FAST FORWARD FIFTY YEARS: PROTECTING UNINHIBITED, ROBUST, AND WIDE-OPEN DEBATE AFTER *NEW YORK TIMES CO. V. SULLIVAN*

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> "Voluntarily or not, we are all 'public' men to some degree."[1]
>
> -Justice William Brennan

I. INTRODUCTION

In September 2013, California Governor Jerry Brown signed into law SB 606, criminalizing attempts to photograph or videotape a child if the reason for doing so was because the child's parent is a celebrity or public official. Not surprisingly, the measure garnered significant support from Hollywood's elite, including legislative testimony from actress-moms Halle Berry and Jennifer Garner. Against the outcry of the California Broadcasters Association and the California Newspaper Publishers Association, the California Legislature approved the measure, which raises current penalties for first-time offenders to one year of incarceration and/or a $10,000 fine (up from a maximum of six months of incarceration and/or a $1,000 fine).[2]

The law, which will likely be challenged as an unconstitutional infringement on freedom of speech, separates out a class of children to be protected based on their parents' status as public people based on their employment.[3] Such a distinction—like the current distinctions between public and private plaintiffs in defamation and invasion of privacy cases—proves problematic in the age of the Internet for a variety of reasons.

As the development of, and reliance on, the Internet as a medium of mass communication has fueled instantaneous global communication, the geographic barriers to message transmission have dissipated. No longer are the foibles of a particular person

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[1] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) (plurality opinion).

[2] *California Governor Signs Law Aimed at Protecting Kids from Paparazzi*, REUTERS, Sept. 25, 2013, *available at* http://www.reuters.com/article/2013/09/25/us-usa-california-paparazzi-id USBRE98O04A20130925.

[3] At least one constitutional law scholar has said publicly that he believes the law is constitutional. University of California at Irvine Law School Dean Erwin Chemerinsky does not believe the law threatens freedom of speech, telling *Time* magazine, "it applies only to harassing behavior that is intentional, knowing and willful and directed at a specific child." Jens Erik Gould, *Paparazzi Crackdown: Can California Protect the Tots of Tinseltown?*, TIME (Nov. 17, 2013), http://nation.time.com/2013/11/17/paparazzi-crackdown-can-california-protect-the-tots-of-tinseltown/.

largely constrained to the personal or professional community to which they are geographically connected. Instead, these viral videos, emails and tweets can spread rapidly across the nation and around the globe. Take, for example, the recent controversy created by University of Missouri School of Journalism graduate Marina Shifrin, who perhaps foolhardily created a YouTube video of herself dancing to hip-hop artist Kanye West as a means of quitting her job.[4] Shifrin's escapade garnered more than 13.2 million views in under a week and made headlines on more than 300 news sites. It even prompted a response video from her former employer and a job offer from Queen Latifah. But amidst the media frenzy, some scurrilous remarks were also likely to surface, which begs the question of whether Shifrin's 1:45 minutes of fame would be enough to make her a public plaintiff for the purposes of a defamation lawsuit.

In the past, technological change has often been a catalyst for legal change. Take the invention of radio communication and the subsequent enactment of the Radio Act of 1912, which was followed by the creation of the Federal Radio Commission through the Radio Act of 1927. Consider the implications of cable television and its regulation through the Cable Communications Act of 1984. Clearly, the Internet has been no exception. All one has to do is scan the Supreme Court docket from its landmark ruling in *Reno v. ACLU*[5] to more recent decisions to realize the Internet's increasing impact on the law.

Although the law of defamation has been relatively stable since the Supreme Court's 1990 decision in *Milkovich v. Lorain Journal Co.*,[6] the lower federal courts as well as the state courts have been actively addressing an increasing number of defamation cases related to the rise in social media. Along with the uptick in these cases come additional complications that the Internet and new communication technologies have inserted into defamation law. Our ability to communicate instantly across geographic borders and to connect with old friends using social media has changed the

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[4] *This May Be the Coolest Way Ever To Quit Your Job*, HUFFINGTONPOST.COM (Sept. 29, 2013), http://www.huffingtonpost.com/2013/09/29/quit-your-job-kayne-dance_n_4013902.html.

[5] 521 U.S. 844 (1997).

[6] 497 U.S. 1 (1990).

way we think about community, moving us from a simple geographic analysis to a much more difficult determination.[7] The speed with which messages travel can amplify the amount of damage to reputation by increasing the number of people who come into contact with defamatory speech.[8] As a result, the traditional rules of defamation law must change to accommodate changes in how we communicate. The Internet has complicated the distinction between public and private figures in modern defamation law—a distinction critical to protecting free speech in a democratic society. To fully protect speech in light of these changes, I propose a return to the matter of public concern standard articulated by Justice Brennan in *Rosenbloom v. Metromedia, Inc.*[9] This standard creates a rebuttable presumption that would require all defamation plaintiffs to prove actual malice unless they can show the issue being discussed was not a matter of public concern.[10]

Part II of this Article examines *New York Times Co. v Sullivan*[11] and its progeny as the Supreme Court created the actual malice standard and extended it from public officials to public figures. Part III discusses the short-lived transition away from plaintiff status, exploring the Court's decision in *Rosenbloom*. Part IV applies Brennan's matter of public concern standard to modern-day, Internet-based communication, concluding that the number of public figures has increased exponentially. Part V explains how the matter of public concern standard dovetails nicely with foundational justifications for freedom of expression. Part VI discusses how adoption of the matter of public concern

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[7] For more on how the Internet has changed the notion of community as it applies in defamation law, see generally Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet,* 15 COMM. L. & POL'Y 231 (2010) (discussing court-adopted definitions of community and potential alternatives).

[8] For more on how the Internet has changed the notion of harm as it applies in defamation law, see generally Amy Kristin Sanders, *Defining Defamation: Evaluating Harm in the Age of the Internet*, 3 J. MEDIA L. & ETHICS 112 (2012) (addressing construction of "harm" in internet defamation context).

[9] 403 U.S. 29 (1971) (plurality opinion).

[10] *Id.* at 52 (explaining that plaintiff in a libel suit regarding his involvement in a matter of public concern must prove the material was published with knowledge or reckless disregard of its falsity).

[11] 376 U.S. 254 (1964).

standard might aid in the unification of defamation and privacy law.

II. *NEW YORK TIMES CO. V. SULLIVAN*: THE CREATION OF THE PUBLIC OFFICIAL

Prior to 1964, the law of defamation was well-settled and plaintiff-friendly, requiring proof only that the defendant had published a defamatory statement about the plaintiff. The Constitution, it seemed, did not play a role. Instead, the Court viewed the defamation tort as a creature of state law, subject to no First Amendment constraints. Justice William Brennan's oft-quoted majority opinion in *New York Times Co. v. Sullivan* dramatically changed the legal landscape, upending what attorneys knew about the common law tort by imposing the burden of proving actual malice upon plaintiffs classified as public officials.[12] Doing so, Justice Brennan noted, would protect core speech: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[13] The intention behind Justice Brennan's landmark decision was no doubt well-meaning. By instituting the actual malice requirement, the majority marked a dramatic victory for the institutional press, the publication of news, and the freedom of speech in general.

After *Sullivan,* a series of cases would continue to transform libel law, erecting a high hurdle over which nearly all plaintiffs would have to jump in order to prevail. In fall 1964, Justice Brennan penned the *Garrison v. Louisiana* decision for the Court, extending the *Sullivan* rule to a criminal libel case against a non-media defendant:[14]

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[12] *Id.* at 283.

[13] *Id.* at 270.

[14] 379 U.S. 64 (1964) (applying the *Sullivan* actual malice rule in a criminal libel action against a non-media defendant whose alleged defamatory statement was made at a press conference).

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded."[15]

The Court would go on, three years later, in *Curtis Publishing Co. v. Butts,* to apply the *Sullivan* rule in all cases involving public figures, a new class of plaintiffs the Court deemed sufficiently similar to public officials that they must prove actual malice to prevail.[16] To justify such a burden, Chief Justice Earl Warren, concurring, noted that public figures possessed significant access to the media to "both influence policy and counter criticism of their views and activities."[17] Similar to public officials, public figures played a role in shaping society, which created a strong public interest in their actions and activities.

III. *ROSENBLOOM V. METROMEDIA, INC.*: THE MATTER OF PUBLIC CONCERN STANDARD

For four years, the law of defamation as it applied to public plaintiffs seemed settled: the plaintiff status inquiry determined the level of fault a plaintiff would be required to prove. But that predictability began to unravel in 1971 when Justice Brennan, along with a plurality of the Court, shifted the focus away from plaintiff status and onto the nature of the speech involved in the litigation.[18] *Rosenbloom v. Metromedia, Inc.* involved media

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[15] *Id.* at 73–74 (quoting Rix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949)).

[16] 388 U.S. 130 (1967).

[17] *Id.* at 164 (Warren, C.J., concurring).

[18] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion).

coverage of the trial of a nude magazine distributor, whom the media referred to as a "smut distributor" and "girlie-book peddler," characterizing the materials being sold as "obscene."[19] Siding with the defendant, the plurality noted that the "determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases."[20] Justice Brennan suggested that "public or general concern" be construed broadly enough to include speech related to government, science, morality, and the arts.[21]

Comparing Justice Brennan's 1964 opinion in *Sullivan* and his 1971 decision in *Rosenbloom*, it becomes evident that Justice Brennan's shift in focus related largely to the distinction between what he believed should be private versus what he believed to be fair game for public discourse—turning the focus away from the plaintiff's status and onto the speech at hand. In *Rosenbloom*, he noted:

> Further reflection over the years since *New York Times* was decided persuades us that the view of 'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. . . . Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern.[22]

The Rosenbloom plurality clearly recognized a plaintiff's interest in personal privacy and reputational protection but believed such interests could, and should, be outweighed by society's interest in protecting speech on certain matters. Using

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[19] *Id.* at 36.

[20] *Id.* at 44–45.

[21] *Id.* at 48 (discussing why "public or general concern" inquiry is not concerned with fame of party allegedly libeled).

[22] *Id.* at 47–48.

previous cases that supported the publication of truthful speech, Justice Brennan crafted a highly speech-protective standard that placed a premium not on plaintiff status but instead on the importance of the speech to society.[23]

He wrote: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[24] In doing so, Justice Brennan aligned himself with a number of key theories that support freedom of expression, discussed further in Part V.

Justice Brennan's approach was not popular enough among members of the Court to garner a majority of the Justices, and the Court soon revisited the issue in *Gertz v. Welch*.[25] Justice Powell, writing for the majority, rejected the *Rosenbloom* approach, masterfully cobbling together an opinion predicated on the sympathies of certain justices who were concerned about a private individual's ability to protect his own reputation.[26] For Justice Powell, the line to be drawn between public and private plaintiffs seemed clear:

> Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.
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> With that caveat we have no difficulty in distinguishing among defamation plaintiffs.[27]

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[23] *Id.* at 51–52; *see, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publication as well as true ones.").

[24] *Rosenbloom*, 403 U.S. at 43 (plurality opinion).

[25] 418 U.S. 323 (1974).

[26] *Id.* at 346 (declaring that the *Rosenbloom* standard would unacceptably abridge the state's interest in preventing defamation).

[27] *Id.* at 343–44.

Subsequent case law suggests this distinction may have proved more challenging than Justice Powell initially predicted.[28] Numerous cases have made their way through the federal and state courts, requiring findings about whether doctors, teachers, and other plaintiffs constituted public figures who would be required to prove actual malice. A classic example of this quandary is documented in *Hutchinson v. Proxmire*, where the courts were asked to decide whether a research scientist and adjunct professor who received federal funding from the National Science Foundation, NASA, and the Office of Naval Research was a public figure for the purposes of a defamation lawsuit.[29] Using the *Gertz* analysis, the Court decided he was not a public figure.[30] Nonetheless, one could argue that the spending of federal funds on his research—which some considered to be wasteful government spending—would likely have met Justice Brennan's *Rosenbloom* standard as a matter of public concern.

The rise of technology only complicates this inquiry further. Take, for example, the case of Dr. Jerrold Darm, a plastic surgeon who sued a blogger after she asserted that Dr. Darm had been reprimanded for inappropriate sexual contact with female patients.[31] The blogger failed to mention that the doctor's ten-year suspension had been lifted two years prior to when she posted the assertion. Subsequent to the blog post and tweets about the post, the case received significant media attention. Current case law, including *Hutchinson,* makes it clear that subsequent media attention alone would not be enough to make Dr. Darm a public figure, but that does not end the inquiry. Before the case settled in late 2011, an Oregon district court judge ruled the issue was a matter of public interest and that Twitter was a public forum but did not address whether the plaintiff was a public figure.[32] Under

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[28] For an in-depth look at some of these cases, see generally Amy Kristin Sanders, *Defining Defamation: Plaintiff Status in the Age of the Internet*, 1 J. MEDIA L. & ETHICS 155 (2009) (discussing progression of Court doctrine regarding plaintiff status).

[29] 443 U.S. 111 (1979).

[30] *Id.* at 112–13.

[31] Sally Ho, *Oregon's First Twitter Libel Lawsuit Pits Tigard Doctor Against Portland Blogger*, OREGONIAN (Oct. 11, 2011, 9:19 AM), http://www.oregonlive.com/tigard/index.ssf/2011/10/oregons_first_twitter_libel_la.html.

[32] *Id.*

Rosenbloom, the district court's two findings alone would have been enough to require Dr. Darm to prove actual malice, further insulating Internet speech about what many would likely consider to be a matter of public concern: medical credentialing and practice.

But the *Gertz* holding leaves defamation law in a state of disarray and allows cases like those involving Dr. Darm to be determined largely by ad hoc decisions about the plaintiff's status. Further, the standard adopted in *Gertz* does not resonate with the uniformity needed to clarify defamation law in the era of Internet communication. Though *Gertz* made it clear that private plaintiffs could not succeed on a strict liability theory—presumably setting the minimum fault standard at negligence—it does not prevent states from setting a higher bar for plaintiffs of all types. Additionally, *Gertz* clarifies that certain damages will only be permitted on a showing of actual malice, establishing a de facto situation where attorneys must plead and prove actual malice in order to obtain the strongest damage award for their clients.

Although *Rosenbloom* faded quickly into the past with the *Gertz* decision, its impact on defamation law can still be seen in a number of states. At least five states have maintained standards more akin to *Rosenbloom* than *Gertz,* requiring all plaintiffs to prove actual malice in cases involving matters of public concern. The Colorado Supreme Court, for example, noted the difficulty in accommodating both First Amendment interests in public discourse and the state interest in protecting a private person's reputation in cases where a private person is defamed in relation to a matter of public concern:

> Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of

> lack of adequate compensation to a defamation-injured private individual.[33]

Colorado is not alone in taking this position. Courts in Alaska, Indiana, New Jersey, and New York have taken similar approaches, erring on the side of allowing judges to determine whether the speech concerns a matter of public interest. As an appellate court in Indiana noted:

> The general or public interest test for applying the "malice" privilege standard will involve the trial courts in the task of deciding what information is or is not relevant to the promotion of free expression. While it is true that this task will not always be easy, the courts have traditionally assumed the role of ultimate arbiters of disputes concerning conflicting constitutional policies. The contention that the judiciary will prove inadequate for such a role would be more persuasive were it not for the sizable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens. The public interest is necessarily broad; recent decisions dealing with a panoply of topics and events, ranging from organized crime to the quality of food served in a particular restaurant, will assist trial courts in defining the proper scope of the public interest test.[34]

To some extent, a return to the *Rosenbloom* standard would actually streamline the law of defamation by eliminating one time-consuming inquiry: the plaintiff status determination. Critics of *Rosenbloom* often suggest that the matter of public concern

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[33] Walker v. Colo. Springs Sun, Inc., 538 P.2d 450, 458 (Colo. 1975) (holding that when a defamatory statement has been published concerning a private individual, but involves a matter of public or general concern, the plaintiff is required to prove actual malice), *overruled on other grounds by* Diversified Mgmt., Inc. v. Denver Post, Inc., 653 P.2d 1103 (1982).

[34] AAFCO Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 321 N.E.2d 580, 590 (Ind. Ct. App. 1974).

inquiry is more problematic for courts, but they overlook the fact that such a determination is made in nearly all defamation cases that have been decided after *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[35] and *Philadelphia Newspapers, Inc. v. Hepps*.[36] In those cases, the Court made clear that the matter of public concern analysis would continue to play a role in defamation law.[37] Further, as will be discussed in Part VI, something akin to the matter of public concern analysis crops up in privacy cases when courts are asked to determine the newsworthiness of certain information. So despite Justice Powell's return to the plaintiff status distinctions that began with *Sullivan,* the matter of public concern inquiry lives on in defamation law long after *Rosenbloom* was overturned.

IV. ARE WE ALL PUBLIC FIGURES NOW? WHY BRENNAN GOT IT RIGHT IN *ROSENBLOOM*

When penning the *Sullivan* opinion, Justice Brennan and his eight colleagues clearly never envisioned the decline of the institutional press, let alone the impact of social media and other forms of instantaneous communication on society. After all, Massachusetts Institute of Technology professor Leonard Kleinrock had just published the first book on packet-switching theory, the foundational technology behind today's Internet,[38] the year that *Sullivan* was decided. Since that time, significant changes in how we communicate have occurred. But a close reading of *Sullivan* and *Rosenbloom* suggests Justice Brennan's desire to protect speech had little to do with the way it was published and much to do with the role the information played in society.

Although the institutional press still plays a major role in American society, that role has waned notably since the *Sullivan*

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[35] 472 U.S. 749 (1985).

[36] 475 U.S. 767 (1986).

[37] *See Dun*, 472 U.S. at 758–59 ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' "); *Phila. Newspapers*, 475 U.S. at 777 ("[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.").

[38] LEONARD KLEINROCK, COMMUNICATION NETS: STOCHASTIC MESSAGE FLOW AND DELAY (McGraw-Hill, New York, 1964).

decision. For example, in 2012, the Pew Research Center reported that only 23% of American adults surveyed reported reading a print newspaper (29% if including those who read newspapers online).[39] Some chalk this decline up to the rise in broadcast television, including local and national newscasts. But data indicate that daily newspaper circulation grew coming out of World War II through the 1970s.[40] From the 1970s to the 1990s, circulation remained relatively stable, with occasional small upticks.[41] Circulation dropped 1% per year from 1990 to 2002, and data suggest it continues to plummet.[42]

A decline in newspaper circulation is not conclusive proof that Americans are accessing less information or that news plays a less important role in society. In fact, many Americans are getting news and information from television. A 2013 survey found that television was the most popular source of news for Americans at home.[43] According to the report, 71% surveyed had watched a local television newscast in the past month.[44] Nearly two-thirds of Americans surveyed reported they had watched a network newscast in the past month.[45] Further, as Pew reports, the number of Americans who say they "enjoy reading a lot" has remained largely unchanged at 51%.[46] This suggests changes in where Americans are getting their content, moving away from the institutional press and seeking out non-traditional sources such as blogs, online publications, and social media.

Some research suggests that where a person lives impacts how they access information. A 2011 phone survey suggests that urban residents are more likely to get their news from a variety of digital platforms, including Twitter, blogs, and the websites of local news

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[39] *Number of Americans Who Read Print Newspapers Continues Decline*, PEW RESEARCH CENTER (Oct. 11, 2012), http://www.pewresearch.org/daily-numbers/number-of-americans-who-read-print-newspapers-continues-decline/.

[40] *Newspapers—Audience*, THE STATE OF THE MEDIA 2004, http://stateofthemedia.org/2004/overview/audience/ (last visited Mar. 15, 2014).

[41] *Id.*

[42] *Id.*

[43] Kenneth Olmstead et al., *How Americans Get TV News at Home*, PEW RESEARCH CENTER (Oct. 11, 2013), http://www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home/.

[44] *Id.*

[45] *Id.*

[46] PEW RESEARCH CENTER, *supra* note 39.

outlets.[47] Suburban residents are more likely to rely on local radio (perhaps because of commuting) but are also regular digital consumers of information.[48] Pew concludes that small-town and rural residents are more likely to rely on traditional news sources such as local newspapers and broadcast stations.

In addition to using digital means to access news and information, American adults are becoming more comfortable using these digital technologies to share information. By September 2013, 73% of online adults reported using a social networking site. Nearly 1 in 5 reported using Twitter. From February 2005 to May 2013, social networking use was up across all age groups of online adults surveyed, from 8% to 72%. These users are also sharing content in significant amounts. As of August 2012, 56% of online adults were either creating and publishing original content or curating and re-posting content they had found online.[49]

The Internet's impact on the distinction between what is properly viewed as public and what is private cannot be underestimated. As early as 1998, legal scholar Frederick Schauer noted "the Internet has changed our very conception of privacy itself."[50] Although writing in the context of invasion of privacy and the ability "to control the facts about one's life," Schauer's observations are clearly relevant to any meaningful discussion of defamation in the Internet age.[51] More than fifteen years ago, Schauer commented on the Internet's diminution of our zone of personal privacy, stating that technological developments could either empower those seeking to invade our privacy or unite those seeking to protect our privacy.[52]

I would argue that a third path—not mutually exclusive of the others—also exists. Technological developments could facilitate a

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[47] Carolyn Miller et al., *How People Get Local News and Information in Different Communities*, PEW RESEARCH CENTER (Sept. 26, 2012), http://www.pewinternet.org/2012/09/26/how-people-get-local-news-and-information-in-different-communities/.

[48] *Id.*

[49] *Social Networking Fact Sheet*, PEW INTERNET (Dec. 27, 2013), http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/.

[50] Frederick Schauer, *Internet Privacy and the Public-Private Distinction,* 38 JURIMETRICS J. 555–56 (1998).

[51] *Id.*

[52] *Id.* at 560.

cultural shift in the way some view privacy by creating what some scholars refer to as a "sharing" or "participatory" culture.[53] At the same time, it has perhaps also resulted in phenomenon others have referred to as "voyeur" culture.[54] Regardless of the terminology we decide to adopt, it is clear that many of us are growing conscious of these changes. More than 55% of adult Internet users reported taking steps to avoid being observed by specific people, organizations or the government, according to a September 2013 survey by the Pew Internet and American Life Project.[55] At the same time, teens are sharing more information about themselves online than ever before, according to a May 2013 survey by Pew.[56] Given those findings, it is not surprising that 6% of adult Internet users report having their reputations damaged because of something that happened online.[57] As tech writer Clive Thompson first noted in 2007, we are living in the age of the "microcelebrity."[58]

These changes in the media landscape have rendered the *Sullivan/Gertz* plaintiff status inquiry obsolete. A number of scholars have suggested the age of the "microcelebrity" has made it nearly impossible to distinguish between limited-purpose or involuntary public figures and private plaintiffs.[59] Instead of a world with a few well-known celebrities and millions of Average Joes, the digital media landscape has created a world of plaintiffs who fall in between, including reality TV stars, prominent bloggers, and the Internet's version of "one-hit" wonders. The creation of specialized communication tools has replaced the mass

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[53] S*ee generally* HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (New York Univ. Press 2006).

[54] *See generally* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE (Westview Press 2000).

[55] Lee Rainie et al., *Anonymity, Privacy, and Security Online*, PEW INTERNET (Sept. 5, 2013), http://pewinternet.org/Reports/2013/Anonymity-online.aspx.

[56] Mary Madden et al., *Teens, Social Media, and Privacy*, PEW INTERNET (May 21, 2013), http://pewinternet.org/~/media//Files/Reports/2013/PIP_TeensSocialMediaandPrivacy.pdf.

[57] *See* Rainie et al., *supra* note 55.

[58] Clive Thompson, *Clive Thompson on the Age of Microcelebrity: Why Everyone's a Little Brad Pitt*, WIRED (Nov. 27, 2007), http://www.wired.com/techbiz/people/magazine/15-12/st_thompson.

[59] *See, e.g.*, David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TELECOMM. & HIGH TECH. L. 403, 410 (2011) (arguing such changes render *Gertz*'s plaintiff categorization standard obsolete to the new media landscape and advent of digital media).

appeal of broadcasting with the ability to communicate to niche audiences, resulting in plaintiffs who are very well-known to small groups of people. These changes, it seems, have exponentially increased the number of limited-purpose and involuntary public figures. Thus, one could argue that, in our specialized communities, we are all public figures with regard to one topic or another. Given the courts' difficulties in drawing the line between private plaintiffs and limited-purpose or involuntary public figures, such a cultural change renders the plaintiff status distinction largely unworkable.

V. THE MATTER OF PUBLIC CONCERN STANDARD RESPECTS TRADITIONAL FREE SPEECH VALUES

Focusing on the importance of the speech at issue provides a better balance between protecting a person's reputation and preserving the First Amendment protections on expression. Many of the theories associated with the protection of free speech focus on the societal benefits of promoting speech. When striking down one of the first major restrictions on the Internet, Justice John Paul Stevens noted:

> [The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.[60]

The potential for the Internet to serve as a modern-day marketplace of ideas like the one envisioned by John Milton, John Stuart Mill, and Oliver Wendell Holmes is greater than ever

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[60] Reno v. ACLU, 521 U.S. 844, 870 (1997).

before. More Americans are using the Internet to access and disseminate information, giving them access to a form of mass communication in a way that was not possible in the past.

Although the marketplace metaphor has never existed in a perfect fashion, its current embodiment via the Internet provides more checks and balances on communication than we have seen in previous decades. Entire organizations dedicated to fact-checking have developed. Small citizens' groups centered on coverage of local issues have been formed. Entrepreneurial sites to fund ideas and innovation through small donations are thriving. Much of this suggests the Internet is functioning as a modern-day market allowing citizens from disparate backgrounds to exchange ideas as well as wares. As Justice Stevens so eloquently wrote: "[W]e presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[61]

The Court's free speech jurisprudence has long emphasized the role of freedom of speech in society—focusing not on the particulars of the speaker so much as the importance of the speech itself.[62] In fact, the Court has so revered the importance of the content of speech that strict scrutiny review places burdensome hurdles on those who seek to curtail speech based solely on its content.[63] Such an approach suggests the value that speech derives comes largely from the message it sends as opposed to the identity of the person communicating the message.

In the context of defamation, the Court has long recognized the societal benefits of protecting speech. Justice Brennan's majority opinion in *Sullivan* attempted to strike this balance, noting the importance of allowing criticism—even when it is unpleasant—against public officials. When the Court extended the actual

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[61] *Id.* at 885.

[62] *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected.").

[63] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 108 (applying strict scrutiny to laws establishing a financial disincentive to create or publish works with particular content).

malice rule to public figures, it noted their ability to seek self-help in the media. Now, more than ever, nearly all Americans enjoy that same self-help remedy through tools like social media and the non-institutional media.

A modern legal landscape must acknowledge the ways in which communication is changing. This includes shifts in how content is created, how content is consumed, and how content is disseminated. Media consumers of the twenty-first century can no longer rely on a singular news source to provide all the information necessary to make decisions. The media landscape no longer reflects the days when Walter Cronkite assured audiences, "And that's the way it is . . .," at the end of his broadcast. No longer do we live in a society where trust in a news source correlates to its status as a member of the institutional press.

Because of these changes, the law must embrace our culture of information sharing. It must operate in a way that allows us to re-imagine journalism as we knew it and embrace the journalism of the future. The law must focus on the protections that free speech and a free press (in whatever form it may take) need to ensure that U.S. citizens have access to the information they need to make informed decisions about their society.

VI. THE MATTER OF PUBLIC CONCERN STANDARD HELPS UNIFY DEFAMATION AND PRIVACY LAW

At nearly the same time the First Amendment's protections were woven into the fabric of defamation law, the Court was also tackling the emerging notions of the right to privacy. Both the privacy torts and defamation required the Court to strike a balance between protecting freedom of expression and protecting individual rights in reputation and privacy. But, by the end of the twentieth century, the concept of actual malice developed by the Court in *Sullivan* had taken root in the invasion of privacy and intentional infliction of emotional distress torts as well. Starting with *Time Inc. v. Hill*[64] and *Hustler Magazine, Inc. v. Falwell*,[65] the Supreme Court mandated the proof of actual malice in numerous instances, forcing courts once again to decide whether plaintiffs

[64] 385 U.S. 374 (1967).
[65] 485 U.S. 46 (1988).

like the Hill family or the Reverend Jerry Falwell would constitute public figures who must prove actual malice to recover.

In *Falwell*, the Supreme Court, broadened the application of the actual malice standard to cases involving intentional infliction of emotional distress, ruling that the First Amendment constrained such lawsuits when they involved public plaintiffs.[66] As the Court said in *Falwell*: "Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures."[67] The Court explicitly rejected a test based on outrageousness, noting concern about leaving such a question to the jury who might not view the speech as desirable:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[68]

In doing so, the Court emphasized the need to protect core speech even in instances that are objectionable. Such a focus recognizes the importance of the topic of the speech in addition to the plaintiff about whom the speech occurs.

In *Time Inc. v. Hill,* the Court once again returned to the subject matter of the speech at issue, noting that one result of being a part of society is exposure within that society.[69] It opined that the protections of actual malice need not be reserved solely for cases dealing with political or public affairs speech but that the protection must be broader:

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[66] *Id.* at 50.
[67] *Id.* at 53.
[68] *Id.* at 55.
[69] *Time*, 385 U.S. at 388.

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[70]

Although the Court's application of actual malice in the non-reputational torts seems clear, the reliance in privacy cases on the muddled defense of newsworthiness begs for clarity.[71] Instituting a matter of public concern test could solidify the Court's intent behind the newsworthiness defense, which seems to share similar themes, bringing a sense of uniformity across the speech-based torts constrained by the First Amendment. Given the First Amendment justification for protecting freedom of expression, it seems only logical that both analyses should aim to protect the same type of discourse. Although doing so requires the courts to determine how such speech would be assessed,[72] it does not appear to be an unworkable standard.

VII. CONCLUSION

As technology changes the way we communicate, so too must the law change to accommodate new technology. The actual malice standard created by the U.S. Supreme Court in *Sullivan* has become one of the most fundamental protections for freedom of

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[70] *Id.*

[71] A complete discussion of newsworthiness is outside the parameters of this piece, but a number of scholars have addressed the issue. *See, e.g.*, Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1041–42 (2009) (discussing how in recent years courts have become less deferential to journalists when it comes to newsworthiness).

[72] For more on how courts should evaluate whether matters are of public concern, see generally Amy Kristin Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, FIRST AMEND. L. REV. (forthcoming 2014).

expression in this country, converting what was once a pro-plaintiff tort at common law into a tort reserved to compensate those whose reputations are injured in only the most egregious of situations. As a result, the institutional press in the United States has enjoyed the freedom to promote "uninhibited, robust, and wide-open" debate and engage in "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[73]

But changes in the way we distribute and consume information have changed our communication culture. The Internet has transformed the United States from a country whose notion of community was largely influenced by geographic boundaries into one where instantaneous communication unites people across geographic and socioeconomic divides. It has created a culture of seeking and sharing that has resulted in Internet celebrities and viral videos. Let us hope these changes do not result in a legal system that uses the number of Facebook friends or "likes" a post receives to determine whether speech merits constitutional protection.

The modern First Amendment must not be about protecting discussion about a specific person in the same way the Court has interpreted the *Sullivan* decision. Instead, it must be about protecting discussion about specific topics, in the way Justice Brennan articulated matters of public concern in *Rosenbloom*. The modern First Amendment demands that we fight the trend that suggests the happenings of the microcelebrities are newsworthy and re-focus the law to protect discussion of political and social issues that affect the operation of this nation.

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[73] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).