> *Cf.* Lafferman, *supra* note 212, at 242-44 (asserting defamation liability should be premised not only on use/presence distinction, but should also account for the type of community into which the user publishes information).

<sup>241</sup> Sam Bayard, *First Twitter Libel Suit, Starring Courtney Love*, Mar. 30, 2009, archived at [www.webcitation.org/6FdNBeaexwww.webcitation.org/6FdNBeaexwww.webcitation.org/6FdNBeaex](http://www.webcitation.org/6FdNBeaexwww.webcitation.org/6FdNBeaexwww.webcitation.org/6FdNBeaex).

more protected and less likely libelous), the California Courts examined the “context, including the nature of the platform.”<sup>242</sup> Thus, because opinion-based speech receives much greater First Amendment protection than fact-based speech, this will be a crucial point of analysis in determining whether tweets are defamatory.<sup>243</sup>

However, as the California court indicated in denying Love's motion to strike, this does not necessarily protect Twitter users in publishing fact-based defamatory tweets.<sup>244</sup> While many of Love's tweets, posted in a span of 21 minutes,<sup>245</sup> could clearly be construed as opinion<sup>246</sup>, or were hyperbole, and not reasonably meant to have been taken seriously,<sup>247</sup> some of the tweets could be considered factual in nature.<sup>248</sup> For example, Love tweeted “the felonious Dawn/Bourdoir Queen witnessed stealing two massive army bags out of the chat at 4am” and that Simorangkir had “a history of dealing cocaine,” “lost all custody of her child,” and was guilty of “assault and burglary.”<sup>249</sup>

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<sup>242</sup>*Id.*

<sup>243</sup> See *id.* (suggesting that many of the statements Love made about Simorangkir are factual in nature); Sam Bayard, *Anonymity of ‘Skanks in NYC’ Blogger Could Hinge on Fact-Opinion Divide*, Jan. 8, 2009 archived at [www.webcitation.org/6FdOwhtU4](http://www.webcitation.org/6FdOwhtU4) (explaining the fact-opinion divide and how the First Amendment protects statements of “pure opinion”).

<sup>244</sup> See Heller, *supra* note 236, and accompanying text (noting the court's denial of Love's motion to strike in libel suit against her).

<sup>245</sup> See Heller, *supra* note 236 (stating the span of time in which Love made the allegedly defamatory tweets).

<sup>246</sup> See DMLP: Simorangkir Complaint, *supra* note 226, at 6-7 (stating Love tweeted Sigmoragkir was a “nasty, lying, hosebag thief”; and published the statement that she was “the nastiest lying worst person I have ever known” on etsy.com).

<sup>247</sup> See DMLP: Simorangkir Complaint, *supra* note 246, at 7 (stating Love tweeted, “oi vey dont fuck with my wradrobe or you willend up in a circle of corched eaeth hunted til your dead”).

<sup>248</sup> See DMLP: Simorangkir Complaint, *supra* note 246, at 6-7 (alleging Love published false statements that Simorangkir sold drugs, is a drug addict, has a history of assault and burglary, prostitution, and is an unfit parent among others).

<sup>249</sup> DMLP: Simorangkir Complaint, *supra* note 246, at 6.

In 2011, Love, again was a defendant in a Twibel suit.<sup>250</sup> A California superior court dismissed some of the claims in another defamation suit that Love's former lawyers brought against her for things she said about them on Twitter.<sup>251</sup> However, the court ruled the post "may be reasonably interpreted by the average reader as a statement of fact, and the statement expressly identified 'Rhonda J. Holmes' and referred to Gordon & Holmes 'by clear implication.'"<sup>252</sup> The case is still pending, and Courtney Love could be the first defendant in an American Twibel trial.<sup>253</sup> While *Love* is the first known Twibel suit, other Twitter users have brought suit for allegedly defamatory content.<sup>254</sup> Public figures and celebrities like Love may have more notoriety on Twitter, however private individuals make up for the majority of the 140 million users.<sup>255</sup> It is these private individuals, like those in

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<sup>250</sup> See Eriq Gardner, *Judge Rejects Courtney Love's Defamation Theories In Twitter Lawsuit*, Feb. 17, 2012, archived at [www.webcitation.org/6FdTOaD2S](http://www.webcitation.org/6FdTOaD2S) (discussing a defamation suit Love's former lawyer filed against Love over a tweet about the attorney).

<sup>251</sup> See Zach Winnick, *Courtney Love Must Face 'Defamatory' Tweet Suit*, Sept. 21, 2011, archived at [www.webcitation.org/6FdVgDoZ2](http://www.webcitation.org/6FdVgDoZ2) (noting the judge granted Love's motion to dismiss claims that she defamed her former attorney's law firm and interfered with client relationships, but allowed Holmes to proceed with defamation claim over Love's tweet that she was "bought off"); See also Gardner *supra*, note 250 (describing a tweet Love sent indicating her former attorney had accepted a bribe) In a tweet from June 2010, Love posted a tweet about the lawyer who represented her in matters concerning fraud on her late husband's estate that said, "I was fucking devastated when Rhonda J Holmes esq [sic] was bought off. . . ."

<sup>252</sup> Gardner *supra*, note 250.

<sup>253</sup> See Gardner *supra*, note 250, (stating "the case continues and looks headed to a jury trial").

<sup>254</sup> See *La Russa v. Twitter, Inc.*, No. CGC-09-448101, at 4 (Cal. Sup. Ct. May 6, 2009) (claiming creation of false Twitter account was misappropriation of name which caused damage to plaintiff's reputation); see also *Horizon Group Mgmt. v. Bonnen*, No. 2009L008675, 2009 WL 2231162, at 2 (Ill. Cir. Ct. July 20, 2009) (contending defendant defamed plaintiff on Twitter when complaining about mold to her followers); see also *Clay Corp. v. Colter*, No. NOCV2012-011382012, WL 6554752, at \*1 (Mass. Dec. 10, 2012) (alleging that defendants defamed plaintiff via Facebook, an online petition site, and Twitter for firing their sister). see also, Joe Trevino, *From Tweets to Twibel: Why the Current Defamation Law does not Provide for Jay Cutler's Feelings*, 19 SPORTS L. J. 49, 62-63 (2012) (reporting on various Twibel suits).

<sup>255</sup> See @TWITTER, *supra* note 4 (listing the variety of Twitter users).

the above hypothetical, who would be most impacted by future Twibel cases rather than traditional media defendants.<sup>256</sup>

For example, in 2009 the Illinois court dismissed a Twibel case between a renter and her landlord, two private figures.<sup>257</sup> Amanda Bonnen tweeted to her 20 followers (at the time), "[w]ho said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay."<sup>258</sup> Horizon sued Bonnen for \$50,000 in damages contending that her tweet was libelous per se because it "damaged the [p]laintiff's reputation in its business."<sup>259</sup> The Cook County court later dismissed the suit because the "tweet was too vague to meet the legal standards for libel."<sup>260</sup> Because the tweet mentioned "Horizon realty" but never Chicago or Illinois, the Cook County court claimed the tweet did not satisfy the element of libel that requires the plaintiff show the false statement was of and concerning the plaintiff.<sup>261</sup> Horizon also failed to prove actual harm from the statement, such as damage to its reputation or negative financial effects.<sup>262</sup>

Bonnen deleted the tweet and her account as a result of the lawsuit.<sup>263</sup> Unlike in *Love*, the court ruled that the tweet was not defamatory because it "could be innocently construed" as her opin-

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<sup>256</sup> See e.g., Hunt, *supra* note 73 (positing that the inability to guarantee all Twitter users will read a rebuttal to a defamatory comment negatively affects users with smaller numbers of followers).

<sup>257</sup> See Andrew L. Wang, *Twitter apartment mold libel suit dismissed*, CHI. TRIB., Jan. 22, 2010, archived at [www.webcitation.org/6FjMWtVSA](http://www.webcitation.org/6FjMWtVSA) (reporting on case's dismissal).

<sup>258</sup> See Pete Cashmore, *Woman Sued for \$50,000 Over a Tweet*, MASHABLE, July 28, 2009, archived at [www.webcitation.org/6FjNdrL40](http://www.webcitation.org/6FjNdrL40) (quoting defendant's tweet).

<sup>259</sup> See Compl. at 10, *Horizon Group Mgmt, LLC v. Amanda Bonnen*, 2009 WL 2231162 (Ill. Cir. 2009) (No. 2009L008675) (summarizing plaintiff's claim).

<sup>260</sup> See Wang, *supra* note 257 (explaining court's reason for dismissing suit).

<sup>261</sup> See Def.'s Mem. Supp. Mot. 2-615 Dismiss at 10-11, *Horizon Group Mgmt, LLC v. Amanda Bonnen*, (Ill. Cir. 2009) (No. 2009L008675), archived at [www.webcitation.org/6FjRKznvL](http://www.webcitation.org/6FjRKznvL) (arguing that tweet lacked factual context and was merely defendant's opinion).

<sup>262</sup> See *id.* at 13-14 (arguing how complaint does not allege any specific damages).

<sup>263</sup> See Cashmore, *supra* note 258 (describing defendant as defunct Twitter user).

ion.<sup>264</sup> Some question the weight of an assertion on Twitter and whether the community considers "one-liners on Twitter" to be truth because of "stream of consciousness" nature of tweeting which involves typing in a text box the response to "*What are you doing?*"<sup>265</sup> Some analysts have questioned whether a tweet at all would be considered defamatory because Twitter conversations are "like the electronic version of a coffee shop, where you can gripe privately but have your gripes overheard" and "no one considers *that* defamation."<sup>266</sup>

Another recent Twibel case involved a blogger who tweeted and blogged about a medical spa doctor's practice.<sup>267</sup> In 2011, Jerrold "Jerry" Darm had been reprimanded for "unprofessional or dishonorable conduct" that was in violation of the Medical Practices Act.<sup>268</sup> His conduct involved kissing and touching a patient as an inferred payment for treating her spider veins for free after office hours.<sup>269</sup> The order, which was terminated in 2009, cited that Darm's conduct was "an inappropriate boundary violation."<sup>270</sup> The Oregon medical board let Darm continue to practice with restrictions, including "required chaperones to see female adult patients, probationer interviews with the state board, mental health

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<sup>264</sup> See Matthew Heller, *Tenant's Gripe Tweet Too Vague to be Libel, Judge Says*, ON POINT NEWS, Jan. 29, 2010, archived at [www.webcitation.org/6FjSvXnkG](http://www.webcitation.org/6FjSvXnkG) [hereinafter *Tenant's Gripe*] (comparing Love and Boonen's tweets).

<sup>265</sup> See Marian Wang, *UPDATED: Rounding Up the Buzz... Will One Chicago Woman's Tweet Cost Her \$50,000?*, CHICAGO NOW, July 27, 2009, archived at [www.webcitation.org/6FjTITfyy](http://www.webcitation.org/6FjTITfyy) [hereinafter *Rounding*] (opining that tweets are more "stream of consciousness" than libelous).

<sup>266</sup> See *id.* (describing nature of tweets such that they are likely not defamatory).

<sup>267</sup> See Eric E. Johnson, *Dr. Darm Settles Defamation Suit Against Blogger Tiffany Craig in Portland, Oregon*, BLOG LAW BLOG, Dec. 30, 2011, archived at [www.webcitation.org/6FjUzXWf8](http://www.webcitation.org/6FjUzXWf8) (outlining blogger's blog post containing allegedly defamatory statements); see also Tiffany Craig, *Dr. Darm and the Missing Medical License*, CRIMINALLY VULGAR, June 30, 2011, archived at [www.webcitation.org/6FjUGzqGG](http://www.webcitation.org/6FjUGzqGG) (describing another lawsuit involving Twitter and defamation).

<sup>268</sup> See *Oregon's first*, *supra* note 227 (describing doctor's medical license violation).

<sup>269</sup> See *Oregon's first*, *supra* note 227 (discussing results of state board's investigation).

<sup>270</sup> See *Oregon's first*, *supra* note 227 (describing doctor's conduct and noting termination of stipulated order).

reviews, and courses on doctor-patient boundaries and risk management."<sup>271</sup>

In July 2011, Darm filed a \$1 million suit in Multnomah County Circuit Court claiming that Tiffany Craig, a Portland, Oregon blogger, defamed him with posts she wrote on Twitter and her blog in June.<sup>272</sup> Craig wrote that Darm "tried to get sex in exchange for treatment."<sup>273</sup> This was the first Twibel suit in Oregon and was almost the nation's first Twibel case to go to trial.<sup>274</sup>

The court upheld Craig's motion to dismiss the case under Oregon's anti-SLAPP laws because the case is a matter of public interest and Twitter is a public forum.<sup>275</sup> The judge based his decision on the grounds that "the gist" of the content is true and the other statements were opinions based on those facts.<sup>276</sup> Darm argued that this issue was not a matter of public interest because Darm has never treated Craig.<sup>277</sup> Also, because Darm is a prominent doctor, who could be considered a public figure, Craig contended his disciplinary record was a matter of public interest.<sup>278</sup> After the dismissal Craig spoke out about the global impact of

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<sup>271</sup> See *Oregon's first*, *supra* note 227 (listing order's restrictions).

<sup>272</sup> See *Oregon's first*, *supra* note 227 (describing doctor's claim against blogger, Craig).

<sup>273</sup> See *Oregon's first*, *supra* note 227 (quoting defendant's alleged defamatory statement).

<sup>274</sup> See Sally Ho, *Million-dollar Twitter Libel Suit Dismissed*, OREGON LIVE, Oct. 12, 2011, archived at [www.webcitation.org/6FjWnlMvd](http://www.webcitation.org/6FjWnlMvd) (noting potential significance case if it went to trial).

<sup>275</sup> See OR. REV. STAT. § 31.150 (2011) (setting forth Oregon's anti-SLAPP laws to prevent Strategic Lawsuit Against Public Participation, section (2)(c) of which applies in pertinent part to "any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest"); see also *Oregon's first*, *supra* note 227, (stating judge ruled with Williams that "the case is a matter of public interest and Twitter is a public forum, potentially clearing the way for anti-SLAPP laws to be applied" and referencing that SLAPP/Strategic Lawsuit Against Public Participation suits "are recognized as threats or attempts to shut down speech on public issues by the heavy burden of a lawsuit itself").

<sup>276</sup> See *Oregon's first*, *supra* note 227, (noting what was in defendant's filing).

<sup>277</sup> See *Oregon's first*, *supra* note 227 (noting plaintiff's argument).

<sup>278</sup> See *Oregon's first*, *supra* note 227 (arguing how plaintiff's prominent reputation makes his records a matter of public interest).



tweeting, arguing that the controlling law should be defined on a "broader scale."<sup>279</sup> She suggested that Federal anti-SLAPP laws should be "acknowledged nationwide as a public forum without having to define it case by case."<sup>280</sup> Craig's blog post and Tweet in question remain online.<sup>281</sup>

The dismissal of *Darm* means that U.S. courts have yet to rule on a Twibel case.<sup>282</sup> Due to the informal nature of the platform, as seen in these cases, much of what appears on Twitter is incapable of fulfilling the requirements of a defamation claim.<sup>283</sup> For example in *Love*, tweets can often be considered hyperbole or opinion.<sup>284</sup> Similarly, in *Bonnen*, many potentially defamatory tweets do not have enough information to identify the party they are allegedly defaming.<sup>285</sup> Additionally, in *Craig*, because Twitter is a public forum, speech is likely to be considered a matter of public interest.<sup>286</sup>

While giving some clues about judicial treatment of Twibel cases, these cases did not consider the role of the actual malice standard in Twitter lawsuits.<sup>287</sup> The question remains whether courts are

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<sup>279</sup> See Kara Hansen Murphey, *Blogger, Dr. Darm settle landmark Twitter lawsuit*, PORTLAND TRIB., Oct. 11, 2011, archived at [www.webcitation.org/6Fl69nZab](http://www.webcitation.org/6Fl69nZab) (quoting Craig's comment that Twitter has "a global impact and should be defined on a broader scale").

<sup>280</sup> *Id.*

<sup>281</sup> See Craig, *supra* note 267 (displaying blogger's blog post and tweets).

<sup>282</sup> See Ho, *supra* note 274 (acknowledging how this Oregon lawsuit could have been the nation's first Twibel trial).

<sup>283</sup> See *Rounding*, *supra* note 265 (describing likely non-defamatory nature of tweets).

<sup>284</sup> See DMLP: *Love's Motion to Strike*, *supra* note 232, at 10, 12 (discussing the nature of tweets).

<sup>285</sup> See Wang, *supra* note 257 (describing how Boonen's tweet failed to meet the legal standards for a libel claim).

<sup>286</sup> See *Oregon's first*, *supra* note 227 (noting how judge agreed with plaintiff's argument that "the case is a matter of public interest and Twitter is a public forum").

<sup>287</sup> See DMLP: *Simorangkir v. Love Summary*, *supra* note 238 (reporting Love settled Twibel suit with plaintiff prior to any decision on the merits of the claim); Murphy, *supra* note 279 (stating Darm and Craig settled suit prior to any court decision).

more likely to consider Twitter users to be public figures.<sup>288</sup> Notwithstanding the ultimate answers to these thorny problems likely to arise in Twibel litigation, during the months it takes to file and resolve defamation suits, the offending tweets often continue to harm plaintiffs.<sup>289</sup>

## B. INTERNATIONAL CASES OF TWIBEL

Twibel has arisen more frequently in the United Kingdom,<sup>290</sup> where online defamation cases have doubled.<sup>291</sup> Twitter is based in the United States, but it recently opened a London office.<sup>292</sup> “It’s really going to the core of Twitter’s service and trying to balance the speech of its users and the fact that countries have different laws and norms about speech.”<sup>293</sup> The global nature of Twitter combined with conflicting international laws regarding

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<sup>288</sup> See Lafferman, *supra* note 212, at 246-47 (asserting courts need to decide whether *Gertz* standard of public figure to social media users and how it would apply given the varying levels of use and fame associated with users of such technology).

<sup>289</sup> See Marton, *supra* note 204, at 77 (proffering that though a plaintiff may have successfully adjudicated a claim, the problem with social media technology is that, in theory, libelous tweets and material may remain publicly available forever and that the forum where defamatory material is published may affect the defamer’s ability to remove the offending content).

<sup>290</sup> See *Former Mayor Becomes First Briton Ordered to Pay Damages for Twitter Libel*, DAILY MAIL, Mar. 11, 2011, archived at [www.webcitation.org/6FmMw2XT8](http://www.webcitation.org/6FmMw2XT8) (providing an example of the United Kingdom’s first Twibel case).

<sup>291</sup> See *Online Defamation Cases in England and Wales “Double”*, BBC, Aug. 26, 2011, archived at [www.webcitation.org/6FmNQMwoA](http://www.webcitation.org/6FmNQMwoA) (acknowledging rapid increase in internet-related libel cases in the United Kingdom).

<sup>292</sup> See Mick Butcher, *Twitter’s new Dublin office will help it save 16% in tax - maybe more*, TECHCRUNCH, Sep. 26, 2011, archived at [www.webcitation.org/6FmNigYeh](http://www.webcitation.org/6FmNigYeh) (noting Twitter’s advertising sales office in London). Twitter also opened offices in Dublin and Japan. See *id.* (acknowledging Twitter’s international business presence).

<sup>293</sup> Claire Cain Miller & Ravi Somaiya, *Free Speech on Twitter Faces Test*, N.Y. TIMES, May 22, 2011, archived at [www.webcitation.org/6FmOTvVi0](http://www.webcitation.org/6FmOTvVi0) (quoting Eric Goldman, director of the High Tech Law Institute at Santa Clara University).

defamation means that applying Twibel laws consistently could be more challenging.<sup>294</sup>

The first British Twibel case to go to trial in the U.K. involved former British Mayor, Colin Elsbury, who inaccurately claimed that Eddie Talbot, his political rival, had to be removed by police from a polling station in a tweet during a 2009 city council election.<sup>295</sup> The tweet stated, "[i]t's not in our nature to deride our opponents however Eddie Talbot had to be removed by Police from the Polling Station."<sup>296</sup> The British High Court ordered Elsbury to pay £3,000 compensation, legal costs totaling £50,000, and to apologize to Talbot via Twitter.<sup>297</sup>

One contributing factor to the rise in defamation cases in the U.K., known as the "defamation capital of the world" and notorious for being the "most expensive place to bring a defamation claim," is the fact that courts award the highest damages in Europe.<sup>298</sup> Some have called "libel tourism" an "export industry" for the U.K.<sup>299</sup>

Britain's libel laws, which are currently being revised, make the U.K. a popular place to bring suit because "jurisdiction is easy to obtain and libel laws are heavily weighted in favor of complainants."<sup>300</sup> Contrary to defamation laws in the United States, even with the proposed changes, a libel defendant must prove that the

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<sup>294</sup> See *id.* (explaining how Twitter's international presence complicates applying internet-related defamation law since various foreign countries handle cases differently).

<sup>295</sup> See *Former Mayor*, *supra* note 290 (summarizing the details of the U.K.'s first Twibel case).

<sup>296</sup> *Former Mayor*, *supra* note 290.

<sup>297</sup> See *Former Mayor*, *supra* note 290 (explaining Elsbury's penalties).

<sup>298</sup> See Emily MacManus, *Will British libel law kill net free speech?*, OPENDEMOCRACY, Mar. 27, 2009, archived at [www.webcitation.org/6FmQLA2sH](http://www.webcitation.org/6FmQLA2sH) (noting U.K.'s reputation in defamation law throughout the world)..

<sup>299</sup> See *id.* (opining how the U.K.'s reputation may cause more people to bring their defamation cases there)

<sup>300</sup> See Sarah Lyall, *British Lawmakers Look at Rewriting Libel Law*, Dec. 10, 2009, archived at [www.webcitation.org/6FmTLyfMd](http://www.webcitation.org/6FmTLyfMd),

comments made are true.<sup>301</sup> Publishers receive no protection for "due reporting diligence" for reporting content in good faith, nor do they receive protection via a "fair comment" exception to British libel.<sup>302</sup> Additionally, since a "single publication" rule does not exist in British libel laws, "every printing or download of an article" is fair game for a new case of libel.<sup>303</sup> Some of the proposed changes to libel reform seek to clarify important defenses of "truth" and "fair comment" and to add "public interest" as a new defense.<sup>304</sup>

In 2008, United States Congress initially proposed the "Free Speech Protection Act" to combat the "libel tourism" encouraged by lax jurisdictional requirements in Britain.<sup>305</sup> The proposed bill later became law under the SPEECH Act of 2010.<sup>306</sup> It prevents the U.S. Courts from enforcing judgments against U.S. defendants in foreign countries unless the speech in question was afforded "at least as much protection for freedom of speech and press in that case as would be provided by the First Amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located."<sup>307</sup> As Twitter has a global impact, a multitude of applicable legal frameworks

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<sup>301</sup> See Arthur Bright, *British Libel Reform -- Now with Real Proposed Legislation*, April 5, 2011, archived at [www.webcitation.org/6FmTsCcfs](http://www.webcitation.org/6FmTsCcfs) (summarizing Britain's plaintiff-friendly libel policies).

<sup>302</sup> See *id.* (explaining in detail British policy).

<sup>303</sup> See *id.* (discussing consequences of such a policy).

<sup>304</sup> See *id.* (determining that the "public interest" defense is a "defense to an action for defamation for the defendant to show that (a) the statement complained of is, or forms part of, a statement on a matter of public interest; and (b) the defendant acted responsibly in publishing the statement complained of.").

<sup>305</sup> See S. 449 (111th): *Free Speech Protection Act of 2009*, GOVTRACK.US, archived at [www.webcitation.org/6FmVdp5XR](http://www.webcitation.org/6FmVdp5XR) (detailing history of bill).

<sup>306</sup> See *Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH ACT)*, Pub. L. No. 111-223, 124 Stat. 2380 (indicating that SPEECH is an acronym for "Securing the Protection of our Enduring and Established Constitutional Heritage Act").

<sup>307</sup> See Stephen Bates, *More Speech: Preempting Privacy Tourism*, 33 HASTINGS COMM. & ENT L.J. 379 (2011).

will likely navigate issues affecting the future of Twibel.<sup>308</sup> A centralized community-based remedy could be a way out of these conflicts as well.<sup>309</sup>

## V. REMEDIES IN THE AGE OF TWITTER

Traditional defamation law will rarely provide any remedy for online defamation for some practical reasons, as well as some legal reasons.<sup>310</sup> Realistically, defamation suits are lengthy and costly.<sup>311</sup> These two concepts are counterintuitive to the nature of the Twitter community, which seeks free and lightning-fast solutions.<sup>312</sup>

The lifespan of a tweet is typically less than an hour -- that is, most Twitter users will read, retweet or reply to a tweet within an hour from when it is originally posted.<sup>313</sup> So, before a Twitter user can contact a lawyer and bring a claim, the majority of the

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<sup>308</sup> See Levi, *supra* note 187, at 1577-78 (remarking upon the growth of "libel tourism" and its effect on U.S. law and policy concerning free speech and liability).

<sup>309</sup> See Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COMM. L. & POL'Y 231, 256 (commenting upon the use of community to determine geographic implications of defamation in traditional media cases and how such analysis may play a key role in determination and discussion of online defamation cases).

<sup>310</sup> See Marton, *supra* note 207 at 69 (remarking that technology and the ease of publishing defamatory material has outstripped the development of legal remedies for technology-based defamation).

<sup>311</sup> See Marton, *supra* note 207, at 76 (observing costliness of lawsuits and the heavy time requirements placed upon both parties when seeking resolution of the claims, whether through settlement or adjudication on the merits).

<sup>312</sup> See Twitter, *supra* note 6 (advertising Twitter as a "real-time information network that connects you to the latest stories . . ."); see also *Abusive Behavior*, TWITTER, April 10, 2013, archived at [www.webcitation.org/6FmdwJZky](http://www.webcitation.org/6FmdwJZky) (instructing users on how to block and ignore offending Twitter users and thus end any dispute); see also TWITTER.COM, *supra* note 28 (teaching users how to delete tweets).

<sup>313</sup> See Frederic Lardinois, *The Short Lifespan of a Tweet: Retweets Only Happen Within the First Hour*, Sep. 29, 2010, archived at [www.webcitation.org/6FmXciAG3](http://www.webcitation.org/6FmXciAG3) (providing research by social media marketing company Sysomos that found ninety-two percent of retweets in a sample of 1.2 billion tweets happened within the first hour of the original tweet).

damage has likely already been done.<sup>314</sup> Realistically, the damage done to a defamed plaintiff would likely be “limited to the results of Google searches for the plaintiff’s name.”<sup>315</sup> Ideally, there could be some sort of remedy that could deter perpetuating the allegedly defamatory tweet, or at the very least alert others that someone is challenging the tweet’s content.

Furthermore, in the hypothetical case presented earlier, Best Burgers Ever was forced to close its business even before it could potentially recover damages caused by the potentially defamatory tweets.<sup>316</sup> The speed of the effects a tweet has on a plaintiff is exacerbated by the length of the time it takes for pretrial judgment and the granting of an injunction to take down a tweet.<sup>317</sup> As a result, the pace of the Twitter community makes any remedy that takes any substantial period of time to develop and resolve is an unlikely option for any successful outcome.<sup>318</sup> It is important to craft a solution for Twitter users, like Best Burgers Ever, to be able to challenge and potentially minimize the harm done by allegedly defamatory tweets before it is too late.<sup>319</sup> Even if Best Burgers Ever has the means and wherewithal to pursue lengthy

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<sup>314</sup> See L.V. Anderson, *Can You Libel Someone on Twitter? Yes. On Facebook, too.*, Nov. 26, 2012, archived at [www.webcitation.org/6FyxfWbXd](http://www.webcitation.org/6FyxfWbXd) (informing reader that despite withdrawing defamatory tweets or only having a small following, users who defame other users are still liable for the content).

<sup>315</sup> See Kosseff, *supra* note 30, at 267 (providing an example of the scope of damages).

<sup>316</sup> See *infra* Part I.A. Hypothetical: Best Burgers Ever And @Socialbutterfly3 (proposing hypothetical twibel situation).

<sup>317</sup> See Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 43-44 (remarking upon the speed with which defamatory material appears and disappears on social media and how this impacts courts); see also Anderson, *supra* note 314 (remarking upon continuation of liability even after defamatory comments are removed from social media); see also Marton, *supra* note 207, at 77 (positing the problem with social media-based defamation is the fact that it lingers indefinitely on the Internet).

<sup>318</sup> See Garfield, *supra* note 317, at 40 (discussing the rapid appearance and disappearance of speech online); Marton, *supra* note 207, at 69 (commenting upon the speed and ease of publishing and removing defamatory materials online and the need for courts to adjust).

<sup>319</sup> See Hunt, *supra* note 73, at 600 (concluding the transformation of electronic media forces the courts to adapt real-time remedies for real-time defamation issues).

litigation, the damages they would receive would likely be limited by the fact that the defamer @SocialButterfly3, who claims to be a broke college student, is likely judgment proof.<sup>320</sup> Another issue is the challenge in identifying the defamer.<sup>321</sup> To create a Twitter account, a user needs to supply an email address, but with so many email providers available, this could potentially complicate the identification process.<sup>322</sup> Tracking the IP addresses of anonymous people online makes this even more difficult.<sup>323</sup> Traditional defamation framework is not designed for Twitter's pace.<sup>324</sup> There's a need for a remedy that would operate on the global scale of Twitter to help injured parties like Best Burgers Ever.<sup>325</sup> There appears to be a variety of possible sources of alternative remedies that may help facilitate this relief.<sup>326</sup>

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<sup>320</sup> See BLACK'S LAW DICTIONARY 390 (3d ed. 2006) (defining judgment proof as a defendant who is "unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment or claims the benefit of statutorily exempt property.").

<sup>321</sup> See Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2745 (introducing problem of anonymous defamation online).

<sup>322</sup> See Twitter, *Twitter – Homepage*, TWITTER.COM, April 23, 2013, archived at [www.webcitation.org/6G6bHl2a8](http://www.webcitation.org/6G6bHl2a8) (instructing new users to give Twitter their name, email, and create a password in order to create an account).

<sup>323</sup> See O'Brien, *supra* note 321, at 2745-46 (commenting that though users disclose their actual identity to their ISP, the use of anonymous usernames allow for anonymity online).

<sup>324</sup> See Marton, *supra* note 207, at 69 (postulating the increased ease with which individuals may publish material because of technological advances has far outstripped the law's ability to keep pace).

<sup>325</sup> See Levi, *supra* note 187, at 1577-78 (positing the need for global defamation in order to protect media and social media users from varied defamation laws).

<sup>326</sup> See Lafferman, *supra* note 212, at 246-47 (suggesting a change in analytical tests to determine type of public or private figure plaintiff is in an attempt to standardize twibel suits); see also Lide, *infra* note 362, at 222 (proposing alternative dispute resolution as a solution to twibel and online defamation cases); see also O'Brien, *supra* note 321, at 2776 (advocation application of new Jersey Appellate Division's guidelines to resolve issues of anonymous online defamation).

### A. TWITTER

Because Twitter is an internet service provider, it enjoys immunity from any injury for defamation done by its users.<sup>327</sup> This gives Twitter little incentive to prevent its users from creating defamatory content.<sup>328</sup> Some have suggested that Twitter should hire a staff with editorial experience to guide people to factual information during breaking news stories, or other stories with high user interest.<sup>329</sup> And in fact, Twitter has hired a handful of former journalists to help people use the tool for news purposes more effectively.<sup>330</sup> Legally, because Twitter is considered to be an internet service provider, Section 230 of the Communications Decency Act provides complete immunity for liability for Twitter for any defamatory content created by its users-- lessening any incentive for Twitter to expend resources to deter defamatory speech.<sup>331</sup> One purpose of the CDA is to promote self-help on the internet and "prevent the potentially chilling effect that regulation may have on internet speech."<sup>332</sup>

As a "communication service" Twitter does not "mediate disputes between users."<sup>333</sup> Twitter permits users to post content without restriction as long as the user abides by the "Twitter Rules and

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<sup>327</sup> See 47 U.S.C.A. § 230 (West 2013) (protecting ISPs because they only archive, cache, or provide access to the content).

<sup>328</sup> Cf. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009) (finding that for purposes of immunity and liability, courts must determine if the internet service provider or social media provider is a "publisher or speaker" of content that is provided by a third party, and that a publisher actively edits the material presented on its site).

<sup>329</sup> See Catacchio, *supra* note 96 (recommending an editorial board).

<sup>330</sup> See Matthew Ingram, *Twitter wants to be a journalist's best friend*, June 27, 2011, archived at [www.webcitation.org/6FmcnT6Zt](http://www.webcitation.org/6FmcnT6Zt) (listing its new team members).

<sup>331</sup> See 47 U.S.C.A. § 230 (West 2013) (acknowledging the immunity Twitter gets).

<sup>332</sup> See Allison E. Horton, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 Val. U. L. Rev. 1265, 1305 (2009) (noting its purpose and its goal with chilling effect regulations).

<sup>333</sup> See *Reporting Abusive Behavior*, Twitter, Apr. 10, 2013, archived at [www.webcitation.org/6FmdwJZky](http://www.webcitation.org/6FmdwJZky) (stating Twitter's policy on abuse).



Terms of Service."<sup>334</sup> Twitter gives all users the same opportunity to speak and respond to one another.<sup>335</sup> However, the impact of the message depends on a user's credibility and reach.<sup>336</sup>

Twitter suggests that users who find themselves involved in abusive conversations remove themselves from the discussion to prevent escalating the issue.<sup>337</sup> It also gives users the opportunity to "protect" their tweets, making them visible to only those the user approves.<sup>338</sup> Or, users can "block" others from following and or replying to them.<sup>339</sup>

If someone makes a "violent threat" or "attack" on a Twitter user, they have the option to file a support ticket.<sup>340</sup> However, Twitter encourages users who experience attacks to contact the police, warning users to "contact your local authorities as they are in the best position to assess the threat and intervene or assist as necessary."<sup>341</sup> When a user submits a support ticket to report an abusive user for Twitter to review, Twitter asks the user to fill out a form.<sup>342</sup> The form begins by asking the user to select from one of five options, such as, "Someone on Twitter is posting offensive content."<sup>343</sup> After that, the user is asked to share the names of those causing the issue, a link to the offensive tweet, the time since the offense began and the frequency, if they have

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<sup>334</sup> *Id.* (removing profiles when it violates Twitter's rules).

<sup>335</sup> *See About Twitter*, *supra* note 6 (noting that you may either become an actor or an observer).

<sup>336</sup> *See id.* (addressing the power of a Tweet).

<sup>337</sup> *See Reporting Abusive Behavior*, *supra* note 333 (noting that failing to remove earlier in the fight may make the argument worse).

<sup>338</sup> *See About Public and Protected Tweets*, *supra* note 112 (giving its users the option to protect their tweets).

<sup>339</sup> *See Reporting Abusive Behavior*, *supra* note 333 (acknowledging that users may block the other user).

<sup>340</sup> *See id.* (noting that Twitter will investigate all reports).

<sup>341</sup> *Id.* (suggesting that users should contact the police if the user has found himself threatened).

<sup>342</sup> *See I'm reporting an abusive user*, Twitter, Apr. 10, 2013, archived at [www.webcitation.org/6FmhPpmwL](http://www.webcitation.org/6FmhPpmwL) (requiring the user to fill out the form before proceeding into the next steps).

<sup>343</sup> *Id.* (requiring the user to fill out form).

blocked the person involved and a description of the problem.<sup>344</sup> Twitter cannot block users from creating new accounts, nor can they give users information about other users unless "required by a valid legal process."<sup>345</sup>

Therefore, in the Best Burgers Ever hypothetical, Twitter would have been unlikely to have the ability to intervene in a timely and effective fashion, even if the restaurant owners had filed a support ticket to report abuse.<sup>346</sup> Twitter's only possible remedy would be to block @SocialButterfly3.<sup>347</sup> Even then, the damage would have still been done -- and could persist through others perpetuating @SocialButterfly3's message. This remedy, likely to be considered a chill of speech by the community would likely spur even more reaction and uproar.<sup>348</sup>

This is a reason why the Twitter community itself would likely be more invested than the Twitter platform itself in developing a solution for deterring defamatory content between Twitter users.<sup>349</sup>

#### B. ONLINE DISPUTE RESOLUTION FORUMS

The law recognizes the necessity for efficient and cost-effective mechanisms for resolving internet disputes.<sup>350</sup> Online dispute resolution is a growing area of alternative dispute resolution that uses technology to resolve disputes between parties using nego-

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<sup>344</sup> See *id.* (providing examples).

<sup>345</sup> See *Reporting Abusive Behavior*, *supra* note 333 (requiring the legal process).

<sup>346</sup> See *supra* Part I (discussing Best Burgers Ever hypothetical).

<sup>347</sup> See *supra* p. 55 (suggesting the remedy of blocking offensive tweeter).

<sup>348</sup> See Horton, *supra* note 332, at 1305, and accompanying text (discussing the chilling effect of regulations like the Communications Decency Act).

<sup>349</sup> See 47 U.S.C. § 230 (c)(2) (immunizing provider of interactive computer service from civil liability under Good Samaritan provision of Communications Decency Act for not blocking user-generated content).

<sup>350</sup> See Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-mediation Websites*, 2003 Duke L. & Tech. Rev. 4, \*13 (2003) (stating internet mediation can be much less costly than traditional litigation).

tiation, media or arbitration.<sup>351</sup> Cyber-mediation sites, such as Cybersettle, provide services that let parties confidentially initiate claims, facilitate multiple rounds of negotiations and eventually seek to reach settlements.<sup>352</sup> For example, Cybersettle has "facilitated settlement of \$1.9 billion in claim-based transactions for insurance companies, self-insured Fortune 500 corporations, and municipalities."<sup>353</sup>

To settle a claim, online users create an account and password, and then enter basic information about the opposing party (including contact information) and the claim.<sup>354</sup> They then submit three offers for settlement of the claim. Cybersettle sends the other party<sup>355</sup> an access code to the completed submission on the site with an overview of the claim as well as the terms and conditions.<sup>356</sup> The opposing party enters up to three demands and the system then compares the offers and demands in the blind in three rounds -- keeping the terms confidential to either party.<sup>357</sup> Using the three offers and three demands supplied by both parties, Cybersettle determines if the "responding demand is less than or equal to the settlement offer."<sup>358</sup> If so, the parties reach a settlement.<sup>359</sup> If the parties do not agree to terms, they can either resubmit the claim with three new demands, or request a facilitator to reach an agreement.<sup>360</sup>

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<sup>351</sup> See Goodman, *supra* note 350, at \*1 (indicating available methods of online dispute resolution range from negotiation and mediation to modified arbitration to modified jury proceedings).

<sup>352</sup> See Goodman, *supra* note 350, at \*4 n. 15 (stating [o]n Cybersettle, a settlement is reached if there is less than twenty percent between the offers in any of the rounds, and then the claim will settle for the average of the two amounts").

<sup>353</sup> Cybersettle, About Us, Apr. 11, 2013, *archived at* [www.webcitation.org/6Fo72hyDs](http://www.webcitation.org/6Fo72hyDs).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* (using the contact information supplied by the user).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

Online mediation boasts the obvious benefits of being less expensive and more convenient than litigation.<sup>361</sup> This technique is also more flexible than other forms of mediation, as it allows the mediator to tailor the process to meet the needs of the disputants.<sup>362</sup> Parties who may not live near one another can mediate asynchronously between one another without enduring travel costs.<sup>363</sup> Because parties can negotiate on their own schedule, online forums are often more convenient than traditional mediation.<sup>364</sup> Additionally, because each party has a chance to edit itself more so than in face-to-face discussions, communications in cyber mediations are often more thoughtful and well crafted.<sup>365</sup> Since lawyers are not usually necessary, online mediation can be a low-cost solution, especially for disputes with low dollar amounts, like potential cases involving Twitter defendants.<sup>366</sup> Since much, if not all of the defamatory content in Twibel cases

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<sup>361</sup> See Goodman, *supra* note 350, at \*13, \*15 (touting the costs saved by not requiring an attorney or paying long-distance phone calls, and convenience of not having to travel lengthy distance as advantages of online dispute resolution).

<sup>362</sup> E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 Ohio St. J. on Dis. Resol. 193, 208 (1996) (noting the flexibility of the tribunal ADR offers by eliminating jurisdiction and choice of law questions and accommodating various international concepts of property).

<sup>363</sup> See Goodman, *supra* note 350, at \*15-\*16 (citing online dispute resolution benefits of avoiding travel costs since there is no need to meet at a neutral site to negotiate, and avoiding scheduling difficulties by emailing one another at each party's convenience).

<sup>364</sup> See Goodman, *supra* note 350, at \*16 (noting parties' participation in online dispute resolution can be done at their convenience, tailored to their separate schedules via email and webpostings).

<sup>365</sup> See Goodman, *supra* note 350, at \*17 (discussing the benefit of having the opportunity to edit and reflect on communications before they are made in online dispute resolution in contrast with often more impulsive first responses in real time, face-to-face mediation).

<sup>366</sup> Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837, 855 (2001) (pointing to costs saved in online dispute resolution by not hiring an expensive attorney as parties would in litigation).

exist online, keeping the resolution of a dispute in its "natural state" could be considered to make logical sense.<sup>367</sup>

However, obviously, there are attributes of online mediation that make it an imperfect option for Twibel cases.<sup>368</sup> Technology has eliminated so many obstacles in our everyday life, yet it goes without saying that "cyberspace is not a 'mirror image' of the physical world" and accordingly mediation online is not an exact replica of the traditional experience.<sup>369</sup> Online mediation can be impersonal, not as effective (or allowed) in resolving some types of disputes, present technology challenges, and potentially introduce privacy concerns with the posting of sensitive information online.<sup>370</sup>

While online mediation is more convenient, you often lose some of the richness of human expression and emotion communicating exclusively online.<sup>371</sup> Mediators, who in a traditional mediation, can create an environment that puts the parties at ease and encourage problem solving, can come across as "a disembodied voice" in online mediation.<sup>372</sup> Another major issue is under what

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<sup>367</sup> See, e.g., First Amended Complaint, *supra* note 229, at ¶ 26 (alleging defamatory statements made by Courtney Love via MySpace, Twitter, and website Etsy.com).

<sup>368</sup> See Goodman, *supra* note 350, at \*2 (alluding to disadvantages of online dispute resolution like its impersonal nature and potential inaccessibility).

<sup>369</sup> See Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1310 (1998) (noting electronic communications cannot precisely duplicate face-to-face mediation practices).

<sup>370</sup> See Goodman, *supra* note 350, at \*22, \*25, \*27 (addressing online dispute resolution's disadvantages in lacking the physical cues that provide more meaningful context to a party's expression in mediation, problems posed by internet access issues, and confidentiality concerns of a party disseminating other unknowing party's communications).

<sup>371</sup> See Goodman, *supra* note 350, at \*22 (commenting that substituting email for dialogue "makes it difficult to give any weight to give any weight to emotion in mediation" in cyber mediation, and that the lack of an established relationship or personal connection between parties can hinder effectiveness of online mediation).

<sup>372</sup> Ethan Katsh, Janet Rifkin, & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 Ohio St. J. on Dis. Resol. 705, 714 (2000) (addressing the online mediator's difficulty in managing or tempering tone of interactions without a physical presence)..

circumstances online mediation can be used at all. Commonly, online mediation is only used when the only unresolved issue is the amount of the settlement.<sup>373</sup> Determining fault, like in a defamation case, would need to be determined and agreed upon in a more traditional legal forum.<sup>374</sup>

Technical issues are becoming less and less of an obstacle for most, especially those Twitter users who would likely be bringing suit, but still some late adopters may find online mediation too technologically challenging or untrustworthy.<sup>375</sup> And though confidentiality concerns are more often a perception rather than a reality, privacy concerns in online mediation do still exist.<sup>376</sup> Best Burgers Ever could attempt to pursue online mediation to remedy their conflict with @SocialButterfly3. Much of the evidence is online and would be easy to upload to an online mediation forum.<sup>377</sup> The speed of the process is much quicker than traditional litigation and provides relief much sooner.<sup>378</sup> Also, the costs would be much more minimal than traditional litigation.<sup>379</sup> While this method may hold some promise, it presents challenges too.<sup>380</sup> First, before this forum could be used, a court would likely

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<sup>373</sup> See Goodman, *supra* note 327, at 20 (discussing how cyber-mediation can lower costs of settlement).

<sup>374</sup> See Goodman, *supra* note 350, at 20 (noting how online mediation may not be effective when factors such as liability need to be determined).

<sup>375</sup> See M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 971 (1996) (placing trust in the neutral party even though privacy is not guaranteed).

<sup>376</sup> See *id.* (comparing confidentiality and privacy concerns between traditional and online ADR).

<sup>377</sup> See Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 ILL. J.L. TECH & POL'Y 1, 42-43 (2009) (commenting upon the advantages of online dispute resolution, such as online filing and evidence submission).

<sup>378</sup> See Galves, *supra* note 377, at 44 (extolling the speed with which online dispute resolution can resolve issues between parties and the benefits of such expediency).

<sup>379</sup> See Galves, *supra* note 377, at 43 (remarking upon the savings of online dispute resolution over traditional litigation and ADR, both in labor, travel, and fees associated with the litigation).

<sup>380</sup> See Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. MARSHALL J. COMPUTER & INFO L.

need to be involved to establish fault.<sup>381</sup> Also, this forum would be easier for a defendant to dodge.<sup>382</sup> Finally, @SocialButterfly3 is a college student and, like many Twitter users, she is likely a judgment-proof defendant.<sup>383</sup> Therefore, even though the process of the online mediation forum potentially provides benefits, it cannot overcome a primary likely issue in many Twibel suits between private parties.<sup>384</sup> If the Twitter user does not have the financial resources, there is nothing for the damaged plaintiff to recover, and this process is still too slow to prevent irreparable harm, similar to what Best Burgers Ever suffered, for instance.<sup>385</sup>

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81, 87 (2009) (introducing issues and disadvantages stemming from use of online dispute resolution).

<sup>381</sup> See Note, *In Defense of Fault Determination Law*, 88 YALE L.J. 1735, 1746 (1979) [hereinafter *In Defense*] (discussing importance of determination of fault due to public misperception of defamatory content and ineffective rebuttal material). *But cf.* Lide, *supra* note 362, at 214 (positing dispute resolution could play a large role in ameliorating defamation suits and that alternative dispute resolution could make “vindication-based” decisions grounded in a finding of falsity).

<sup>382</sup> See Langvardt, *supra* note 196, at 141 (positing confusion regarding plaintiff’s status as a public or private figure has already complicated the ability of courts to determine fault of defendants); Levi, *supra* note 187, at 1577 (discussing the repercussions of the globally available social media and the complications created by a myriad of defamation laws); Lide, *supra* note 362, at 211 (indicating the proliferation of the Internet on a global scale may have overly muddled the waters by raising complex issues of jurisdiction, venue, and applicability of substantive law).

<sup>383</sup> See Jason C. Miller, Article, *Who’s Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL’Y 229, 244 (2008) (explaining only a small fraction of online defamation suits are successful because online defamation defendant “. . . has neither deep pockets nor libel insurance from which to satisfy a defamation judgment”).

<sup>384</sup> See Robert L. Arrington, Aaron Duffy, & Elizabeth Rita, *An Arbitrator’s Guide to Social Networking Issues in Labor and Employment*, 66-JAN Disp. Resol. J. 20, 22 (2012) (introducing methods arbitrators could use in resolving disputes concerning online defamation through social media).

<sup>385</sup> See Miller, *supra* note 383, at 244 (commenting upon defamation plaintiffs’ inability to recover damages from online defamation defendants because of their lack of funds and libel insurance).

## B. PRIVATE SECTOR ONLINE REPUTATION MANAGEMENT TOOLS

Today almost anyone is susceptible to having their “skeletons from the past popping up on Web browsers.”<sup>386</sup> And the more robust of an online presence you have, the more likely it is that you have “negative information . . . associated with you and [it can] more persistently . . . follow you.”<sup>387</sup> Private businesses have erupted in recent years as a solution for those who would like to mitigate potential harm caused by a negative results found in Google search of their name.<sup>388</sup>

Generally, these services comb the internet to find information posted about the client.<sup>389</sup> Then, the client selects what specifically from the existing content should be promoted, and which content would ideally be suppressed.<sup>390</sup> Promoting content is usually accomplished by creating a “personal website, a LinkedIn profile or a Twitter account, all things that rank high on search engines and that can be used to promote positive information.”<sup>391</sup> The companies then will contact site owners and ask them to remove harmful content about clients.<sup>392</sup> However, site owners are only legally obligated to remove untrue and defamatory content posted.<sup>393</sup>

One online reputation management firm, Integrity Defenders, focuses on “push[ing] negative content off of the first pages of Google, Yahoo, and Bing” for one search phrase selected by its cli-

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<sup>386</sup> See Megan Gibson, *Repairing Your Damaged Online Reputation: When Is It Time to Call the Experts?*, TIME, Apr. 19, 2011, archived at [www.webcitation.org/6Fx1pcTUU](http://www.webcitation.org/6Fx1pcTUU) (discussing how online reputation is an issue for all and not just high-profile individuals).

<sup>387</sup> *Id.*

<sup>388</sup> See *id.* (noting the rapid increase in online reputation management companies in recent years).

<sup>389</sup> See *id.* (describing how online reputation management services work).

<sup>390</sup> See *id.* (explaining how clients distinguish good and bad content).

<sup>391</sup> *Id.*

<sup>392</sup> See *Frequently Asked Questions*, INTEGRITY DEFENDERS, November 16, 2012, archived at [www.webcitation.org/6Fx2qN8fZ](http://www.webcitation.org/6Fx2qN8fZ) (describing what a company can do to rectify a client's reputation).

<sup>393</sup> See *id.* (acknowledging limitations on removing a client's online information).



Like Integrity Defenders, for a monthly fee, another online reputation management firm, Reputation.com, offers “reputation management services” that focus on promoting positive content online.<sup>399</sup> Reputation.com boasts patented technology that

<http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts><http://www.reputation.com/reputationwatch/ask-the-experts>(describing comprehensive services offered by another online reputation management company).

changes the ranking of online content.<sup>400</sup> According to the company's official website, this technology creates new pages that "out-rank" negative material by creating web pages that are more attractive to search engines and their constantly changing algorithms.<sup>401</sup> For an annual fee, this company also offers a "ReputationDefender" product to suppress negative information found online, or "fix your Google results."<sup>402</sup>

The obvious danger with companies like these, is that they threaten transparency and can result in promoting misleading or biased information.<sup>403</sup> These solutions seem to be fighting bad speech with the filtered information that the person wants the rest of the world to hear, which can often be unauthentic and at times biased or inaccurate.

### C. FIGHT BAD SPEECH WITH MORE SPEECH

While Twitter does remove some tweets, such as illegal Tweets and spam, it strives to not "remove Tweets on the basis of their content."<sup>404</sup> The practical and ethical beliefs of Twitter as an organization encourage the open exchange of information to support a "positive global impact."<sup>405</sup> Practically, Twitter says it

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<sup>400</sup> See *Your Reputation*, REPUTATION.COM, November 15, 2012, *archived at* [www.webcitation.org/6Fx5kWbod](http://www.webcitation.org/6Fx5kWbod) (explaining technology used to change how content appears in search results).

<sup>401</sup> See *id.* (describing how patented technology changes rankings).

<sup>402</sup> See *Fix your Google results today*, REPUTATION.COM, April 17, 2013, *archived at* [www.webcitation.org/6FxCRC4Lb](http://www.webcitation.org/6FxCRC4Lb) (allowing users to eliminate unwanted links from the top search results).

<sup>403</sup> See *id.* (mentioning that anything that is bumped beyond the first page is considered invisible).

<sup>404</sup> See @BIZ & @amac, *supra* note 24 (noting that removal is not based on its content but rather upon its legality or if it is under spam).

<sup>405</sup> See *id.* (supporting the idea of speaking freely).

can't review the 340 million-plus tweets sent every day.<sup>406</sup> Ethically, "almost every country in the world agrees that freedom of expression is a human right."<sup>407</sup> Although this right comes with responsibilities, there are several limits such as the refusal to allow unlawful tweets which may violate defamation laws.<sup>408</sup> While one option is to simply delete tweets that are false or defamatory, this censorship would be counter intuitive to First Amendment principles that promote speech and strongly oppose restricting it. Further, the Internet provides defamation victims more opportunities for self help than ever before.<sup>409</sup> The First Amendment provides protection for all speech -- including those online: "The words [of the First Amendment] do not change, but how we interpret them does."<sup>410</sup> "During the past 220 years, courts have interpreted these freedoms in landmark legal cases, setting the standards for freedom of expression for each new American generation."<sup>411</sup>

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<sup>406</sup> See @TWITTER, *Twitter Blog: Twitter turns six*, *supra* note 2 (acknowledging that Twitter's administrators see more than one billion tweets within a three day time span).

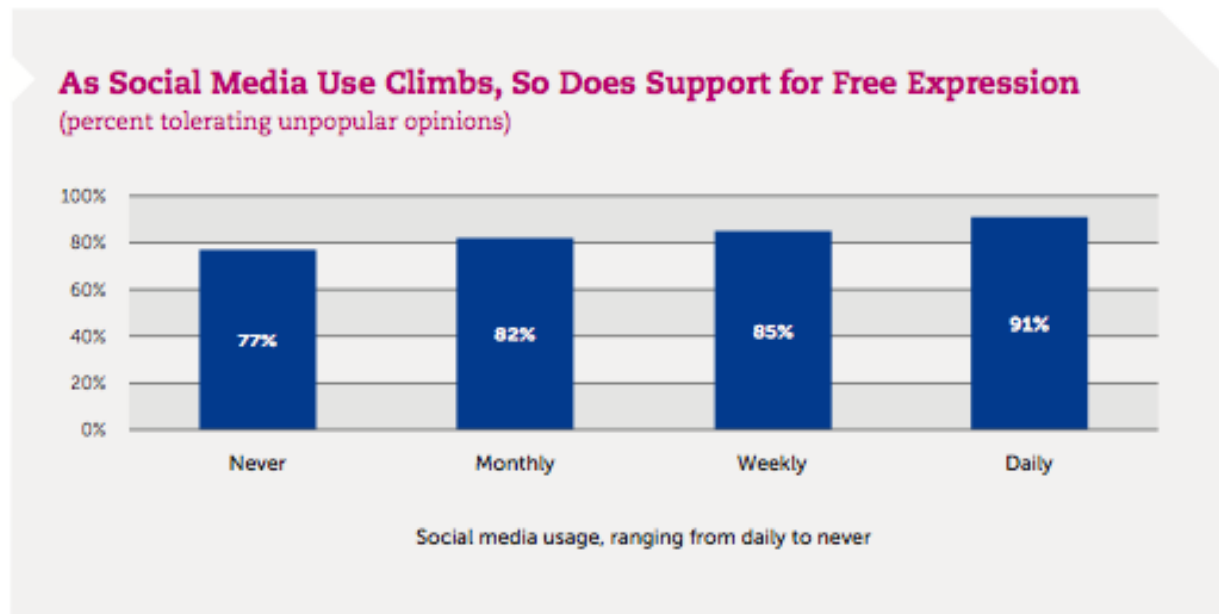
<sup>407</sup> See @BIZ & @amac, *supra* note 24 (noting the values of the freedom of speech has worldwide).

<sup>408</sup> *Id.* (removing illegal Tweets).

<sup>409</sup> See *Doe v. Cahill*, 884 A.2d at 464 (stating that other than the legal remedies that are available to the victim, the victim may also take steps to alleviate the harm by "setting the record straight"); *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002) (suggesting that victims should attempt to mitigate the harm done to them).

<sup>410</sup> See Dr. Kenneth Dautrich, *Future of the First Amendment 2011*, John S. and James L. Knight Foundation, Sept. 15, 2011, archived at <http://www.webcitation.org/6FxIMgSvy//www.webcitation.org/6FxIMgSvy//www.webcitation.org/6FxIMgSvy> (stating that the language of the constitution is subject to interpretation).

<sup>411</sup> See *id.* (acknowledging the two centuries worth of precedent).



**Figure 2, Knight Foundation, "Future of the First Amendment, 2011 Survey of High School Students and Teachers."<sup>412</sup>**

Figure two demonstrates the correlation between frequent social media use and tolerance of unpopular opinions.<sup>413</sup> Younger generations that have grown up with social media usage as a staple part of their lifestyles, tend to support more freedom of expression than those who never use social media.<sup>414</sup> Social media lets users overcome distance and connect with people they would never have connected with before.<sup>415</sup> As the president of The First Amendment Center, Ken Paulson has noted "The vibrancy of worldwide communications today, fueled by social media and engaged users, is in effect exporting First Amendment values to a new and global generation."<sup>416</sup> This tolerance of freedom of ex-

<sup>412</sup> *Id.* at 9 (providing a chart for its viewers).

<sup>413</sup> *Id.* (noting the difference by the 91% and the 77%).

<sup>414</sup> *Id.* at 10 (noting the percentages to support this proposition).

<sup>415</sup> *Id.* at 11 (finding that younger generations now have the ability to obtain information via text, blogs, websites, and videos).

<sup>416</sup> See Mark Fest, *Twitter, Facebook and Co. – good for teens and the First Amendment?*, Knight Foundation, Sept. 15, 2011, archived at <http://www.knightfoundation.org/press-room/press-release/twitter->

pression indicates not only more of a willingness to promote free speech and deter remedies that chill speech, but also signals that this generation (and generations to come) are more likely to support remedies that do the same.<sup>417</sup>

Censorship of defamatory tweets presents an obvious challenge to the core intention of the First Amendment and the "heart of the Constitution." Many question the effectiveness of muzzling speech as a tool to combat false speech.<sup>418</sup> Limiting speech often times has the opposite effect than the intended one.<sup>419</sup> By silencing speech, we run the risk of giving bad speech a mystique and making it seem more desirable.<sup>420</sup> The courts have consistently looked to more speech as a remedy for bad speech. Supreme Court Justice Louis J. Brandeis, set this tenor in *Whitney v. California*,<sup>421</sup> when he suggested the remedy for bad speech is "more speech, not enforced silence,"<sup>422</sup> a statement that has been considered the greatest defense of the freedom of speech ever written by a member of the high Court.<sup>423</sup> The idea behind this is "the inherent persuasiveness of truth" can be the most effective tool used to defeat a bad idea.<sup>424</sup>

Courts have encouraged defamation victims to seek self help as primary remedy by using "available opportunities to contradict the lie or correct the error" to minimize the adverse impact the

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facebook-and-co-good-teens-and-first-amend/ (realizing the effects of world-wide communication have been great).

<sup>417</sup> *Id.* (referencing to a student who logged onto Facebook several times a day has realized the importance of her First Amendment rights).

<sup>418</sup> See Mark Sableman, *MORE SPEECH, NOT LESS: COMMUNICATIONS LAW IN THE INFORMATION AGE*, 10 (Southern Illinois University Press, 1st ed. 1997) (questioning whether banning speech is the only effective remedy).

<sup>419</sup> *Id.* (noting the opposite effects).

<sup>420</sup> *Id.* (suggesting that banning speech makes it more desirable).

<sup>421</sup> See 274 U.S. 357, 373 (1927) (Brandeis, J., arguing that only "serious evils" could justify suppression of speech)..

<sup>422</sup> *Id.* at 377.

<sup>423</sup> See Anthony Lewis, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 85 (1991) (describing Brandeis's concurring opinion as setting out the principles of free speech more completely than anyone before him).

<sup>424</sup> See Mark Sableman, *MORE SPEECH, NOT LESS: COMMUNICATIONS LAW IN THE INFORMATION AGE* 10 (1997) (discussing the idea that allowing freedom of speech will produce good results in the end).

statement may have on their reputation.<sup>425</sup> Many businesses have found ways to turn a social media crisis<sup>426</sup> into a positive public relations social media campaign.<sup>427</sup> These companies, many similar to @Best Burgers Ever, "didn't understand the impacts of the power shift to the participants, or how fast information would spread, or were just plain ignorant" about social media.<sup>428</sup> A report by Altimeter, a social media consultation agency, found that 76 percent of social media crises in the report could have been prevented or harm could have been minimized had the attacked organization been prepared with proper social media training and had processes in place to respond to the community directly.<sup>429</sup>

It's difficult for an allegedly defamed party like @BestBurgersEver to minimize or eliminate the harm caused by @SocialButterfly3's specific actions on Twitter because of the relatively limited reach they have in comparison to @SocialButterfly3.<sup>430</sup> In a situation like this the toothpaste is out of the proverbial tube.

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<sup>425</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (discussing some of the remedies for victims of defamation).

<sup>426</sup> See Jeremiah Owyang, *(Report) Social Media Crises On Rise: Be Prepared by Climbing the Social Business Hierarchy of Needs*, WEB-STRATEGIST, Aug. 31, 2011, archived at [www.webcitation.org/6FyayRXWO](http://www.webcitation.org/6FyayRXWO) [www.webcitation.org/6FyayRXWO](http://www.webcitation.org/6FyayRXWO) (defining a social media crisis as "an issue that arises in or is amplified by social media, and results in negative mainstream media coverage, a change in business process, or financial loss.").

<sup>427</sup> See Jeremiah Owyang, *A Chronology of Brands that Got Punk'd by Social Media*, WEB-STRATEGIST, May 2, 2008, archived at [www.webcitation.org/6FybzCa6P](http://www.webcitation.org/6FybzCa6P) [www.webcitation.org/6FybzCa6P](http://www.webcitation.org/6FybzCa6P) (discussing some of the effects of not understanding the impact of social media).

<sup>428</sup> *Id.*

<sup>429</sup> See *(Report) Social Media Crises on Rise*, *supra* note 426, (citing 76% of organizations' social media-related crises could have been prevented or diminished had brand been trained and prepared to respond).

<sup>430</sup> See *supra* Part I A (stating in hypothetical scenario that SocialMediaButterfly3 has 58,000 followers when she publishes her defamatory tweet which then goes viral).

In the presented hypothetical, a strategy that depended on more speech to combat bad speech could have encouraged supporters of Best Burger Ever to speak up about the veracity of the claims made by the tweets in question.<sup>431</sup> Best Burger Ever could have used the very method that damaged their reputation as a tool to combat the damage from the allegedly false speech by offering information or evidence directly via tweets.<sup>432</sup> BestBurgersEver can publish and distribute information that negates the false claims. They can share this message to other reputable voices in the community, like the mainstream media, or other online publishers with significant audiences. With the multiple—and conflicting—perspectives, Best Burgers Ever could encourage those in the community to think critically about the claims and come to their own conclusions instead of relying solely on the initial tweets posted by @SocialButtefly3 to form their opinion about the claims against the restaurant.

While more speech does not remedy the damage that has been done to @BestBurgersEver, it may cause the community to question the integrity of what @SocialButterfly3 publishes. If Best Burgers Ever acts quickly enough and is "social-media ready," it could halt the damage.<sup>433</sup> Imagine the effect that a campaign mobilizing Best Burger Ever customers to share what they enjoy the most about the restaurant's burgers, or reposting pictures of prominent local figures eating at the restaurant, could have on defeating the damage done by @SocialButterfly3's tweet. And hopefully this deters her, and others, from defaming others from posting false and defamatory information in the future.

#### D. THE OPEN-SOURCE TWITTER COMMUNITY

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<sup>431</sup> See, e.g., *A Chronology of Brands that Got Punk'd by Social Media*, *supra* note 427, (discussing Mattel's response to Greenpeace attack on the company for deforestation via Mattel's Facebook page in part by responding directly to the issue with its on Facebook posts and announcing a change in supply chain).

<sup>432</sup> See, e.g., *A Chronology of Brands that Got Punk'd by Social Media*, *supra* note 427, (using example of Mattel responding to social media attacks posted on its Facebook page in part with its own posts in response on the page).

<sup>433</sup> See *(Report) Social Media Crises on Rise*, *supra* note 426, (recommending social media preparedness that author contends would have prevented or diminished the negative impact of social media in many cases of attacks on a brand).

This freedom of expression cultivated by Twitter has created an empowered community that identifies the problems as they surface and uses technology -- and one another -- to create solutions. Twitter is built completely on open source software, which means it shares its data source code and data with the Twitter community in order to encourage collaboration and creation of new products that improve Twitter.<sup>434</sup> Specifically, Twitter's Application Programming Interface (API),<sup>435</sup> makes it easy for Twitter users, who have basic programming capabilities, to create one-off, third-party projects and services that enhance the Twitter experience for everyone.<sup>436</sup>

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<sup>434</sup> See Twitter, Inc., *Open Source*, Apr. 18, 2013, archived at [www.webcitation.org/6Fyp6OK4I](http://www.webcitation.org/6Fyp6OK4I) [www.webcitation.org/6Fyp6OK4I](http://www.webcitation.org/6Fyp6OK4I) (stating Twitter is built on open source software); Barb Mosher Zinck, *Discussion Point: Does Open Source Encourage and Support Innovation?* June 6, 2012, archived at [www.webcitation.org/6FymTlpfF](http://www.webcitation.org/6FymTlpfF) [www.webcitation.org/6FymTlpfF](http://www.webcitation.org/6FymTlpfF) (discussing how open source software makes source code available to a wider community that contributes to the development of the software by incorporating disparate ideas, promoting innovation). Open source is the practice of publically sharing uncopyrighted access to a website's source code in the hopes of encouraging others to improve upon the current product and collaborate with others to create new products. See *id.* (discussing how community input into open source software creates more diverse, innovative software); see also Ian C. Ballon, *E-Commerce & Internet Law*, 18.03[7], 2 E-Commerce and Internet Law 18.03[7] (2012) (explaining open source software's code may be available free of charge, and distributed under licenses such as GNU General Public License under which software may be freely available provided that if licensee publishes a modified version of the software, the source code for the modified versions will be made available for third party use).

<sup>435</sup> See David Orenstein, *QuickStudy: Application Programming Interface (API)*, Jan. 10, 2000, archived at [www.webcitation.org/6FyppeVRs](http://www.webcitation.org/6FyppeVRs) [www.webcitation.org/6FyppeVRs](http://www.webcitation.org/6FyppeVRs) (defining API as set of standardized requests that a program has defined on which almost every application depends to perform basic functions like accessing the file system). An API, or Application Programming Interface, is a system that lets people take data from Twitter and make applications, websites, widgets, and other projects that interact with Twitter on other sites. See *id.* (discussing how APIs work for basic functions of applications).

<sup>436</sup> See Twitter, Inc., *supra* note 434 (noting Twitter users are free to use, modify, distribute any documentation, source code, or examples within its open source projects).



Twitter users have control over who follows them because they can block or delete followers from their account.<sup>437</sup> Due to the public nature, however, followers are more of a one-way subscriber with little obligation on the person they are following to follow them back.<sup>438</sup> While the number of followers a Twitter user has is a superficial indicator of popularity, many Twitter users base their reputation on this statistic.<sup>439</sup> Outside developers have created other third-party sites to help Twitter users determine their reach and influence within the network.<sup>440</sup>

One solution to defamatory tweets could include looking to the Twitter development community to create a solution to specifically facilitate a resolution forum for defamatory content. Twitter encourages the open source development as it provides an API<sup>441</sup> for developers to use, and which supports a very active development community.<sup>442</sup> Developers identify problems that need to be solved and then work with other developers in the community to build functionality.<sup>443</sup> Developers collaborate with

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<sup>437</sup> See *Blocking people on Twitter*, TWITTER, archived at [www.webcitation.org/6G4gmNhN2](http://www.webcitation.org/6G4gmNhN2) (describing how Twitter users can gain or maintain control over who follows their tweets).

<sup>438</sup> See *FAQs about following*, TWITTER, archived at [www.webcitation.org/6G4hBgFO5](http://www.webcitation.org/6G4hBgFO5) (noting how difficult it may be to get Twitter followers, and discussing how the following relationship does not have to be mutual).

<sup>439</sup> See Vanessa Doctor, *Why People Buy Followers – And Why It Doesn't Work*, HASHTAGS.ORG, Feb. 22, 2013, archived at [www.webcitation.org/6G4iXUKcF](http://www.webcitation.org/6G4iXUKcF) (describing the advantages of having a high follower count).

<sup>440</sup> See Lauren Dugan, *5 Tools to Measure your Twitter Influence*, MEDIABISTRO – ALLTWITTER, Feb. 23, 2011, archived at [www.webcitation.org/6G4iuD3Ru](http://www.webcitation.org/6G4iuD3Ru) (providing information on five tools that measure users' Twitter influence).

<sup>441</sup> See *Frequently Asked Questions*, TWITTER, archived at [www.webcitation.org/6G4k6Okvn](http://www.webcitation.org/6G4k6Okvn) (describing how developers use APIs to create software programs that add functionality to sites like Twitter by facilitating interactions between different sites).

<sup>442</sup> See *id.* (addressing how troubleshooting and feature concerns are handled by developers).

<sup>443</sup> See *The Twitter Glossary*, *supra* note 20 (defining “developers” and “third-party applications”).

one another to use the Twitter API to build programs that "talk" between Twitter and other sites.<sup>444</sup> The result is custom-created functionality on external sites that relies on Twitter's functionality and data.<sup>445</sup> Examples of Twitter APIs include layering websites, applications and widgets on top of existing Twitter content. Thousands of web sites have been created using Twitter's API, including many that track Twitter users' reputations. One example of a website that has used the Twitter API to create third-party website and service is Klout.<sup>446</sup> Many consider Klout, which launched in 2008, to be the "gold standard of Twitter influence measurement."<sup>447</sup> Klout looks at a user's influence across social networks, primarily Twitter and Facebook, to assign users a "Klout Score, a representation of your influence and ability to compel action by others online."<sup>448</sup> Klout calculates a user's "true reach" by taking into consideration more than 30 factors including Twitter metrics like how many people are following a user, number of retweets, number of unique mentions.<sup>449</sup>

Klout is a good example of how the community has responded to the need of determining the reputation of Twitter users. In the presented hypothetical, Klout would be useful to determine the influence of the accounts of @SocialButterfly3 and @BestBurgersEver. It could indicate the general trustworthiness of the accounts as a whole on a macro level. However, Klout does not necessarily speak to the accuracy of the tweets on a micro level.

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<sup>444</sup> See *Frequently Asked Questions*, *supra* note 441 (describing how API is used to advance Twitter features and applications).

<sup>445</sup> See *Frequently Asked Questions*, *supra* note 441 (noting the resulting products of developers' work).

<sup>446</sup> See Dugan, *supra* note 441 (describing Klout as one of the tools that measures Twitter influence).

<sup>447</sup> See Dugan, *supra* note 441 (noting Klout's high quality nature).

<sup>448</sup> See Ben Parr, *Klout Now Measures Your Influence on Facebook*, MASHABLE, Oct. 13, 2010, archived at [www.webcitation.org/6G4n3WJ1U](http://www.webcitation.org/6G4n3WJ1U) (illustrating how Klout works).

<sup>449</sup> See Dugan, *supra* note 441 (explaining how Klout technically measures one's Twitter influence).

Using the Twitter API, it is technically possible to create a site that could focus specifically on the influence and trustworthiness of tweets at a micro level. A developer could use the API to pull in Tweets and Twitter user data and then design a mechanism that lets users bring attention to and discuss false or damaging tweets in real time. This site would dovetail nicely with the concept of using "more speech to combat bad speech" because it could encourage businesses to confront those attacking them using social media before the situation, and to the detriment of businesses like the hypothetical Best Burgers Ever.

Another option in dealing with Twibel would be looking to the community to moderate itself within the confines of Twitter. Specifically, Twitter could create an incentive for developers to create a "thumbs-up-thumbs-down" voting mechanism, commonly used in user commenting systems or other social media networks. This system would let Twitter users vote tweets up or down or flag tweets more explicitly. If a system like this would have been in place, @BestBurgersEver could have encouraged its loyal customers and followers to "thumbs down" the false tweets. Letting the community weigh in could have challenged the legitimacy of the tweets, thus minimizing the resulting harm. This would also encourage users to judge a statement's credibility instead of simply reading it.

The primary challenge would be to get a critical mass of the Twitter population to use and rely on this system. Without widespread adoption, this solution would lack relevance, and not serve the designed purpose of providing a sufficient remedy for those who believe they were defamed.

## VI. CONCLUSION

Defamation lawsuits and the Twitter community have many things in common. They are both complex, and place high regard on reputation and promoting the exchange of news ideas through free speech. However, the Twitter community functions at a lightning-fast speed, while traditional defamation law suits often

take a very long time to litigate. It is important that the defamation laws provide tools on Twitter for deterring harmful content effectively without hindering the ability to protect users' online reputations.

Common law and landmark cases like *New York Times vs. Sullivan* and *Gertz v. Welch* have driven defamation law up until this point. However, applying traditional defamation law to the online world requires categorizing Twitter users in new ways that have yet to be clarified.

Defamation law made more sense with traditional media and a passive news cycle. Now that anyone can be a content creator, more publishers with varying standards for vetting and ethics have entered into the fold. While this encourages interactivity and user engagement, it does so potentially at the expense of thoughtful speech and truth. This competition of voices often puts more of an emphasis on speed rather than accuracy. Twitter allows its users to create information quickly and share it with large, global audiences instantaneously. The effects of how people interact on Twitter have spilled over into other online and real word forms of communication, demonstrating the great impact Twitter now has on our culture. This influence and access to publishing has interjected defamation law into the interests of anyone who publishes online. While Twitter presents new legal challenges to maneuver and questions to be answered, the tool and those who use it offer many opportunities for developing solutions to these challenges. Moreover, a developing, yet untested area of defamation law is Twibel. The global nature of Twitter could mean that how other countries handle Twibel could likely influence the initial decisions made domestically. In determining who should regulate Twibel, the courts might not be the most effective forum in all cases. To determine the best remedy, it is important to look at who the stakeholders are, and who has the greatest interest in preventing and regulating defamatory speech. In this case the primary stakeholders are Twitter users and those who could be affected by defamatory speech, which is essentially anyone now.

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Since Twitter enjoys immunity from liability for defamatory content under Section 230 of the Communications Decency Act, the best option for resolution may not be to focus on Twitter as an organization solving the problem, but rather to look to the community itself for a solution. An open-source, collaborative nature defines the Twitter community, as well as the online social media community as a whole. This community is known for defining both the problems and the solutions. It does not need a referee anymore because everyone can speak. However, the obstructive nature of false information can be detrimental to the quality of the public discourse. The best response to harmful speech could very well be more speech.

In the online environment, which places an emphasis on automation and algorithms, the community usually aims for efficiency in the functions it creates. When it comes to finding efficient remedies to repair the damage done to others' reputation in the digital world, it is as important to find ways to rehabilitate an individual's reputation, as it is to deter others from causing the initial damage.

An ideal solution would involve creating a community around the shared interest of promoting civil discourse and minimizing the harm caused by reputation-damaging speech. One of the benefits of the informal communication style of Twitter is that it is very easy to create a conversation around a shared interest like civil discourse and deterring defamatory speech, while attracting those with "distinct expertise" to tackle this issue and find solutions. A community like this might attract people with diverse valuable perspectives, including trusted sources that could help to shape the future of the law, and that will help the courts navigate the inevitable first Twitter trial. More importantly, the community itself may develop a better long-term solution for using defamation law as a tool and not an obstacle.

While no remedy can undo the damage defamation can do to one's reputation, more tools are available now to victims of defamation in order to mitigate the harm than was available before. The context has changed so the legal community and the Twitter

community have a prime opportunity to collaborate to provide much-needed guidance.