

Chapter 5 The Role of Law

With so much data being collected about us and with anybody being able to disseminate it around the globe, is there anything we really can do to protect privacy? According to the science fiction writer and essayist David Brin, it is too late: "Light is going to shine into nearly every corner of our lives."¹ Scott McNealy, CEO of Sun Microsystems, has famously quipped: "You already have zero privacy. Get over it."² His stance reflects a view that many are increasingly sharing. Privacy is dead, they believe, and there's not much that can be done except deliver a eulogy and move on. Can anything be done? Is it possible for the law to protect us? Or should we just get over it?

A TRIP BACK TO THE NINETEENTH CENTURY

New technologies rarely give rise to questions we have never addressed before. More often they make the old questions more complex. Gossip, rumor, and shaming have been with us since the dawn of civilization. Although modern information technology has revolu-

tionized how we record and spread information, we have experienced similar revolutions in the past. More than a century ago, in the second half of the nineteenth century, we were in the throes of another information revolution—the rise of the newspaper. This revolution had its roots in the 1830s in England, with the innovation of the “penny press.” New printing technology enabled newspapers to be sold much more cheaply than ever before—for just a penny. These new papers were filled with news of scandals, family squabbles, public drunkenness, and petty crimes.³ They were tabloids, and people loved them.

It didn't take long for the penny press to come to America. In 1833 in New York, Benjamin Day published a newspaper called the *Sun* modeled on the English penny papers. With a cheap price and a heavy dose of sensationalism, the *Sun* quickly attracted many readers. When true lurid tales couldn't be found, *Sun* reporters would just make them up. One series of stories about creatures on the moon became known as the “moon hoax.” Circulation rates exploded, quickly surpassing those of the more traditional newspapers, which were referred to as the “qualities” or the “respectables.” Imitators soon followed—the *New York Herald*, the *New York Transcript*, and the *New York Graphic*, to name a few. And penny press papers sprung up in Boston and Philadelphia and other big cities as well.⁴ Charles Dickens depicted this frenzy of newspapers in his novel *Martin Chuzzlewit*. When Martin steps off a steamer from England to New York in the 1840s, he encounters a crowd of paperboys: “Here's this morning's New York Sewer!” cried one. “Here's this morning's New York Stabber! Here's the New York Family Spy! Here's the New York Private Listener! Here's the New York Peeper! Here's the New York Plunderer! Here's the New York Keyhole Reporter! Here's the New York Rowdy Journal!”⁵

This new breed of sensationalistic reportage, called “yellow journalism,” proliferated after the Civil War, when newspaper circulation continued to rise exponentially.⁶ Newspapers vigorously competed to capture the public interest and sell papers. The age of yellow journalism soon became dominated by Joseph Pulitzer and William Randolph Hearst, two titans who lorded over vast newspaper empires.

In the novelist Henry James's *The Reverberator*, written in 1888, a character proclaims the prevailing attitude of the media: “It ain't going to be possible to keep out anywhere the light of the press. Now what I'm going to do is to set up the biggest lamp yet made over and make it shine all over the place. We'll see who's private then.”⁷

The press came under sharp criticism for invading privacy. For example, when journalists converged around President Grover Cleveland's cottage while he was there on his honeymoon with his new wife and watched him with binoculars, the president complained that the press “in ghoulish glee desecrate every sacred relation of private life.”⁸

The media went into overdrive during the 1875 adultery trial of the Reverend Henry Ward Beecher, which one commentator describes as “one of the first great American media/privacy stories.”⁹ A masterful speaker during a time when the public was captivated by oratory, Beecher was one of the most famous and revered figures in America.¹⁰ To expose social hypocrisy about sex, the free-love proponent Victoria Woodhull revealed that Beecher was having an affair with Elizabeth Tilton, a member of his congregation and the wife of his friend Theodore Tilton.¹¹ The story received unprecedented media coverage. Before the trial, the Associated Press dispatched thirty reporters to cover Beecher's address before his church commission. Nearly all newspapers covered the trial, and some even printed daily transcripts. The trial ended with the jury deadlocked. Just fourteen minutes after the verdict was announced, one newspaper was already on the streets with the news.¹² A year afterward, Beecher lamented: “I have not been hunted as an eagle is hunted; I have not been pursued as a lion is pursued; I have not been pursued even as wolves and foxes. I have been pursued as if I were a maggot in a rotten corpse.”¹³

In addition to the voraciously sensationalistic press, other new technologies were posing an increasing threat to privacy. In 1876 Thomas Edison invented the telephone, allowing people to converse over great distances. A short time afterward, technology to wiretap phone conversations was developed.¹⁴

In 1884 Eastman Kodak Company came out with a new invention called the “snap camera.” Photography had been around since the mid-nineteenth century, but cameras were large and difficult to operate. People had to pose for a long time to have photos taken. Cameras were also expensive. As Robert Ellis Smith observes: “In the years before the development of photography in the mid-1800s, even mirrors were not universal in British and American home life. Imagine the realization that for the first time the very essence of your being—your visage—could be captured by someone else—used and controlled by someone else.”¹⁵ Kodak's snap camera was cheap and portable. Many more people could afford to own their own camera, and for the first time, candid photos of people could be taken.

In 1890 E. L. Godkin, a famous social commentator, complained that these developments were threatening privacy. According to Godkin, curiosity was

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An advertisement for the Kodak camera in 1889

the "chief enemy of privacy in modern life." Godkin noted that for a long time in history, gossip was oral and only slightly wounded the individual. But "gossip about private individuals is now printed, and makes its victim, with all his imperfections on his head, known to hundreds or thousands miles away from his place of abode." Godkin was not optimistic about finding a solution to these new threats to privacy. "In truth," he wrote, "there is only one remedy for the violations of the right to privacy within the reach of the American public, and that is but an imperfect one. It is to be found in attaching social discredit to invasions of it on the part of conductors of the press." Godkin did not foresee any plausible way to alter the current sensationalism of the press: "At present this check [of social discredit] can hardly be said to exist. It is to a large extent nullified by the fact that the offence is often pecuniarily profitable."¹⁶

Samuel Warren and Louis Brandeis were concerned about the same privacy problems as Godkin. Warren was a well-known Boston lawyer and socialite. Louis Brandeis was a brilliant young attorney who would later become a Supreme Court justice. Warren and Brandeis met in law school, where Warren read aloud Brandeis's law school assignments because Brandeis had poor eyesight.¹⁷ Brandeis finished first in his class, and Warren was second. They began practicing law together in Boston and cowrote a few law review articles in the late 1880s. Their first two articles were entitled "The Watuppa Pond Cases"

and "The Law of Ponds"; not surprisingly, these essays on pond law sank into obscurity.¹⁸ But for their third article, Warren and Brandeis turned to a much more gripping topic—privacy—and this would become one of the most famous law review articles of all time.

"The Right to Privacy" was published in the *Harvard Law Review* in 1890.¹⁹ The reason for their switching topics from ponds to privacy has long been the subject of a contentious debate. According to William Prosser, one of the most famous tort law scholars, the article was prompted by Warren's outrage over the media's snooping on his daughter's wedding. Prosser quipped that Warren's daughter had a "face that launched a thousand lawsuits."²⁰ But there's a problem with this theory: Warren's daughter was only about six years old in 1890.²¹ Instead, Warren and Brandeis's interest in privacy was probably sparked by a series of articles about Warren's dinner parties in a Boston high-society gossip rag.²²

More broadly, Warren and Brandeis were concerned about the sensationalistic press and new technologies such as the snap camera. "The press is overstepping in every direction the obvious bounds of propriety and of decency," Warren and Brandeis complained in the article. "Gossip is no longer the resource of the idle and of the vicious, but has become a trade." They observed that the problem of the increased commercial exploitation of the private life would be vastly heightened by the impact of new technologies: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"²³

At the time of their article, however, the snap camera was just a recent development and the media's use of candid photos wasn't much of a threat. In the late nineteenth century, few daily newspapers printed drawings, let alone photographs.²⁴ Warren and Brandeis, however, astutely recognized the potential for these new cameras to be used by the already sensationalistic press. Warren and Brandeis looked into the future and foresaw the paparazzi.

Unlike Godkin, Warren and Brandeis believed that law could provide a solution to these privacy problems. They observed that privacy invasions caused "mental pain and distress," an "injury to the feelings." The law didn't adequately protect against these kinds of injuries.²⁵ But they argued that the law could evolve to protect privacy. They explained that the law already protected "the more general right of the individual to be let alone," and that this right could be the foundation for new protections for privacy to develop. Warren

and Brandeis recommended a tort remedy for people whose privacy is invaded. A tort is a legal cause of action where people can sue others who have wronged them. If I wrongfully injure you, you can sue me for damages. Warren and Brandeis argued that a tort remedy should be available for privacy invasions—if I wrongfully invade your privacy, you should be able to sue me.

Warren and Brandeis's article was a big hit in the legal world. Between 1890 and 1900, more than ten articles examined Warren and Brandeis's proposal to create privacy torts.²⁶ Throughout the twentieth century, states began to recognize privacy torts as Warren and Brandeis had suggested. Today the vast majority of states have created tort actions in response to the Warren and Brandeis article.²⁷ Many commentators consider the article to be one of the primary foundations of privacy law in the United States. One famous scholar even declared that it was the "most influential law review article of all."²⁸

The debate in 1890 has many similarities to that of today. Warren and Brandeis were concerned about the incursions into privacy by the burgeoning print media, the most rapidly growing form of media in the late nineteenth century. Today we are experiencing the rapid rise of a new form of media—the Internet. There are those like Godkin, who say that there is little to be done. And there are those like Warren and Brandeis, who call for action. I side with Warren and Brandeis.

TYPES OF LEGAL APPROACHES

What can and should the law do? From the bird's-eye view, there are three basic approaches the law might take. First, the law could take a libertarian approach and remain as "hands off" as possible. Second, the law could adopt an authoritarian approach and attempt to radically limit the ability of people to spread information on the Internet. Or, third, the law could take some middle-ground approach between these extremes.

The Libertarian Approach

The law could adopt a libertarian approach, exercising great caution about hindering the flow of information. The libertarian approach reflects deeply rooted norms that developed among Internet users in the early days of the technology. At that time, the prevailing view was that the Internet was a free zone, and the law should keep out. People analogized the Internet to the Wild West.²⁹ One of the most famous and extreme statements of this view was John Perry Barlow's Declaration of the Independence of Cyberspace:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave me alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.³⁰

Commentators celebrated the openness and freedom that the Internet provided. For example, the cyberlaw scholars David Johnson and David Post argued that it was best to leave the government out of regulating the Internet, which would function best on its own.³¹

Although these attitudes have mellowed over time, the general view that the flow of information should remain free still persists. Consider the case of Laurie Garrett. A Pulitzer Prize-winning journalist, she attended the World Economic Forum in 2003 and wrote a candid email to a few friends about her experience.³² Among other things, she described her "hobnobbing with the ruling class":

A day spent with Bill Gates turned out to be fascinating and fun. I found the CEO of Heineken hilarious, and George Soros proved quite earnest about confronting AIDS. Vicente Fox—who I had breakfast with—proved sexy and smart like a—well, a fox. David Stern (Chair of the NBA) ran up and gave me a hug.

With uncommon candor, Garrett concluded: "The world isn't run by a clever cabal. It's run by about 5,000 bickering, sometimes charming, usually arrogant, mostly male people who are accustomed to living in either phenomenal wealth, or great personal power."

Somehow, Garrett's email got forwarded around to others, and eventually made it onto the Web, where it was reproduced on numerous websites and widely read and commented upon. Why did the email become so popular? One of the primary reasons was that Garrett was so frank and direct. These were Garrett's personal sentiments, not the kind of prose found in the typical journalism article. Ironically, the email's popularity stemmed from its not being written for popular consumption.

Garrett was aghast that her personal email had been broadcast to the world. She wrote a public letter to MetaFilter, one of the blogs where her email was being discussed. Garrett noted that when she found her email on the Internet

and “read the remarks, paranoid fantasies, speculations, derisions, insults, and Internet din,” she felt “considerable humiliation.” She further declared:

Let me be as clear as possible about this: The letter you are all clamoring over, parsing, deriding and fantasizing about was a personal note. It is a private letter that someone among my friends thoughtlessly, yet I am sure without any malice, forwarded to a couple of people who are strangers to me. And they, in turn, passed it on to more strangers, and so on. Now, to my deep embarrassment, and acute sense of invaded privacy, all of you—thousands of strangers—are dissecting my personal letter. I would never have written for public consumption in such a sloppy, candid, opinionated flip tone. This was never intended for your eyes.³³

The reaction she received from many online, however, was unsympathetic. One commenter replied:

Personally, I'm not sorry I read your email, but I'm sorry it was posted without your knowledge, and that some people said careless things about you. If you're looking for somewhere to shove the “blame” though, you may want to start closer to home.

Another commentator observed:

For a professional journalist, Ms Garrett has a pretty slipshod approach to protecting her own privacy. Because email is as insecure as it is, responsibility falls to the end user to protect their own privacy.

“Welcome to the 21st century,” yet another person wrote, chiding Garrett to stop “pining for a mythical 1979 in which privacy was universally respected and photocopiers didn't exist.”

As the cyberlaw scholar James Grimmelman aptly points out, the comments embodied a “classically techno-libertarian viewpoint” that holds that it is impossible to contain the spread of information and that the rapid dissemination of data is a good thing.³⁴

The problem with the libertarian approach is that it fully embraces the free flow of information and does little to protect privacy. The result of this “hands off” approach is that people who suffer the stings of gossip and rumor on the Internet have little redress. As I will show in the next chapter, gossip and rumor have substantial effects on people's freedom, autonomy, and self-development—the very same values that free speech protects.

The Authoritarian Approach

At the other end of the spectrum, the law could adopt an authoritarian approach. Such an approach is designed to employ strict controls over the spread of information. Authoritarian approaches employ censorship in an attempt to

halt the circulation of problematic information. Lawmakers often find such approaches appealing. For example, a bill in the United States House of Representatives would ban social network sites from public schools and libraries.³⁵ Some state legislatures are considering similar bills. Other authoritarian attempts at regulation have included bans on anonymous speech or criminal penalties for impersonating another online. For example, back in the mid-1990s, Georgia made it a crime to send any data through a computer network and falsely identify oneself. A federal court struck down the law as violating the constitutional right to free speech.³⁶

Authoritative approaches often wind up being more symbolic than effective, since the First Amendment stands in the way of many attempts at censorship. The authoritative approach can be oppressive and far too stifling of free speech. Attempts to ban social network sites from schools do little to stop students from using them. The use of the sites will simply migrate to places outside of school, where schools have even less control. In short, authoritative approaches attempt to address the problem in a broad and crude manner that is inconsistent with the U.S. Constitution.

Finding a Middle Ground

We need to find some middle ground between the libertarian and authoritarian approaches. A more moderate role for the law to take would be to help shape the norms that govern the circulation of information. As people are discovering the profound power to disseminate information across the planet, they often continue with gossip as if there were no difference between real-space and cyberspace. The law should ensure that people better understand the dramatic difference between gossip offline and online.

Tort law remedies—lawsuits—represent one possible middle-ground approach. They aren't authoritarian because they are initiated by individuals and are not systematic in their reach. There are many problems with lawsuits, which I will discuss, but we must evaluate any approach not in the abstract but as a practical choice among a set of imperfect alternatives.

The law currently protects the flow of personal information about people's reputations through defamation law as well as the invasion-of-privacy torts spawned by Warren and Brandeis's article. For this body of law to work effectively, however, two seemingly contradictory changes must be made. First, the law must be broadened significantly—especially the law of privacy. Second, the law must be restricted so that the lawsuit is employed only rarely to redress privacy invasions.

LEGAL PROTECTIONS OF PRIVACY AND REPUTATION

Throughout history, people have found some mechanism for vindicating their reputations. For centuries, European aristocrats defended their honor by dueling.³⁷ The duel, which originated in Italy around 1500, became immensely popular among European gentlemen, especially in the 1600s and 1700s. As one commentator observes: "In France alone, in just the twenty-one years of Henri IV's reign, 1589 to 1610, perhaps ten thousand gentlemen died for their honor."³⁸ Although today we think of dueling as barbaric, it was long considered to be a civilized and urbane way of resolving disputes, since the alternatives were sneak attacks and brawls.

A duel could be provoked by insult, defamation, or gossip. Even the slightest of insults could spark a duel. An elaborate set of rules, the "code duello," governed the practice. The offended person would issue the challenge, which involved the use of swords or pistols. Before a duel was fought, the parties exchanged letters and engaged in negotiations to see whether a reconciliation could be achieved. Each party had a "second," who functioned as his agent throughout the process. In many cases, the parties reached a settlement, with the offender admitting, for example, that a rumor was spurious without conceding that he had deliberately spread a lie.³⁹ Skillful seconds were adept at helping the parties reconcile, and one contemporary observer even remarked that "nine duels out of ten, if not ninety-nine out of a hundred, originate in the want of experience in the seconds."⁴⁰ "It is not the sword or the pistol that kills," another stated, "but the seconds."⁴¹

When dueling migrated to America, it became especially popular in the South, where lawyers, judges, politicians, and wealthy elites frequently engaged in the practice. Andrew Jackson allegedly engaged in more than a hundred duels before becoming president and even killed a man during one duel.⁴²

Although both the church and the law banned it, dueling persisted. As the eighteenth-century English legal scholar William Blackstone observed, until an alternative method could be found to redress the offended person, "the strongest prohibitions and penalties of the law will never be entirely effective to eradicate this unhappy custom."⁴³ In America every state prohibited dueling, but nobody seemed to care. A duelist who killed his opponent could face murder charges, but even this was an ineffective impediment, as juries would rarely convict.⁴⁴

One reason dueling was so difficult to stop was the tremendous social pres-



The duel between Alexander Hamilton and Aaron Burr

sure to defend one's honor. If a person wasn't willing to duel, he was thought to be spineless.⁴⁵ As Samuel Johnson once said, the gentleman duels "to avert the stigma of the world, and to prevent himself from being driven out of society."⁴⁶ Alexander Hamilton perished in a duel he didn't want to fight. When Aaron Burr challenged Hamilton to a duel in 1804, Hamilton wrote that he "abhor[red] the practice of dueling" but that he felt a "peculiar necessity not to decline the call." He explained that to remain "useful" in public affairs, he had to protect his reputation, which would be impugned if he refused Burr's challenge.⁴⁷ During the duel, Hamilton's shot missed (by some accounts his intention), but Burr's shot mortally wounded Hamilton.

An alternative to the duel was the courtroom. Lawsuits constituted a peaceful way to resolve disputes and keep people from resorting to violence. They substituted money for blood.⁴⁸ But many still believed that squabbles over reputation were "best resolved by extralegal means," and courts were a "last resort."⁴⁹ In the days of dueling, going to court was seen as cowardly and ineffective.⁵⁰ As one commentator has observed, "Duels were the only court available for retrieving your reputation with your peers."⁵¹

The historian Cynthia Kierner's fascinating account of a scandal in the 1790s involving Richard Randolph (brother of the famous politician John Randolph) reveals a lot about how people attempted to vindicate their reputation in postrevolutionary America. The Randolph family was one of the most elite families in Virginia. Rumors circulated that Richard Randolph had en-

gaged in an adulterous affair with his unmarried sister-in-law, Nancy, resulting in an unwanted pregnancy. Although the infant may have been miscarried or stillborn, Richard and Nancy were suspected of having aborted it.

Richard thought that Nancy's brother William was spreading these rumors. To defend himself, Richard published an open letter to the public in the principal newspaper of Virginia (it appeared just after news of King Louis XVI's beheading in Paris).⁵² In the letter, he indicated that he would be willing to duel to defend his reputation.

Richard didn't bring a defamation lawsuit because, as Kierner notes, "slander was a deeply gendered offense in eighteenth century America." For men, the most damaging attacks on their reputation impugned their honesty and trustworthiness; for women, the most harmful reputational assaults focused on their sexual activities. Therefore the sexual dimension to the scandal "undoubtedly deterred Richard from initiating legal proceedings against William Randolph."⁵³ Instead, Richard "waited for the local authorities to act and faced a criminal charge instead." Richard and Nancy were charged with the murder of their baby. They were acquitted, but the trial may have "enhanced the authority of the gossip and innuendo that he sought to discredit. . . . The court proceedings, far from silencing the rumors about him and Nancy, facilitated their circulation among a wider audience."⁵⁴

The Richard Randolph scandal illustrates the benefits and limitations of using the courts as an alternative to dueling. The courts could provide a more orderly and fair way to vindicate one's reputation, but they also could further spread the offensive information.

Courts eventually won out over the duel as the way to redress reputational harm. The death of Hamilton had a sobering effect on dueling in the North, where it largely ceased by 1850. Dueling in the South lasted longer but finally began to fade away after the Civil War. Many theories have been proposed for why dueling ended. One of the more convincing theories is the legal historian Alison LaCroix's contention that dueling diminished because the norms of honor governing gentlemen changed with increased commercial activity and industrialization. The qualities that people deemed important to reputation transformed from a more aristocratic sense of honor to factors that mattered in the marketplace. Impugning one's honor no longer was a big deal; instead, what mattered was damaging one's reputation for "creditworthiness." Dueling persisted longer in the South in part because the South remained more agrarian and honor-based than the North.⁵⁵ After the Civil War, another commen-

tator explains, many in the Southern aristocracy had been killed, and the South became "more urbanized and commercial, more open to ambitious businessmen" and "less hospitable to dueling."⁵⁶

For all their crudeness and barbarism, duels did serve an important function. As the historian David Parker notes, "The duel offered a highly effective tool for repairing a damaged reputation" because others in the aristocracy viewed one's willingness to duel as "evidence" of his "integrity and conviction" and because "an agreement to duel was also an agreement to end the polemic that gave rise to the duel." As Parker writes, "Ideally, a well-fought duel reconciled the two adversaries, reestablished mutual respect, and 'cleansed' the stain caused by the original insult. No lawsuit or libel prosecution was capable of producing the same effect."⁵⁷ Moreover, the law could not redress all of the harms redressed by duels. The kinds of insults that provoked duels would strike many of us as rather silly. Merely calling a person a "puppy," a "liar," or a "coward" could spark a duel.⁵⁸ South Carolina Governor John Lyde Wilson, in his 1858 guide to dueling, declared that "in cases where the laws of the country give no redress for injuries received, where public opinion not only authorizes but enjoins resistance, it is needless and a waste of time to denounce the practice [of dueling]."⁵⁹

But as America modernized, mere insults no longer seemed as damaging. Instead, what mattered to people's reputations were harms that would diminish their employment opportunities and economic success. Courts in defamation cases understood reputation more narrowly as "damage to an individual as a commercial actor" rather than more broadly as gentlemanly honor.⁶⁰

If there's a moral to the story of the demise of dueling and the rise of litigation, it is that every society needs some mechanism to resolve reputational harms. Duels served this function for centuries (albeit only for elites). Duels thus satisfied a social need. With the rise of the modern economy, honor ceased to be the core of a person's reputation, and dueling faded into obscurity. But something still had to serve as the vehicle for people to safeguard their reputations, and the courts became the main option.

Today, instead of guns and swords, people use lawyers. There are two main bodies of law available to people who sue because of information (or misinformation) being circulated about them—the law of privacy and the law of defamation. These two bodies of law serve as a primary tool for people to vindicate their reputations.

Defamation

The ancient law of defamation has long protected against spreading false rumors about a person. Defamation “exposes a person to hatred, contempt, ridicule, or obloquy, or causes him to be shunned and avoided.”⁶¹ President John Adams once stated that the “man . . . without attachment to reputation, or honor, is undone.”⁶² As one U.S. congressman remarked in 1794, “Slander is in a moral what poison is in a physical sense; it is the resource of cowards. It is a species of attack against which it is impossible to defend ourselves.”⁶³

Defamation law developed over the course of thousands of years. It existed in ancient Rome, which made certain kinds of defamation criminal offenses.⁶⁴ In the early Middle Ages, defamation was punished by cutting out the offender’s tongue. Later on in the Middle Ages, ecclesiastical courts began to punish defamation by requiring public penance.⁶⁵ Eventually, the state required defamers to pay damages and publicly admit to their lies.⁶⁶

Today, defamation law consists of two torts—libel and slander. Libel involves written or recorded words (newspaper articles, television broadcasts, and writing on the Internet). Slander involves oral communications and speech between individuals. For the law to kick in, a statement must be false and it must harm a person’s reputation.⁶⁷ The person making the defamatory statement must be at fault—if she reasonably believed the fact to be true, then she isn’t liable. It is up to the plaintiff to prove that the statement was false, and the speaker doesn’t have to vouch for its truth. If the statement is true, the plaintiff loses. Someone can be liable for defamation even for just spreading information originated by someone else.⁶⁸

Defamation law is a complicated and uncertain body of law. Entire treatises have been written on it. Critics call it a “forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities.”⁶⁹ Another First Amendment scholar writes: “The law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind.”⁷⁰ Beyond these complexities, defamation law has been limited by the Supreme Court in order to protect free speech. Even though these limits are substantial, the defamation torts remain quite powerful. For defamation on the Internet, however, the law is much more restricted. These restrictions, which I will discuss in the next chapter, make defamation law a relatively ineffective tool to protect against the spread of rumors on the Internet.

Invasion of Privacy

The second body of law available to protect reputation is the law of privacy. A number of torts evolved to protect privacy in response to the Warren and Brandeis article of 1890. These torts are referred to collectively as “invasion of privacy.” The privacy torts are a relatively young body of law, just over a century old. There are four torts in all: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false light; and (4) appropriation.⁷¹

The tort of intrusion protects against the intentional intrusion into one’s “solicitude or seclusion” or “his private affairs or concerns” that “would be highly offensive to a reasonable person.”⁷² This tort primarily redresses intrusive information gathering activities. The tort of false light protects against the spread of false, distorted, or misleading information about an individual that is “highly offensive to a reasonable person.”⁷³ False light has many similarities to defamation law.

The two most relevant privacy torts for addressing the spread of information online are appropriation and public disclosure. Appropriation protects against the use of a person’s name or likeness for the benefit of another.⁷⁴ For example, the tort allows someone to sue if her name or image is used in an advertisement without her consent. To be liable for appropriation, “the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff’s name or likeness.”⁷⁵

Another of the privacy torts is the tort of public disclosure of private facts, which provides a remedy when somebody widely discloses another person’s private information. The disclosure must be “highly offensive to a reasonable person” and “not of legitimate concern to the public.”⁷⁶ This tort can potentially be helpful in protecting our private lives from being splattered across the Internet. In contrast to defamation, which makes people liable for spreading falsehoods, the public-disclosure tort remedies the dissemination of truths.

Courts are uneasy about the privacy torts and have limited them in two fundamental ways. First, in the name of free speech, privacy law (as well as defamation law) has been severely restricted. Second, the law of privacy is being held back by narrow understandings of privacy. Many courts throw out lawsuits because they do not recognize a privacy violation. As a result, people suing under the privacy torts frequently lose their cases. The First Amendment scholar Rodney Smolla observes that if the Warren and Brandeis privacy torts

"were a stock, [their] performance over the last century would not be deemed impressive."⁷⁷

FINDING THE RIGHT ROLE FOR LAW

Although lawsuits based on defamation law and the privacy torts are key components of a middle-ground approach, we don't want to encourage a blizzard of lawsuits. Lawsuits are frightful monsters. They are expensive, imposing, and stressful. Merely being subjected to a lawsuit can be traumatic, let alone losing and having to pay damages. The threat of a lawsuit—even a lawsuit which a speaker or writer will ultimately win—can be damaging enough to make the potential defendant extra cautious.

One problem with lawsuits is abuse. For example, people can misuse defamation as a way to attack critics. Defamation law does not protect one from being the target of negative opinions, criticisms, satire, or insults. It protects one from having falsehoods spread that damage one's reputation. But people merely insulted by criticism or satire can overreact by filing an inappropriate defamation suit. Likewise, people may misuse invasion of privacy torts to attack speakers because they dislike criticism, not because of any privacy violation.

Lawsuits can chill speech. If it is too easy to win a lawsuit, people will sue too readily, causing people to refrain from engaging in candid robust speech for fear of being sued. The effect of too many lawsuits resembles that of the authoritative approach, impeding speech far too much. But without the threat of lawsuits, online speakers have no legal incentive to remove posts or to resolve disputes informally. And for egregious cases, we want the law to be involved.

Lawsuits hurt not only the speaker but also the person who is suing. Judge Richard Posner notes that privacy cases are rare because such a suit results in further publicizing the privacy violation.⁷⁸ When people sue, American courts are reluctant to allow them to conceal their names. As one court declared, "The use of fictitious names is disfavored" and will be allowed only under "exceptional circumstances."⁷⁹ In contrast, courts in many European countries are more willing to allow people to conceal their identities when suing, thus protecting plaintiffs from bringing more attention to the gossip they are trying to stop.

The American approach, however, penalizes people for using the law to protect their rights. In one recent defamation lawsuit, a man named Todd

sued the website Don't Date Him Girl for false statements about him appearing on the site. His profile contained his picture and the following comment:

This guy is a trip. In fact, screw trip, he's a DOG. He dated one of my friends. . . . that was before she found out he had dated half of Pittsburgh. . . . Often dresses shabbily for a lawyer—probably part of his disguise. He's in his 30s; AND he is believed to have HERPES. Stay away!

Another commentator stated:

DO NOT DATE HIM. He gave me an STD and dated 2 people at a time.

Yet another chimed in:

Dark and handsome ladies, he looks like a chocolate dream. Until you get to know him. His crib is a dump. He wears dirty clothes all the time. He's an attorney but you would never think so cause he complains about paying child support for his kids. He got hook-ups in every zipcode in the USA. He's hot. . . . DON'T LET HIM FOOL YOU GIRL!

Todd sued, claiming that these were lies, and he wanted to set the record straight. His decision to sue, however, was met with disdain in the blogosphere. One blogger wrote that before the lawsuit, he had never heard of Todd, but now "thousands of people who never would have seen the comments are left wondering if they're not true." The moral of the story, the blogger concluded, was: "Don't sue for defamation, because even if you win, you'll lose."⁸⁰ On another blog, one commentator wrote: "To me it is like rumors and people talking smack; the more you yell about it the more truthful it seems to others. Better to post a rebuttal on [Don't Date Him Girl] and let it die a more silent death."⁸¹ Yet another commentator said: "Hey Todd, I went to the website and read the comments about you. Big deal! You must be very thin-skinned. By suing you've brought the whole world's attention to the fact that four women don't like you. And believe me, bro, you're not helping yourself. My advice: just lay low for awhile so people will forget."⁸² Reaction to Todd's lawsuit in the blogosphere is similar to the reaction to many people who sue for privacy and defamation. Some people are sympathetic, but others ridicule the plaintiffs for bringing more attention to themselves.

The American rule is unproductive, and it cuts against people's right to obtain redress for damage to their reputation. More people should be allowed to sue without having their real names appear in the record. This would allow people to seek a remedy for the spread of information about them without having to increase the exposure of the information.

Even if this problem is resolved, other problems make bringing a lawsuit a losing strategy for a plaintiff. Unlike the mainstream media, many bloggers are amateurs without a lot of money to pay damages to an injured person. In one recent incident, a woman won an \$11.3 million verdict against another woman who posted messages on the Internet stating that the plaintiff was a “con artist” and a “fraud.” But the woman who posted the comments had no money to pay. She had lost her home in Hurricane Katrina, she couldn’t even afford a lawyer, and she didn’t even bother to show up for trial. So why did the victim bother to sue? Indeed, it cost her money to sue and she wound up losing money by pursuing the case. She explained: “I’m sure [the woman] doesn’t have \$1 million, let alone \$11 million, but the message is strong and clear. . . . People are using the Internet to destroy people they don’t like, and you can’t do that.”⁸³ As one lawyer candidly observes: “Rarely does a good defamation case walk in the door.”⁸⁴ Few plaintiffs win their cases in defamation suits. According to one estimate, only about 13 percent prevail in the end.⁸⁵ If you’re suing for the money, then defamation and privacy lawsuits are not particularly effective. So in cases where there isn’t a lot of money at stake, why would people sue?

The reason, I posit, is that people need to protect their reputations, and there are few alternatives besides bringing a lawsuit. Although in several cases, the law doesn’t provide financial redress, it establishes a forum for people to seek vindication. In one study of people suing for defamation, only 25 percent were primarily interested in getting money.⁸⁶ The law professor Jerome Barron notes: “Individuals increasingly use libel actions for purposes such as vindication, reprisal, response, and publicity.”⁸⁷ Lyrissa Lidsky, a defamation law scholar, notes that people sue primarily “to salve hurt feelings and express outrage at the misbehavior of defendants who publish false statements.”⁸⁸ Many plaintiffs want the gossip or rumor-mongering to stop and to be removed from the site. They want to be issued an apology. In other words, people resort to the law because they want a way to vindicate their reputations.

Ideally, the law can spur people to work out these disputes amicably before the lawsuit is brought. If we find a way to allow people to vindicate themselves, express their anger, and have the damage patched up at least to some degree, we can avoid a lot of litigation. People resort to lawsuits because of a lack of informal means to find resolutions, because there are no other good options.

The goal of the law should be to encourage the development of norms and to spur people to work out their disputes informally. Ideally, most problems would be dealt with between the parties without resort to law. We need some

legal remedies, however, for more extreme and harmful cases. We also need remedies for systematic infringers—those who repeatedly invade others’ privacy or facilitate shaming. The law should encourage websites to develop a process by which problems can be adjudicated and resolved, where bad information can quickly be taken down, and false statements can be corrected.

At its best, the law can achieve control without having to be invoked. This might sound paradoxical, but it is a rather obvious point. The best laws for addressing harms are ones that not only help fix the damage but also keep the harms from occurring in the first place. The most effective law rarely needs to be used, as the legal process is expensive and time-consuming. The law works best when it helps people resolve disputes outside the courtroom.

TOO MUCH LAW, TOO LITTLE LAW

In short, the law works best when it can hover as a threat in the background but allow most problems to be worked out informally. The threat of the lawsuit helps to keep people in check. Without the lawsuit threat, people who defame other people or invade their privacy can just thumb their nose at any complaints.

The problem, of course, is how to have lawsuits serve as a credible threat without being brought inappropriately. Under our current legal system, we have remedies for defamation and invasion of privacy, but as we have seen, these remedies are currently quite limited in their effectiveness, especially the law of privacy. The current law is too limited and restricted to serve as a tenable threat in many situations.

One problem with expanding the scope of legal protection, however, is that it might encourage more lawsuits. Make it too hard to sue, and the law ceases to be a credible threat. Make it too easy to sue, and lawsuits multiply like rabbits. How can we maintain the law as a credible threat yet keep lawsuits in check? I propose a requirement that a plaintiff first exhaust informal mechanisms for dealing with the problem. If the defendant agrees to remove the harmful information from the website, then this should be the end of the lawsuit unless the victim can demonstrate that merely taking down the offensive speech won’t sufficiently patch up the harm.

Under this system, before proceeding in a lawsuit, a plaintiff must prove that she first attempted to seek informal redress and that the defendant didn’t adequately attempt to provide a resolution. Or a plaintiff could also proceed if she established that the damage done was severe and irreparable—for ex-

ample, gossip that had already wreaked havoc that couldn't be undone by quietly removing the material from the site. In many cases, the gossip or rumor has not yet gone viral—it has not spread too far beyond the originating speaker. Although the Internet allows information to proliferate much faster than before, it has the virtue of allowing for an easier cleansing of gossip and rumor than does print, where retractions can be printed but the uncorrected publication still exists in circulation. Online postings, in contrast, can promptly be edited. The law should serve to induce people to edit their postings to eliminate harmful information about others.

Although in many cases, problems can be resolved before they spiral out of control, in other situations, it is too late. In several cases the information has become infectious and has spread far and wide, such as the video of the Star Wars Kid and the gossip by Jessica Cutler in her *Washingtonienne* blog. In these circumstances, there is no way to remove the information from the Internet. The damage is irreparable, and the lawsuit should be allowed to proceed even if the speaker subsequently removes the information from her site.

The law should also create incentives for parties to use what is known as "alternative dispute resolution." Parties can go to a mediator or arbitrator rather than go to court. In mediation and arbitration, a neutral person or group of people resolves the case. Mediation and arbitration are similar, but they differ in that mediation is nonbinding and arbitration is binding. Alternative dispute resolution might cut down considerably on the legal costs and allow disputes to be resolved more quickly.

Another possible method of cutting down on law's expense is to limit damages. Most people posting online have little money to pay. The threat of massive damages can unduly chill speech and make lawsuits more contentious. Limiting damages is designed not to trivialize the harm some people suffer to their reputations but to steer litigation toward resolving disputes more quickly and inexpensively. The primary goal of the law should be imparting a sense of responsibility on those who post online, deterring the spread of gossip and rumors in cyberspace, and creating incentives for parties to resolve their disputes informally. Large damage awards are not necessary to accomplish these goals. Exceptions could be made, however, for especially egregious cases or for speakers who demonstrate a pattern of abusive conduct.

Therefore the law should expand its protection against irresponsible Internet postings, but only after disputes have been proven insoluble via informal means or alternative dispute resolution. In other words, the law should cast a wider net, yet have a less painful bite.