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Valparaiso University

BEYOND CONTROL?: THE RISE AND FALL OF DEFAMATION REGULATION ON THE INTERNET

I. INTRODUCTION

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse, steals trash; 'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.[1]

"Have you seen this?"[2] This was the subject of an e-mail message received by a female law student from another classmate one afternoon, and as the classmate was speculative as to its contents, she decided to open the intriguing message. Inside the message contained a link to a contest for "The 'Most Appealing' Women @ Top Law Schools." However, what lay beneath this catchy title was anything but appealing; the site displayed three personal pictures of this particular law student. The first two were from her friend's fashion show and the other of her at a beach in Santorini wearing only a bathing suit. The caption beneath the picture read "[f]or a self-proclaimed feminist, [Jane Doe] loves objectifying herself in front of cameras. I guess it's empowerment when she does it, and exploitation when others do it, because she is in law school." While she did not consent to being entered into this demoralizing contest, the law student had posted her pictures on websites like Flickr, Facebook, YouTube, MySpace, and Friendster—something that she later lamented.[3] This simple task is certainly not unusual. In fact, most of her friends posted similarly personal pictures on the same or similar sites but were not subject to the scorn that overshadowed this particular law student.

With little other recourse, the law student e-mailed the website coordinators and asked to be removed from the competition, but there was no response. Later, a message appeared on the website stating the pictures would not be taken down until after the competition. Again, the

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1 WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

2 This hypothetical is completely fictional and entirely the creation of the author. Any resemblance to real persons or facts is coincidental.

3 *See infra* note 28 (discussing these and other websites that allow users to post and share their pictures).

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law student made a request of the coordinators to take down the material—again, no response. Indeed, it seemed that all her requests generated was retaliation by hosts and users posting nasty comments about the women and speculating as to their promiscuity. The comments included, "i would like to [expletive deleted] [Jane Doe] but since people say she has herpes that might be a bad idea[,]" and the site attacked the reputations of a number of female law students, solely so that a bunch of Internet spectators could vote on their favorite "CGWBT," shorthand for "cheerful girl with big tits[.]"[4] Within days, the contest generated nearly 2,000 hits on Google.[5]

Over the years, the Internet has transformed into something much different than its bulletin board predecessors.[6] It is no longer merely a facet of computing technology; today, it is a part of entertainment, consumer spending, and popular culture.[7] The Internet has fused

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[4] Posting of Patterico to Patterico's Pontifications, http://patterico.com/2007/06/13/volokh-on-the-autoadmit-lawsuit/ (June 13, 2007, 6:01). This quote was extracted to prove the degree of insult that can be found online. *See id.*

[5] *See* Posting of Jill Filipovic to Feministe, http://www.feministe.us/blog/archives/2007/03/07/wapo-calls-out-law-school-pervs/ (Mar. 7, 2007). *See also* Posting of DavidRosen to AutoAdmit, http://www.autoadmit.com/thread.php?thread_id=643868&forum_id=2#8243886 (June 11, 2007, 20:38) (the attorney bringing the lawsuit posted a summons on the AutoAdmit website under the user name DavidRosen). This introduction closely traces the facts alleged by a defamed law student, and are the subject of a complaint filed June 11, 2007 in the U.S. District Court in Connecticut by two other law students defamed on the same website. *Id.* The suit, filed by two female law students, named as defendants Anthony Ciolli, a former director of the website, and a number of other users who posted the students' photos as well as defamatory and threatening remarks about them on the AutoAdmit law school discussion forum. *Id.* The lawsuit sought more than $200,000 in punitive damages for defamation and demanded the offensive postings be taken down. Posting of Amir Efrati to Law Blog, http://blogs.wsj.com/law/2007/06/12/students-file-suit-against-autoadmit-director-others/ (June 12, 2007, 11:42). As a result of this lawsuit, Anthony Ciolli will be forced to realize the real-world consequence of Internet defamation because his post-graduation job offer has been rescinded as a direct result of his involvement in the AutoAdmit scandal. *Id.* In March 2009, Portfolio Magazine published an update to this cyber-bullying lawsuit. David Margolick, *Slimed Online*, Portfolio Magazine, http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying (discussing the lawsuit and defendants that have been charged to date).

[6] *See infra* Part II.A and accompanying text (discussing the transition for bulletin boards to online web journals).

[7] *See, e.g.*, Pew Internet & American Life Project, Reports: Online Activities & Pursuits, http://www.pewinternet.org/PPF/c/1/topics.asp (last visited Nov. 8, 2007). This study reports the most popular internet uses, including but not limited to, video-sharing, information searches, web journals, hobbies, online video and pictures, and social networking sites. *Id.* For example, the study reports that "[m]ore than half (55%) of all online American youths ages 12–17 use online social networking sites." *Id.* And, perhaps even more startlingly, the study reports that 28% of teens have their own web journal, more commonly referred to as a "blog." *Id.*

analytical computing with the mainstream social life in America.[8] Moreover, the ability of users to access the Internet has increased.[9] The Internet no longer requires technical computing language to navigate effectively; instead, the Internet is provided by the mere click of a mouse, and widespread broadband Internet access allows virtually anyone to become a publisher.[10]

This increased freedom has given way to new forms of publication, including weblogs, or "blogs[,]" typically produced by individuals as merely a pastime, or increasingly more common, as an income yielding, self-made enterprise.[11] Collectively, the blogs comprise the

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[8] *See, e.g.*, JOHN HORRIGAN & LEE RAINIE, THE INTERNET'S GROWING ROLE IN LIFE'S MAJOR MOMENTS (Apr. 19, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Major%20Moments_2006.pdf. This study reports that the Internet developed as an important medium to individuals' everyday lives. *Id.* In fact, "[t]he proportion of Americans online on a typical day grew from 36% of the entire adult population in January 2002 to 44% in December 2005." *Id.* at 1. Likewise, "[t]he number of adults who [reportedly] said they logged on at least once a day from home rose from 27% of American adults in January 2002 to 35% in late 2005." *Id.* Moreover, for many Internet users "the [I]nternet has become a crucial source of information . . . fully 45% of [I]nternet users, or about 60 million Americans, say that the [I]nternet helped them make big decisions or negotiate their way through major episodes in their lives in the previous two years." *Id.*

[9] *See, e.g.*, JOHN HORRIGAN, HOME BROADBAND ADOPTION 2006, Pew Internet & American Life Project (May 28, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf. The number of Americans with broadband Internet access in their homes increased from 60 to 84 million between March 2005 and March 2006. *Id. at* i. In addition, the study reports that 48 million Americans have posted content on the Internet. *Id.* at ii. Broadband Internet adoption also increased by 14% over the 2006 numbers, as reported in a 2007 update report. *See* JOHN HORRIGAN & AARON SMITH, HOME BROADBAND ADOPTION 2007, PEW INTERNET & AMERICAN LIFE PROJECT (Jul. 3, 2007), *available at* http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf.

[10] *See, e.g.*, JOHN B. HORRIGAN, A TYPOLOGY OF INFORMATION AND COMMUNICATION TECHNOLOGY USERS, Pew Internet & American Life Project (May, 7, 2007), *available at* http://www.pewinternet.org/pdfs/PIP_ICT_Typology.pdf. This study explains that more than half of Americans regularly used the Internet or engaged devices that connect to the Internet, and it further describes a broad spectrum of Internet users including: the most active users termed "Web 2.0 users," less active users that appreciate Internet devices but own relatively few, and the least active users that are satisfied using very few Internet devices. *Id.* at i. The term Web 2.0 is instructive in any discussion of the history of the Internet and is often used to describe users or ideas at the forefront of innovation. *See* Tim O'Reilly, O'Reilly—What Is Web 2.0 (Sept. 30, 2005), http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html. Web 2.0 is a term that was created during a brainstorming session after the crash of the Internet when Internet advocates feared that there would not be an adoption of the Internet by everyday consumers. *Id.* Web 2.0 replaced the double-clicking, directory based "sticking" feel with a new interactive approach that led to Google, Wikipedia, and other more seamless web applications. *Id.*

[11] *See* Stephen Baker & Heather Green, *Blogs Will Change Your Business*, BUSINESS WEEK 56, May 2, 2005, *available at* http://www.businessweek.com/magazine/content/05_18/b3931001_mz001.htm. This article boldly states that Internet users should not turn their heads to the influence of blogs: "you cannot afford to close your eyes to them, because

"blogosphere[,]" and in much the same way a small leak can become a flood, the collective power of the blogosphere can likewise have a tremendous impact.[12]

As with all emerging media, the Internet has experienced its fair share of growing pains, as legislatures and the law struggle to keep pace.[13] Despite the increasing number of publishers, a majority of the recent legislation drafted by Congress to regulate or potentially stifle online speech has misunderstood, or largely ignored, the speed of technology that has given new life to the threat defamation poses on the Internet.[14] Moreover, while many of the present problems facing the Internet have existed since its inception, it was not until 1995 that the first law review article appeared with "[d]efamation" and "Internet" in

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they're simply the most explosive outbreak in the information world since the Internet itself." *Id.* Moreover, the article accurately describes the transformation from printing presses to blogs, noting the extremely low barriers to entry that make this new form of publication so incredibly influential. *Id.*

[12] *Id.* This article concludes its discussion of mass media by stating as follows:

> The printing press set the model for mass media. A lucky handful owns the publishing machinery and controls the information. Whether at newspapers or global manufacturing giants, they decide what the masses will learn. This elite still holds sway at most companies. You know them. They generally park in sheltered spaces, have longer rides on elevators, and avoid the cafeteria. They keep the secrets safe and coif the company's message. Then they distribute it -- usually on a need-to-know basis -- to customers, employees, investors, and the press.
>
> That's the world of mass media, and the blogs are turning it on its head. Set up a free account at **Blogger** or other blog services, and you see right away that the cost of publishing has fallen practically to zero. Any dolt with a working computer and an Internet connection can become a blog publisher in the 10 minutes it takes to sign up.
>
> Sure, most blogs are painfully primitive. That's not the point. They represent power. Look at it this way: In the age of mass media, publications like ours print the news. Sources try to get quoted, but the decision is ours. Ditto with letters to the editor. Now instead of just speaking through us, they can blog. And if they master the ins and outs of this new art -- like how to get other bloggers to link to them -- they reach a huge audience.

Id.

[13] *See infra* Part II.A (discussing the implications and criticisms of regulation on the Internet in recent years).

[14] *See infra* note 30; *see also* Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALBANY L. REV. 1083 (1996); Paul R. Niehaus, Comment, *Cyberlibel: Workable Liability Standards?*, 1996 U. CHI. LEGAL F. 617 (1996); C. Waelde & L. Edwards, *Defamation and the Internet: A Case Study of Anomalies and Difficulties in the Information Age*, 10 INT'L REVIEW OF LAW COMPUTERS & TECH. 263 (1996).

its title.[15] Although Congress has made some attempt to protect Internet users and shift liability for defamatory acts, little change has actually occurred, and many of the underlying concepts behind the intended progress are conclusively unsound.[16]

To deal with the speed of cyberspace, legislatures and courts are often faced with three conflicting methods: the first, to proceed leniently allowing the technology to develop its own self-regulation; the second, to proceed definitively through the development of cyberlaws that establish order ahead of technology; and, the third, to proceed cautiously, applying pre-existing laws, so that they might better understand cyberspace before enacting more comprehensive regulations.[17] Among these conflicting methods, both the courts and

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[15] *See* Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995) (located through a search of Westlaw's database of "Journals and Law Reviews Combined" (JLR) in January 2008 for article titles which include "defamation" and "Internet").

[16] *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). Justice Stevens, writing for the majority in the affirmed decision, included observations of the three-judge district court panel to conclude that the Internet was a unique mode of communication. Reno v. ACLU, 521 U.S. 844, 850 (1997). More specifically, Judge Datzell, the District Court Judge, after examining the extensive findings of fact before the court, described the Internet as unique for a number of reasons:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among the speakers.

Reno, 929 F. Supp at 877. In fact, the concept of a unique Internet environment acted as an undercurrent throughout much of Stevens's opinion, and assisted in characterizing the Internet has wholly unique from other forms of broadcast media. *See Reno*, 521 U.S. at 867. However, the Court recognized that some of its prior decisions were predicated on special justifications for regulating broadcast media that may be inapplicable for other types of speakers. *Id.* at 868. Moreover, Stevens distinguished *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), by stating that the FCC had "decades" of experience in regulating radio broadcast communication, but the CDA provided no opportunity for oversight by an agency "familiar with the unique characteristics of the Internet." *Id.* at 867. In short, Stevens cited precedent in which the Court acknowledged that "[e]ach medium of expression . . . may present its own problems[,]" and the weight of these various distinguishing factors will further limit First Amendment protection. *Id.* at 868 (alterations in original). Thus, the government's attitude toward the Internet, manifested by Congress's cursory manner in enacting the CDA, shows that, at least on some level, the government misunderstands the true nature of the Internet. *Id.* As the Court suggests, if Congress wishes to effectively regulate the Internet, a full understanding is at the very least necessary, if not mandatory. *Id.*

[17] *See infra* Parts III, V. *See* Joseph Reagle, *Why the Internet is Good*, http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html (last visited Feb. 17, 2008).Lawrence Lessig was the first to identify a total of four factors that regulate cyberspace: laws (describing this approach as the use of government sanction and force);

legislature have yet to decide on one best practice, and as a result, the governing law has grown increasingly inconsistent.[18]

This Note attempts to resolve the debate over best practices, in particular, in the area of defamation law.[19] The importance of the Internet as an emerging medium of communication and the limited success in its regulation requires increased evaluation of the methodologies employed, and the reasons for their failure.[20] This Note combines the existing regulation furthering the first approach with the more traditional third approach and encourages the use of both methods as a modest approach to regulation of defamatory communications on the Internet, in lieu of passing more comprehensive legislation when the Internet escapes its infancy.[21] This method provides increased protection from liability in the case of small-scale bloggers, and ensures that individuals defamed online receive some form of retribution, even in the likely event of suit against a judgment-proof defendant.[22] Moreover, this method may provide a powerful tool for plaintiffs to use against expanding ISP immunity by, at the very least, requiring some action with regard to defamatory statements posted on websites.[23]

In support of this thesis, this Note begins in Part II by exploring the history, growth, and development of the Internet into an influential medium dominated by individuals, with an eye toward its structure and regulation throughout the past two decades.[24] Building on this outline of the Internet's current structure and prior regulatory attempts, Part III provides an analysis of the three current regulatory methods employed by the legislatures, interpreted by the courts, and criticized by the

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social norms (implying regulation by expectation, encouragement, or embarrassment); markets (regulation by price and availability); and architecture (described as what technology permits, favors, dissuades, or prohibits). *Id.*

[18] *See infra* note 86 (discussing the three Internet regulation methods, including: self-regulation, cyberlaws, and the application of traditional laws).

[19] *See infra* Parts III, V (condensing the three regulatory methods employed throughout the Internet's recent history that developed in large part from Lawrence Lessig's four factors, then analyzing the methods' flaws and inconsistencies).

[20] *See infra* Parts III, V (analyzing the drawbacks of the three main regulatory methods employed by legislatures, courts, and academics during the Internet's most recent history).

[21] *See infra* Part IV (suggesting that applying traditional laws to the Internet is a solution to the existing and emerging Internet regulatory problems arising within Congress's existing self-help regulations).

[22] *See infra* Part IV (describing the unique nature of the Internet and the problems various legislative initiatives have encountered in trying to regulate the Internet, and discussing the call for more principled legislation that accounts for the ever-changing Internet infrastructure).

[23] *See infra* Part IV (asserting that the immunity of ISPs from liability for damages may not include immunity from injunctive or declaratory relief).

[24] *See infra* Part II (discussing the background and history of the Internet).

academic community, in regard to the ever-growing Internet community.[25] This analysis attempts to highlight each method's drawbacks, including structural incompatibility and inconsistent application.[26] Next, Part IV recommends that legislatures and the courts adopt an effective, but modest, approach to the regulation of Internet defamation law, by using the self-help purpose of existing Internet regulation in tandem with the existing bricks and mortar legal principles, under a too-often dismissed wait-and-see approach.[27] Finally, Part V concludes by assessing the nature of the current problems of unprovided-for plaintiffs and increasingly large liability for potentially judgment-proof defendants in the context of the Internet's history. In addition, Part V provides modest recommendations for legislative priorities to address these issues, which if followed could provide not only a timely solution to this conflict but could also provide long-awaited action by previously immune ISPs. Throughout, this Note encourages lawmakers and policymakers to consider the trend toward establishing virtual identities that closely track real identities, in large part brought on by the advent of social networking sites like Facebook[28] and MySpace,[29] and the implications of a system largely ill-equipped to address electronic defamation actions.[30]

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[25] *See infra* Part III (analyzing three regulatory methods that have emerged upon close examination of the Internet's recent history).

[26] *See infra* Parts III.A, C (discussing the self-regulation, cyberlaw, and traditional law approaches respectively).

[27] *See infra* Part IV (discussing an approach that would incorporate the existing self-help framework established by Congress with the long-established common law principles of retraction to provide victims of cyberwrong relief that is not currently available).

[28] Facebook, About Facebook, http://www.facebook.com/about.php (last visited Nov. 8, 2007). "Facebook gives people the power to share and makes the world more open and connected. Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet." *Id.* Facebook was created by Mark Zuckerberg, a Harvard student. Krista Naposki, *Facebook: The Craze that has Crashed into College Life May Have Other Consequences*, PENDULUM, Jan. 19, 2006, *available at* http://www.elon.edu/e-web/pendulum/Issues/2006/01_19/features/specialfeature.xhtml. Mr. Zuckerberg created the website as a replacement to the freshman-year ID photos and information booklets. *Id.* But, after nearly "6,000 Harvard students signed up within the first three weeks, he started to offer the service to other schools." *Id.* There are a multitude of reasons students choose to join, such as the fact that students who join the website get personal pages on which they can post their pictures, cell phone numbers, class schedules, and even sexual orientation information. *Id. On Campus: Facing Facebook*, ATHLETIC MANAGEMENT, June/July 2006, at 6. For students, "it's a fun and easy way to meet new friends and keep in touch with old ones." *Id*.

[29] MySpace, About Us—MySpace.com, http://www.myspace.com/index.cfm?fuseaction=misc.aboutus (last visited Nov. 8, 2007). "MySpace is an online community that lets you meet your friends' friends." *Id.* MySpace is open to the general public and is largely appealing to both teenagers and adults. *Id.* In order to establish an account, a valid e-mail

II. BACKGROUND

As the Internet continues to grow, legislatures and courts face difficult questions regarding how to apply the law of defamation to defamatory remarks made in cyberspace.[31] With the increased speed of

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address is all that is required. *Id.* A recent ComScore Media Metrix report, which tracks Internet use, reports that "traffic on MySpace has grown 319 percent in the last year to 37.3 million visitors in February, making it the top networking site on the Web and the eighth most popular website overall." Jimmy Watson, *Racy Website's Have Coaches', AD's Attention*, SHREVEPORT TIMES, June 24, 2006, *available at* http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20060624/SPORTS/306240006/1001. Similarly, according to a ComScore Media Metrix report, Facebook "has grown 272 percent in the past year, making it the 66th most popular website in February." *See* USATODAY.com, What you say online could haunt you, http://www.usatoday.com/tech/news/internetprivacy/2006-03-08-facebook-myspace_x.htm (last visited Mar. 10, 2009). *Id.* Prior to 2006, the greatest distinction between Facebook and MySpace was that Facebook was available only to college students and alumni who maintained a valid school e-mail address. Facebook – Timeline, http://www.facebook.com/press/info.php?timeline (last visited Mar. 10, 2009). However, in September 2005, Facebook opened its doors to millions of high school students. *Id.* And, one year later on September 26, 2006, Facebook relaxed all of its requirements allowing anyone to become a member. *See* Facebook – Press Releases, http://www.facebook.com/press/releases.php?p=618 (last visited Mar. 10, 2009).

[30] *See infra* Part II.A (discussing the framework of the Internet in its existing self-regulation state).

[31] *See* Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359 (2003) (providing insight into the "'no-law Internet,' the 'Internet as a separate jurisdiction,' and Internet law as a 'translation' of familiar legal concepts[]"); *see also* David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993 (1994); First Amendment Center, Internet & First Amendment, http://www.firstamendmentcenter.org/speech/internet/index.aspx (last visited Dec. 21, 2007) (arguing for a presumption of using "bottom up" private rules for cyberspace instead of statutes or judicial decisions). Congress and the courts have addressed Internet regulation in a variety of contexts, including, Internet filtering, indecency online, spam, cybersquatting, online libel, virtual child pornography, copyright, cyberstalking and blogging. *Id.* However, despite the many attempts by ISPs, Congress, and the courts to regulate Internet speech, they have failed to adequately address the new threat that defamation law poses on the Internet. *See* First Amendment Center, Internet & First Amendment, http://www.firstamendmentcenter.org/speech/internet/topic.aspx?topic=online_libel (last visited Dec. 21, 2007). In fact, major legislation in this area, most notably the Communication Decency Act ("CDA"), has experienced extensive criticism by the courts. *See* Reno v. ACLU, 521 U.S. 844, 868–81 (1997) (striking down two provisions of the CDA, but not adopting a medium-specific standard for Internet speech). Moreover, many authors criticized the CDA as not fluid enough to cope with the rapidly changing Internet. *See* Praveen Goyal, *Congress Fumbles With the Internet:* Reno v. ACLU, *117 S. Ct. 2329 (1997)*, 21 HARV. J.L. & PUB. POL'Y 637, 638 (1998). More specifically, this article stated, "Because of the rapidly changing nature of telecommunications media such as the Internet and the case-specific approach to speech regulation that the Court is likely to adopt in such an area, congressional attempts at direct speech regulation are very likely to be inadequate and constitutionally unsound." *Id.*

Internet innovation, the difference and inconsistencies between the various methods used to approach the intersection of the law and the Internet become more apparent.[32] To understand the issues involving best practices for defamation law on the Internet and to build a framework for future regulation, it is essential to begin with a brief overview of the Internet's history.[33] First, Part II explores the Internet evolution, including the rise of virtual worlds and online communities.[34] Next, Part II examines existing regulation of cyberspace that may affect the breadth and scope of future regulations.[35] Last, Part II addresses the history of defamation law and retraction strategy.[36]

A. Defamation on the Internet: The Dynamics of the Law in Cyberspace

A brief introduction to the history of the Internet, including the more recent development of online communities and online publishing, is essential to understanding Internet defamation and the potential solutions for its regulation in cyberspace.[37] First, Part II.A.1 briefly discusses the concept of the Internet and its development into a seamless communication medium.[38] Next, Part II.A.2 describes some of the more popular online communities and forecasts coming attractions in online life to better track innovation in the virtual world, including the virtual self, and its impact on the law.[39]

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[32] *See infra* Part III (discussing the three current methods for Internet regulation—self-help, cyberlaws, and the application of traditional laws).

[33] *See infra* Part II.

[34] *See infra* Part II.A (discussing the evolution of the Internet to a widely accepted form of mass media).

[35] *See infra* Part II.B (discussing attempts to regulate the Internet).

[36] *See infra* Part II.C (discussing defamation law and retraction strategy at the common law, and later, as applied to the Internet).

[37] *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp 44, 49 (D.D.C. 1998).

> This information revolution has . . . presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, . . . [given the] competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape.

Id.

[38] *See infra* Part II.A.1 (discussing the early forms of Internet use).

[39] *See infra* Part II.A.2 (discussing the introduction of the Internet to consumers).

1. The Early Years: The Creation and Development of the Internet

In 1965, the Internet emerged as a new medium for communication.[40] The concept was simple—telephone lines already in existence would allow multiple computers to "talk" with one another and thereby share information.[41] In 1969, this networking concept spawned the creation of larger computer networks, most notably, the Internet's first appearance as the Advanced Research Projects Agency Network ("ARPANET") throughout the 1960s and 1970s.[42] At its

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[40] Barry M. Leiner et al., All About the Internet: *History of the Internet*, (Dec. 10, 2003), http://www.isoc.org/internet/history/brief.shtml. The concept of the Internet stemmed from a number of memoranda produced by J.C.R. Licklinder of MIT discussing a "Galactic Network" that would globally interconnect information and allow access from any given point on the network. *Id.*

[41] *Id.* In 1965, Lawrence Roberts of MIT successfully connected a single computer in Massachusetts with a single computer in California using dial-up telephone lines creating the first computer network. *Id.*

[42] *See* ROBERT J. DILLIGAN, COMPUTING IN THE WEB AGE: A WEB-INTERACTIVE INTRODUCTION 30 (Plenum Press 1998). ARPA initially connected four major computers at southwestern universities (UCLA, Stanford Research Institute, UC Santa Barbara, and the University of Utah). *Id. See also* Shea on Behalf of American Reporter v. Reno, 930 F. Supp. 916, 925–26 (S.D.N.Y. 1996). The joint stipulations in the case provide a brief overview of the Internet's history:

> What we now refer to as the Internet grew out of an experimental project of the Department of Defense's Advanced Research Projects Administration ("ARPA") designed to provide researchers with direct access to supercomputers at a few key laboratories and to facilitate the reliable transmission of vital communications. ARPA supplied funds to link computers operated by the military, defense contractors, and universities conducting defense-related research through dedicated phone lines, creating a "network" known as ARPANet. Programs on the linked computers implemented a technical scheme known as "packet-switching," through which a message from one computer to another would be subdivided into smaller, separately addressed pieces of data, known as "packets," sent independently to the message's destination and reassembled upon arrival. Each computer on the network was in turn linked to several other computers, creating any number of routes that a communication from one computer could follow to reach its destination. If part of the network were damaged, a portion of the message could be re-routed automatically over any other path to its ultimate destination, a characteristic of the network intended initially to preserve its operability in the event of enemy attack.
>
> Having successfully implemented a system for the reliable transfer of information over a computer network, ARPA began to support the development of communications protocols for transferring data between different types of computer networks. Universities, research facilities, and commercial entities began to develop and link together their own networks implementing these protocols; these networks included a high-speed "backbone" network known as

inception, the Internet was a very complex system, used primarily by computer researchers, experts, engineers, and librarians.[43] As familiarity with this new network increased, so too did the many user-specific advancements, including, in 1972, the first appearance of electronic mail, or "e-mail" as it was later dubbed.[44] Later, as the potential to improve personal communication and achieve increased collaboration became apparent, the Transmission Control Protocol and Internet Protocol ("TCP/IP")[45] technology was developed to increase networking ability.[46]

> NSFNet, sponsored by the National Science Foundation, smaller regional networks, and, eventually, large commercial networks run by organizations such as Sprint, IBM, and Performance Systems International (commonly known as "PSI"). As faster networks developed, most network traffic shifted away from ARPANet, which formally ceased operations in 1990. What we know as "the Internet" today is the series of linked, overlapping networks that gradually supplanted ARPANet. Because the Internet links together independent networks that merely use the same data transfer protocols, it cannot be said that any single entity or group of entities controls, or can control, the content made publicly available on the Internet or limits, or can limit, the ability of others to access public content. Rather, the resources available to one with Internet access are located on individual computers around the world.
>
> It is estimated that as many as forty million individuals have access to the information and tools of the Internet, and that figure is expected to grow to 200 million by the year 1999. Access to the Internet can take any one of several forms. First, many educational institutions, businesses, libraries, and individual communities maintain a computer network linked directly to the Internet and issue account numbers and passwords enabling users to gain access to the network directly or by modem. Second, "Internet service providers," generally commercial entities charging a monthly fee, offer modem access to computers or networks linked directly to the Internet. Third, national commercial "on-line services"—such as America Online, CompuServe, Prodigy, and Microsoft Network—allow subscribers to gain access to the Internet while providing extensive content within their own proprietary networks. Finally, organizations and businesses can offer access to electronic bulletin-board systems—which, like national on-line services, provide certain proprietary content; some bulletin-board systems in turn offer users links to the Internet.

Id. (citations omitted) (footnote omitted).

[43] *Id.*; *see also* FREDERICK BETZ, MANAGING TECHNOLOGICAL INNOVATION: COMPETITIVE ADVANTAGE FROM CHANGE 79–80 (John Wiley & Sons, 2d ed. 2003).

[44] *See* Paul Frisman, *E-Mail Dial 'E' for 'Evidence'*, CONN. L. TRIB., Dec. 18, 1995, at 1 (praising e-mail as a "high-tech" means of communication); Amie M. Soden, *Protect Your Corporation from E-Mail Litigation; Privacy, Copyright Issues Should be Addressed in Policy*, CORP. LEGAL TIMES, May 1995, at 19 (describing e-mail as an integral part of the technological explosion in communication).

[45] TCP/IP Tutorial, http://www.w3schools.com/tcpip/default.asp (last visited Nov. 8, 2007). Communication protocols provide a series of rules for your computer to follow, the

ARPANET was the largest of a number of other networks supported by the Department of Defense's Advanced Research Projects Administration ("ARPA"), and the new protocol significantly increased the ability of users on one network to communicate with users on *different* networks.[47] As a direct result of this achievement, users were able to more freely communicate across the resulting "network of networks" by simply logging into a router and obtaining an Internet Protocol ("IP") address.[48] By 1995, the Internet founders's original vision, to create a system of interconnected networks, greatly expanded and resulted in an influx of 50,000 networks across the globe using the

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end result of which is a user's ability to use Internet browsers and servers to connect to the Internet. *Id.*

[46] *See* NATIONAL RESEARCH COUNCIL, FUNDING A REVOLUTION: GOVERNMENT SUPPORT FOR COMPUTING RESEARCH (National Academy Press 1999), *available at* http://www.nap.edu/catalog.php?record_id=6323#orgs; Rita Tehan, *Spinning the Web: The History of Infrastructure of the Internet*, U.S. DEP'T OF STATE, Aug. 12, 1999, *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-1026:1. Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1365 n.2 (N.D. Cal. 1995) (quoting DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 16 (1994)). What started as a single computer network for a government project grew to incorporate many additional networks and developed the collective name of the Internet which in its most technical sense is a "'set of all interconnected IP networks'—the collection of several thousand local, regional, and global computer networks interconnected in real time via the TCP/IP Internetworking Protocol suite . . . . " *Id.*

[47] *See* NATIONAL RESEARCH COUNCIL, FUNDING A REVOLUTION: GOVERNMENT SUPPORT FOR COMPUTING RESEARCH (National Academy Press 1999), *available at* http://www.nap.edu/catalog.php?record_id=6323#orgs. A history of the Internet is available in many additional published sources. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 830–31 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997); JAMES GILLES & ROBERT CAILLIAU, HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB (Oxford University Press 2000); CHRISTOS J.P. MOSCHOVITIS ET AL., HISTORY OF THE INTERNET: A CHRONOLOGY, 1843 TO THE PRESENT (ABC-CLIO 1999); Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 BYU J. PUB. L. 191, 257–63 (2003) (discussing the origins of the Internet).

[48] *See* NATIONAL RESEARCH COUNCIL, FUNDING A REVOLUTION: GOVERNMENT SUPPORT FOR COMPUTING RESEARCH (National Academy Press 1999), *available at* http://books.nap.edu/openbook.php?record_id=6323&page=173; *see also* Internet, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), *available at* http://dictionary.reference.com/browse/Internet (defining Internet as "[a]n interconnected system of networks that connects computers around the world via the TCP/IP protocol[]").

TCP/IP protocol.[49] Thus, the Internet, as envisioned by its founders, was born.[50]

2. The Advent of Cyberspace[51]

The increase in forums and the ability of Internet users to publish information—through bulletin boards, chat rooms, and web journals, often referred to as blogs—has created a greater threat of damage to one's reputation on a much larger scale.[52] Defamation, libel, and slander issues in cyberspace have all posed challenges for the law, and in order to better understand the legal issues, one must first understand how the information superhighway,[53] and the growing cyber community, work.[54]

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[49] Susan P. Crawford, *Internet Think*, 5 J. TELECOMM. & HIGH TECH. L. 467, 470 (2007); *see also* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Penn. 1996), *aff'd*, 521 U.S. 844 (1997) (noting that the ARPANET evolved to include networks catered to "universities, corporations, and people around the world," its first merger of networks produced the "DARPA Internet," and after later developments, it became known as simply the "Internet[]").

[50] *See supra* note 40 (discussing the desire for the Internet to grow into a galactic network of sorts).

[51] R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, WIS. LAW. 10, 11 (Sept. 1995), *available at* Westlaw at 68-SEP WILAW 10. "Cyberspace refers to the interaction of people and businesses over computer networks, electronic bulletin boards and commercial online services. The largest and most visible manifestation of cyberspace is the Internet—a worldwide network of networks electronically connecting millions of computers and computer users." *Id.*

[52] *See generally* R. SCOTT HALL, THE BLOG AHEAD: HOW CITIZEN-GENERATED MEDIA IS RADICALLY TILTING THE COMMUNICATIONS BALANCE (Deane Rink ed., Morgan James Publishing, LLC 2006); Patrick Beeson, *Blogging: What is it? And How Has It Affected the Media?*, THE QUILL, Mar. 2005, at 16 (citing Rebecca Blood, an authority on the nature of blogs, who describes "blogs" as a "continuous, chronological series of posts—some inviting comments from readers—on any topic imaginable, often containing links to sites throughout the Internet"); Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, 29 ALI-ABA BUS. L.J. 17, 21–22 (2005) (discussing the user services provided by leading blog sites—www.xanga.com, www.blogspot.com, and www.livejournal.com).

[53] Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality, and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 544 n.14 (1998); Computer Dictionary, "Information Superhighway", http://www.computerhope.com/jargon/i/infosupe.htm (last visited Dec. 21, 2007) (defining "Information Superhighway" as "[a] term coined by Vice President Albert Gore when giving a speech January 11, 1994 to describe a future of computers accessing and communicating over a world-wide network[]"). The site also notes that "[l]ater during a CNN interview, Gore stated 'During my service in the United States Congress, I took the initiative in creating the Internet.' This statement helped spark the belief that Al Gore invented the Internet." Computer Dictionary, "Information Superhighway", *supra*. *But see* New Network Institute, Chapter I Promises, Promises, http://www.newnetworks.com/chapter1.html (last visited Dec. 21, 2007) (tracing the coining of the term "Information Superhighway" to an April 12, 1993 issue of *Time* Magazine bearing the cover "The Info Highway: Bringing a Revolution in Entertainment, News and Communication: Coming Soon to your TV Screen[]").

Prior to Internet access becoming widely available, the consumer based Internet developed largely as an Internet forum, known as a Bulletin Board System ("BBS"), which was the primary online community.[55] The early BBSs allowed Internet users to publish and receive messages on more than 10,000 newsgroups, each based upon a particular topic of interest.[56] This new soapbox style forum sparked spirited debate on a wide-range of topics; however, it was not without flaws as message posts often digressed to personal attacks against other users, termed "flaming" by the system's early adopters.[57] An early advantage of message boards was the allowance of greater content control, often through the assignment of moderators, a feature that was not offered by many of the BBSs's early successors.[58]

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[54] *See generally* HALL, *supra* note 52. This source asserts its prediction regarding the future of blogs:

> Let me make a prediction. Five years from now, the blogosphere will have developed into a powerful economic engine that has all but driven newspapers into oblivion, has morphed (thanks to cell phone cameras) into a video medium that challenges television news, and has created a whole new group of major companies and media superstars. Billions of dollars will be made by those prescient enough to either get onboard or invest in these companies. At this point, the industry will then undergo its first shakeout, with the loss of perhaps several million blogs, though the overall industry will continue to grow at a steady pace.

Id. at iii. (quoting Michael S. Malone, ABCNews.com, Silicon Insider Column, November 4, 2005).

[55] *See* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 50 (2d ed., Blackwell Publishing 2000) (noting that BBS systems "became the electronic notice-boards of all kinds of interests and affinities, creating . . . 'virtual communities[]'"). The BBS operated as a computer network running software that enabled users, who dialed into the system over the existing telephone framework, to download software and other information or upload the same, and, in addition, allowed users to access news articles and to view and exchange message posts with other users. *Id.* The appeal of the bulletin board system was its functionality as a type of social network targeted for specific interest groups. *Id.* Today, many of the old message boards are still available on Google. *See* FRANCES JACOBSON HARRIS, I FOUND IT ON THE INTERNET: COMING OF AGE ONLINE 41 (American Library Association 2005) (citing http://www.groups.google.com).

[56] Muth, *supra* note 51, at 10–11. For an example of one of the first bulletin boards created in 1996, UBB.classic (i.e. the Ultimate Bulletin Board), now in its most recent form UBB.threads, see http://www.ubbcentral.com/. *Id.*

[57] URS E. GATTIKER, THE INTERNET AS A DIVERSE COMMUNITY: CULTURAL, ORGANIZATIONAL, AND POLITICAL ISSUES 195 (Lawrence Erlbaum Associates, Inc. 2001) (defining the term "flamed" as "[a] virulent and often largely personal attack against the author of a posting on the Internet. Flaming occurs more frequently than is probably desirable[]"); *see also* Mark Dery, *Flame Wars*, *in* FLAME WARS: THE DISCOURSE OF CYBERCULTURE (Mark Dery, ed., Duke Univ. Press 1994) (further defining the concept of flame wars).

[58] Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, SK102 ALI-ABA 63, 67 (2005). Moderators

Later, as the speed of the Internet increased, so too did the popularity of Instant Messenger ("IM") software.[59] The IM system improved upon the early editorial posting design of BBSs and allowed users to enter virtual chat rooms "where two or more individuals connected to the Internet [could] have real-time, synchronous conversations" by simply typing messages to one another on their computers.[60] The speed and automatic posting qualities of IMs allowed the majority of chat rooms to remain free from the editorial limitations imposed by the message board predecessors and often allowed for little, if any, content intervention.[61]

By the advent of the user-friendly World Wide Web—the weblog, later dubbed the blog—evolved as an online journal.[62] In their infancy,

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maintained the ability to delete, edit, or remove posts or engage in "other mechanisms designed to keep the peace" on the message board. *Id.*

[59] *Id.* The term "IM" is defined as follows: "[s]hort for Instant Messenger, IM is a software utility that allows users connected to the Internet or a corporate network to quickly send text messages and files between other IM users." *See* Computer Dictionary, "IM", http://www.computerhope.com/jargon/i/im.htm (last visited Dec. 21, 2007). The site includes a short list of some of the popular and widely used instant messenger programs available today, including "AOL AIM (ICQ) – http://www.aim.com/, Google Talk – http://www.google.com/talk/, Skype – http://www.skype.com, Jabber – http://www.jabber.org/, MSN Messenger – http://messenger.msn.com/, Yahoo! Messenger – http://messenger.yahoo.com/." *Id.* In addition, Windows Live Messenger, yet another instant messaging service, boasts of its ability to allow users to connect instantly using text, voice, and video, or leave messages if the other user is unavailable. *See* Windows Live Messenger – Overview, http://get.live.com/messenger/overview (last visited Nov. 1, 2007).

[60] *See* Conway-Jones, *supra* note 57. Chat rooms are further defined as

> a "place" where two or more individuals connected to the Internet have real-time, synchronous conversations (usually text based) by typing messages into their computer. Groups gather to chat about various subjects. As you type, everything you type is displayed to the other members of the chat group. Some chat rooms are "moderated" whereby certain messages are not broadcast because they do not conform to the standards set up by the operator of the service. Reasons for a message being blocked could include: discussion off the topic, bad language, or repeat messaging especially of undesirable or obscene text, known as flaming. The majority of chat rooms however, remain "open" such that messages are posted automatically with no human intervention. And, to complicate matters further, people may enter chat rooms and begin discussion threads with prior verification of user identity.

Id.

[61] *Id.* The speed at which chat room speech operates is not unlike that of a telephone and, therefore, became difficult, if not impossible, to regulate individual conversations in real-time. *Id.*

[62] *See* JAMES GILLIES & ROBERT CAILLIAU, HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB 92–96 (Oxford Univ. Press 2000). In 1989, Tim Berners-Lee, Sam Walker, and Robert Cailliau created the concept for the World Wide Web. *Id.* One year later,

blogs were simply the manually updated portions of otherwise static websites.[63] Today, blogs have made the creation and publication of content online as simple as browsing the web.[64] Thus, modern blogging applications have removed virtually all of the technical barriers to publication and are now embraced by the masses.[65] As a result, blogs

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Berners-Lee developed a browser/editor program and coined the name World Wide Web as the name of the program. *Id.* In recent years, the information superhighway has had a profound effect on nearly every aspect of our lives—it is an essential tool for families to keep in touch, for consumers, and for individuals to inform themselves on news and areas of interest. The Internet allows people to "meet, and talk, and live in cyberspace in ways not possible in real space." Laurence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745–46 (1995) ("What will be new are the communities that this space will allow, and the constructive . . . possibilities that these communities will bring.").

[63] *See generally* David Kline & Dan Burstein, BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE (CDS Books 2005). *See also* Amy Gahran, E-Media Tidebits Editor, Poynter Online, *On Facing the Heat*, http://www.poynter.org/dg.lts/id.31/aid.91283/column.htm (last visited Oct. 8, 2007). Offering gripes regarding websites without a commenting feature, the author notes:

> People who start a blog and don't have a commenting function -- I just think they're cowards. I mean, if you're going to be out there, you've got to have a real blog. Everybody else does! It's kind of pathetic to be a professional journalist and feel like you can't handle the heat. All those amateurs out there allow comments, and that's what makes a blog really interesting, because it's a conversation.

Id. (quoting Carl Zimmer, http://www.corante.com/loom).

[64] *See* Computer Dictionary, "Weblog", http://www.computerhope.com/jargon/w/weblog.htm (last visited Dec. 21, 2007). The site provides a brief explanation of weblogs, or blogs:

> A weblog, or blog, is a listing of text, images, and/or other objects that are arranged in a chronological order that first started appearing in 1998. Blogs are often maintained and run by a single individual, updated daily, and/or contain random personal remarks about a topic, a personal ramble, an update on the person's life and/or their current feelings. In many ways, many weblogs are like a personal journal, diary or a look into another individual's life and can be a great way to learn about people, events, places, and much more from millions of people around the world.
>
> Some examples of software and services that users use to create and start their own weblogs are Blogger, Manila, Movable Type, MySpace, LiveJournal, Radio Userland, and TypePad.

Id.

[65] *See* Jeffrey M. Schlossberg & Kimberly B. Malerba, *Outside Counsel: Employer Regulation of Blogging*, N.Y. L.J., Oct. 31, 2005, at 4:

> While originally blogs were used by the technically savvy, blogs are now being used by the masses as a type of electronic diary where people can post their thoughts on everything from politics and life in general[] . . . . The difference between a blog and a diary, however, is that anyone with access to the Internet can read, copy, e-mail or print the blog entries.

Id.; *see also supra* Kline, note 63.

have become a very influential component on the Internet. Blogs have become news sources, methods to memorialize thoughts and reactions to news, tools for creating online communities based upon similar interests, and, more recently, have played a large part in political debates.[66]

Today, online communities have reached their pinnacle with the rise of Facebook and other social networking sites.[67] The new online community allows users to merge their real identity with their *virtual* identity by providing an interactive, image-laden directory of former and current classmates who share similar lifestyles and interests.[68] Some analysts note that the new Facebook generation has allowed the Internet to grow up.[69] Under the old regime, the idea seemed to be that the Internet allowed users to escape their real identity and re-invent themselves without public scorn or Internet oversight; thus, users sought freedom from the social burdens and stigma of real life.[70] By contrast,

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[66] *See* Alexa Web Search, United States—Alexa Top 100 Sites, http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none (last visited Oct. 8, 2007).

[67] *See* Facebook, About Facebook, http://www.facebook.com/facebook (showing one of today's online communities) (last visited Nov. 8, 2007).

[68] *Id.* "Facebook gives people the power to share and makes the world more open and connected. Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet." *Id.* The Facebook website allows its users to create profiles, complete with personal information, interests, and photos. *Id.* In addition, the site allows users to exchange messages, both private and public, and to join interest groups. *Id.* Facebook boasts upwards of 46 million users, with an additional 200,000 users signing up daily since January 2007. Facebook, Statistics, http://www.facebook.com/press/info.php?statistics (last visited Oct. 8, 2007). Perhaps even more startlingly, more than half the users of the website use it daily, spending on average 20 minutes a day and uploading more than 14 million pictures. *Id.*

[69] Lev Grossman, *Why Facebook Is the Future*, TIME, Aug. 23, 2007, *available at* http://www.time.com/time/magazine/article/0,9171,1655722,00.html. This article contrasts popular technological advancements on the Internet and concludes that:

> Whereas Google is a brilliant technological hack, Facebook is primarily a feat of social engineering. (It wouldn't be a bad idea for Google to acquire Facebook, the way it snaffled YouTube, but it's almost certainly too late in the day for that. Yahoo! offered a billion for Facebook last year and was rebuffed.) Facebook's appeal is both obvious and rather subtle. It's a website, but in a sense, it's another version of the Internet itself: a Net within the Net, one that's everything the larger Net is not.

Id.

[70] *Id.* Thus, the lure of secrecy on the net is dwindling as the Internet is and will continue to merge our everyday image with our online personalities until the distinction disappears. *Id.* In fact, scholars note that the Internet, rather than decreasing socialability and real world contact (as had been previously predicted) instead has increased contact by strengthening both relationships and facilitating meetings. BARRY WELLMAN & CAROLINE HAYTHORNTHWAITE, THE INTERNET IN EVERYDAY LIFE 82 (Blackwell Publishers Ltd. 2002) (investigating how being online fits into people's everyday lives).

today's Internet encourages and embraces real-world identities.[71] For example, on Facebook, for the most part, people use their real names, post pictures of themselves, and "also declare their sex, age, whereabouts, romantic status and institutional affiliations."[72] However, the emergence of blogging and social networking as a replacement to online anonymity has brought a range of legal liabilities and other unforeseen consequences.[73] As a result, the legislatures and the courts are charged with developing and interpreting the law in relation to this newly formed medium.[74]

B. Early Attempts to Regulate the World Wide Web

This Part briefly describes early attempts by the courts, and later by Congress, to regulate the seemingly boundary-less Internet. First, Part II.B.1 briefly explores attempts by the judiciary to impose liability for wrongs that occurred in cyberspace and the ensuing inconsistency that followed. Second, Part II.B.2 examines Congress's regulatory changes that sought to clear up judicially created inconsistencies.

1. Pre-Communications Decency Act: The Split of Authority in the Early Years

In the early 1990s, the United States District Court for the Southern District of New York undertook cyber-libel as a question of first impression.[75] In *Cubby, Inc. v. CompuServe, Inc.*, the district court interpreted the role of CompuServe as an Internet Service Provider (ISP) as merely a passive conduit for expressive activity.[76] Thus, the district

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[71] *See supra* note 68 (describing one of the most popular social networking communities).

[72] *See supra* note 68 and accompanying text. *See also* KAREL M. BALOUN, INSIDE FACEBOOK: LIFE, WORK AND VISIONS OF GREATNESS 7 (Karel Baloun 2006). The book briefly describes the Facebook environment:

> Facebook is No. 1 in the amount of time spent on-site by visiting users. Think about that. A site that didn't even exist three years ago is *the* place on the Internet where visiting users spend more time than on any other site. Facebook is the most important site for folks in college. Facebook is the most successful privately held, closed social network. Facebook is also a first job for many of the people who work there, and a once-in-a-lifetime experience for everyone else.

Id. (footnotes omitted).

[73] *See supra* note 68 (discussing how the communication environment established by Facebook creates ample opportunity for defamation on the Internet as users are encouraged to use the site to post pictures and messages to other users on the network).

[74] *See infra* Part II.B (discussing early attempts to regulate the Internet).

[75] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[76] *Id.* at 141. The district court applied a three-prong test to determine CompuServe's liability for defamation to determine: (1) whether the company was a publisher or

court held that CompuServe could not be held liable under traditional defamation principles as a distributor because it completely lacked editorial control.[77]

Four years later, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[78] the New York Supreme Court entered a judgment that sparked far more controversy than its predecessor, *Cubby, Inc.*[79] In *Stratton Oakmont*, an investment firm sued Prodigy, an ISP, for defamatory messages posted by third-party subscribers of Prodigy's web services, in particular, the Money Talk bulletin board.[80] Contrary to the decision in *Cubby, Inc.*, the

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distributor; (2) the extent of editorial control, if any; and (3) whether there is an affirmative showing that CompuServe knew or should have known the defamatory nature of the comments posted to the discussion boards. *Id.* at 139–41.

[77] *Id.* The district court noted that

> [w]ith respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications . . . . Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment."

Id. at 140 (quoting Lerman v. Flynt Distrib. Co., 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied* 471 U.S. 1054) (footnote omitted) (ellipsis in original); *see also* Daniel v. Dow Jones & Co.,520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987) (holding that computerized database service "is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news[]" and "is entitled to the same protection as more established means of news distribution[]").

[78] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, ("CDA") 47 U.S.C. § 230 (2000).

[79] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[80] *Stratton Oakmont*, 1995 WL 323710 at *1. The Money Talk bulletin board was a financial information bulletin board with strong readership on which subscribers posted defamatory comments about Stratton Oakmont, Inc.'s fraudulent business practices. *Id.* at *1–2. The statements posted to the Money Talk bulletin board stated:

> (a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;
> (b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";
> (c) PORUSH was "soon to be proven criminal"; and,
> (d) STRATTON was a "cult of brokers who either lie for a living or get fired."

court held that Prodigy was liable for postings on the bulletin board due to its decision to retain the ability to delete and otherwise manipulate user postings, likely a result of its desire to attract a market of users seeking a "family oriented" computer service.[81]

In part, the resulting inconsistency in the precedent regarding ISP liability led to greater speech protection for ISPs under the Communications Decency Act of 1996 ("CDA" or "section 230" or "the Act").[82]

2. Post-CDA: The After-Effects of Congress's Regulation

The *Stratton Oakmont* and *Cubby* decisions created an interesting paradox: on the one hand, a message board operator could abstain from maintaining editorial control and avoid liability as a passive conduit of information;[83] on the other hand, any attempt to edit and control user content may have the potential consequence of added liability.[84]

At the time the *Stratton Oakmont* decision came down in 1995, Congress was considering an overhaul of the Communications Act of 1934.[85] The new Telecommunications Act of 1996 proposed a massive

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Id. at *1. Stratton sued Prodigy for one hundred million dollars in compensatory damages and another one hundred million dollars for punitive damages. *Id.*

[81] *Id.* at *4–5. "PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice." *Id.* The court determined in *Stratton* that Prodigy effectively regulated the content and acted more as a publisher by retaining the ability to exhibit editorial control over the content. *Id.* at *3; *cf. Cubby, Inc.*, 776 F. Supp. at 140 (noting that CompuServe acted as a distributor, in that it collected a fee to set-up an online forum for its subscribers after which it retained no editorial control over the content).

[82] 47 U.S.C. § 230. The CDA was included in Title V of the Telecommunications Act of 1996 and focused primarily on reducing regulation and promoting competition in local telephone and broadcast markets. Telecommunications Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat. 56, 133 (1996). The proposal was accepted by a vote of 84 to 16. Communications—Telecommunications—Child shield/obscene telecommunications amendment, CONG. INDEX 1995–1996 23,027 (June 14, 1995). On February 8, 1996, just days after the CDA's passage into law, the usually vibrant and colorful world of cyberspace turned black as hundreds of website hosts blackened their websites for forty-eight hours in protest of the enactment of the CDA. *See* Mike Snider, *Cyber Protest Planned Over Telecom Bill*, USA TODAY, Feb. 7, 1996, at A1; *see also* Jeff Frentzen, *The CDA in review: silencing the whiners*, PC WEEK, Aug. 30, 1997, at 181 (discussing the "Black Thursday" protest).

[83] *See Cubby, Inc.*, 776 F. Supp. at 141 (the court held that ISPs are merely a passive conduit and, as such, cannot be subject to liability for any failure to edit content).

[84] *Stratton Oakmont, Inc.*, 1995 WL 323710 at *1 (setting the precedent that ISPs who perform editorial controls would be subject to liability).

[85] 47 U.S.C. § 151 (2000). The Communications Act of 1934 re-dubbed the Federal Radio Commission as the Federal Communications Commission ("FCC"). *Id.* (describing the purposes of this chapter). In addition, it transferred the regulation of telephone services

deregulation of broadcast media, the first of its kind in nearly sixty-two years.[86] However, hidden beneath the surface of the Act were several additional provisions related to the regulation of the untamed Internet that effectively overruled *Stratton Oakmont*.[87]

The advent of the CDA accomplished two of Congress's primary goals.[88] First, it was an attempt to regulate pornography and obscenity on the Internet to protect children.[89] Second, section 230 of the Act, arguably the most controversial in recent years, declared that operators and users of Internet services could not be held liable for the remarks of *third parties* who use their services.[90]

The CDA quickly met its first opposition in the United States District Court for the Eastern District of Pennsylvania in *ACLU v. Reno*,[91] and under careful scrutiny, the district court invalidated key provisions of the CDA.[92] This issue was brought before the United States Supreme

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under the FCC umbrella; formerly the Interstate Commerce Commission regulated telephone services. *Id.*

[86] 47 U.S.C. § 230. This attempt at regulation met stark opposition with other proposed systems of Internet regulation. *See* Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 485–88 (2004) (discussing a traditional law approach to regulation); Johnson & Post, *supra* note 31, at 1367 (discussing the development of cyberlaws); John Perry Barlow, *A Declaration of Independence in Cyberspace*, ELECTRONIC FREEDOM FOUNDATION, Feb. 8, 1996, http://homes.eff.org/~barlow/Declaration-Final.html (discussing Internet autonomy and self-regulation).

[87] 47 U.S.C. § 230; *see* David E. Loundy, *E-LAW: Computer Information Systems Law and System Operator Liability*, 21 SEATTLE U. L. REV. 1075, 1089–90 (1998) (discussion of the CDA's safe harbor provision and its relationship to *Stratton Oakmont*).

[88] Loundy, *supra* note 87, at 1084, 1102 (noting the purposes related to both content regulation, which were later ruled unconstitutional, and liability for Internet service providers and users).

[89] 141 CONG. REC. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon). Senator James Exon (Democrat – Nebraska) introducted the CDA on February 1, 1995. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995). He stated, "the information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices." *Id.* The bill served as an amendment to section 230 of Title 47 of the United States Code entitled "[o]bscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications." 47 U.S.C. § 230 (2000).

[90] *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.). The House Conference Report states that "[o]ne of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." *Id.*

[91] ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

[92] *Id.* at 849. Almost immediately after lawmakers signed the CDA into law, the ACLU and numerous other organizations brought this action seeking a preliminary injunction and raising a facial constitutional challenge to the provisions of the CDA. *Id.* at 826–27. The district court conducted extensive fact-finding, no fewer than nineteen pages of text,

Court and, later the same month, in *Reno v. ACLU*,[93] the Court upheld the decision of the district court.[94] The Supreme Court analyzed the CDA's provisions criminalizing the knowing transmission of *obscene* or *indecent* material, and in particular, the regulation of *indecent* messages to persons under the age of eighteen, and concluded that the provisions lacked the precision required by the First Amendment.[95] Thus, the Court struck down the law as an unconstitutionally overbroad infringement on the First Amendment, despite the government's asserted interest in protecting children from indecency.[96]

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cataloging the inner workings of computers in cyberspace. *Id.* at 830–49. The district court rejected any attempt by the Government, collectively Janet Reno, the Attorney General of the United States, and the United States Department of Justice, to use the term "indecent" in the statute with the Court's earlier analysis of the term in *FCC v. Pacifica Foundation*, 438 U.S. 726, 739–40 (1978). *Id.* In *Pacifica*, the Court held that George Carlin's "Filthy Words" broadcast, though it was not obscene, was indecent, and given the compelling interest in the protection of child audiences and privacy interests of shielding unwanted speech from the home was subject to restriction. *Pacifica*, 438 U.S. at 748–51. Thus, the Court for the first time upheld a regulation to the on-air, free, broadcast media. *Id.* at 762.

[93] 521 U.S. 844 (1997) (declaring the prohibition of indecent communication over the Internet unconstitutional).

[94] *Id.*

> The breadth of the CDA's coverage is wholly unprecedented. . . . [T]he scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value.

Id. at 877.

[95] *Id.* at 846. Despite Congress's narrowing attempts to protect children from pornography on the Internet, the Court reached the same result in its analysis of the Child Online Protection Act ("COPA") in *Ashcroft v. ACLU*. 542 U.S. 656 (2001). Under COPA, Congress narrowed the reach of its prior attempts to protect children from exposure to indecent material on the Internet. *Id.* at 668–69 (in previous challenges to the use of filters in the Supreme Court Congress's attempts to mandate the use of filters did not pass strict scrutiny). Unlike filters the new COPA legislation would penalize communications posted for commercial purposes which contained material harmful to minors. *Id.* at 661; *see also* 47 U.S.C. § 231 (the amended COPA statute applies only to communication for commercial purposes). Therefore, COPA did not prohibit indecent material on the Internet, but merely required commercial website owners to take reasonable steps to bar children from their site. *Id.* at 668–69. The Court did not hold that the statute was overbroad even though it relied on community standards to determine "material that is harmful to minors[,]" rather it held that on this record the District Court did not abuse its discretion when it determined the statute was unconstitutional, however, the Court remanded to determine if less restrictive alternatives existed to further the government's objective. *Id.* at 672–73.

[96] *Reno*, 521 U.S. at 885. The Government's interest in preventing potentially harmful communication from reaching children is unpersuasive as it in turn suppresses vast amounts of speech that adults have a First Amendment right to transmit and receive. *Id.* The breadth of the statute is too large given that there was no assertion by the Government

The second, and more recent, CDA-sparked controversy concerned the immunity from liability granted to both ISPs and third-party users under section 230(c)(1).[97] Section 230's grant of immunity to ISPs was quickly confirmed by the court in *Zeran v. America Online, Inc.*[98] The *Zeran* court rejected the challenge to ISP immunity and cited Congress's apparent rationale for granting the favored immunity: "[T]o maintain the robust nature of Internet communication and, accordingly," to keep ISPs from imposing "severe[] restrict[ions on] the number and type of messages posted[]" out of fear of liability.[99] In 1998, *Blumenthal v. Drudge*[100] extended *Zeran*, and the court held that even ISPs who pay

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that less restrictive alternatives did not exist. *Id.* at 879. Perhaps the most significant aspect of the Court's decision in *Reno* is its willingness to apply traditional First Amendment precedent to a new medium. *Id.* 864–68.

[97] *See* 47 U.S.C. 230(c)(1). "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* *See also* Andrea L. Julian, Comment, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509, 523–24 (2004) (discussing the controversey over the potential for self-regulating ISPs to be assigned defamation liability while creating a liability free pass for ISPs who do not).

[98] 129 F.3d 327, 330 (4th Cir. 1997). In *Zeran*, a user posted a message to an America Online bulletin board that advertised the sale of t-shirts that "featur[ed] offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City." *Id.* at 329.

[99] *Id.* at 330, 331. The court noted:

> Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

Id. at 330.

[100] 992 F. Supp. 44 (D.D.C. 1998). In *Blumenthal v. Drudge*, the plaintiff Blumenthal was a high-ranking Clinton aide. *Id.* at 46. The defendant, Matt Drudge, is the writer and publisher of the Drudge Report, a website devoted to conservative political news, opinion, and gossip. *Id.* at 47. In addition to his own website, Drudge also published stories via AOL, an online service provider and defendant in this matter. *Id.* In the instant case, Drudge published a story about Blumenthal which quoted an anonymous source as disclosing allegations that Blumenthal abused his spouse. *Id.* at 46. As a result, the Blumenthals filed a Complaint in the U.S. District Court for the District of Columbia that demanded $30,000,001.00 in damages. *See* Plaintiff's Compl. ¶ 273. The court took up the issue of AOL's liability for defamatory statements posted to their website, and concluded AOL should be dismissed from the lawsuit pursuant to the immunity from liability granted by the CDA. *Id.* at 53. However, the majority noted its discomfort with this result, and further discussed the purpose behind Congress's enactment of the CDA, which it had no choice but to follow in the instant case:

> If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively

members for posting certain content are immune from any tort liability derived from the posting.[101] In 2006, another court decided *Barrett v. Rosenthal*,[102] and it too relied upon *Zeran*, holding that until Congress decides to revisit the issue, ISPs are immune.[103] Thus, many defamed plaintiffs are restricted to recovery only against the original source, not merely for a user's republished version of the same defamatory material.[104]

Although the *Zeran*, *Blumenthal*, and *Barrett* cases exhibit an understanding of Congress's attempt to suppress the potential chilling effects of speech on the Internet that would result from ISP liability for member postings, these rulings have also affirmed that there is little recourse for Internet libel victims, at least those seeking the deep pockets of Internet ISPs.[105] At present, neither ISPs nor *anonymous* posters are subject to liability for defamatory statements.[106] However, while section 230 may frustrate the ability of individuals and businesses that seek to

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> promoted Drudge as a new source of unverified instant gossip on AOL. . . . But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

Id. at 51–52.

[101] *Id.* at 51–52 (briefly discussing the *Zeran* opinion).

[102] 146 P.3d 510 (Cal. 2006).

[103] *Id.* at 529. Briefly, the facts of this opinion reveal that Bolen sent an e-mail correspondence to Rosenthal that was alleged to be defamatory. *Id.* at 513–14. Then, Rosenthal copied the e-mail received from Bolan to two separate newsgroups. *Id.* at 514. Rosenthal then defended the suit under section 230 immunity. *Id.* at 513. The trial court granted the motion to dismiss in light of Rosenthal's purported section 230 immunity. *Id.* at 514. On appeal, the trial court's decision was reversed. *Id.* The California Supreme Court then interpreted the immunity provision of section 230 as also applying to individual *users* of Internet services and did not acknowledge an exception for distributor liability. *Id.* at 514. The court concluded, "Congress has comprehensively immunized republication by individual Internet users." *Id.* at 529. The term *user*, defined as any person or entity that uses an interactive computer service, establishes that there is no basis to distinguish between active and passive Internet use; all Internet *users* are immune. *Id.*

[104] *Id.* at 529 ("Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action.").

[105] *See supra* notes 95–98 and accompanying text (describing immunity granted ISPs); *see also* Eric P. Robinson, Staff Attorney, Media Law Resource Center, Legal Actions and Developments Involving Blogs (Sept. 24, 2007), http://www.medialaw.org/bloggerlawsuits (collecting cases).

[106] *See supra* notes 100, 103 and accompanying text (describing immunity granted ISPs and users of Internet services).

put a stop to damaging Internet posts, it has not entirely foreclosed the ability of plaintiffs to file defamation actions.[107]

As a whole, the aforementioned cases provide a very broad grant of immunity for ISPs and third party users of their services.[108] Although the *Zeran-Blumenthal-Barrett* line of cases provides strong support for the continued expansion of immunity, it leaves open liability for the original source.[109] While this virtual immunity ends almost all concern for large companies and third party users, it does not remove the very real threat of monetary injury that plagues bloggers, Facebook friends, and other denizens of this new Internet.[110]

C. The Background and History of Defamation Law and Retraction Strategy

This Part briefly describes the history of defamation to build a framework for analyzing the problems created through the application of defamation law to the new Internet medium.[111] First, Part II.C examines the history and development of defamation law by examining common law principles to form a basic framework of defamation law and retraction strategy.[112] Next, Part II.C highlights judicial attempts to resolve Internet defamation suits under the old framework.[113] This Part endeavors to highlight many of the most important Internet cases to date, to describe the legal climate of defamation law on the Internet, to bring to light current issues related to defamation liability on the Internet, and to lay the groundwork for examining workable future solutions.[114]

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[107] *Barrett*, 146 P.3d at 529 (Cal. 2006). The *Barrett* court based their opinion upon the fact that the defendant did not have any supervisory role in the Internet site, nor was the defendant the original source of the allegedly defamatory material; nonetheless, the court held that the plaintiffs were free under section 230 to pursue the originator of the Internet publication. *Id.*

[108] *See supra* notes 95–104 and accompanying text (discussing the breadth of the CDA and the immunity created for ISPs under corresponding case law).

[109] *See, e.g.*, *Barrett*, 146 P.3d at 529 (upholding the CDA's grant of immunity to ISPs).

[110] *See supra* notes 95–97 (discussing the immunity granted ISPs, but withheld from the original source).

[111] *See infra* Part II.C (discussing problems with applying traditional defamation law principles to the Internet).

[112] *Infra* Part II.C.1 (discussing defamation law at the common law).

[113] *Infra* Part II.C.2 (discussing a retraction strategy used to mitigate damages at the common law).

[114] *Infra* Part II.C (discussing preeminent case law as it relates to defamation and the Internet).

1. History and Development of the Law of Defamation

The Supreme Court has long recognized that the inherent right of an individual to safeguard his name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[115] In fact, even at its inception, defamation law was a remnant of the British crime of seditious libel that developed to allow an individual to utilize the machinery of the courts to vindicate his good name.[116]

From the outset, the eighteenth century Framers of the United States Constitution guaranteed the freedoms of press and speech by writing these protections into the First Amendment of the Constitution.[117] However, in its earlier jurisprudence, the Supreme Court refused to protect the media from defamation lawsuits by relying on the guarantees of the First Amendment.[118] Instead, defamation law varied from state to

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[115] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J. concurring); *see also* THE FEDERALIST NO. 51, at 351 (James Madison) (Cooke ed. 1961) ("It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.").

[116] *See, e.g.*, Alan M. Dershowitz, America on Trial: The Cases that Define Our History 42-48 (Warner Books 2004) (*citing* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 6–7 (Stanley Nider Katz ed., Cambridge: the Belknap Press of Harvard Univ. Press) (1963)). Perhaps one of the most famous American defamation cases occurred in 1734, wherein Zenger, an American newspaperman, was charged by the British Crown with the crime of seditious libel for mocking the Royal Governor, a widely detested man named Cosby, in the *New York Weekly Journal*. *Id.* Also of importance in Zenger's case, was the establishment of truth as an absolute defense in defamation actions. *Id.* at 45–46. (the judge ruled that truth could not be a defense to libel but counsel eloquently persuaded the jury that this was the right result) Presumably, until Zenger's case, it had never mattered much whether the allegedly libelous statements about someone were true or false. *Id.* Since the Zenger case and a series of debates on the issue, a person can sue successfully for libel only if the defamatory information is proven to be false. *Id.* at 48.

[117] U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[118] *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 349–50 (1956). The law of defamation did not historically include the principles of free speech and press. *Id.* Instead, defamation dealt with the generalized abuses of those rights and with injury to one's reputation. *Id.* While the law among the states varied, in the most general sense whenever one person communicated information that injured another's reputation often to incite hatred, contempt, ridicule, to otherwise deprive another of respect or cause him to be shunned by others, the party defamed had a cause of action against the defamer. *See* ROBERT MCEWEN & PHILIP LEWIS, GATLEY ON LIBEL AND SLANDER 14–15 (7th ed. Sweet and Maxwell Limited 1974) (1924). To prove defamation, the plaintiff bore the burden to show only that his reputation had been impaired in the eyes of a substantial number of respected community members. HARPER & JAMES, *supra*, at 350; *see also* Kimmerle v. N.Y. Evening Journal, 186 N.E. 217, 217 (N.Y. 1933) (describing strict liability for defamation, "[t]he law of defamation

state without the benefit of a single cohesive rule throughout the nation.[119]

It was not until *New York Times Co. v. Sullivan*[120] that the Supreme Court acted upon the inconsistencies of developing defamation law by issuing a ruling that recovery for defamation be limited by the First Amendment; in short, this proposition revolutionized defamation law in the United States.[121] The significance of *Sullivan* rests in the Court's decision to square defamation law more fully with the freedoms of press and expression guaranteed by the First Amendment.[122] However, the Court warned that these protections are not absolute.[123] Moreover, the

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is concerned only with injuries to one's reputation[]"). However, courts soon realized that although protecting individuals' interest in their reputation was important, it must be balanced against the important ideals of self-government, for "[w]hatever is added to the field of libel is taken from the field of free debate." Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942).

[119] RICHARD LUBUNSKI, LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING 54 (Transaction Books 1987). "The laws varied not only from state to state, but often from case to case within the same state." *Id.*

[120] 376 U.S. 254 (1964).

[121] *Id.* at 265–92. (the court determined that states cannot award damages to public officials for falsehoods under the First and Fourteenth Amendments without proof of "actual malice"). In *Sullivan*, the Supreme Court faced the challenge of balancing the protection of reputation, the principle of defamation law, against the protection of expression. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1008 (Aspen Publishers 2002). The facts of the case provided that the *New York Times* ran a full-page advertisement entitled "Heed Their Rising Voices," produced by a group of black clergyman in support of the Negro right-to-vote movement and Negro Student movement. *Sullivan*, 376 U.S. at 256. Sullivan, the plaintiff and police chief of Montgomery, Alabama, brought a defamation suit against the *New York Times* for the advertisement. *Id.* He alleged the newspaper's advertisement made false accusations that he had harassed black activists. *Id.* at 258. The Supreme Court held that tort liability recovery for defamation—both libel and slander—despite its falsity, is limited by the First Amendment. *Id.* at 269. An additional burden rests upon plaintiffs to cure the balance of interests that requires proof the defendant acted with actual malice in printing the defamatory material. *Id.* at 279–80. The Court justified this burden by explaining that defamation is protected speech not fully immune from liability. *Id.* at 269. In short, the Court stated, "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.*

[122] *See, e.g.*, CHEMERINSKY, *supra* note 121, at 1008. The author notes the Supreme Court has identified several categories of speech that are either unprotected or less protected by the First Amendment. *Id.* at 952–53. In these instances the justifications for regulating the speech are overshadowed by the value of the expression. *Id.* at 953. The unprotected categories of speech include defamation, incitement of illegal activity, fighting words, and obscenity. *Id.* at 952–53. Two examples of less protected, or low-value speech, are commercial speech and sexually-oriented speech. *Id.* at 953.

[123] *Sullivan*, 376 U.S. at 279–80; *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245–46 (2000) (placing emphasis on free speech limitations; for example, the First Amendment guarantees do not protect defamation, incitement, obscenity or pornography); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) ("[T]he great principles of the Constitution

Court concluded that additional limitations and exceptions would be necessary to strike a balance between protecting reputation and safeguarding First Amendment guarantees.[124]

From its humble beginnings, the law of defamation began to flourish as the courts imposed exceptions, crafted definitions, and invoked certain privileges.[125] Today, these early privileges and exceptions have carried over to the emerging broadcast mediums of television and radio, wherein a libelous broadcast has traditionally been treated as an original publication made by the network or broadcast publisher.[126] As a result, under *Sullivan* and the Court's subsequent limitations, defamation

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which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.").

[124] *See, e.g.*, CHEMERINSKY, *supra* note 121, at 1008 ("Since *New York Times*, the Supreme Court has attempted to strike this balance by developing a complex series of rules that depend on the identity of the plaintiff and the nature of the subject matter.").

[125] *Id.* at 952 (Chermerinsky inquires as to whether the categorical definitions and exceptions developed by the Court are sufficiently specific). Many of these exceptions, while important to the law of defamation, are irrelevant for the purposes of this Note; nonetheless, it is worth brief mention that "public figure[s]" have traditionally faced a higher burden in defamation suits than "limited purpose public figure[s]" or "private figure[s]." CHEMERINSKY, *supra* note 121, at 1015. *Sullivan* is the preeminent case for the "public figure" distinction. *Id*. at 1008. The issue in *Sullivan* grew out of a split of authority between the states on whether public officials were required to prove actual malice prior to any recovery. *See* E.B. Morris, Annotation, *Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office*, 110 A.L.R. 412 (1937). The majority of states permitted recovery absent malice. *Id.* at 412–35 (collecting cases). However, a small majority of states disallowed recovery without proof of malice. *Id.* at 435–41 (collecting cases). The minority position laid the groundwork for the future of defamation law, including the Court's revolutionary decision in *Sullivan*. *Id.* Post-*Sullivan*, an elected official or public figure must prove actual malice on the part of the speaker by clear and convincing evidence. *Id.* at 412–35. However, for private persons not thrusting themselves into the sphere of public debate the standard is lower, and as in the past is set by various state laws, but cannot be strict liability. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974); Time, Inc. v. Hill, 385 U.S. 375, 391 (1967). In addition, a defamatory statement must not be a mere expression of opinion; rather, it must be factual in nature or give rise to a factual inference. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990). Later, exceptions to this general framework were created. *See* Morris, *supra* note 125, at 435–41. For example, at common law a person committed libel each time a defamatory statement was reproduced, meaning either repeated or republished, and that person would be subject to the same degree of liability as the first publisher. *Id.* Moreover, distributors of written material such as news stands, bookstores, and libraries would be found liable only if they knew or had reason to know that the content was defamatory. *Id.* Thus, a publisher might be held liable for defamation at the common law for unknowingly publishing defamatory material; however, the distributor will not be liable unless it knew or had reason to know of untruths in the publication. *Id.*

[126] CHEMERINSKY, *supra* note 121, at 1008.

remains the primary remedy against communication excesses in verbal, print, and electronic media.[127]

2. Prudent Defenses to Defamation Actions—Retraction Statute Applicability

The common law doctrine of unavoidable consequences allows a publisher the opportunity to mitigate its damages by submitting to a retraction request.[128] Under this doctrine, defamatory action is weighed against the ability of the victim to avoid or mitigate the harmful effects and the gravity of the consequences.[129] Consistent with similar damages principles in tort law, this doctrine places the burden upon the plaintiff in a defamation action to "use such means as are reasonable under the circumstances to avoid or minimize the damages."[130]

Practically speaking, the doctrine of unavoidable consequences works to protect both publishers and their victims by requiring a fair rebuttal and retraction of the defamatory content.[131] In effect, the doctrine can be both a means of providing restoration of the injured party's reputation and an effective means to mitigate damages caused by defendants.[132] In this sense, retraction is the most effective means for

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[127] *Id.* (noting that the principles of defamation law combined with retraction strategy have the potential to provide for reputational repairs through damages and the correction of the defamatory statement).

[128] DEFAMATION: LIBEL AND SLANDER 84 (Theodore R. Kupferman ed., Mecklermedia 1990). Retraction originated in a New York case wherein the "court held that a retraction afforded 'proof not only of a disposition to repair the wrong afflicted, but of actual reparation to some extent.'" *Id.* (citations omitted). Retraction is a strong defense to defamation due to its ability to correct the error by presenting the truth, and thereby "showing that plaintiff's reputation suffered less than claimed." *Id.* (citation omitted).

[129] Donna M. Murasky, *Avoidable Consequences in Defamation: The Common Law Duty to Request Retraction*, 40 RUTGERS L. REV. 167, 174 (1987–88).

[130] C. MCCORMICK, LAW OF DAMAGES 127 (1935). *See also* PROSSER & KEETON ON THE LAW OF TORTS § 65, at 458 (Keeton 5th ed. 1984) (noting that the doctrine rests upon the "fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests[]"). Thus, failure by the plaintiff to request a timely retraction of the defamatory publication may result in loss of recovery "to the extent that it has been increased by his own unreasonable acts or by his failure to take active steps to minimize the loss so long as unreasonable expense or exertion would not be involved." *Id.* McCormick, *supra*, at 130.

[131] Murasky, *supra* note 129, at 175–76.

[132] *Id*; *see also* Mathis v. Cannon, 573 S.E.2d 376 (Ga. 2002), *rev'g*, 556 S.E.2d 172 (Ga. Ct. App. 2001) (statute provides that plaintiff in libel action shall not be entitled to any punitive damages if defendant corrects and retracts libelous statement, and as a result, all libel plaintiffs who intend to seek punitive damages must request retraction or correction before filing civil action); Hucko v. Jos. Schlitz Brewing Co., 302 N.W.2d 68, 73–74 (Wis. Ct. App. 1981). Although some defamation statutes merely codify the common law in providing retraction as a mitigating circumstance, others seek to eliminate or condition an award of

remedying injury caused by defamatory publication at the earliest opportunity.[133] Thus, though often under-asserted, the doctrine of retraction remains in effect today, and one need look no further than her daily paper to view the practical effects of this principle.[134]

Today, most retraction statutes relate only to defamatory statements published in the broadcast or print media.[135] In fact, thirty-one states

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damages recovered by a defamed plaintiff. *Hucko*, 302 N.W.2d at 73. In fact, retractions are often legislatively awarded. *Id.* The motivation for this enhancement of retractions rests not only in the efforts to protect the First Amendment rights of the defendant but also in the belief that frequently the best remedy for the defamed plaintiff may be a timely correction or retraction of the libelous material. *Id.* at 73 n.5.

[133] Murasky, *supra* note 129, at 175–76.

[134] *E.g.*, James Barron, *Need Case: Just Auction Off a Meteorite*, N.Y. TIMES, Sept. 15, 2007, at B3. The *New York Times* retracted, stating:

> The article did not adequately emphasize Mr. Pitt's considerable experience in the handling, study and sale of meteorites, or his sensitivity to the concerns of the Grand Ronde. The article should have made clear that he was not interested merely in money but also in acquiring other extraterrestrial objects, and that his awareness of the feelings of the Indians was the reason he had been uneasy about being photographed.

Id. *See generally* Craig Silverman, REGRET THE ERROR, http://www.regrettheerror.com/ (last visited Oct. 11, 2007) (tracking corrections and retractions in newspapers, magazines, broadcast media, and online media).

[135] *See infra* note 136 (discussing the substance of state retraction statutes). However, the courts have in limited instances broadly defined state retraction statutes to apply to the Internet. *Compare* It's In the Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 12 n.1, 14–15 (Wis. Ct. App. 1995) (reversing a grant of summary judgment based on plaintiff's failure to request a retraction prior to filing suit, as required by the retraction statute which applies to "any libelous publication in any newspaper, magazine or *periodical*[,]" the court determined that because the statute predates the Internet it did not apply to Internet postings and the legislature must address the growing problems of Internet libel) (emphasis omitted), *with Mathis*, 573 S.E.2d at 385 (stating that a statute which purported to apply to newspapers and print media also applied to Internet postings). The Georgia Supreme Court, in *Mathis*, departed from the plain language interpretation performed by the appellate court, wherein the court stated:

> Following the plain language of these statutory provisions, they would not appear to be applicable to Internet postings. First, they contemplate actions between an aggrieved party and a newspaper, television station, or radio station. They do not appear to address actions between two individuals. Second, these statutes do not reach Internet media such as chat rooms. The statutes, to the contrary, address media which broadcast programs at specific times to specific audiences, whereby a retraction would likely be heard by the same audience hearing the original defamatory remarks. To the contrary, the audience in a chat room is in a constant state of flux, making the remedy envisioned by OCGA § 51-5-12 inapplicable. Accordingly, the trial court did not err in finding that these statutes did not preclude Cannon's claim for punitive damages.

have enacted statutes that recognize retraction, correction, or apology for defamatory statements as a defense in civil suits alleging defamation, libel, or slander.[136] Similar to their predecessors, retraction statutes

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Mathis v. Cannon, 556 S.E.2d 172, 176 (Ga. Ct. App. 2001), *rev'd*, 573 S.E.2d 376 (Ga. 2002) (citations omitted).

[136] Retraction statutes vary considerably from state to state. *See* ALA. CODE §§ 6-5-184 to -88 (West, Westlaw through End of 2007 Reg. Sess.) (defining publications as "[m]agazines" or "newspapers" or any publication that can be mailed through the United States post office); ARIZ. REV. STAT. ANN. §§ 12-653.01–.05 (West, Westlaw through End of the Forty-Eighth Legislature, First Reg. Sess. (2007)) (applies only to "libel in a newspaper or magazine, or of a slander by radio or television broadcast"); CAL. CIV. CODE § 48a (West, Westlaw through Ch. 256 of 2007 Reg. Sess. urgency legislation) (libel defined as "an[] action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast"); CONN. GEN. STAT. § 52-237 (West, Westlaw through the 2007 Jan. Reg. Sess. and public acts from the June Sp. Sess. approved by the Gov. on or before June 29, 2007); FLA. STAT. § 770.02 (West, Westlaw through Chapter 322 (End) of the 2007 First Reg. Sess. and Special B Sess. of the Twentieth Legislature) (applies to newspaper and broadcast media); GA. CODE ANN. § 51-5-11 (West, Westlaw through end of the 2007 Reg. Sess.) (plain language of the statute applies only to printed and broadcast media); IDAHO CODE 6-712 (West, Westlaw through the 2007 First Reg. Sess. of the 59th Legislature, Ch. 369) (newspaper, radio or television broadcasts); IND. CODE ANN. § 34-15-3-3 (West, Westlaw through end of 2007 1st Reg. Sess.) (newspapers, radio, and television); IOWA CODE ANN. §§ 659.2, 659.3, and 659.5 (West, Westlaw through Acts of the 2007 1st Reg. Sess.) ("newspaper, free newspaper or shopping guide, or for defamatory statements made on a radio or television station"); KY. REV. STAT. ANN. §§ 411.051, .060–.061 (West, Westlaw through end of 2007 legislation) (newspaper, magazine, periodical, radio, and television); MAINE REV. STAT. tit. 14, § 153 (West, Westlaw with emergency legislation through Chapter 466 of the 2007 First Reg. Sess. of the 123rd Legislature); MASS. GEN. LAWS ch. 231 § 93 (West, Westlaw through Ch. 125 of the 2007 1st Annual Sess.) (publication); MICH . STAT. ANN. § 600.2911 (Westlaw through P.A.2007, P.A.2007 No. 1-74, 76, 78-80, 82-84, 86, 87, 89) ("newspaper, magazine, or other periodical publication or by a radio or television broadcast"); MINN. STAT. ANN. § 548.06 (West, Westlaw with laws of the 2007 Reg. Sess. effective through July 1, 2007) (newspaper); MISS. CODE ANN. § 95-1-5 (West, Westlaw through End of the 2007 Reg. Sess. and 1st Ex. Sess.) (published, broadcast, telecast); MONT. CODE ANN. §§ 27-1-818 to -821 (West, Westlaw through the End of 2007 Reg. Sess. and May 2007 Special Sess.) ("publication in or broadcast on any newspaper, magazine, periodical, radio or television station, or cable television system"); NEB. REV. STAT. § 25-840.01 (West, The Statutes and Constitution are Westlaw through the Second Reg. Sess. of the 99th Legislature (2006) (any medium); NEV. REV. STAT. ANN. §§ 41.336–.338 (West, Westlaw through the 2005 73rd Regular Session and the 22nd Special Sess. of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006)) ("libel in a newspaper, or of a slander by radio or television broadcast"); N.J. STAT. ANN. § 2A:43-2 (West, Westlaw with laws through L.2007, c. 186, and J.R. No. 11) ("newspaper, magazine, periodical, serial or other publication in this state"); N.C. GEN. STAT. § 99-2 (West, Westlaw through S.L. 2007-268 of the 2007 Reg. Sess.); N.D. CENT. CODE §§ 32-43-02 to -10 (West, Westlaw through the 2007 Reg. Sess.) ("all publications, including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information"); OHIO REV. CODE ANN. §§ 2739.03, 2739.13, and 2739.14 (West, Westlaw through 2007 Files 1 through 24 of the 127th GA (2007-2008), apv. by 10/7/07, and filed with the Secretary of State by

"allow[] a defamation plaintiff to retract, or take back, a defamatory statement."[137] Increasingly more often, retraction statutes are effective for many defamed individuals merely seeking to have their reputation repaired to the extent possible and avoid costly or invasive litigation.[138] Thus, in many instances, "a correction, retraction or apology is often adequate[]" to resolve the harm to reputation caused by the defamatory statement, when applied with some consistency.[139]

3. Inconsistent Application by Courts

Although defamation law has been easily adapted from newspaper and other forms of print media to broadcast media, the Internet has presented difficulty in its application due in part to the many players involved—including ISPs, hosts, and third-party users—and the ever-present jurisdictional issues that stem from networked activity.[140] There are two major cases that clearly present the issue of inconsistency in the application of retraction statutes to online defamation.[141]

10/7/07) (print and broadcast media); OKLA. STAT. ANN. tit. 12, § 1446a (West, Westlaw with chapters of the First Reg. Sess. of the 51st Legislature (2007) (effective September 1, 2007)) ("newspaper or periodical"); OR. REV. STAT. ANN. §§ 31.210, 31.215 (West, Westlaw through End of the 2005 Reg. Sess.) ("newspaper, magazine, other printed periodical, or by radio, television or motion pictures"); S.D. CODIFIED LAWS §§ 20-11-6 to -7 (West, Westlaw through the 2007 Reg. Sess. and Supreme Court Rule 06-77) (applies to newspapers, television, and radio not liable if one exercises due care); TENN. CODE ANN. §§ 29-24-103 to -104 (West, Westlaw through 2007 First Reg. Sess. 2007) (newspaper, periodical, radio, and television); TEX. CIV. PRAC. & REM. CODE ANN. § 73 (West, Westlaw through the end of the 2007 Reg. Sess. of the 80th Legislature) ("expressed in written or other graphic form"); UTAH CODE ANN. §§ 45-2-1 to -1.5 (West, Westlaw through 2007 First Special Sess.) (newspaper, radio, and television); VA. CODE ANN. §§ 8.01-48 to -49.1 (West, Westlaw through End of 2007 Reg. Sess.) (newspaper, magazines, periodicals, radio, television, and Internet); W. VA. CODE § 57-2-4 (West, Westlaw through End of 2007 Second Ex. Sess.) (applies to written or spoken words); WISC. STAT. ANN. § 895.05 (West, Westlaw through 2007 Act 14, published 06/13/07) (newspapers).

137 First Amendment Center Frequently Asked Questions, http://www.firstamendmentcenter.org/Press/faqs.aspx?id=644& (last visited Oct. 8, 2007). Many statutes provide that a plaintiff must make a request for retraction prior to a pre-determined time. *Id.* Then, the defendant is given an opportunity to comply within a separate pre-determined time. *Id.* A properly executed retraction statute has the effect of mitigating any damages incurred. *Id.*

138 RANDALL P. BEZANSON, LIBEL LAW AND THE PRESS: MYTH AND REALITY 50 (Free Press 1987) (1985) (reporting that three-fourths of libel litigants who were interviewed and questioned about why they brought a lawsuit said they would have been satisfied with a correction, retraction, or apology but indicated that they proceeded with a lawsuit because they did not receive any of these other resolutions).

139 *Id.*

140 *See generally supra* Part II.B (discussing the legislatures' attempts to regulate defamatory content on the Internet).

141 *See infra* notes 142–54 and accompanying text.

In the first case of *Cannon v. Mathis*,[142] Cannon sued Mathis and, to defend against punitive damages, Mathis alleged that Cannon's failure to request a retraction precluded any award of punitive damages.[143] According to Mathis, the retraction statute that provided for newspapers or other publications should be construed broadly to cover his online

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[142] 573 S.E.2d 376 (Ga. 2002). In this Internet defamation case, Bruce Mathis, a resident of Crisp County, made defamatory postings on an Internet message board asserting a "solid waste recovery facility in Crisp County" was unprofitable in its operations. *Id.* at 377. The solid waste recovery plant, though state-of-the-art, was never able to live up to the expectations of the Crisp County community, and, in fact, was not able to cover its expenses from the outset. *Id.* at 378. As a result, Mathis and others created a citizens' rights group, "the Crisp Watchdogs." *Id.* at 379. The advocacy groups eventually brought about a grand jury investigation after a strong collaborative effort to ask critical questions at commission meetings and public criticism of the waste management company's operations and finances. *Id.* Later, the grand jury recommended that the waste management company increase the availability of information regarding their operations and finances to the public. *Id.* After reading the grand jury's report, Mathis used the Internet to voice his opinions and posted three defamatory statements about Chris Cannon, an officer and director of Waste Management Services, Inc. *Id.* Mathis's postings, posted under the screen name "duelly41," stated and implied defamatory facts about Cannon, an officer and director of Waste Management Services, Inc., a company who hauled waste to a controversial city dump site. *Id.* The messages are as follows:

> [F]irst message, posted at 11:14 p.m., stated:
>
> > **what u doing???**
> > by: *duelly41*
> > does wwin think they can take our county—stop the trash flow cannon we would love u for it—our county not a dumping ground and sorry u and lt governor are mad about it—but that is not going to float in crisp county—so get out now u thief
>
> The second message, posted at 11:27 p.m., stated:
>
> > **cannon a crook????**
> > by: *duelly41*
> > explain to us why us got fired from the calton company please ???? want hear your side of the story cannon!!!!!!!!
>
> The third message, posted at 11:52 p.m., stated:
>
> > **cannon a crook**
> > by: *duelly41*hey cannon why u got fired from calton company???? why does cannon and lt governor mark taylor think that crisp county needs to be dumping ground of the south??? u be busted man crawl under a rock and hide cannon and poole!!! if u deal with cannon u a crook too!!!!!!! so stay out of crisp county and we thank u for it

Id.

[143] *Id.* at 383. The court explained its decision not to award punitive damages as follows:

> Applying our decision to the facts here, we find that Cannon asked the Internet service provider Yahoo! to delete the three messages that Mathis posted, but did not ask Mathis to correct or retract any of his statements. Because it is undisputed that Cannon did not request a correction or retraction in writing before filing his complaint, he is not entitled to recover punitive damages from Mathis for any defamatory statements posted on the bulletin board on the Internet.

Id. at 386.

message board post.[144] Fortunately for Mathis, the court agreed, finding "[t]he practical effect of [its] decision is to require all libel plaintiffs who intend to seek punitive damages to request a correction or retraction[,]" in essence broadening the retraction statute and treating similar defendants as such.[145] It is unclear what amount of punitive damages would have been recognized as a result of this off-the-cuff posting.[146] It is clear, however, that without a retraction statute, given the sheer size of the audience that can be reached on the Internet, unlike newspapers and other members of the press, an individual defendant like Mathis, may have been subject to overwhelming punitive damages.[147] While Mathis survived the litigation gauntlet, others may not escape the damaging effects of a punitive damages award.[148]

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[144] *Id.* at 385. Specifically, the court stated:

> Our reasons for preferring this broader reading are many. This construction makes the same word mean the same thing in all the libel and slander code sections. It treats a publication for purposes of seeking a retraction the same as a publication for purposes of imposing liability. It acknowledges that the legislature extended the retraction defense originally created for newspapers, magazines, and periodicals to include newspapers and "other publications." It encourages defamation victims to seek self-help, their first remedy, by "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."

Id.

[145] *Id.* First, the Court noted the advantage of having one reading of all the libel and slander code sections regardless of medium. *Id.* Second, it acknowledged the legislative intent to provide a retraction defense to all publications. *Id.* Third, and most importantly, the court noted that the incentive retraction statutes provide for libel victims to seek self-help. *Id.* By contrast, the dissent disagreed with the majority's expansive interpretation of the retraction statutes. *Id.* at 386–87 (Hunstein, J., dissenting). The dissent honed in on the plain language of the statute, contending that if the legislature had intended the retraction statute to apply to the Internet it could have done so; instead, however, the legislature limited the statutes application to defendants who publish regularly, to allow for publication of a retraction in the next issue. *Id.* at 388–89. Thus, the dissent concluded that an individual like Mathis, who posted three messages on the Internet, was incapable of complying with the retraction statute. *Id.* at 389. The dissent acknowledged, however, that the retraction statute may be applicable to an individual who regularly publishes an Internet newspaper, magazine, or other publication. *Id.* In its conclusion, the dissent stated, "the majority ruling which asks no self-censorship of an Internet poster is unconscionable in that it allows Internet users free reign to injure the reputations of others, even when the statements cross the bounds of propriety." *Id.* at 389. The dissent would apply defamation laws not in an effort to chill Internet speech, but rather to protect private Internet posters, like Mathis, from an Internet that fosters the "poisonous atmosphere of the easy lie." *Id.* (quoting Rosenblatt v. Baer, 383 U.S. 75, 94 (1966)).

[146] *See id.* (reversing the judgment of the lower court, holding that awarding damages was improper).

[147] *See supra* note 136 (noting that most state retraction statutes do not provide for Internet publications).

[148] *See supra* Part II.A (explaining the tremendous scope and audience of the Internet).

In contrast to the facts of the *Cannon* case, a recent case from Wisconsin unfortunately does not relieve any confusion for Internet publishers.[149] *It's in the Cards v. Fuschetto* grew out of a series of posts on SportsNet, an online sports memorabilia website's bulletin board and mailbox feature.[150] In *It's in the Cards*, the Wisconsin Court of Appeals was faced with determining whether the SportsNet website was a periodical under a Wisconsin retraction statute that, like many other state statutes, provides relief only for newspapers, magazines, or periodicals.[151] The court concluded that a SportsNet bulletin board post is a random act of communication more closely analogous with a grocery store bulletin board rather than a publication.[152] The court specifically noted the discourse between print and Internet publishing, finding that "[a]pplying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services."[153] Consequently, the court

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[149] *See* Electronic Freedom Foundation Bloggers' FAQ - Online Defamation Law, http://w2.eff.org/bloggers/lg/faq-defamation.php (last visited Jan. 25, 2007) ("The Bloggers' FAQ on Online Defamation Law provides an overview of defamation (libel) law, including a discussion of the constitutional and statutory privileges that *may* protect you.") (emphasis added).

[150] 535 N.W.2d 11, 12–13 (Wis. Ct. App. 1995). Fuschetto, of Triple Play Collectibles, and Meneau, of It's In the Cards, Inc. collectibles, communicated via the SportsNet bulletin board, as well as on the telephone. *Id.* at 13. During these conversations, it was agreed that Meneau would visit Fuschetto in New York. *Id.* at 13. After agreeing to the visit, Fuschetto and his wife became ill with mononucleosis. *Id.* Consistent with their previous conversations, Fuschetto informed Meneau that he had become ill and asked that Meneau postpone his trip scheduled for January 1994. *Id.* As a result, Fuschetto and Menau exchanged several mailbox conversations in which they and argued about the cost of various items that Meneau had purchased: airline tickets, tickets to a Knicks game, and tickets to the David Letterman show. *Id.* While the bulk of this conversation was posted using the more personal mailbox function of SportsNet, Fuschetto later posted a message using the bulletin board feature, which was easily reached by all subscribers of SportsNet, in which he discussed the arguments he had had with Meneau. *Id.* This led Meneau to claim that Fuschetto had posted defamatory communications about Meneau on the bulletin board. *Id.*

[151] *Id.* at 14. In order to resolve the meaning of the term "periodical" in the absence of any case law on point, the court consulted WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1680 (Unabr. 1976), which states that a "periodical is defined as 'a magazine or other publication of which the issues appear at stated or regular intervals.'" *Id.* The court concluded that periodicals, based upon this definition, must appear on a regular basis—that is, neither infrequent, nor intermittent. *Id.* Furthermore, the court concluded that the term is not ambiguous and, therefore, should be given the ordinary meaning derived from the aforementioned Webster's dictionary. *Id.*

[152] *Id.* at 14. "Writings such as personal letters, billboards and signs are not included; therefore, the statute is not inclusive of all forms of alleged libel." *Id.*

[153] *Id.*

called for legislators "to address the increasingly common phenomenon of libel and defamation on the information superhighway."[154]

The current status of defamation law on the Internet presents both ongoing problems inherited from the aforementioned troubled legislative history and new problems emerging from recent, but apparently unsuccessful, attempts by courts to remedy the issues through judicial interpretation.[155] As noted from the start, perhaps the most immediately identifiable problems facing the application of defamation law to the Internet are solidifying the best practices for regulation and also instilling the necessary patience in the legislature to listen before they speak.[156] The current regulation under the CDA essentially leaves online content to the whims of self-regulation and, as such, has created an interesting array of self-help remedies without solid legal backing.[157] The current challenge to the legislatures and the courts is, and always has been, to define the appropriate framework for correcting cyber wrongs.[158]

D. Closing Thoughts

The current state of law and regulatory methods with regard to the new Internet medium have worked to foreclose tangible relief for defamation victims by either providing an essentially non-existent legal framework or granting sweeping immunity to ISPs.[159] But this does not have to be the case.[160] Clearly, the pull of the various regulatory players, including legislatures, courts, and commentators, not to mention the Internet's rapidly changing infrastructure, has created more problems in

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[154] *Id.* "The magnitude of computer networks and the consequent communications possibilities were non-existent at the time this statute was enacted." *Id.* *See also* text accompanying note 153 (providing the next sentence in the case).

[155] *See supra* Parts II.B–C (discussing the enactment of the CDA and the courts' interpretation of its application to ISPs and other Internet users).

[156] *See supra* Part I (discussing the framework of the Internet and the inherent problems with rapidly developing technology).

[157] *See supra* note 57 (discussing flame wars); *infra* note 180 (discussing web services that seek to repair reparations of defamed internet users).

[158] *See infra* Part III (discussing the three regulatory methods that have been attempted by the legislatures and the courts to resolve this problem, including each method's drawbacks).

[159] *See infra* Part III.A (discussing the theory behind and the criticism of the self-regulation approach to the Internet, which the author suggests encompassed the provisions of the CDA).

[160] *See infra* Part V (suggesting that by combining the most effective portions of the current regulation approaches, in addition to working with the existing framework created by Congress through the enactment of the CDA, the Internet could be regulated to provide effective relief for victims of defamatory statements in the online environment).

application than successes in achieving any true regulation.[161] This Note teases apart the preceding discussion to identify and relate three categorical approaches previously taken by legislatures, courts, and academics, examining each in turn; however, it also pauses to consider the potential for overlap and collaboration necessary to the development of a more effective and workable solution.[162]

III. ANALYSIS: COMPARING THREE POTENTIAL APPROACHES TO THE REGULATION OF DEFAMATION ACTIONS ON THE INTERNET

The speed of Internet development and the problems of old law and new technology create unique challenges for both the legislatures and the courts.[163] It is often stated that the law struggles to keep pace with technology, and defamation law on the Internet is no exception.[164] Each change in technology creates new possibilities, and lawyers, courts, and legal scholars struggle to deal with its implications.[165] The question often becomes whether legal frameworks should heed altogether to a completely self-regulated system, whether it should give way to a new system of cyberlaws for cyberwrongs, or whether the traditional legal framework is adequate and should be applied to new technologies, including the Internet.[166]

This Part analyzes three existing approaches to Internet regulation derived from the aforementioned history of the Internet, with an eye toward developing a workable framework for Internet defamation cases and resolving the current inconsistency in regulatory attempts.[167] First, Part III.A analyzes self-regulation on the Internet along with its inherent problems and limitations, including the current self-regulation-focused provisions of the CDA.[168] Next, Part III.B evaluates a cyberlaw approach that suggests the Internet should retain its own sovereign immunity from other jurisdictions's rules, and the weaknesses associated with this

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[161] *See infra* Part III (discussing the criticisms of each approach to Internet content regulation).

[162] *See infra* Part III (categorizing three common methods to Internet regulation and discussing the drawbacks that must be addressed in order to begin to provide any tangible relief to online defamation victims).

[163] *See generally supra* note 31 (discussing regulation attempts and the difficulties encountered).

[164] *See infra* Part II.C.2 (discussing the treatment of defamatory statements in the online environment).

[165] *See infra* Part III (discussing the three regulatory methods used in relation to the Internet and each method's inherent drawbacks).

[166] *See generally supra* note 86 (for citations to the leading articles regarding self-help, cyberlaws, and traditional law methods).

[167] *See infra* Part III (analyzing three existing approaches to Internet regulation).

[168] *See infra* Part III.A (discussing the self-help method).

approach.[169] Last, Part III.C scrutinizes the application of pre-existing legal rules to similar wrongs on the Internet.[170] In addition, this Part considers the disadvantages associated with contradictory interpretations of the applicability of traditional laws to the new Internet medium, and attempts to reconcile the current inconsistent application of retraction statutes to the Internet.[171]

A. Self-Regulation

Under the first approach, the argument for not regulating the Internet is becoming more controversial.[172] In fact, in light of failed attempts to regulate the Internet, proponents of this approach argue that it is better to watch the Internet develop than to promote a hasty intervention.[173] Moreover, self-regulation is supported by the notion that a delay in regulation is appropriate until Internet development slows, its effects are plain, and the law can create and apply a proper regulatory

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[169] *See infra* Part III.B (discussing the cyberlaws approach).

[170] *See infra* Part III.C (discussing the traditional laws approach).

[171] *See infra* Part III.C (providing an analysis of the current inconsistency in retraction statute case law as applied to the Internet).

[172] *See supra* note 30. *See also* David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1401 (1996). Commenting on the virtues of developing a self-governance system, the authors note:

> The law of any given place must take into account the special characteristics of the space it regulates and the types of persons, places, and things found there. Just as a country's jurisprudence reflects its unique historical experience and culture, the law of Cyberspace will reflect its special character, which differs markedly from anything found in the physical world. For example, the law of the Net must deal with persons who "exist" in Cyberspace only in the form of an e-mail address and whose purported identity may or may not accurately correspond to physical characteristics in the real world. In fact, an e-mail address might not even belong to a single person. Accordingly, if Cyberspace law is to recognize the nature of its "subjects," it cannot rest on the same doctrines that give geographically based sovereigns jurisdiction over "whole," locatable, physical persons. The law of the Net must be prepared to deal with persons who manifest themselves only by means of a particular ID, user account, or domain name.

Id.

[173] *See, e.g.*, Keith J. Epstein & Bill Tancer, *Enforcement of Use Limitations By Internet Services Providers: "How To Stop That Hacker, Cracker, Spammer, Spoofer, Flamer, Bomber"*, 9 HASTINGS COMM. & ENT. L.J. 661, 664 (1997) (suggesting that the existing laws and methods of lawmaking are inadequate and too swift; therefore, the Internet should be self-regulated); Jason Kay, *Sexuality, Live Without A Net: Regulating Obscenity And Indecency On The Global Network*, 4 S. CAL. INTERDISC L.J. 355, 387 (1995) ("Because government regulation has been unsuccessful, and self-regulation has succeeded, the Internet should continue to be allowed to regulate itself.").

regime.[174] In addition, many commentators have also suggested that a more hands-off approach to the Internet will bolster Internet self-help that is said to best prevent the chilling effects that would otherwise result from increased regulation.[175] First, this Part analyzes the weaknesses of the self-regulation approach, highlighting issues and problems with baseline assumptions, including the ability, response, and effectiveness that are essential to the success of this type of regulation.[176] Next, this Part examines this theory's current role as a self-regulatory tool on the Internet enacted under the guise of the CDA.[177] One of the most important drawbacks to the self-regulation approach is its reliance upon unprincipled assumptions about Internet actors.[178] In short, self-help allows rogue agencies and unreasonable individual actors to provide essentially unprincipled regulation of the Internet.[179] Moreover, this

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[174] *See* Hughes, *supra* note 31, at 365–69 (describing the effect of a no-law Internet and determining that it is an understandable, yet flawed, first approach to the borderless Internet); *see also* Trotter Hardy, *The Proper Legal Regime for "Cyberspace*," 55 U. PITT. L. REV. 993, 1016 (1994) ("The lowest level of self-help is unilateral action by an individual. We might capture the sense of this measure with the phrase 'if you don't like it, don't do it.'").

[175] *See supra* note 126 and accompanying text (describing the potential chilling effect of regulation on Internet speech); *see also* Chilling Effects, Frequently Asked Questions (and Answers) About Chilling Effects Clearinghouse, http://www.chillingeffects.org/faq.cgi#QID76 (last visited Nov. 1, 2007); Dee Pridgen, *How Will Consumers Be Protected on the Information Superhighway?*, 32 LAND & WATER L. REV. 237, 253 (1997) ("The final avenue for consumer protection on the information superhighway is consumer self-help. Many Internet users oppose any and all government regulation[] of cyberspace. Some may call it anarchy, but Internet users label themselves 'netizens,' citizens of the Internet world, who agree to abide by their own self-imposed rules of 'netiquette.'"); Stuart Elliott, *Clinton Advisor Urges Self-Regulation in Cyberspace*, N.Y. TIMES, Nov. 4, 1997 (acknowledging the fear that growth of the Internet and digital technology would be hampered if "overregulat[ed], overtax[ed] and overcensor[ed]").

[176] *See infra* Part III.A (suggesting the notion of whether self-regulation can be effective depends upon whether there are parties who are willing and able to take the affirmative steps necessary).

[177] *See infra* Part III.A (discussing the implication of the self-help provisions of the CDA).

[178] *See supra* Part II.A; *see also infra* note 180 (discussing the Reputation Defender website). It should be noted that along the continuum of regulatory approaches, self-regulation represents a simplistic extreme rarely found in the real world. *Id.* Ultimately, self-regulation depends upon a simple command and control that many participants are unwilling to undertake resulting in the unprincipled regulation or exploitation by the few willing to take on the responsibility, often to the detriment of the majority. *Id.*

[179] *See generally supra* Part II.A. *See, e.g.*, ReputationDefender, ReputationDefender > About Us, http://www.reputationdefender.com/company (last visited Nov. 8, 2007). Founded in 2006, ReputationDefender was created as a response to the "emerging reality of the Internet Age" and the erosion of "the line dividing people's 'online' lives from their 'offline' personal and professional lives[.]" *Id.* The site's purpose is to "find the unwelcome online content about you or your loved ones, even if it is buried in websites that are not easily examined with standard online search engines. And if you tell us to do

theory rests on the notion that a person defamed online can remedy any harm caused by either contacting the blogger or engaging in countering the defamatory speech by posting a counter-comment.[180] However, the success of this argument is based upon the assumption that effective self-help remedies exist, which essentially means that commentary is permitted and requests for removal of content will be honored.[181] Therefore, the extensive reliance on misguided assumptions taken by this approach severely diminishes, if not completely eliminates, its useful application in cyberspace.[182]

In addition, the idea of counter-speech runs the risk of transforming into a flame war.[183] Speech used in flame wars is often more antagonistic

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so, we will work around the clock to get that unwelcome content removed or corrected." *Id.* Perhaps most disturbing is their answer to the following FAQ: "Does ReputationDefender simply send cease-and-desist letters or sue everybody when it seeks to implement its 'Destroy' assistance?" and the corresponding answer,

> No. Most of our approaches to assisting in the correction or removal of content are *non-legal*. We will only pursue legal options with the express consent of our clients, and these techniques are strictly optional and usually the last resort. They may incur additional cost. In such cases, we do not act as lawyers for our clients. We are not lawyers or a law firm, and we do not offer legal advice or services.

ReputationDefender, ReputationDefender > Frequently Aasked [sic] Questions, http://www.reputationdefender.com/faq (last visited Nov. 8, 2007) (emphasis added).

[180] ReputationDefender, Frequently Aasked [sic] Questions, *supra* note 179. The appeal of this viewpoint for many is that without any participation by the legal system, there is no need to unmask the identity of anonymous bloggers. *See* Doe v. Cahill, 884 A.2d 451, 464 (Del. 2005). However, the need to determine a person's identity is derived from the growing need to repair reputational wrongs in the online environment and dispensing of this as a requirement through self-regulation does little to assist in remedying the harm caused, which are better addressed through damages and injunctive relief. *Id.* At the heart of the self-regulation drawbacks is the notion that the harmful information remains widely available and, consequently, continues the harm without any correction. *Id.*

[181] *See supra* note 63 (noting that some blogs and similar websites do not offer an option for visitors to comment, which in many ways forecloses a victim's ability to reach the same audience, in a manner similar to the defamatory speech).

[182] *See supra* note 63 (noting that some blogs and similar websites do not offer an option for visitors to comment, which in many ways forecloses a victim's ability to reach the same audience, in a manner similar to the defamatory speech).

[183] See GATTIKER, *supra* note 57 for a discussion of "flaming" and "flame wars". The author suggests that flame wars are the result of the self-regulation approaches heavy, and merely speculative, assumptions that new Internet users are capable of and willing to appropriately regulate their own online affairs. *Id.* To the contrary, flame wars exacerbate questions regarding the ability to regulate and the responsibility to regulate that are important to the success of this rationale. *Id.* Based on this unprincipled assumption of user's ability to self-regulate, there is little hope that self-regulation will ever be compatible with the legitimacy and enforceability required to protect Internet users from defamation online. *Id.*

than useful in countering harmful speech.[184] Furthermore, participants in flame wars, even if they are not the initial attacker, run the risk of creating additional defamatory speech.[185] Indeed, counter-speech may in fact provide little remedy and defamation victims, unable to obtain retractions or removals from the original source, would be left with little real remedy other than to rebut the accusations on their own.[186] Thus, a lack of Internet regulation would provide a greater benefit to would-be defendants and extremely low protection, without substantial non-legal efforts, to Internet defamation plaintiffs.[187]

The CDA provides a modern example of regulations that can be categorized aptly as self-help in the area of defamation law; however, this Note, as stated previously, concedes that this method fails to adequately protect real-life rights in the online environment.[188] The CDA does not provide a complete bar to defamation suits on the Internet.[189] Instead, the statute bars only plaintiffs who seek relief from the deep pockets of ISPs.[190] While an ISP is immune, the CDA does not provide any immunity from liability for the original poster.[191] In fact, the CDA's purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech.[192] However, with a great number of responsible parties potentially judgment-proof

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[184] *See* DERY, *supra* note 57, at 1–2 (describing flame wars as a battle between two online users, and noting that speech used in flame wars is often hostile, the author compares their contribution to discussion as on par with bathroom graffiti).

[185] *See supra* note 57 and accompanying text (describing flame wars and their potential effects).

[186] *See* GATTIKER, *supra* note 57, at 195 (defining flame wars). The author suggests that engaging in flame wars does not effectively repair an individual's reputation, nor does it have the potential to provide any relief in the form of damages. *Id.*

[187] *See supra* Part III.A (discussing one of the non-legal measures Internet defamation victims can take). The effect of self-regulation in the realm of Internet defamation allows defendants too much free reign without consequence. *See supra* Part III.A. Defendants are not required to take any action to correct a false statement, which runs contrary to the expectations established by the common law doctrine of defamation. *See supra* Part II.C.1 (discussing the importance placed upon the ability to safeguard reputation).

[188] *See supra* note 63 (discussing the difficulty in correcting defamatory speech posted on another's website).

[189] *See supra* notes 97–99 (discussing how original source liability is not foreclosed by the provisions of the CDA which have been interpreted to allow only immunity for ISPs).

[190] *See supra* notes 97–99 (discussing how original source liability is not foreclosed by the provisions of the CDA which have only been interpreted to allow immunity for ISPs). However, the author suggests recent case law shows a move toward the imposition of injunctive orders on ISPs despite their ever-broadening immunity from liability for damages. *See infra* Part V.

[191] *See, e.g.*, Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

[192] *See supra* note 176 and accompanying text (describing the chilling effect too much regulation may have on the open Internet dialogue enjoyed by so many users today).

and foreclosure from recovery by the immunity granted online providers, the CDA has created little, if any, tangible recovery for online defamation victims through self-help methods.[193]

In conclusion, the principal weakness of the self-regulation argument is its complete separation from common law doctrines.[194] In fact, there is little reason to assume that the purpose behind defamation laws does not apply to postings on the Internet, just as there is little reason to presume that such Internet postings warrant less protection than other postings because of the medium involved.[195] This approach creates "a 'continuing race of offensive and defensive technologies's on the Internet . . . metaphorical to some and very real to others[] . . . it is a race in which no one should expect a final 'winner.'"[196] Indeed, this encouragement of bad behavior with little disincentive hardly provides even more minimal protection for reputational harms on the Internet than a more substantive, legal rules-based approaches might offer.[197]

B. Cyberlaws

A second approach to Internet regulation calls for new cyberlaws in cyberspace.[198] A cyberlaw approach seeks to address the new medium as well as the new types of relationships that exist in cyberspace.[199]

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[193] *See* Hughes, *supra* note 31, at 1367. The author suggests that based upon Internet demographic information many of the potential defendants to an Internet defamation suit are without the means to provide any tangible relief to the victims of their defamatory statements. *Id.* Without access to the deeper pockets of Internet ISPs and the nominal relief provided to those able to post replies or effectively access the same audience as the original message, plaintiffs are left with little available remedy to repair their reputation. *Id.*

[194] *See supra* Part II.C.1 (discussing the basic principles behind the law of defamation).

[195] *See supra* note 124 and accompanying text (discussing defamation law as striking a necessary balance between the preservation of one's reputation and the freedom of expression).

[196] *See* Hughes, *supra* note 31, at 368 (footnote omitted).

[197] *See supra* Part II.C.2 and accompanying text (discussing common law retraction statutes).

[198] *See* Johnson & Post, *supra* note 31, at 1367. *See also* Manish Lunker, Cyber Laws: A Global Perspective, http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN005846.pdf (last visited on Oct. 16, 2008). The concept of cyberlaw stems from the broad territorial reach of the Internet that creates a boundary-less medium and undercuts the "feasibility and legitimacy of applying laws based on geographic boundaries." *Id.* (emphasis omitted). This perspective suggests the enactment of necessary legislation in all countries for the prevention of computer related crime.

[199] *See* Johnson & Post, *supra* note 31, at 1367. In 1996, Johnson and Post characterized the virtual world as separate and apart from the "real world[,]" and they added that "[t]his new boundary defines a distinct Cyberspace that needs and can create its own law and legal institutions." *Id.* More specifically, the authors viewed the Internet as its own legal

Moreover, it recognizes the speed and volume of Internet-facilitated cross-border communication that may prevent adequate enforcement under existing legal rules.[200] However, this theory is largely based upon the fact that "[n]o one accidentally strays across the border into Cyberspace[,]" and implies the Internet is its own jurisdiction.[201] This Part explores the basic theory behind the cyberlaw approach and provides an examination of its inherent weaknesses relevant to the continued discussion of the best practices for the regulation of Internet content introduced in Part III.B.[202]

A strong argument against early conclusions regarding the need for cyberlaws is the seamless intertwinement of everyday life to the Internet, likely not considered more than ten years ago. The Internet has quickly crossed the threshold into the real world—technologically, socially, and economically.[203] Indeed, "[a]s our appliances [have] become 'smart,' our houses become [increasingly] 'wired,' our . . . cable, telephone, and Internet services bundle and unbundle," and with our life events "Googled" and "Facebooked," it becomes increasingly difficult to identify cyberspace as a separate and distinct world.[204] With the significant, and altogether seamless, contributions cyberspace makes in our everyday lives, few could be expected to know when they have left reality and entered the cyberspace jurisdiction—a picture message? or a phone call?[205] Likewise, few would expect their rights to be protected

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jurisdiction, a new sovereign within which lurked the opportunity to rethink law and implement more distinct and rational rules. *Id.*

[200] *Id.*

[201] *Id.* at 1379. *See generally supra* Part II.A (discussing the scope of the new Internet communities). The author of this Note suggests that the extent to which this underlying principle remains true today is in jeopardy. *See generally supra* Part II.A. With every new technological advancement, the line between the two separate and distinct jurisdictions envisioned by this approach becomes increasingly blurred. *See generally supra* Part II.A. Mobile computing has greatly advanced every day tasks to include networked connections that take place at the border of each virtual jurisdiction, therefore, as in the case of other legislative efforts to develop and enact laws that apply to cyberspace will be both daunting and likely plagued by the same inability to keep pace with the technology of the future. *See generally supra* Part II.A.

[202] *See infra* Part III.B.

[203] *See supra* note 7 and accompanying text (discussing the immersion of the Internet into entertainment, consumer spending, and popular culture).

[204] *See* Hughes, *supra* note 31. *See also supra* note 8 and accompanying text (discussing the Internet's effect on every aspect of our modern lives).

[205] *See supra* note 7 (the author of this Note comments on the seamless nature of the Internet and the increasing inability to separate out non-networked tasks for treatment by the common law). In addition, the author suggests that the creation of different rights to be applied in cyberspace would create an even greater incentive to perform tasks in the networked environment in an effort to take advantage of an underdeveloped legal framework. *See supra* note 7.

any differently in cyberspace than in other settings.[206] For example, when one completes a bank transaction online, would the bank or account holder expect that different set of laws will apply to that transaction that are distinct from those that apply to their transactions in local bank branches?[207] No, and similarly, no one would expect defamation law to treat postings on a school message board or locker in a particular state to be treated any differently than a posting on a virtual message board or blog from a computer in the same state.[208]

C. Traditional Legal Frameworks

The third approach to Internet regulation, proposing the use of traditional legal principles, suggests that the Internet should be treated no differently than previous telecommunications technology, such as Morse code or the telephone.[209] The Internet does not foreclose the application of pre-existing laws; something unlawful, regulated, or licensed does not become lawful, unregulated, and unlicensed merely because it occurs on the Internet.[210] Though faster and more comprehensive, the Internet still involves communication between individuals over distances.[211] Consequently, existing legal rules can be applied to the Internet.[212] However, there exists an interpretive concern

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[206] *See* Hughes, *supra* note 31, at 371 (making similar comparisons and conclusion in the area of online securities).

[207] *Id.*

[208] *Id.*; *see also* Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1147 (2000) (noting that "'cyberlaw,' or the 'law of the Internet,'" does not usefully exist. "Very few bodies of law are defined by their characteristic technologies. Tort law is not 'the law of the automobile,' even though the auto accident is the paradigmatic tort case. Nor is urban zoning 'the law of the elevator.'"); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (announcing that there was no more a "law of cyberspace" than there was a "Law of the Horse").

[209] *Id. See also* ANNA MANCINI, INTERNET JUSTICE: PHILOSOPHY OF THE LAW FOR THE VIRTUAL WORLD 76 (Buenos Books Americas LLC 2005). Mancini concludes that law and philosophy were conceived for a material economic world driven by scarcity and territoriality. *Id.* at 75–80. Without the criterion of territoriality, the dominant philosophies of law in the virtual world may be left bankrupt. *Id.* This is especially the case in pure theories of law, in which the territoriality criterion is the cornerstone. *Id.* Mancini proposes a philosophy of justice that is suited to the virtual world and would involve mapping traditional legal principles into international laws to cure territoriality issues that plague the Internet's development. *Id.*

[210] *Id.*

[211] *See supra* Part II.A (discussing the various forms of Internet communication that at their core simply allow individuals to reach and connect with others quickly over substantially large distances).

[212] *See supra* Part II.A (discussing the various forms of Internet communication that at its core simply allow individuals to reach and connect with others quickly over substantially large distances).

in this area wherein traditional legal principles have been applied inconsistently, particularly in the area of defamation law and retraction strategy.[213] Therefore, unlike the discussion of the flaws of a particular method in Parts III.A–B, this Part instead analyzes the inconsistent approach taken by the courts as a drawback to the application of traditional laws in Internet defamation cases.[214]

The uncertainty of the courts in both the *Cannon* and *It's in the Cards* Internet defamation lawsuits demonstrates that concerns regarding the application of traditional laws to the Internet are not merely theoretical.[215] In one instance, courts will protect individual Internet posters the same as their print and broadcast publishing counterparts,[216] but, as the second instance demonstrates, this may not always be the case.[217] Indeed, in many jurisdictions, retraction statutes do not extend to Internet publishing but instead make explicit reference to the statutes's application to print and broadcast media.[218] Therein lies the inconsistency in the application of traditional defamation law that must be reconciled—should retraction statutes apply to the Internet?[219] In other words, are the statutes's purposes and references broad enough to include online communications and flexible enough to work with existing laws?[220]

Based on the substance of the preceding analysis, the inconsistency in the courts's application of traditional retraction statutes in *Cannon* and *It's in the Cards* may be reconciled by examining the reasoning employed by each court.[221] In *Cannon*, the court explained that its decision to prohibit the plaintiff from collecting punitive damages was due to the

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[213] *See supra* Part II.C.2 (discussing the holding in *Cannon* which permitted the application of retraction statutes and the courts refusal to allow application of retraction statutes to Internet publications in *It's in the Cards*).

[214] *See infra* Part III.C.

[215] *See infra* Part II.C.2 (discussing the holding in *Cannon*, which held that traditional retraction laws also applied to the Internet, and the holding in *It's in the Cards*, which held traditional retraction laws do not apply to the Internet).

[216] *See supra* Part II.C.2.

[217] *See supra* Part II.C.2.

[218] *See supra* note 136 (discussing the various retraction statutes within the United States). In addition, some state defamation laws require that a retraction be requested prior to conferring any right to sue for defamation to the plaintiff. *See, e.g.*, Mathis v Cannon, 573 S.E.2d 376, 383 (2002) (holding that "OCGA § 51-5-11, the state retraction statute, provides that a plaintiff in any libel action shall not be entitled to any punitive damages if the defendant corrects and retracts the libelous statement 'in a regular issue of the newspaper or other publication in question' after receiving a written demand[]").

[219] *See infra* Part IV.

[220] *See infra* Part IV.

[221] *See supra* Part II.C.3 and accompanying text (discussing the facts and holding of both the *Cannon* and *It's in the Cards* decisions).

plaintiff's failure to request a retraction.[222] Indeed, in explaining its decision to prohibit the plaintiff from collecting punitive damages for failure to request a retraction, the court hoped to "encourage[] defamation victims to seek self-help, their first remedy, by 'using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.'"[223] The court, in encouraging the use of traditional defamation remedies in tandem with the notion of self-help remedies in cyberspace, hoped to "strike[] a balance in favor of 'uninhibited, robust, and wide-open' debate in an age of communications when 'anyone, anywhere in the world, with access to the Internet' can address a worldwide audience of readers in cyberspace."[224] By contrast, as previously discussed, the Court in *It's in the Cards*, rejected the application of traditional legal principles to cyberspace and called for the legislatures to enact new cyberlaws for the treatment of defamation on the Internet.[225]

At its core, the inconsistency between the following two cases can be attributed to, and resolved as, a conflict among regulatory methods.[226] In *Cannon*, the court pushed the use of traditional retraction statutes as a method for self-help, pulling together both the traditional law approach and the underlying self-help purpose of section 230.[227] However, in *It's in the Cards*, the court resorted to the previously discussed cyberlaws approach, calling for the legislature to enact laws that apply to the Internet and provide greater recognition of its unique characteristics.[228] In *Cannon,* the plaintiff was allowed recovery for the injury to his reputation, and to the contrary, in *It's in the Cards*, the plaintiff was denied recovery despite an extensive and well-developed body of common law defamation principles.[229] Thus, a rejection of the traditional

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222 *See supra* note 145 (describing the underlying reasons the court read the state retraction statute broadly to apply to all defamatory statements, including those by Mathis in his message board posting).

223 *See* Cannon v. Mathis, 573 S.E.2d 376 (Ga. 2002) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)).

224 *See* Cannon v. Mathis, 573 S.E.2d 376 (Ga. 2002) (quoting Reno v. ACLU, 521 U.S. 844, 851–53 (1997)); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

225 *See supra* note 154 and accompanying text (explaining the refusal by the Wisconsin Court of Appeals to apply present libel law to cyberspace).

226 *See supra* Part III.A (discussing three regulatory methods that have been applied to the Internet).

227 *See supra* note 145 and accompanying text.

228 *See supra* notes 151–54 and accompanying text.

229 *See supra* Part II.C.3 (discussing the facts of both *Cannon* and *It's in the Cards*).

law approach by the courts may yield perverse results in determining plaintiffs' recovery.[230]

The inherent problems with the self-regulation and cyberlaw approach and, in addition, the perverse results reached by the courts's inconsistent application of traditional defamation principles to the Internet have created both persistent and emerging problems.[231] As noted at the outset of this analysis, a workable solution is necessary to prevent the perverse effects of the current state of the law that deprives plaintiffs of any meaningful recovery for their injuries, and defendants of an opportunity to mitigate their damages.[232]

IV. CONTRIBUTION: PERSISTENT PROBLEMS, EMERGING PROBLEMS, AND MODEST RECOMMENDATIONS FOR A LASTING SOLUTION

Internet defamation jurisprudence is in general inconsistent, and many of the solutions proposed do not adequately track the primary goals of defamation actions, as discussed above, to provide vindication for one's good name.[233] The inconsistent Internet defamation principles stem from two competing interests. On the one hand, the interest is in preserving the free flow of communication on the Internet. The lack of regulation and the broad grant of section 230 immunity preclude many sources of online speech from liability for defamation in furtherance of this interest.[234] On the other hand, this first interest competes with the interest that victims of defamatory speech have in the vindication of their good name and other remedies. Taking this basic conflict into account, this Note recognizes the proper solution may require the law to take the middle ground—seeking a solution that allows cybertort defendants to mitigate their damages and provides incentives for correction, which may incidentally improve plaintiffs' abilities to receive some redress for their injuries.

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[230] Furthermore, the author suggests that the duplication of the court's decision in *It's in the Cards* or, alternatively, the legislature's failure to broaden existing retraction statutes may deny victims any chance of recovery under the traditional law approach. *See supra* note 137 (discussing the substance of state retraction statutes). Moreover, many states require that a plaintiff first demand a retraction prior to instituting an action for defamation that would further deny plaintiffs any meaningful recovery if the reasoning employed by the court in *It's in the Cards* is followed. *See supra* note 137.

[231] *See supra* Part III (discussing the drawbacks and inconsistency in the current regulatory approaches to Internet defamation).

[232] *See infra* Part V (discussing the author's mid-ground solution to the drawbacks and inconsistency that have prevented plaintiffs from meaningful recovery for cyberwrongs).

[233] *See supra* note 115 and accompanying text.

[234] *See supra* notes 97–104 (discussing the broad grant of immunity given ISPs under section 230 and the courts later interpretations).

Thus, this Part first briefly discusses the existing self-help provisions of section 230 and, subsequently, proposes and examines the benefits of a broad interpretation of traditional retraction statutes as an effective but modest approach that has the ability to work in tandem with this existing framework.[235] Prior to this discussion, it is conceded that this imperfect solution is not an answer that completely preserves either the interest in the preservation of speech, or, for that matter, the interest of persons harmed by defamatory online speech. Nevertheless, this solution creates a better balance of the conflicting interests at stake by providing the backing of a strong common law legal framework that has survived the prior innovations of radio and broadcast media, without resorting to drastic legal changes or less-than-effective inaction.

Under section 230, the current self-help model, ISPs are immune from liability in damages for defamatory content posted on their websites.[236] Despite the criticism in recent years to upend this *Zeran-Blumenthal-Barrett* interpretation of section 230, the courts' interpretation has instead extended the immunity granted and, as a result, parties defamed online have both retained formidable obstacles that must be overcome in seeking legal recourse and become the subject of ineffective self-help remedies.[237]

The *Zeran-Blumenthal-Barrett* interpretation continues to engage courts in the practice of denying victims of libelous speech any recourse in favor of the CDA's purpose of encouraging self-governance in the online environment.[238] In effect, Congress and the courts have underlined the notion that parties harmed by defamatory online speech can readily respond because the barriers to entry remain low, and

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[235] While a number of the provisions of the CDA were determined unconstitutional by the Supreme Court, the CDA remains a barrier to both further regulation and relief in online defamation lawsuits. *See supra* Part II.B.2. Therefore, the author suggests that any meaningful regulatory solution for this type of cyberwrong must take into account the limitations created by the CDA. *See supra* Part II.B.2.

[236] *See generally supra* Part II.B. *See also* Mainstream Loudoun v. Bd. of Trustees of Loudoun County Library, 24 F. Supp. 2d 552, 561 (E.D. Va. 1998) (suggesting that section 230 provides immunity from actions for damages but does not provide immunity for actions seeking declaratory or injunctive relief). If retraction statutes are broadened to cover Internet content, then this proposed solution would be the most effective solution in providing relief despite the immunity granted by the CDA. *Id.* In fact, if ISPs are subject to declaratory and injunctive relief, retraction statutes would allow demands for retraction to be made to the ISPs directly. *Id.* While many commentators have undertaken an extensive search to find ways in which ISPs can be engaged to regulate the Internet, this solution would accomplish that task in the area of defamation law. *Id.*

[237] *See generally supra* Part IV (analyzing the various approaches to Internet regulation).

[238] *See supra* Part II.B (discussing the *Zeran-Blumenthal-Barrett* interpretation of the provisions of the CDA).

significant technological ability is no longer needed.[239] Thus, while online content providers revel in the immunity granted under section 230, this approach alone neither repairs, nor prevents, the harm caused to victims of defamatory online speech.

However, despite the limitations created by the courts' interpretation of the CDA provisions, the legislature and the courts can tip the balance of interests in favor of providing plaintiffs adequate relief for damage caused to their reputation. By applying section 230 in tandem with traditional retraction statutes, this Note suggests that courts may be able to give legal effect to existing self-help remedies in the online environment.

While some interpretations of section 230 have merely protected the interests of online content providers, the additional self-help protections instructed by *Cannon*'s application of traditional retraction laws to the Internet create a workable solution for victims of online defamation. This solution both empowers defamed parties with the force of law and creates a cost-effective way for online speakers to minimize their liability. First, with the adoption of retraction statutes applicable to the Internet, a publisher of defamatory speech would be required to act, allowing for both recognition that the speech is harmful and for some vindication of an Internet defamation victim's reputation. Although it is still open to debate whether a retraction is sufficient to redress the wrong, the increased risk of judgment-proof defendants online may make retraction the best option toward receiving any relief, even if it is only minimal. Moreover, cyberspace as a low-cost medium allows for greater ease in retracting harmful speech online. Finally, it traces the beneficial bricks-and-mortar principles developed for the mitigation of damages incurred by Internet defendants sued for harmful speech and lessens the chilling effects associated with the cost of aversion.

In addition, retraction statutes may impose a minimal duty upon ISPs to respond if failure to do so would affect the plaintiff's ability to bring their lawsuit.[240] Under the current CDA model for immunity, ISPs are immune from damages and have yet to be held liable in actions for declaratory or injunctive relief.[241] Thus, this solution provides legal means to engage ISPs despite their long history of immunity from actions for damages. Moreover, this Note recognizes that applying

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[239] *See supra* notes 6–9 (discussing the demographics of Internet users); *see also supra* Part II.A.2 (discussing the ability for a large range of users to become Internet publishers given the accessibility and increasingly easy to use software applications).

[240] *See supra* note 137 (stating that some defamation actions cannot be brought until a retraction is first requested).

[241] *See Mainstream Loudoun*, 24 F. Supp. 2d at 561 (holding that ISPs are only immune from actions for damages under section 230).

retraction statutes in tandem with the CDA will provide necessary legal backing to the spirit of self-help, while recognizing that it is not a perfect solution to redressing the harm experienced by victims of defamatory speech. Nevertheless, this union brings greater balance to the interests of robust and wide-open debate online and redressing the harm felt by victims of online defamation.

Finally, this middle-ground approach carries with it the potential to engage ISPs, a solution that ultimately benefits both online speakers through the mitigation of punitive damages and those whom they defame by providing some retribution for their injury. Until the true implications of the Internet are realized in the years to come, this solution will provide the necessary relief from online defamation and offers an excellent alternative to hasty, comprehensive regulations.

The solution to the problem of defamatory online speech, given the diverse attempts to regulate the Internet that have created an uneasy landscape for further development, is not an easy one, but the timing is ripe for continued development of regulations. Currently, the state of Internet law remains at a juncture where hasty self-help legislation, not unlike the CDA, has created rights and immunities likely to continue to evolve. Moreover, the nature of this quickly expanding technology, although it has produced cries for reformation, is unlikely to be adequately served by a resort to the development of comprehensive legislation. This middle-ground solution—expanding the reach of retraction statutes developed at common law—though not without its flaws, seems plausible as a long-term solution to some of the current problems. Most importantly, this approach balances competing interests, utilizing existing regulatory frameworks and greater efficiency, flexibility, and predictability associated with traditional laws.

V. CONCLUSION

Internet defamation highlights the conflict between the rights of individuals to speak freely and the need of those individuals to protect their reputation. As the Internet continues to expand its reach technologically, socially, and economically, the problem of Internet defamation will no doubt continue. The consistent changes in the Internet's breadth and scope as a primary communication medium, including changes to its regulatory structure, pose serious questions as to the best practices for regulating this new online jurisdiction. Moreover, in this new environment, the protection of both free speech rights and individual reputations will require more vigilance on behalf of the courts and legislatures. However, until a comprehensive solution is reached,

the current self-help provisions of the CDA working alongside common law retraction statutes can provide a modest and effective solution.

As the hypothetical lawsuit presented in Part I reveals, self-help alone is not an effective alternative for individuals defamed online. As discussed, the common law retraction strategy developed with the intent to protect individuals and relieve misguided defendants from punitive damages. This principle has survived newspapers, radio, and broadcast television, and there is no reason to suggest it cannot do the same for the Internet. Working in tandem with the CDA's self-help purpose, a broad interpretation of state retraction statutes could provide the hypothetical law student discussed in Part I with the means necessary to engage ISPs and website owners, as well as users, to provide a true remedy for the harm caused.

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