OF REASONABLE READERS AND UNREASONABLE SPEAKERS: LIBEL LAW IN A NETWORKED WORLD

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OF REASONABLE READERS AND UNREASONABLE SPEAKERS: LIBEL LAW IN A NETWORKED WORLD[1]

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Social-media libel cases require courts to map existing defamation doctrines onto social-media fact patterns in ways that create adequate breathing space for expression without licensing character assassination. This Article explores these challenges by investigating developments involving two important constitutional doctrines—the so-called opinion privilege, which protects statements that are unverifiable or cannot be regarded as stating actual facts about a person, and the actual malice rule, which requires defamation plaintiffs who are public officials or public figures to prove that the defendant made a defamatory statement with knowledge of, or reckless disregard for, its falsity. Given the critical role these two constitutional doctrines play in protecting free expression, it is especially crucial that courts apply them in social-media cases with due regard for the unique aspects of the medium. This article's analysis of early social-media cases reveals that many—though by no means all—courts addressing these cases appreciate that social media are different than the media that preceded them. However, some of these courts have floundered in adapting constitutional doctrines. The Article addresses the most difficult new issues faced by courts and offers specific prescriptions for adapting the opinion privilege and actual malice rule to social media. It recommends that the opinion privilege be applied based on a thorough understanding of both the internal and external contexts of social-media expression and that this broad reading of the opinion privilege be offset by a narrow reading of actual malice in cases involving delusional or vengeful social-media speakers.

INTRODUCTION

IN 2014, a California jury rendered the first Twitter libel verdict in the country. Somewhat surprisingly, the jury found that iconoclastic celebrity Courtney Love did not defame her former attorney by tweeting that the attorney was "bought off."[2] Love's case was a signal moment in U.S.

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[1] Some of the cases discussed in this article were compiled by the authors for an outline distributed in connection with Practising Law Institute's "Communication Law in the Digital Age" continuing legal education program. *See* RonNell Andersen Jones & Lyrissa Barnett Lidsky, *Recent Developments in the Law of Social Media Communications—2014*, *in* 3 Comm. L. Digital Age 799 (2014).

defamation law, because it required a jury to consider for the first time how to interpret an allegedly libelous tweet. But Love's case is by no means unique. As the communications landscape shifts and the number of social-media libel cases grows, judges and juries will be forced to adapt and apply to speakers like Courtney Love constitutional doctrines originally developed to prevent libel judgments from chilling the speech of professional journalists.

This is no easy task. Applying libel law to cases involving social media is complicated, because social media differ from traditional mass media in a number of relevant respects. Social media are Internet and mobile-based technological platforms such as Facebook, Twitter, and Reddit that permit ordinary citizens to interact with others around the globe, using technology they carry in their pockets or handbags.[3] Social-media platforms make gathering and sharing information simple, inexpensive, and almost instantaneous. Thus, social media encourage informal and *unmediated, or disintermediated,* exchanges of ideas that transcend geographical, social, and cultural boundaries.

From a constitutional and public policy perspective, social media have the capacity to promote expressive freedoms in ways never previously imagined. Social media allow speakers to communicate information, thoughts, ideas, and images to mass audiences, and, at times, to mobilize those audiences to action.[4] On the other hand, social media magnify the potential for conflicts between free speech and the rights of individuals to be free from defamation and other forms of harmful expression. From a strictly statistical standpoint, social-media usage is increasing the number of libel lawsuits, because it exponentially expands the number of people disseminating speech to mass audiences.[5] Social-media outlets also multiply the vectors for defamatory speech, because the outlets encourage users to rate every person and experience they encounter and to do so in the most hyperbolic terms, all without the benefit of journalistic training or editorial oversight.[6]

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[2] *See* Eriq Gardner, *Courtney Love Wins Twitter Defamation Trial*, HOLLYWOOD REPORTER (Jan. 24, 2014, 5:03 PM), http://www.hollywoodreport er.com/thr-esq/courtney-love-wins-twitter-defamation-673972. For further discussion of the Love case, see *infra* Section III.

[3] Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010), http://www.michaelhaenlein.eu/Publications/Kaplan,%20Andreas%20-%20Users%20of%20the%20world,%20unite.pdf.

[4] *See generally* Lyrissa Barnett Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011) (discussing how citizens can use social media to spur government action and reform).

[5] Lyrissa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 945 (2000) [hereinafter *Silencing John Doe*].

[6] As of July 2015, for example, users of the online review site Yelp had written 61 million reviews of businesses ranging from hair salons to burger joints, and 138 million people in 29 countries visit Yelp monthly.

Social-media libel cases are just beginning to make their way into published judicial opinions around the world.[7] These cases require courts to map existing defamation doctrines onto social-media fact patterns in ways that create adequate breathing space for expression without licensing character assassination.[8] In the United States, the challenges are best illustrated by developments involving two important constitutional doctrines.

The first is the so-called opinion privilege, which protects statements that are unverifiable or cannot be regarded as stating actual facts about a person.[9] The second is the actual malice rule, which requires defamation plaintiffs who are public officials or public figures to prove that the defendant made a defamatory statement with knowledge of, or reckless disregard for, its falsity.[10] Given the critical role these two constitutional doctrines play in protecting free expression, it is especially crucial that courts apply them in social-media cases with due regard for the unique aspects of the medium. This article's analysis of early social-media cases reveals that many—though by no means all—courts addressing these cases seem to appreciate that social media are different than the media that preceded them. However, some of these courts have floundered in adapting constitutional doctrines.

To assist future courts, this article offers specific prescriptions for how to adapt the opinion privilege and actual malice rule to social media. First, judges must reshape and broadly apply the opinion privilege – the constitutional doctrine protecting statements that are unverifiable or cannot be interpreted as stating actual facts – based on a thorough under-

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[7] For example, Australia's first Twitter defamation case to proceed to full trial ended in judgment for the plaintiff, a New South Wales teacher, in late 2013. Michaela Whitbourn, *The Tweet That Cost $105,000*, SYDNEY MORNING HERALD (Mar. 4, 2014), http://www.smh.com.au/technology/technology-news/The-tweet-that-cost-105000-20140304-341kl.html. And in early 2014, a British court ordered a mother in a "landmark" Facebook libel case to pay for defamatory statements made only to Facebook "friends" on a "locked" Facebook profile. David Churchill, *Mother Faces Paying £20,000 Damages over Facebook "Libel,"* LONDON EVENING STANDARD (Feb. 21, 2014), http://www.standard.co.uk/news/uk/mother-faces-paying-20000-damages-over-facebook-libel-9114217.html. The United States calibrates the balance between free expression and reputation differently than many countries around the world, in part because the United States Supreme Court has interpreted the First Amendment as limiting the ability of state common law to safeguard reputation. *See generally* Frederick Schauer, *The Exceptional First Amendment* (Kennedy Sch. of Gov't Fac. Res. Working Paper Series, Paper No. RWP05-021, 2005).

[8] *See, e.g.*, Obsidian Fin. Grp., L.L.C. v. Cox, 740 F.3d 1284 (9th Cir. 2014); Seaton v. TripAdvisor, L.L.C., 728 F.3d 592 (6th Cir. 2013); Redmond v. Gawker Media, L.L.C., No. CGC–11–508414, 2012 WL 3243507 (Cal. Ct. App. Aug. 10, 2012).

[9] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20–21 (1990).

[10] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).

standing of both the internal and external contexts of social-media expression. These contexts include the conventions of discourse within social media generally, and within specific social-media platforms, as well as the technological architecture of different social-media platforms. By taking account of the unique contexts within social media, courts can ensure adequate breathing space for expression.

Second, this broad reading of the opinion privilege should be offset by a narrow reading of actual malice in cases involving defendants like Courtney Love. In such cases, courts should be cognizant that social media sometimes allow delusional or vengeful speakers to engage in campaigns of character assassination. Thus, courts should narrowly apply the actual malice rule to prevent the delusional speaker from escaping liability simply because she believed the defamatory accusations she invented about public figures or public officials.

I. CONTEXT MATTERS: APPLYING THE OPINION PRIVILEGE TO SOCIAL-MEDIA FORUMS

The central question in all defamation cases is whether the defendant's published or posted statement was false and defamatory.[11] When addressing this question, the U.S. Supreme Court has directed lower courts that the First Amendment bars holding speakers liable for defamation when they publish or post statements about matters of public concern that are unverifiable (not provable as false) or cannot reasonably be interpreted as stating actual facts about the plaintiff.[12] This doctrine,[13]

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[11] The common law defines a defamatory statement as one that harms an individual in the eyes of his or her community. For example, the Restatement (Second) of Torts §559 defines a defamatory statement as one that "harm[s] the reputation of another so as to lower him in the estimation of the community or . . . deter third persons from associating or dealing with him." However, as explained in this section, the Supreme Court's First Amendment jurisprudence prevents courts from treating as defamatory statements that are not probably false or cannot reasonably be interpreted as stating actual facts. *See generally* LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE OF THE UNITED STATES CONSTITUTION 67, 74 (Jack Stark ed., 2004) [hereinafter FREEDOM OF THE PRESS].

[12] Milkovich, 497 U.S. at 18 (noting that there is no "wholesale defamation exemption for anything that might be labeled 'opinion,'" but explaining that precedent protects statements on matters of public concern that do not imply a false assertion of fact). *See also id.* at 20 (holding that statements are constitutionally protected if they are not "provable as false" or cannot "'reasonably [be] interpreted as stating actual facts' about an individual"); *Silencing John Doe*, supra note 5 (extensively discussing the application of the constitutional opinion privilege in the online context).

[13] While rooted in common law, this doctrine is distinct from the common law protections surrounding fair comment. *See* MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW: CASES AND

known as the opinion privilege, requires courts to place themselves in the shoes of reasonable readers of the allegedly defamatory statement[14] to determine whether a defendant's allegedly defamatory statement is capable of being proven false, or whether it might be construed as satire, parody, hyperbole, or another type of figurative speech.[15] Determining whether a statement published in a newspaper or magazine falls into one of these categories requires close consideration of the exact language used, as well as the internal and external context.[16] Put another way, the allegedly defamatory statement's meaning is a function of both the verbal and social context of the statement.[17]

Contextual clues are equally crucial in interpreting allegedly defamatory statements made in social media, but internal and external contexts are often different. Thus, if courts are to give sufficient breathing space for expression in social media, they should not simply interpret

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MATERIALS 246 (8th ed. 2011) (discussing the origins of the common law fair comment privilege) [hereinafter MASS MEDIA LAW].

[14] In the new social-media landscape, as has always been the case in defamation law, courts would do well to remember that there is no such thing as a reasonable reader: the reasonable reader, like the reasonable person of tort law, is a legal construct. The reasonable reader is not the average reader but is instead a hypothesized reader who is a sophisticated decoder of the contextual clues provided to reach the meaning that social norms suggest she should reach. *See* David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 104 (1991). By the same logic, the reasonable reader of social-media texts is one who decodes them consistently with sophisticated actual readers—those aware of discourses conventions within the medium and the technological architectures that may alter meaning. Determining meaning according to this hypothesized reasonable reader protects important public policy interests, including safeguarding the vitality of discourse both in traditional and new media of expression. *See* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 842 (2010) (noting that the Supreme Court has "clearly endorsed the principle that speakers should not be liable for 'mis-readings' of their speech by idiosyncratic or unsophisticated audience members" because imposing such liability would leave insufficient breathing space for free expression). In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007), Chief Justice Roberts, joined by Justice Alito, explained that the First Amendment requires the line between protected and unprotected political speech to be drawn based on a reasonable interpretation of what the effect on the audience was likely to be rather than the actual effects. Otherwise, the search for empirical evidence of "actual effects" would be likely to "chill a substantial amount of political speech." *Id.*

[15] *Milkovich*, 497 U.S. at 20. *See also Silencing John Doe, supra* note 5, at 926 (discussing the scope of the opinion privilege).

[16] *See* Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. CIN. L. REV. 863, 876 (2003).

[17] *See* Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 346–47 (1999).

tweets or Facebook posts in light of the conventions of traditional print media. In addition to the specific language that comprises each statement, courts must become familiar with the architectural constraints that govern social-media usage, conventions of discourse within each social forum, and even patterns of communication between different subgroups within the particular medium.

A. Considering the Internal Context of Social Media

1. Character Limits and Strings of Tweets

The architectural features of most social-media applications form one aspect of the internal context of statements made on social media. These architectures often significantly constrain the context, complicating the determination of whether an allegedly defamatory statement is constitutionally protected opinion. For example, consider Twitter's 140-character limit on posts. A speaker has little opportunity to provide context or to mark her post clearly as hyperbole in a 140-character tweet. Therefore, to determine whether the defendant's tweet was constitutionally protected opinion, a court should examine the defendant's entire string of tweets and the tweets to which she was responding. A subsequent tweet might defuse the defamatory sting of the original and at least should be relevant to whether the defendant knew of, or recklessly disregarded, falsity, or whether the defendant attempted a retraction. However, it is important to note that not all readers of the original tweet will read subsequent tweets, even though they have the option.

From this perspective, Twitter libel cases are analogous to cases involving defamatory meanings that arise in newspaper headlines, in which courts typically consider the allegedly defamatory headline within the broader context of the article of which it is a part.[18] Or, as one court stated, "defamatory meaning must be found, if at all, in a reading of the publication as a whole"[19] rather than "snippets taken out of context."[20]

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[18] *See, e.g.,* Sprouse v. Clay Commc'n, Inc., 211 S.E. 2d 674, 686 (W. Va. 1974), *cert. denied,* 423 U.S. 882 (1975); King, *supra* note 16; Leonard M. Niehoff, Viewpoint, *Opinions, Implications, and Confusions,* 28 COMM. LAW. 19 (2011):

> The law of defamation assumes, for example, that those who read an article in a newspaper do not just look at the headline; they read the entire piece; they take statements in context; they give words their fair and usual meaning. We understand that the law here indulges in a fiction—perhaps even an extravagant one—and it may well be the case that most readers do not do any of these things, let alone all of them. But the alternative is to allow for a form of heckler's veto, where the predispositions and personalities of a less-than-ideal audience determine the rights of the speaker.

[19] Kaelin v. Globe Commc'ns Corp., 162 F.3d 1036, 1040 (9th Cir. 1998).

Courts examine the totality of the circumstances of publication, including the "nature and full content of the communication [and] the knowledge and understanding of the audience to whom the publication was directed."[21] This contextual approach applies even when some readers might only see the headline "standing alone" without reading the full article.[22] By analogy, courts should determine the meaning of a tweet—and whether that meaning is defamatory—by examining the entire context of the tweet, which would include the string of tweets of which it is a part and the chronology of that string. This contextual approach may leave some reputational harm uncompensated, at least where a portion of the audience unreasonably interprets the defendant's tweet outside its full internal context; however, this approach is necessary if freedom of expression in social media is to be "uninhibited, robust, and wide open."[23]

Some courts have begun to recognize that the comment-thread infrastructure of many social-media platforms can offer an important contextual clue on the question of whether a statement constitutes an assertion of defamatory fact or an expression of protected opinion. In *Feld v. Conway*,[24] a Massachusetts district court judge was confronted with an allegedly defamatory tweet arising out of a dispute over a thoroughbred horse belonging to the plaintiff, which had been mistakenly shipped to a horse auction and possibly slaughtered. The story of the mistake spread quickly online, eventually producing a heated debate in forums used by the thoroughbred horseracing community.[25] In the course of the debate, the defendant weighed in: in a tweet, defendant addressed the plaintiff by name and then stated, "you are fucking crazy!"[26] The plaintiff argued that the comment constituted a defamatory factual assertion about her

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[20] *Id.*

[21] Balzaga v. Fox News Network, L.L.C., 173 Cal. App. 4th 1325, 1338 (4th Dist. 2009).

[22] Kaelin v. Globe Commc'ns. Corp., 162 F.3d 1036, 1041 (9th Cir. 1998) (citing Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997). *See also Balzaga*, 173 Cal. App. 4th at 1339 ("the fact that a statement '[s]tanding alone' could be construed as false is not sufficient to support a defamation claim"); Clay Calvert, Daniel Axelrod, Sarah Papadelias & Linda Riedemann, *Bag Men and the Ghost of Richard Jewell: Some Legal and Ethical Lessons About Implied Defamation, Headlines, and Reporting on Breaking Criminal Activity from Barhoum v. NYP Holdings*, 36 HASTINGS COMM. & ENT. L.J. 407 (2014); Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. CIN. L. REV. 863 (2003).

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

[24] 16 F.Supp.3d 1 (D. Mass. 2014).

[25] *Id.* at 2.

[26] *Id.*

sanity that harmed her professional reputation because it appeared when her name was entered into Internet search engines.[27]

The *Feld* court rejected the argument that the tweet was defamatory. The court emphasized that distinguishing hyperbole from assertion of defamatory fact requires "examin[ing] the statement in its totality and in the context in which it was uttered or published" and "consider[ing] all the words used ... [and] all of the circumstances surrounding the statement."[28] In the social-media setting, the court noted, this means that a "tweet cannot be read in isolation, but in the context of the entire discussion."[29] Because the larger thread of tweets of which it was a part was an extensive, emotional debate about the plaintiff's potential responsibility for the horse's disappearance, the comment, "when viewed in that context, [could not] reasonably be understood to state actual facts about the plaintiff's mental state."[30] Instead, it was "obviously intended as criticism—that is, as opinion" about the larger discussion matter within the thread. The court suggested that refusing to read the words of the individual tweet literally, and instead consulting the full thread to lend context, is the "way in which a reasonable person would interpret it."[31] In other words, the court interpreted the individual tweet within its architecturally defined internal context.

2. The Role of Hyperlinks

The hyperlink is another architectural or technical feature of social media that potentially amplifies the surrounding context of an allegedly defamatory tweet or post. The approach of a California appellate court in the non-precedential case of Redmond v. Gawker Media is instructive as a method for applying the opinion privilege in light of the broader context added to allegedly defamatory statements by hyperlinks.32 In that case, the chief executive officer of various tech startup companies sued for libel and false light after the tech blog Gizmodo posted an article suggesting he used "technobabble" to promote products that were not "technologically feasible."33 The article also stated that the CEO's "ventures rarely—if ever—work"34 and that the CEO's business model was a scam.35 After the CEO complained to Gizmodo in a lengthy email, Gizmodo posted the email on its site. The CEO sued Gizmodo's parent

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[27] *Id.* at 3.

[28] *Id.* (quoting Yohe v. Nugent, 321 F.3d 35, 41 (1st Cir. 2003) (some alterations in original)).

[29] *Id.* at 4.

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

[31] *Id.*

[32] No. CGC–11–508414, 2012 WL 3243507, at *5–*7 (Cal. Ct. App. Aug. 10, 2012).

[33] *Id.* at *1.

[34] *Id.*

[35] *Id.* at *2.

company Gawker and the authors of the post. Defendants filed a motion to strike under California's anti-SLAPP statute.[36] The trial court granted the motion, and the California appellate court affirmed.

In concluding that the statements were opinion, the court relied on the nature of the blog and the linguistic style of the posts.[37] The court found that the Gizmodo post concerned an "issue of public interest" and the article's use of the term "scam" was not defamatory when read in context.[38] The court noted that "'scam' means different things to different people, and it is used to describe a range of conduct," and the authors gave links to "evidence" supporting their use of the term "scam."[39] The court also stated that the term "scam" was mere opinion because it was "incapable of being proven true or false," a conclusion apparently influenced by the online context.[40] Moreover, the authors used "qualifying language" and emphasized that they "were expressing their personal, subjective perspective rather than declaring objective facts."[41] The style of the post also influenced the court's decision: the post's "casual first-person style" made "little pretense of objectivity."[42]

In reaching this conclusion, the court placed heavy emphasis on the presence of hyperlinks throughout the blog posts.[43] The court concluded that the allegedly defamatory post contained only statements of opinion because it was "completely transparent," revealing all the "sources upon which the authors rel[ied] for their conclusions" and containing "active links to many of the original sources."[44] Therefore, the article "put [readers] in a position to draw their own conclusions about [the CEO] and his ventures."[45] As a result, the court concluded that the Gizmodo post "c[ould] not provide the basis for a successful libel suit."[46] As this case indicates, extensive linking to original sources—which is easy to do in some social-media applications—should often help defendants escape

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[36] *Id.* SLAPP is an acronym for Strategic Lawsuit Against Public Participation. Anti-SLAPP statutes are designed to protect speakers from groundless libel suits filed by their adversaries solely to chill their speech on matters of public concern. Typically, an anti-SLAPP statute permits a libel defendant to file an early motion to strike the plaintiff's complaint. The motion should be granted unless the plaintiff can show, through pleadings and affidavits, she or he has a probability of prevailing in the libel action. MASS MEDIA LAW, *supra* note 13, at 261.

[37] *See Redmond*, 2012 WL 3243507, at *6–*7.

[38] *Redmond*, 2012 WL 3243507 at *4, *7.

[39] *Id.* at *6.

[40] *Id.*

[41] *Id.* at *7.

[42] *Id.* at *6.

[43] *Id.* at *1, *6.

[44] *Redmond*, 2012 WL 3243507, at *6.

[45] *Id.*

[46] *Id.* at *7 (For this same reason, the plaintiff's false light action failed.).

defamation liability.[47] Hyperlinking signals that an author has relied on underlying facts, which are themselves subject to multiple interpretations, and invites the reader to test the reasonableness of the author's interpretation rather than accept it as gospel.

3. Signals Sent by Hashtags

Another increasingly important feature of the infrastructure of many social-media platforms is the hashtag, and it, too, is likely to implicate contextual analysis in defamation cases. A hashtag is a brief statement that categorizes or summarizes the post and uses a hash symbol (#) before a relevant keyword or phrase to make that word or phrase more readily searchable.[48] On most social-media platforms, hashtags are interactive, so that clicking on a hashtagged word within a tweet or post will show the reader other tweets or posts marked with that keyword.[49] Hashtags that are used with the most frequency become "trending topics" that are highlighted for other social-media users.[50] Originated by users of Twitter, the hashtag is now a common feature on other social-media platforms, including Facebook, Instagram, Tumblr, and Pinterest.[51]

Because hashtags are specifically designed to summarize, categorize, and contextualize social-media speech, it is easy to see how they could help lend important context to a statement that might or might not be actionable defamation. To cite extreme examples, attaching "#justkidding" to a tweet ought to mitigate or completely remove its defamatory sting while attaching "#totallyserious" or "#imeanit" might magnify it. Adding a hashtag that had been exclusively used in numerous previous posts by people making facetious or sarcastic remarks—or, conversely, that had been used primarily for a serious factual exchange—might convey that the subsequent user of the hashtag was speaking in the same vein. More subtle contextual clues might also be found within hashtags, and courts that are striving to correctly determine defamatory meaning

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[47] *See id.* at *6–*7. *See also* Seldon v. Compass Rest., No. 03050/11, 2012 WL 5363518 (N.Y. App. Div. Oct. 21, 2012) (The court reached a similar conclusion, because "it [was] clear the ordinary reader would understand that the writer's remarks describing plaintiff as a 'serial suer, scammer, spammer, embezzler, and revenge artist,' are based on eight separate articles about plaintiff which the writer found on the internet and references in the email.").

[48] *See Using Hashtags on Twitter*, TWITTER.COM https://support.twitter.com /articles/49309 (last visited Aug. 10, 2015).

[49] *Id.*

[50] *Id.*

[51] *See Public Conversations on Facebook*, FACEBOOK.COM http://newsroom.fb.com/news/2013/06/public-conversations-on-facebook/ (announcing the introduction of clickable hashtag functionality on Facebook and noting that their use would be "[s]imilar to other services like Instagram, Twitter, Tumblr, or Pinterest").

should not be indifferent to or ignorant of these social-media conventions.

At least one recent case suggests that a hashtag can be actionable defamation in and of itself. In *AvePoint, Inc. v. Power Tools, Inc.*,[52] a company that produces infrastructure management and governance software sued one of its major competitors for libel. The plaintiff argued that the competitor engaged in a defamatory social-media campaign designed to give customers the false impression that AvePoint's software was not made, developed, or supported in the United States.[53] In particular, Ave-Point alleged that these communications suggested that it was a Chinese company rather than an American company.[54] The company emphasized that this false allegation would damage its reputation and harm its business because clients within the federal government are statutorily required to give preference to domestic products, including software.[55]

One key component of the alleged defamation was a series of hashtags that the plaintiff claimed were designed to drive home the false message about the company's country of origin. The hashtags included "#Red," "#RedDragon," "#MADEINCHINA," and "#SinkingRED-Ship."[56] Meanwhile, the competing company used hashtags "#USA" and "#MADEINTHEUSA" in reference to itself.[57] In denying the defendant's motion to dismiss, the federal district court rejected the argument that the hashtags were not actionable, applying standard libel doctrines providing that "statements that are verifiably false or contain 'provably false factual connotations' may be defamatory."[58] As is the common practice in the medium, the hashtags were succinct and encapsulated their primary point. The court determined those succinct encapsulations conveyed verifiable statements of fact, though without extensive consideration of the role of hashtags in social media. The court accepted, without much question, that hashtags have the potential to amplify or modify the context of postings in social media.

B. External Context

1. Social-Media Informality

To correctly determine whether a statement is opinion, courts sometimes must consider the conventions of discourse within social-media environments. Internal, verbal clues within a text, such as poor grammar and profanity, often signal something about the intended meaning an individual speaker wishes to convey. Yet in some social-media environ-

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[52] 981 F. Supp. 2d 496 (W.D. Va. 2013).
[53] *Id.* at 503.
[54] *Id.*
[55] *Id.* at 507.
[56] *Id.* at 520.
[57] *Id.*
[58] *Id.* at 506 (quoting WJLA-TV v. Levin, 564 S.E. 2d 383, 392 (Va. 2002)).

ments, such signals are so widespread that they indicate a culture of informality that may affect how all texts within the environment should be read.[59] Speakers often use informal language when talking to those they know well (or believe they know well),[60] and the use of informal language by an individual speaker or a group of speakers may often be a signal that most statements contributed to the discourse should not be taken at face value.

Some courts have begun to suggest that the inherent informality of certain social-media communications weighs in favor of reading a statement as opinion rather than fact. In *Giduck v. Niblett*,[61] the Colorado Court of Appeals found that statements made on Facebook could not reasonably be interpreted as factual statements based on their distinctive "content, tone, and context."[62] The case involved an author who had written books and given lectures on anti-terrorism topics and had spoken of his training with Russian Airborne and Special Forces. A number of individuals on Facebook questioned the author's credentials and extent of his authorial expertise.[63] The author sued for defamation, citing more than one hundred posts and online comments that he claimed discredited him, including statements calling him a "charlatan" and stating that he "clearly found his 'calling' . . . [from reading] too many Clancy novels" and was "exaggerating his resume."[64]

The court cited case law involving print media for the proposition that "subjective judgments expressed in imaginative and hyperbolic terms which neither contain nor imply verifiable fact"[65] deserve protection.[66] The court also analogized its contextual analysis of the Facebook posts to cases finding that statements that could be construed as verifiable fact in the news pages of a newspaper would be protected opinion when they appeared in a newspaper editorial section where "intemperate and highly biased opinions are frequently presented and ... often times should not be taken at face value";[67] the court found these same characteristics to be true of Facebook and similar online fora. The fact that the

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[59] *See* Redmond v. Gawker Media, No. CGC-11-508414, 2012 WL 3243507, at *6 (Cal. Ct. App. Aug. 10, 2012) (supporting the conclusion that a blog article contained "opinion rather than fact" by emphasizing its "casual first-person style" and the fact it made "little pretense of objectivity"). *See also* Obsidian Fin. Grp., L.L.C. v. Cox, 740 F.3d 1284, 1293–94 (9th Cir. 2014).

[60] *Formal and Informal Language*, CAMBRIDGE DICTIONARIES ONLINE, http://dictionary.cambridge.org/us/grammar/british-grammar/formal-and-informal-language.

[61] No. 13CA0775, 2014 WL 2986670 (Colo. App. 2014).

[62] *Id.* at *11.

[63] *Id.* at *10.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at *10 (citing Keohane v. Stewart, 882 P.2d 1293, 1301 (Colo. 1994)).

communication took place in a context in which anonymous speech was common further militated "in favor of finding these statements to be opinion." [68]

Another state appellate court reached a similar conclusion by stressing the informal nature of social media in *Rochester City Lines, Co. v. City of Rochester*.[69] In that case, the Minnesota Court of Appeals affirmed a grant of summary judgment in favor of an elected councilman who tweeted angry comments during a public transit contract bidding process.[70] The councilman used language that, divorced of context, could have been viewed as assertions of fact imputing criminal activity—including the suggestion that certain parties held the public "hostage," made "ransom demands," engaged in "extortion" and "robbery," and "stole . . . from taxpayers."[71] The court noted that these phrases are "commonly used rhetorically to describe behavior the speaker might consider distasteful or morally suspect, but not criminal."[72]

The court further stated that "although the words used ... can be used to describe criminal activity, in context, they [could] only reasonably be understood as protected rhetorical speech."[73] Significantly, the court reached this conclusion by applying a contextual inquiry: "the context of [the] statements was inherently informal," which tilted in favor of interpreting them as "opinion and hyperbole, and not statements of fact capable of being proven true or false."[74] The court further speculated on the habits of reasonable readers of the defendant's tweets, explaining that "no reasonable person would believe" that the tweets implied actual criminal behavior. Furthermore, "'even the most careless reader must have perceived that the word was no more than rhetorical hyperbole.'"[75] The court's analysis of the tweets' meaning was aided by its understanding of the relaxed tone commonly used by individuals engaged in social-media exchanges, and the court imputed the same understanding to reasonable readers of the tweet. In light of this understanding, the court concluded that the tweets were not defamatory but were instead mere opinion.

2. Contextual Clues Specific to a Single Social-Media Platform

Different social-media platforms have different conventions, and these conventions form part of the external context that courts should

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[68] *Id.* at 10.

[69] 846 N.W.2d 444, 466–67 (Minn. Ct. App. 2014).

[70] *Id.* at 466.

[71] *Id.* at 464–65.

[72] *Id.* at 466.

[73] *Id.*

[74] *Id.*

[75] *Id.* (quoting Greenbelt Co-op Pub. Ass'n v. Bresler, 398 U.S. 6, 14 (1970)).

consider in determining the meaning of statements posted there. A good illustration of the type of analysis courts should use is presented by *Chaker v. Mateo*.[76] In *Chaker*, a California appellate court held that harshly negative comments about the plaintiff posted by his child's maternal grandmother on Ripoffreport.com and Topix.com were not actionable defamation.[77] The grandmother posted, among other things, that the plaintiff was a "deadbeat dad" and suggested that he was homeless and picked up streetwalkers.[78] In concluding that the statements were nonactionable opinion, the court focused largely on: (1) the nature of the sites where the grandmother posted, and (2) the fact that the plaintiff was embroiled in a paternity and child support dispute with the defendant's daughter.[79]

The court explained that "all [statements] were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here."[80] The "overall thrust" of the defendant's statements portrayed the plaintiff as "a dishonest and scary person."[81] Given the context, however, the "average Internet reader" would not view the defendant's "embellishments"—that is, her statements about plaintiff being homeless and picking up streetwalkers—"as anything more than insulting name calling."[82] This name-calling, according to the court, is what readers "would expect from someone who had an unpleasant personal or business relationship with [the plaintiff] and was angry with him," especially since the insults were general in nature.[83] The only potentially actionable statement made by the grandmother, according to the court, was the statement that plaintiff was a criminal, but that statement was true.[84]

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[76] 147 Cal. Rptr. 3d 496 (Cal. Ct. App. 2012).

[77] *Id.* The court in *Chaker* first suggested that the plaintiff's decision to join a social networking site made his character a matter of public interest. *Id.* at 502. Based on this somewhat dubious logic, anyone who joins a social network invites criticism from other users and automatically gives up a measure of legal protection for her reputation.

[78] *Id.* at 498.

[79] *Id.* at 504.

[80] *Id.*

[81] *Id.*

[82] *Chaker*, 147 Cal. Rptr. 3d at 504.

[83] *Id.*

[84] Consequently, the court affirmed the trial court's decision to strike Chaker's complaint. A judge in a 2009 Twitter libel case also appears to have accepted that a Twitter user's habit of employing sarcasm and hyperbole was relevant to interpreting her allegedly defamatory tweet, though the case is not precedential. In *Horizon Grp. Mgmt. v. Bonnen*, a property management company, Horizon Group Management, sued tenant Amanda Bonnen for defamation in Illinois state court based on her tweet: "Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok." Complaint at ¶ 7, Horizon Grp.

As the *Chaker* court recognized, the prevalence of emotional, hyperbolic discourse within a particular social-media forum affects whether readers will interpret statements as asserting facts or merely opinions. Yet, accepting this principle means that to interpret an allegedly defamatory statement, the interpreter, whether judge or jury, must examine the exact nature of the social-media forum. This examination should take into account where the defendant posted the statement and the nature of the language he or she employed. Obviously, the quality of the interpretation of the allegedly defamatory statement hinges on the interpreter's familiarity with the conventions of discourse within different social-media forums. That familiarity is likely to grow with time as more citizens use different types of social media.

However, advocates should be aware of the need to educate decision-makers about how different forums work. For example, Snapchat is used differently, and by a different demographic of speakers, than Facebook. By the same token, Facebook users have a different demographic profile, and tend to use the medium differently, than Twitter users. These differences should influence the proper interpretation of the statements posted in each forum. Nonetheless, based on lessons drawn from Internet libel cases, courts should not dismiss as "opinion" all statements made in

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Mgmt. v. Bonnen, No. 2009 L 008675 (Ill. Cir. Ct. July 20, 2009), http://www.dmlp.org/sites/citmedialaw.org/files/2009-07-27-Horizon%20 Complaint.pdf. At the time she posted, Bonnen had only twenty people subscribing to, or "following," her Twitter posts. Horizon alleged that Bonnen's defamatory tweet harmed its "reputation in its business," and therefore constituted libel per se, which under Illinois law allowed reputational harm to be presumed without the requirement of proof. *Id.* at ¶ 10. Horizon sought $50,000 in damages. *Id.* Bonnen moved for dismissal, arguing that her tweet could not reasonably be interpreted as defamatory because it was imprecise and, when read in context, did not state verifiable facts about Horizon. Memorandum of Law in Support of 2-615 Motion to Dismiss at 11, Horizon Grp. Mgmt. v. Bonnen, No. 2009 L 008675 (Ill. Cir. Ct. Nov. 9, 2009), http://www.dmlp.org/sites/ citmedialaw.org/files/2009-11-10Bonnen%20Motion%20to%20Dismiss.pdf. She asked the court to consider her Twitter history as part of the relevant context for interpreting her statement. *Id.* at 8–9. She contended that her tweets as a whole represented "off the cuff reflection or opinion" and contained "exaggerations." *Id.* at 9. She pointed to tweets, for example, that said: "[c]all me or else we are not friends" (*Id.* at 8) and "[a]ll of these people eating at McDonalds is making me want to hurl." *Id.* at 9. She further argued that "any reasonable reader of [her] Tweets would not take them literally" and would instead understand them as rhetorical hyperbole. *Id.* The trial court judge evidently agreed and held that her statements were nonactionable as a matter of law, though the court filed no written opinion. Dismissal Order, Horizon Grp. Mgmt. v. Bonnen, No. 2009 L 008675 (Ill. Cir. Ct. Jan. 20, 2010).

a social-media context,85 given the real and often permanent damage to reputations digital libels can inflict.

3. The Context of Rankings and Reviews

Rankings and reviews, which are increasingly common in the social-media sphere, can create a social-media context that seems particularly likely to weigh in favor of a finding of opinion. A number of courts in the United States have accepted the notion that the reasonable reader may be less likely to interpret statements as conveying actual facts in these online and social-media contexts.[86] For example, in a 2014 blog-libel case, the United States Court of Appeals for the Ninth Circuit relied on the nature of the site where the defendant posted her statements as a key factor in labeling her statements opinion.[87] In that case, *Obsidian Finance Group, LLC v. Cox*, the court concluded that the determination of whether a statement is actionable is based on the "general tenor of the work," the defendant's use of "figurative or hyperbolic language," and whether the statement can be proved true or false.[88]

Applying these factors, the court held that the very name of defendant's site, obsidianfinancesucks.com, would lead readers to expect statements posted there to be "one-sided."[89] The court further cited the defendant's use of "extreme language" as a factor that "negate[d] the impression that [her] blog posts assert objective facts."[90] Finally, the court agreed with the district court's conclusion that "in the context of a non-professional website containing consistently hyperbolic language,

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[85] *See* William Charron, *Twitter: A "Caveat Emptor" Exception To Libel Law?*, 1 BERKELEY J. ENT. & SPORTS L. 57, 64 (2012) (arguing that while "Twitter should not provide automatic immunity from a claim of libel . . . Twitter may present a particular environment in which to more readily dismiss claims" as "the limited amount of information in loosely composed Tweets should most often be perceived as 'opinions.'").

[86] *See* Sandals Resorts Int'l v. Google, Inc., 86 A.D.3d 32, 42 (N.Y. App. Div. 2011) (quoting Brian v. Richardson, 87 N.Y.2d 46 (N.Y. 1996)).

[87] *See* Obsidian Fin. Grp., L.L.C. v. Cox, 740 F.3d 1284, 1293–94 (9th Cir. 2014).

[88] *Id.* at 1293.

[89] *Id.*

[90] *Id.* at 1294. *See also* Obsidian Fin. Grp., L.L.C. v. Cox, 812 F. Supp. 2d 1220, 1223 (D. Or. 2011) ("[B]logs are a subspecies of online speech which inherently suggest that statements made there are not likely provable assertions of fact."), *rev'd on other grounds*, Obsidian Fin. Grp., L.L.C. v. Cox, 740 F.3d 1284, 1293–94 (9th Cir. 2014); Global Telemedia Int'l v. Doe, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (noting as early as 2001 that online communication often "lacks the formality and polish typically found in documents in which a reader would expect to find facts); Nicosia v. De Roy, 72 F. Supp. 2d 1093, 1106 (N.D. Cal. 1999) ("[I]n the context of the heated debate on the Internet, readers are more likely to understand accusations of lying as figurative, hyperbolic expressions.").

[defendant]'s blog posts are 'not sufficiently factual to be true or false.'"[91]

The United States Court of Appeals for the Sixth Circuit accepted similar arguments in a 2013 social-media case involving TripAdvisor's list of "Dirtiest Hotels."[92] There, the court relied both on the general tenor of defendant's post as well as the "broader context" in concluding the post was not defamatory.[93] Plaintiff Kenneth Seaton, the sole owner of Grand Resort Hotel and Convention Center ("Grand Resort"), sued TripAdvisor for defamation and false light invasion of privacy for placing his hotel on its "2011 Dirtiest Hotels List."[94] After removing the case to federal court, TripAdvisor filed a motion to dismiss, asserting that its placement of the Grand Resort on the list constituted nonactionable opinion. In response, Seaton moved to amend his complaint and add additional claims for trade libel/injurious falsehood and tortious interference with prospective business relationships.

The federal district court granted TripAdvisor's motion to dismiss and denied Seaton's motion to amend as futile. The appeals court affirmed, holding that TripAdvisor's placement of Seaton's hotel on its dirtiest hotels list was "not capable of being understood as defamatory."[95] The court based this conclusion, first, on the fact that the "superlative" term "dirtiest" was "loose, hyperbolic language."[96] Second, the court emphasized the "general tenor" of the list, which billed itself as a product of user reviews rather than "scientific study," with the user reviews being full of hyperbole and subjective accounts of travelers' experiences.[97]

Finally, the court placed the TripAdvisor list in the "broader context" of online rankings.[98] The court noted that TripAdvisor's compilation of user comments was part of a broader online trend of "'top ten' lists and the like appear[ing] with growing frequency on the web."[99] Thus, "a reasonable observer understands that placement on and ranking within the bulk of such lists constitutes opinion, not a provable fact."[100] Although the plaintiff contended that TripAdvisor employed a flawed methodology for ranking user comments, the court found that "the subjective weighing of factors cannot be proven false and therefore cannot be the basis of a

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[91] *See Obsidian*, 740 F.3d at 1294.

[92] Seaton v. TripAdvisor L.L.C., 728 F. 3d 592, 598 (6th Cir. 2013).

[93] *Id.* at 600.

[94] *Id.* at 594.

[95] *Id.* at 603.

[96] *Id.* at 601.

[97] *Id.* at 598–99.

[98] *Seaton*, 728 F.3d at 600.

[99] *Id.*

[100] *Id.*

defamation claim."[101] Indeed, the court's opinion repeatedly stressed the subjectivity of such rankings as a basis for affirming dismissal of plaintiff's claim.

In some ways, the court's analysis missed the point: the rankings clearly assert the fact—which arguably could be verified objectively—that plaintiff's hotel was dirty, whether or not it was the dirtiest hotel in the United States. Moreover, the court's reasoning could be misconstrued to allow speakers to avoid defamation liability by hiding behind flawed ratings algorithms. Nonetheless, the decision suggests that courts are taking note of conventions of discourse within social media, including the aggregation of consumer reviews on ratings sites, and are willing to recognize the expressive value of user interactions as a form of protected opinion.

All told, the small body of published decisions does suggest that courts will take into account the external and internal contexts of social media in interpreting whether a defendant's statement is defamatory.[102] Some have argued that courts should treat almost *all* material posted to Facebook, Twitter, or other such sites as opinion or hyperbole,[103] but this argument has not gained traction.[104] Nor should it. Defamation law should continue to play a role in preventing character assassination and guaranteeing that public discourse has at least some anchor in truth, even in the social-media age.[105]

III. ACTUAL MALICE AND THE SOCIAL-MEDIA DEFENDANT

Fifty years ago, the United States Supreme Court held in the seminal case of New York Times Co. v. Sullivan that the First Amendment requires libel plaintiffs who are public officials to prove actual malice—that is, that the defendant published a defamatory statement with know-

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[101] *Id.*

[102] *See, e.g., Obsidian,* 740 F.3d at 1293–94; Seaton v. TripAdvisor L.L.C., 728 F.3d 592, 592 (Cal. Ct. App. Aug. 10, 2012).

[103] A similar issue was raised when a defendant posted defamatory comments on a website designed as a place for disgruntled customers to voice complaints. *See* Order Denying Defendants' Special Motion to Strike; Granting Plaintiffs' Special Motion to Strike, Piping Rock Partners Inc. v. David Lerner Associates Inc., 946 F. Supp. 2d 957, 970 (N.D. Cal. 2013) ("Defendants also assert that the very context of the posting — an anonymous website for disgruntled consumers — creates a presumption that the posting is unreliable and therefore non-actionable opinion. The Court disagrees[.]"). While this website was not a social-media site per se, a similar argument could be made with social-media websites.

[104] Charron, *supra* note 85, at 64–65 (noting that while tweets are often perceived as opinion, "Twitter should not provide automatic immunity from a claim of libel"); *see also* Walsh v. Latham, No. SCV 251041, 2014 WL 618995, at *5 (Cal. Ct. App. Feb. 18, 2014) (refusing to find that reasonable readers could not take accusations on Facebook seriously).

[105] *See Silencing John Doe, supra* note 5, at 103.

ledge or reckless disregard of its falsity.[106] The Court subsequently extended the actual malice rule to public figures and even to private-figure plaintiffs involved in matters of public concern if they wish to recover presumed or punitive damages.[107] The Court crafted these constitutional protections for libel defendants in cases involving the institutional press, but most commentators and lower courts have read the Court's complex body of defamation jurisprudence as extending the protections to "non-media defendants"[108] as well. Hence, social-media defendants should be able to avoid liability in cases where plaintiffs cannot establish actual malice.

It is unclear, however, how courts and juries should determine whether a tweet or Facebook post was made with actual malice. The Supreme Court cases elucidating the concept of actual malice predominantly involved media defendants—members of the institutional press—and the Court's examples of actual malice reflect the investigative practices of the institutional press. Thus, the Court has stated that for a plaintiff to establish actual malice, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[109] Actual malice, for example, exists if a defendant invents a story, bases it on "an unverified anonymous telephone call," publishes statements that are "so inherently improbable that only a reckless man would have put them in circulation," or publishes them despite "obvious reasons to doubt the veracity of [an] informant or the accuracy of his reports."[110] These examples have little resonance for "publishers" in a social-media context, many of whom post information spontaneously, with little verification other than perhaps a perusal of other social-media sources. The typical social-media defendant is less likely than her traditional-media counterpart to rely on informants strategically placed within government or corporate hierarchies. The typical social-media defendant is less likely to carefully analyze primary sources before publishing. Moreover, the typical social-media defendant has no fact-checker, editor, or legal counsel and is less likely than institutional-media publishers to have either special training in gauging the credibility of sources or professional ethics that prize accuracy over speed.

In fact, the culture of some social-media sites, such as Twitter and Reddit, encourage users to be the first to share breaking news and information.[111] It is unclear how this emphasis on speed of publication should

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[106] 376 U.S. 254, 279–81 (1964).

[107] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

[108] Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1562 (1987).

[109] Saint Amant v. Thompson, 390 U.S. 727, 731 (1968).

[110] *Id.* at 732.

[111] *See, e.g.*, Doug Stanglin, *Student Wrongly Tied to Boston Bombings Found Dead*, USA TODAY (Apr. 25, 2013, 9:07 PM), http://www.usatoday.com/

affect the actual malice determination. Does the fact that a defamation defendant posted or tweeted in an attempt to "break the news first" tip the scale in favor of, or against, a finding of actual malice? Similarly, it is unclear how the fact that most social-media posters lack journalism training, and many lack critical analytical faculties, should affect the actual malice determination. Does it constitute reckless disregard of a statement's falsity if a defendant irrationally believes her defamatory accusation to be true?

A partial answer to that question can be gleaned from accounts of the first full jury trial for Twitter libel in the United States, in which the jury found that celebrity defendant Courtney Love lacked actual malice.[112] The outcome is particularly noteworthy because Love had been a Twitter libel defendant before; indeed, in 2009 she became the first person in the United States to be sued for so-called "Twibel." But that was not her only first. As of December 2015, Love appears to be the only person in the United States to be sued for Twibel more than once.[113] In addition, Love has been sued for posting allegedly libelous statements on the social-media site Pinterest.[114]

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story/news/2013/04/25/boston-bombing-social-media-student-brown-university-reddit/2112309/; Craig Timberg, *Brother of Newtown School Shooter Races to Dispel False ID on Facebook: 'It Wasn't Me'*, WASHINGTON POST (Dec. 14, 2012), http://www.washingtonpost.com/business/economy/brother-of-newtown-school-shooter-races-to-dispel-false-id-on-facebook-it-wasnt-me/2012/12/14/aae43c82-4637-11e2-9648-a2c323a991d6_story.html (Newtown shooter's brother mistakenly named as shooter)·

[112] Corina Knoll, *Singer-actress Courtney Love Wins Landmark Twitter Libel Case*, LOS ANGELES TIMES (Jan. 24, 2014), http://articles.latimes.com/2014/jan/24/local/la-me-love-libel-20140125.

[113] *Id.*

[114] Complaint at ¶ 22, Simorangkir v. Love, 2013 WL 5213465 (Cal. Super. Ct. Sept. 17, 2013) (No. BC521565). Simorangkir sued Love a second time for statements made on Pinterest subsequent to the settlement in her first case, which would mean that Love has actually been sued for libel in social media in three separate cases. Simorangkir's second lawsuit also alleged that Love had made defamatory statements about Simorangkir when discussing the first suit on the Howard Stern radio show. The complaint in the case states that "Love hired an addiction psychiatrist to try to assert a so-called insanity defense" to the first libel claim. *Id.* at 1. *See also* Eriq Gardner, *Courtney Love Back in Trouble with Latest Defamation Lawsuit*, HOLLYWOOD REP. (Feb. 20, 2014), http://www.hollywoodreporter.com/thr-esq/courtney-love-back-trouble-latest-681964 (According to media accounts, a California judge in February 2014 rejected Love's motion to strike the complaint, noting that the plaintiff was not a public figure and that a jury could very well find Love's statements to be malicious, especially in light of the prior settlement with Simorangkir.); Pamela Chelin, *Judge Crushes Courtney Love's Attempt to Duck Libel Lawsuit*, SPIN (Feb. 20, 2014), http://www.spin.com/articles/courtney-love-dawn-simorangkir-libel-lawsuit-howard-stern/.

The first Twitter libel case against Love arose out of a business dispute between Love and fashion designer Dawn Simorangkir, also known as the "Boudoir Queen."[115] Love, dissatisfied with the Boudoir Queen's attempts to transform some old clothing into designer dresses, posted allegedly defamatory statements about the Queen on Twitter, MySpace, and Etsy. Love tweeted allegations that Simorangkir "has a history of dealing cocaine, lost custody of her children, has a history of assault and burglary, and has a record of prostitution."[116] Love also wrote, "so goodbye asswipe nasty lying hosebag thief," as well as "my clothes my WARDROBE! oi vey dont fuck with my wradrobe or you willend up in a circle of corched eaeth hunted til your dead. [sic]"[117] Love, who had an estimated 40,000 Twitter followers at the time, made similar statements on MySpace and Etsy. Love's attorneys initially claimed that she was acting in the "public interest" by warning others about "Simorangkir's pattern of criminal and bad faith conduct."[118] A California trial court, however, rejected these arguments and held that the dispute involved "a 'discrete private dispute' between [Love] and Simorangkir." [119] According to news accounts, Love settled the libel claim in early 2011 for $430,000. [120]

Love, however, did not learn her lesson from her first tangle with Twibel. In 2010, Love tweeted that her former attorney Rhonda Holmes was "bought off." Holmes sued Love in California state court for $8 million, arguing that the tweet accused Holmes of bribery. Love contended that her tweet was merely hyperbole.[121] News accounts of the jury verdict in Love's favor, however, indicate that the jury found that Love did not post her tweet with actual malice.[122] The jury deliberated for three hours at the end of the seven-day trial before concluding that the plaintiff

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[115] Complaint, Simorangkir v. Love, 2009 WL 798260 (Cal. Super. Ct. May 5, 2009) (No. BC410593).

[116] *Id.* at ¶ 24.

[117] *Id.*

[118] Motion to Strike at 3, Simorangkir v. Love, 2009 WL 798260 (Cal. Super. Ct. Aug. 19, 2009) (No. BC410593), http://www.dmlp.org/threats/simorangkir-v-love.

[119] Matthew Heller, *Judge Allows Twitter Libel Suit Against Rocker Love*, ON POINT (Oct. 26, 2009), http://www.onpointnews.com/NEWS/Judge-Allows-Twitter-Libel-Suit-Against-Rocker-Love.html.

[120] Jennifer Preston, *Courtney Love Settles Twitter Defamation Case*, N.Y. TIMES (Mar. 7, 2011), http://query.nytimes.com/gst/fullpage.html?res=9B0CE5DF1330F934A35750C0A9679D8B63.

[121] Love also claimed that she did not mean to send out the tweet to all of her followers but instead meant to send it as a "direct message" only to two. Knoll, *supra* note 112. Under traditional defamation doctrines, sending to two people would still constitute "publication," though Love's intent to direct message the tweet to a limited audience might be relevant to damages.

[122] *Id.*

had not proved by clear and convincing evidence that Love knew her statements were false or doubted their truth.[123]

The Courtney Love Twibel saga did not set any precedents, but it does raise interesting issues for future cases. According to court documents and news accounts, Love consulted a psychiatrist for an alleged "addiction" to social media. Certainly, Love's actions in the series of defamation cases she has generated do not seem entirely rational, but there is no insanity defense to a libel claim. Even so, the determination of whether a defendant had actual malice is a subjective one, meaning that a relevant factor in that determination is whether the defendant suffered from a mental illness that caused her to have irrational, or even delusional, beliefs about the truth of a statement she posted on social media. It seems problematic, however, for the law to give no recourse to the victims of mentally disordered defamers pursuing social-media vendettas based on fantasies they have concocted. As a practical matter, this problem is likely to be solved by the skepticism of juries, who will rarely accept a defendant's argument that she truly believed her delusional and defamatory statements.

Nonetheless, the number of Facebook "friends" or Twitter "followers" to whom a defendant publishes a defamatory statement arguably magnifies the harm a defamatory statement causes to a plaintiff's reputation by magnifying the size of the audience. Courtney Love, for example, had an estimated 281,000 Twitter followers as of April 2014 and an estimated 1.5 million as of May 2015. Each of these followers is capable of retweeting any of Love's missives with ease from their smartphones or computers. Arguably, the number of Love's followers amplifies the damages the victims of her libelous tweets should receive, because presumably their reputations were injured in the eyes of more people.[124]

IV. CONCLUSION

Social-media libel cases create a challenge for United States courts seeking to balance reputational interests with freedom of expression. Most Supreme Court defamation jurisprudence is tailored to the needs and interests of the institutional press, but social media are generating a growing tide of cases involving so-called non-media defendants. Social-

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[123] *See* Pamela Chelin, *Courtney Love Found Not Liable in Landmark Twitter Defamation Case*, SPIN (Jan. 24, 2014), http://www.spin.com/articles/courtney-love-twitter-defamation-lawsuit-verdict-guilty/. *See also* Kevin McCoy, *Courtney Love Tweets After Trial Win*, USA TODAY (Jan. 25, 2014), http://www.usatoday.com/story/money/business/2014/01/25/jury-sides-with-courtney-love-in-trial-over-tweet/4882997/.

[124] Full analysis of this issue is outside the scope of this article, since it is an unresolved issue. *See* Jeff Hermes, *How Should We Measure Damages for Defamation Over Social Media?*, DIGITAL MEDIA LAW PROJECT (May 10, 2012), http://www.dmlp.org/blog/2012/how-should-we-measure-damages-defamation-over-social-media.

media libel decisions are still so new that it is hard to draw firm conclusions about the effect they will have on the law of defamation in the United States. Still, one can identify some emerging trends. Although social-media libel opinions are few, and published opinions fewer still, they reflect a growing judicial understanding of the nature and importance of social media as a communications tool.

Some of the opinions, for example, explicitly reference the informal nature of social-media sites as a basis for branding allegedly libelous speech posted there as opinion. Moreover, some explicitly point to the prevalence of subjective reviews of service providers and business as a basis for dismissal of the inevitable libel suits such reviews provoke. Nonetheless, there are numerous undecided issues in social-media defamation, such as whether a plaintiff's voluntary use of social media makes her a public figure. Social-media cases may also prompt rethinking of some basic defamation doctrines, such as whether courts should limit the protection of the actual malice rule when delusional defamers pursue imagined vendettas based on invented "facts." For now, it is too soon to make firm conclusions, but the brave new world of social-media defamation law promises to force courts and commentators to rethink the balance between protecting "uninhibited, robust, and wide-open"[125] speech and safeguarding citizens against character assassination.

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