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What Cheap Speech Has Done: (Greater) Equality and Its Discontents

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INTRODUCTION

“Freedom of the press,” A.J. Liebling famously said in 1960, “is guaranteed only to those who own one.”¹ Others elaborated, as the Court reported in 1974: The “press . . . has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.”² “[T]he power to inform the American people and shape public opinion” has been “place[d] in a few hands.”³

“[O]n national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis.”⁴ “[T]he public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.”⁵ Where is true freedom in this sort of oligarchy of speech, the argument went?

The “cheap speech” made possible by the Internet famously democratized mass media communications.⁶ Many inequalities of course remain, related to wealth, fame, credentials, reader prejudices, and the like.⁷ (It’s hard to imagine a nation or an institution where all speakers really had equal influence.) But it’s easier than ever for ordinary people to speak to large groups. It’s easier than ever for them to create audio and visual works, as well as text.⁸ It’s easier than ever

¹ A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed. 1975); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 58 (1993) (“Broadcasting access is the practical equivalent of the right to speak, and it is allocated very much on the basis of private willingness to pay.”); Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) (“[A] comparatively few private hands are in a position to determine not only the content of information but its very availability”); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413 (1986) (“[An unregulated marketplace of ideas will include] only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.”).

² *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 249 (1974) (summarizing the argument of advocates of public rights of access to newspaper editorial pages).

³ *Id.* at 250.

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005); DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2006); Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 895-97 (2000); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

⁷ Gregory P. Magarian, *How Cheap Speech Underserves and Overheats Democracy*, 54 UC DAVIS L. REV. 2455, 2460-62 (2021).

⁸ See Alan K. Chen, *Cheap Speech Creation*, 54 UC DAVIS L. REV. 2405, 2415-17 (2021).

for a few of them to get mass individual followings without the need for an imprimatur from the “mainstream media.” It’s easier than ever for groups of ordinary people, whether formally organized or just loose sets of social media connections, to spread ideas that they find worth spreading.

Oligarchy, how quickly many have come to miss you! Or at least certain facets of what you provided: many of the criticisms of the modern Internet media ecosystem — and many of the legal and social reactions to it — stem precisely from its greater egalitarianism, or so I will argue below.

For instance, while the old expensive-speech system was rightly criticized as undemocratic, the flip side was that the owners of the press had assets that were vulnerable to civil lawsuits, and those owners were thus disciplined by the risk of liability, as well as by market forces. They also had professional and business reputations that they wanted to preserve: if reporters spread something that proved to be a hoax, it could mean loss of a job (or at least of opportunity for promotion) for them, and public embarrassment for their news outlet — consider Dan Rather and *60 Minutes* being duped in 2004 by the fake President Bush National Guard memos.⁹

Say what you will about the old mainstream media, but it didn’t offer much of a voice to people obsessed with private grievances, or to outright kooks, or to the overly credulous spreaders of conspiracy theories. In 1990, someone who wanted to educate the world about an ex-lover’s transgressions would have found it hard to get these accusations published, unless the ex-lover was famous.

Likewise for someone who was arguing that some mass murder (the 1990 analog of the 9/11 attacks, or of the Newtown school shooting) was faked or secretly planned by the government. The media acted as gatekeepers. And while the gates shut out much good material, they shut out much bad as well.

Today, though, those of modest means and the anonymous (literally and figuratively) can speak to the world, and can often find an audience, in Google search results even if not in daily visitors to a site.¹⁰ And while

⁹ See, e.g., Jim Rutenberg, *CBS News Concludes It Was Misled on National Guard Memos, Network Officials Say*, N.Y. TIMES (Sept. 20, 2004), <https://www.nytimes.com/2004/09/20/politics/campaign/cbs-news-concludes-it-was-misled-on-national-guard-memos.html> [<https://perma.cc/9ABE-9TRX>].

¹⁰ Again, getting noticed remains easier if you have the money to advertise, or the ear of an existing media outlet that will pass along your speech to its readers. But the phenomena I describe don’t require that poor speakers have as broad an audience as rich ones — only that they can have an audience of considerable, and damaging, breadth.

this democratization and greater egalitarianism has many virtues, it has the vices of those virtues.

Anyone can say anything about anyone — and they do. They can easily publish complaints, including lies, about acquaintances, ex-lovers, and local businesses. They can publish photographs of their ex-lovers naked. And while the typical “Violet Schmeckelburg done me wrong” site won’t have many readers, it might easily come up as the top result in a Google search for “Violet Schmeckelburg.”¹¹

And many people can do all this without being much deterred by the risk of liability for libel or disclosure of private facts: because the speakers have very little money, they have little to lose from a lawsuit, and potential plaintiffs (and contingency fee lawyers) have little to gain. There are cruel and irresponsible rich people as well as poor people; and there are cruel and irresponsible publishers at media organizations, despite the market constraints under which the organizations operate. But those with assets can at least be sued for damages. Damages lawsuits against those without assets are largely quixotic.¹²

The legal system’s remedy for this, perhaps to the surprise of some, has been increased criminalization:

- (1) Anti-libel injunctions have become much more common, likely because they offer the prospect of enforcement through the threat of criminal contempt (or of jailing

¹¹ The John Smiths of the world might find safety in numbers, but those with less common names are more vulnerable.

¹² In principle, people with a lot of money may also be hard to deter, especially if damages awards are set too low. There is the story of Lucius Veratius, an ancient Roman aristocrat who took advantage of the rule of the Twelve Tables (old even then), “If one commits an outrage against another the penalty shall be twenty-five asses,” the *as* being a copper coin. THE TWELVE TABLES, tbl. VIII, ¶ 4 (emphasis added). Twenty-five asses being nothing to him, he would walk down the street slapping people in the face; his slave would then hand the victim the money, and Veratius would go on to the next man. AULUS GELLIUS, ATTIC NIGHTS (John C. Rolfe trans., Harvard Univ. Press 1927), <http://www.perseus.tufts.edu/hopper/text?doc=Gel.20.1> [<https://perma.cc/QCT6-NM9V>].

But in practice, this doesn’t seem to happen much, precisely because damages awards — including punitive damages for particularly egregious behavior — can be quite substantial. Consider the \$140 million awarded to Hulk Hogan in the Gawker litigation. Eriq Gardner, *Judge Upholds Hulk Hogan’s \$140 Million Trial Victory Against Gawker*, HOLLYWOOD REP. (May 25, 2016), <https://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301> [<https://perma.cc/8WNY-NPTN>]. And while some rich defendants may expect that their expensive top-notch lawyers will avoid such liability, the prospect of liability can draw top-notch plaintiffs’ lawyers (even absent an ideological funder for the litigation, as in the Gawker matter).

under a civil contempt theory until the defendant takes down the libelous material).¹³

- (2) Criminal libel statutes continued to be enforced, with likely about twenty to thirty prosecutions per year, in the about a dozen states in which they exist.¹⁴
- (3) Prosecutors are rediscovering criminal libel law by using other statutes, such as criminal harassment statutes, to go after persistent defamers.¹⁵
- (4) The disclosure of private facts, in recent decades the domain of the disclosure tort, has increasingly been fought using criminal prosecutions as well.¹⁶

Cheap speech also allows people to forward hoaxes, false conspiracy theories, and generally “fake news” at the click of a button. Nonprofessional speakers are just as protected by the First Amendment as is the institutional media.¹⁷ But they may, on average, lack the professional skepticism that mainstream media editors and reporters tend to cultivate. They may lack (again, on average) the background knowledge that helps them sift the true from the false. They often need not worry much about professional or reputational sanctions (or libel lawsuits if those hoaxes also malign someone in particular).¹⁸ To be sure, many social media users may be much more cautious and thoughtful; but plenty aren't.

And the Internet has made it easier for groups to effectively speak to their members and to fellow travelers. Well-established groups (the NRA, the ACLU, religious organizations, and the like) had long been able to do that, though at nontrivial cost. But now any group, including a small upstart, can do the same. And naturally this includes groups whose views we might disapprove of, and which historically found it much harder to speak (because they lacked the money for mailings or

¹³ See *infra* Part I.C.

¹⁴ See *infra* Part I.D.

¹⁵ See *infra* Part I.E.

¹⁶ See *infra* Part II.

¹⁷ E.g., *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463-65 (2012).

¹⁸ The frequency of such hoaxes and falsehoods being spread may be exacerbated if people operate mostly in “filter bubbles” of likeminded friends. See Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *Cheap Friendship*, 54 UC DAVIS L. REV. 2341, 2341 (2021).

broadcasts): pro-terrorist groups, white supremacists, riot organizers, and the like.¹⁹

The reaction here has not been criminalization, because First Amendment doctrine likely protects such speech from governmental restriction, whether through criminal punishment or civil liability. But it has been a push towards greater activism by private platforms — the same sorts of oligarchic intermediaries that many had been so excited to cut out of the process.²⁰

In what follows, I hope to elaborate on all these points. My main task here will be descriptive and analytical, aiming to explain some possible reasons for what I describe. I will largely leave to others prescriptions about what is to be done; but I hope my analysis might help us think through such matters.

I. THE RETURN TO CRIMINAL LAW AS A REMEDY: LIBEL

A. *The Traditional Civil Damages Model*

For decades, protecting people's reputation from defamatory falsehoods had been left to libel damages liability. Damages liability is supposed to compensate the injured target of the speech. It is supposed to deter libelers. And it is supposed to encourage libelers to promptly retract their false charges once threatened with a lawsuit.²¹

This mechanism worked to some degree, however imperfectly, for the pre-Internet mass media. Because such media organizations had money, they tended to worry about libel liability. And because they had money, plaintiffs (or plaintiffs' lawyers) had some prospect of recovering their fees, if they had very strong libel claims. Libel law also worked to some degree for libel lawsuits against employers, business rivals, and similar commercial actors.²²

This is, of course, an oversimplification. Libel cases were often hard to win, because of the Supreme Court's decisions reining in libel law.²³ The availability of libel insurance also likely made the deterrent effect

¹⁹ See Ashutosh Bhagwat, *The Law of Facebook*, 54 UC DAVIS L. REV. 2353, 2379, 2389 (2021); Magarian, *supra* note 7, at 2485-86.

²⁰ See *infra* Part IV.

²¹ See, e.g., Daphna Lewinsohn-Zamir, *Do the Right Thing: Indirect Remedies in Private Law*, 94 B.U. L. REV. 55, 71 (2014).

²² See, e.g., *Nelson v. Tradewind Aviation, LLC*, 111 A.3d 887 (Conn. App. Ct. 2015) (affirming defamation judgment against plaintiff's ex-employer).

²³ “[L]ibel suits are hard to win but easy to bring.” Lidsky, *supra* note 6, at 883.

of libel law more complex.²⁴ And even in the past, there were judgment-proof libel defendants: “[M]ost libellers are penniless,” an 1881 treatise author wrote, though perhaps exaggerating, “and a civil action has no terrors for them.”²⁵ Still, on balance, tort law tended to serve its compensatory and deterrent function here, at least to some extent.²⁶

But the risk of civil liability doesn’t much affect speakers who have no money. Suing such a speaker is a sure money pit: you have to pay your lawyer, and you know you’ll never recover any of that expense, much less get compensated for your damaged reputation.

Knowing this, judgment-proof speakers aren’t much deterred by the risk of a libel lawsuit up front, before they make their statements. And even if they get a letter demanding that they take down the statements from a blog or a Facebook page, they can feel relatively safe playing chicken. True, even poor speakers can have some assets that could be seized, so they risk some pain from a libel lawsuit. But such speakers can usually be fairly confident that their target won’t invest the money in getting and enforcing a judgment.²⁷

B. 47 U.S.C. § 230

Of course, Internet speech, even from judgment-proof speakers, comes through platforms owned by businesses that have ample assets. Blogs are hosted on some company’s computer systems. Consumer reviews are posted on some company’s site, such as Yelp or RipoffReport. Revenge porn is often posted on sites devoted to pornography. And this material is usually found by users using search engines.

But all those non-judgment-proof intermediaries are, with few exceptions, not liable for what users post, and generally aren’t even subject to injunctions to remove or block such user posts.²⁸ Title 47

²⁴ See Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 18-22 (1983); see also Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 927 n.98 (1983).

²⁵ 1 W. BLAKE ODGERS, *A DIGEST OF THE LAW OF LIBEL AND SLANDER* 390 (1881).

²⁶ For data from the late 1980s and 1990s on how libel litigation, including against the mass media, actually worked out, see David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503 (2001).

²⁷ Occasionally, plaintiffs will litigate such cases, if they think that they (1) have a great deal at stake, and (2) can persuade even judgment-proof defendants that having a judgment against them is such a hassle that it’s better to agree to take down and stop the libels. See, e.g., *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014). But my sense is that this is relatively rare.

²⁸ *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000); *Hassell v. Bird*, 420 P.3d 776, 785 (Cal. 2018); *Kathleen R. v. City of Livermore*,

U.S.C. § 230(c)(1), enacted in 1996, expressly provides that such Internet content and service providers can't be treated as publishers or speakers of material posted by others.²⁹ Courts have read this immunity broadly, to bar nearly every theory of civil liability that plaintiffs have tried to impose on such companies.³⁰

And the immunity applies whether or not service providers decide to control what is posted on their sites.³¹ Service providers are thus free to choose whether to take down some material that they conclude is defamatory or otherwise offensive, or whether to keep it up. In either case, they are immune from liability (except as to material that infringes federal copyright or trademark law).

Thus, for much online material, there is no potential institutional defendant who might be held accountable. Plaintiffs can sue the individual authors — but if such a lawsuit doesn't give the plaintiffs the relief they seek, no other defendants are available.

Some of the problems discussed in this Article could be ameliorated by repealing or limiting § 230(c)(1), and thus by giving organizations that are vulnerable to civil liability an incentive to police speech. Of course, this would exacerbate other problems, chiefly by giving the organizations too much of an incentive to police even protected speech.³² For our purposes, I will assume that § 230(c)(1) endures, though the concerns discussed in this Article may lead some readers to reflect on whether § 230(c)(1) ought to be modified — say, by instituting a limited notice-and-takedown provision, such as the one provided for copyright infringement under the Digital Millennium Copyright Act³³ — or whether such calls should be resisted.³⁴

104 Cal. Rptr. 2d 772, 780 (Ct. App. 2001); *Giordano v. Romeo*, 76 So. 3d 1100, 1102 (Fla. Ct. App. 2011); *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010).

²⁹ 47 U.S.C. § 230(f) (2018).

³⁰ Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 36-37 (2019).

³¹ 47 U.S.C. § 230; *Zeran v. Am. Online Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

³² See, e.g., Bhagwat, *supra* note 7, at 2393; Goldman, *supra* note 30, at 41.

³³ 17 U.S.C. § 512 (2018).

³⁴ See, e.g., Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2314 (2014) ("If a private party alleges that the intermediary is hosting content that infringes the party's copyrights, the intermediary must promptly remove it or risk liability. Thus, intermediaries still have incentives to take down content that is protected by fair use and the First Amendment."); Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 181-84 (2013) ("From the perspective of potential to restrain speech, the DMCA certainly appears to create the same harms as distributor liability. . . . Congress and copyright owners together force intermediaries to censor their users or risk their business."); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV.

C. *Anti-Libel Injunctions and Criminal Contempt*

As compensatory damages have become practically unavailable to more and more libel victims, courts have shifted to a remedy that had long been seen as categorically forbidden — injunctions against libel.³⁵ And this trend seems to have accelerated as the Internet has democratized access to the media.

As Judge Posner noted in one recent Internet libel case, the traditional ban on libel injunctions “would make an impecunious defamer undeterrable. He would continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment.”³⁶ In traditional equity terms, the assumption that libel plaintiffs have an “adequate remedy at law” in the form of a damages claim is especially inapt when it comes to the judgment-proof defendant. And the Internet makes it easier than ever for judgment-proof speakers to cause substantial financially irremediable damage.³⁷

Anti-libel injunctions can avoid this problem by adding a potent enforcement tool: the threat of jail. Continuing to libel someone in violation of an anti-libel injunction is criminal contempt, punishable by jail time. Failing to take down libelous material in violation of a takedown order may also be civil contempt, which could lead to the threat of jailing until the defendant complies with the order. Even if

986, 1003 (2008) (“Because DMCA notice requirements are minimal and ISPs have no incentive to investigate, the notice-and-takedown process can be used to suppress critical speech as well as copyright infringement.”).

³⁵ See Eugene Volokh, *Anti-Libel Injunctions*, 168 U. PA. L. REV. 73 (2019).

³⁶ *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (citation omitted); see also *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 351 (Cal. 2007) (allowing injunctions because “a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation,” for instance when the “defendant . . . [is] so impecunious as to be ‘judgment proof’”).

³⁷ Erwin Chemerinsky acknowledges that the worry that libel law won’t deter “the judgment proof defendant” “is not a frivolous concern,” but concludes that “the assumption behind the concern is troubling; poor people should have their speech enjoined, while the rich are allowed to speak so long as they pay damages.” Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 170 (2007). Yet the answer to that objection, it seems to me, is to allow injunctions against the rich and poor alike, rather than to leave victims of defamation with no remedy at all against poor defamers. See Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1460-61 (2009) (concluding that narrow permanent injunctions against repeating “speech that is specifically proven false” are indeed permissible).

we're judgment-proof, we aren't jail-proof (unless we're safely anonymous or outside the jurisdiction).³⁸

I discuss the mechanics of anti-libel injunctions in much more detail elsewhere, and talk there about what First Amendment protections those injunctions ought to contain.³⁹ For now, though, the point is simple. Greater equality of access to speech has meant more speech that is widely distributed, libelous, and said by poor speakers. And that in turn has led to more calls for a remedy that, at bottom, rests on the threat of criminal enforcement.

D. Criminal Libel: Survival and Revival

Libels by the judgment-proof have also led to the use of a mechanism that is all about criminal enforcement: criminal libel. Even if criminal libel prosecutions are rare enough that they won't generally deter Internet speakers at large, they seem likely to yield a prompt takedown of the allegedly libelous speech, and a prompt suspension of such speech during the prosecution. Once an indictment is filed, only rare speakers would boldly continue the same behavior that got them prosecuted.

And criminal libel prosecutions can also benefit poor victims of libel, because the state pays the legal costs. The victims may get little financial compensation: restitution appears not to be a common remedy in criminal libel cases — and even if restitution were made available, and were easier to get through the criminal process than through the civil process,⁴⁰ you can't get blood from a stone even through a criminal prosecution. But you can get some sense of vindication, and likely removal of the reputation-damaging material.

Criminal libel law is often described as essentially dead.⁴¹ But it is constitutionally permissible if it's properly limited to knowing falsehoods.⁴²

Many criminal libel statutes did not survive the Court's libel revolution as well as civil liability has, partly because statutes are less

³⁸ See Volokh, *Anti-Libel Injunctions*, *supra* note 35, at 153-54 (discussing examples of injunctions that seem to have finally had an effect when the judge credibly threatened criminal contempt).

³⁹ See *id.*

⁴⁰ Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 688-89 (2006).

⁴¹ See, e.g., KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 97 (7th ed. 2009) ("There might not have been a successful [criminal libel] prosecution in the last thirty-five years.").

⁴² See Volokh, *Anti-Libel Injunctions*, *supra* note 35, at 80-83.

supple than common-law tort rules. Because libel was a common-law tort, state courts could easily preserve a constitutionally narrowed form of civil libel action just by adapting state tort law rules to fit the Court's emerging libel caselaw, and doing so with each new Court decision.⁴³ But by 1964, the criminal law, including the law of criminal libel, had been codified in most states.⁴⁴ The Supreme Court's libel cases rendered those statutes unconstitutionally overbroad.

And when the statutes were challenged, courts were often inclined to just strike them down rather than to narrow them by essentially adding new limiting language to them. Since 1964, courts in several states have struck down the old statutes,⁴⁵ and in most of those states the legislatures have not reenacted narrower, constitutionally valid versions.⁴⁶ Indeed, in some states, legislatures just repealed the criminal

⁴³ Some states had codified their common law of libel, but generally in broad terms, which state courts could easily interpret in ways consistent with the Supreme Court's precedents. See, e.g., CAL. CIV. CODE § 45 (2020) (defining libel as "a false and unprivileged publication" that damages reputation); *Franklin v. Benevolent & Protective Order of Elks*, 159 Cal. Rptr. 131, 135 (Ct. App. 1979) (reading the term "unprivileged" as incorporating the First Amendment privileges defined by the Supreme Court).

⁴⁴ See, e.g., *State v. Turner*, 864 N.W.2d 204, 208 (Minn. Ct. App. 2015) (noting that the Minnesota legislature had codified criminal libel in 1891, and updated the definition in 1963). *But see Ashton v. Kentucky*, 384 U.S. 195, 195 (1966) (setting aside a conviction under Kentucky's common law of criminal libel).

⁴⁵ See, e.g., *Turner*, 864 N.W.2d 204; *Parmelee v. O'Neel*, 186 P.3d 1094 (Wash. Ct. App. 2008); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003) (Puerto Rico statute); *In re I.M.L.*, 61 P.3d 1038, 1038 (Utah 2002) (but only as to one of the two Utah statutes; the other remains in force); *Ivey v. State*, 821 So. 2d 937, 946 (Ala. 2001); *State v. Shank*, 795 So. 2d 1067 (Fla. Ct. App. 2001); *Nev. Press Ass'n v. Del Papa*, No. 2:98-CV-00991 (D. Nev. July 7, 1998); *State v. Helfrich*, 922 P.2d 1159 (Mont. 1996); *State v. Powell*, 839 P.2d 139 (N.M. Ct. App. 1992) (only as to speech on matters of public concern); *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (only as to speech about public figures or public officials on matters of public concern); *Fitts v. Kolb*, 779 F. Supp. 1502, 1502 (D.S.C. 1991); *Williamson v. State*, 295 S.E.2d 305 (Ga. 1982); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Ct. App. 1976); *Weston v. State*, 528 S.W.2d 412 (Ark. 1975); *State v. Snyder*, 277 So. 2d 660, 668 (La. 1973) (on rehearing), *rev'd on other grounds*, 305 So. 2d 334 (La. 1974); *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972); *Boydston v. State*, 249 So. 2d 411 (Miss. 1971). In a few states, though, courts have narrowed or reinterpreted the statutes to make them constitutional. See, e.g., *Phelps v. Hamilton*, 59 F.3d 1058, 1072 (10th Cir. 1995) (Kansas law); *Thomas v. City of Baxter Springs*, 369 F. Supp. 2d 1291, 1298 (D. Kan. 2005); *Ryan*, 806 P.2d at 940 (the Legislature has since repealed the statute); *Pegg v. State*, 659 P.2d 370 (Okla. Ct. Crim. App. 1983).

⁴⁶ Minnesota and Montana did reenact narrower statutes. MINN. STAT. § 609.765 (2020); MONT. CODE ANN. § 45-8-212 (2020) (discussed in *Myers v. Fulbright*, 367 F. Supp. 3d 1171, 1176 (D. Mont. 2019), which ultimately concluded that even the narrower statute wasn't narrow enough).

libel statutes altogether.⁴⁷ Criminal libel laws are thus indeed less popular now with legislatures than in the past.

But in about a dozen states, the laws remain on the books.⁴⁸ And recent years have begun to see something of a revival in criminal libel enforcement, at least in some states. As best I can tell at this point (I'm writing a broader article called *Criminal Libel: Survival and Revival* in which I hope to canvass this in more detail), there are likely about twenty criminal libel prosecutions per year throughout the country.

Twenty cases a year is not a vast amount. (Libel injunctions, which I mentioned above, are more common.) But the prosecutions show that some prosecutors do see criminal libel as a valuable tool; and what some prosecutors do now, others can do in the future. Indeed, there is some evidence from Wisconsin that criminal libel prosecutions rose from 1991–99 to 2000–07, the era during which Internet use surged.⁴⁹ And most of the prosecutions involve ordinary people lying about each other online — impersonating each other in reputation-damaging ways,⁵⁰ accusing each other of child molestation,⁵¹ and more.⁵²

Sometimes, the prosecutions or threatened prosecutions do appear to be political abuses. Consider, for instance, the case of the Louisiana

⁴⁷ See, e.g., 1978 Alaska Sess. Laws 118-19; 2005 Ark. Acts 7469-72, § 512; 1986 Cal. Stat. 311; 2012 Colo. Sess. Laws 391-92; 2015 Ga. Laws 390, Act 70 § 3-1; 1976 Iowa Acts ch. 1245, § 526; 2002 Md. Laws 686; 1978 N.J. Laws ch. 95, § 2C:98-2; 1985 Or. Laws 759; 1998 R.I. Pub. Laws 324-25; 2009 Wash. Sess. Laws 597-98; *Commonwealth v. Mason*, 322 A.2d 357, 358 nn.1–2 (Pa. 1974) (noting that the Pennsylvania criminal libel law was repealed by 1972 Pa. Laws 1611, Act No. 334); *id.* at 359 (Jones, C.J., concurring and dissenting).

⁴⁸ See IDAHO CODE §§ 18-4801 to -4809 (2020); KAN. STAT. ANN. § 21-6103 (2020); LA. REV. STAT. ANN. § 14:47 (2020); MICH. COMP. LAWS § 750.370 (2020); MINN. STAT. § 609.765 (2020); N.H. REV. STAT. ANN. § 644:11 (2020); N.M. STAT. ANN. § 30-11-1 (2020); N.D. CENT. CODE § 12.1-15-01 (2020); OKLA. STAT. tit. 21 §§ 771-781 (2020); UTAH CODE ANN. § 76-9-404 (2020); VA. CODE ANN. § 18.2-417 (2020); 14 V.I. CODE § 1174 (2020); WIS. STAT. § 942.01 (2020).

⁴⁹ See David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303, 313 (2009).

⁵⁰ E.g., *State v. Birnbaum*, No. 69VI-CR-13-1105 (Minn. Dist. Ct. St. Louis Cnty. Aug. 6, 2013) (ex-boyfriend impersonating ex-girlfriend and placing sexually explicit posts as well as posts soliciting sex); *Student, 17, Accused in Phony Facebook Profile*, AUGUSTA CHRON. (Aug. 9, 2010), <https://www.augustachronicle.com/article/20100809/NEWS/308099947> [<https://perma.cc/LGD3-LQUW>].

⁵¹ E.g., *State v. Moen*, No. 55-CR-14-3008 (Minn. Dist. Ct. Olmstead Cnty. May 14, 2014) (allegedly retaliating against victim for having made accusations against defendant's husband); *Cedar City v. Hancock*, No. C15-3740 (Utah Just. Ct. Iron Cnty. Feb. 11, 2016) (accusing ex-wife's brother of molesting the brother's children).

⁵² See Pritchard, *supra* note 49, at 327-31.

sheriff who went after an anonymous online critic who had claimed that the sheriff had improperly given a local businessman a contract.

The sheriff got a search warrant based on the theory that the criticism was criminal libel of the businessman, and managed to identify the critic as a result.⁵³ But the businessman was himself a local government official, and Louisiana courts had already held the state criminal libel statute unconstitutional as to public officials, or for that matter as to anyone involved in a matter of public concern.⁵⁴ The Louisiana Court of Appeals therefore set aside the warrant as “lack[ing] probable cause because the conduct complained of is not a criminally actionable offense”⁵⁵ — but only after the critic was identified as a police officer from a neighboring jurisdiction.⁵⁶

It’s possible, then, that criminal libel laws are unduly chilling, and subject to potential political abuse. Maybe they should be categorically barred as to speech on matters of public concern: punitive damages are barred in public-concern cases, unless “actual malice” is shown⁵⁷ — perhaps criminal libel law should be even more severely limited.

Or perhaps criminal libel laws should be invalidated or repealed altogether, for instance because the line between speech on matters of public concern and private concern is too hard to draw,⁵⁸ or because we

⁵³ See Naomi LaChance, *Sheriff Raids House to Find Anonymous Blogger Who Called Him Corrupt*, INTERCEPT (Aug. 4, 2016), <https://theintercept.com/2016/08/04/sheriff-raids-house-to-find-anonymous-blogger-who-called-him-corrupt/> [https://perma.cc/P6NG-R94G].

⁵⁴ *State v. Defley*, 395 So. 2d 759, 761-62 (La. 1981); *State v. Snyder*, 277 So. 2d 660, 668 (La. 1973) (on rehearing), *rev'd on other grounds*, 305 So. 2d 334 (La. 1974).

⁵⁵ *Terrebonne Par. Sheriff's Off. v. Anderson*, No. 2016 KW 1093, 2016 WL 11184720, at *1 (La. Ct. App. Aug. 25, 2016).

⁵⁶ The police officer was suspended with pay, but was later reinstated. David Hammer, *Houma PD Reinstates Officer Raided over Blog Posts*, WWL-TV (Aug. 14, 2016), <https://www.wwtv.com/article/news/local/lafourche-terrebonne/houma-pd-reinstates-officer-raided-over-blog-posts/289-297429131> [https://perma.cc/TYZ6-RZT6]. He filed a federal lawsuit over the search, *Anderson v. Larpenter*, No. CV 16-13733, 2017 WL 3064805 (E.D. La. July 19, 2017), which eventually settled. Katie Moore, *Terrebonne Sheriff Reaches 'Compromise' with Blogger in 1st Amendment Lawsuit over Illegal Search*, 4WWL (Sept. 7, 2017), <https://www.wwtv.com/article/news/local/investigations/katie-moore/terrebonne-sheriff-reaches-compromise-with-blogger-in-1st-amendment-lawsuit-over-illegal-search/472063049> [https://perma.cc/DNN6-RPUF]. See also *Simmons v. City of Mamou*, No. 09-663, 2012 WL 912858 (W.D. La. Mar. 15, 2012); *Mata v. Anderson*, 760 F. Supp. 2d 1068, 1076-77 (D.N.M. 2009); *In re Matter Under Investigation*, No. 15-509, 2015 WL 6736200 (La. Ct. App. Nov. 4, 2015).

⁵⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

⁵⁸ See, e.g., Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39 (2012); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First*

think the legal system already criminalizes too much, and adding even misdemeanor punishments will only exacerbate the problem. But if we do set criminal libel laws aside, we have to acknowledge that we're setting aside what might often be the only effective tool for punishing and deterring intentional libels.

E. Criminal Libel by Another Name

Indeed, one state — my own California — appears to be reinventing criminal libel law after a decades-long break. In 1976, a California appellate court struck down the California criminal libel statute, in a case involving a publication about the famous actress Angie Dickinson.⁵⁹ Ten years later, the California Legislature repealed the statute.⁶⁰

But two recent California Court of Appeal decisions have read an identity theft statute as essentially recriminalizing libel (though with no evidence that the Legislature contemplated this). The statute criminalizes “willfully obtain[ing] personal identifying information . . . of another person” and using it “for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person.”⁶¹ “Personal identifying information” includes “any name, address, telephone number” alongside other identifying items (such as Social Security number, bank account number, and the like).⁶²

Though the statute is colloquially called the “identity theft statute,” California courts have held that the statute isn't limited to behavior generally viewed as “identity theft,” such as impersonation, or to financial fraud. The statute, they have held, “contains no requirement that the defendant hold himself out as someone else,” nor does it “require an intent to defraud or to cause harm or loss to another.”⁶³

Amendment Category, 59 GEO. WASH. L. REV. 1, 37 (1990); Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000); Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

⁵⁹ *Eberle v. Mun. Court*, 127 Cal. Rptr. 594, 600 (Ct. App. 1976).

⁶⁰ 1986 Cal. Stat. 311 ch. 141.

⁶¹ CAL. PENAL CODE § 530.5(a) (2011).

⁶² *Id.* § 530.55.

⁶³ “Courts have interpreted section 530.5, subdivision (a), broadly. . . . Courts have interpreted ‘any unlawful purpose’ to include conduct broader than crimes; for example, using a person’s password to commit libel falls within the statute’s purview.” *People v. Lee*, 217 Cal. Rptr. 3d 392, 403 n.8 (Ct. App. 2017). “[T]he statute itself does not use [the] phrase [‘identity theft’], nor does it require that a defendant portray himself as someone else. . . . [T]he statute does not, in fact, require that a defendant have

And courts have held that the “unlawful purpose” could be a purpose to commit a tort, such as libel, and not just to commit a crime.⁶⁴ Since nearly all libels would involve the use of at least one piece of “personal identifying information” — the subject’s name — nearly all knowing libels are thus criminal under this interpretation. Indeed, two California appellate decisions have expressly upheld criminal convictions for posting libels.⁶⁵

I think the California Court of Appeal has erred in reading the statute so broadly. A step as significant as recriminalizing libel, following express legislative repeal, ought not be lightly taken, especially since such a reading may well not be what the Legislature intended — the requirement of “unlawful purpose” in the criminal statute may easily have been intended to refer to criminal purpose.⁶⁶

Nonetheless, the impulse behind these decisions — the impulse of the prosecutors who argued for this theory, and the judges who adopted it — shows the appeal of criminal libel prosecutions, even when a statute has to be stretched for that purpose. The law ought to do something to deal with knowing lies about people, the impulse suggests, and the civil law of libel alone does virtually nothing when the libelers are judgment-proof. That is part of the reaction that I’m aiming to describe.

Modern “criminal harassment” and “cyberstalking” laws are also being adapted to revive aspects of criminal libel law. Traditionally, such laws have banned unwanted speech *to* a person (such as telephone harassment or in-person approaches). But increasingly they also ban unwanted speech *about* a person, if it’s intended to “harass,” “annoy,” “alarm,” or “embarrass”; and much libelous speech can be said to qualify. Indeed, several state and federal cases have allowed such

personated another in using another individual’s personal identifying information in order to be convicted under its terms.” *People v. Barba*, 149 Cal. Rptr. 3d 371, 380 (Ct. App. 2012). “[Section 530.5(a)] clearly and unambiguously does *not* require an intent to defraud.” *People v. Hagedorn*, 25 Cal. Rptr. 3d 879, 885 (Ct. App. 2005) (emphasis in original).

⁶⁴ See *People v. Bollaert*, 203 Cal. Rptr. 3d 814, 825 (Ct. App. 2016); *People v. Casco*, No. G049375, 2015 WL 2455083, at *6 (Cal. Ct. App. May 22, 2015) (nonprecedential); *In re Rolando S.*, 129 Cal. Rptr. 3d 49, 58 (Ct. App. 2011). A nonprecedential case, *Clear v. Superior Court*, No. E050414, 2010 WL 2029016, at *1 (Cal. Ct. App. May 24, 2010), had concluded that “[t]here is no authority that the commission of civil tort, such as defamation, constitutes an unlawful purpose.” But there is such authority now, and in precedential opinions (*In re Rolando S.* and *Bollaert*).

⁶⁵ See *Casco*, 2015 WL 2455083, at *6; *In re Rolando S.*, 129 Cal. Rptr. 3d at 58.

⁶⁶ See, e.g., *People v. Cox*, 2 P.3d 1189, 1193 (Cal. 2000) (interpreting the requirement of an “unlawful act, not amounting to a felony” in a criminal manslaughter statute as referring to a crime).

statutes to be used to criminally punish speech that in earlier decades might have been punished as criminal libel.⁶⁷

II. MORE CRIMINALIZATION: DISCLOSURE OF PRIVATE FACTS

A. *The Official Model: Civil Liability*

For several decades, the legal system has generally tried to use the risk of civil liability to prevent disclosure of private facts.⁶⁸ The disclosure tort has been defined narrowly, as limited to information that is viewed as (1) highly sensitive and (2) not newsworthy, and only when (3) it is communicated to largish groups, rather than just a few friends.⁶⁹ Thus narrowed, it has been largely accepted (though a minority of state courts have rejected it, partly on First Amendment grounds⁷⁰). And the recent \$140 million *Gawker* verdict⁷¹ shows its potential effectiveness

⁶⁷ Criminal Complaint, *United States v. Thompson*, No. 17 MAG 1532 (S.D.N.Y. Mar. 1, 2017) (cyberstalking complaint based on defendant's impersonating the victim and sending threats in her name); *Burroughs v. Corey*, 92 F. Supp. 3d 1201, 1208-09 (M.D. Fla. 2015) (upholding Florida criminal harassment statute in part because it "prohibits unprotected conduct," such as "defamation"); *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 371-72 (D. Del. 2015) (allowing criminal cyberstalking prosecution on the grounds that the distressing speech in that case was "defamation"); *United States v. Sergentakis*, 2015 WL 3763988, at *7-8 (S.D.N.Y. June 15, 2015); *United States v. Sayer*, 2012 WL 1714746, at *4 (D. Me. May 15, 2012) (likewise); *Commonwealth v. Cox*, 72 A.3d 719, 721-22 (Pa. Super. Ct. 2013) (upholding harassment conviction for publicly accusing someone of having a sexually transmitted disease, a classic example of libel); Order Imposing Sentence, *Commonwealth v. Abrams*, No. MJ-3810+NT-0000217-2014, at 1 (Pa. Mag. Ct. Montgomery Cnty. Sept. 15, 2014) (sentencing for criminal harassment based on allegedly "slandorous" statements against a business, see Private Criminal Complaint, *id.* at para. 2 (July 7, 2014)).

⁶⁸ See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). I focus here on cases aimed at restricting the distribution of speech about people, rather than cases having to do with governmental or private surveillance.

⁶⁹ RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

⁷⁰ See, e.g., *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977); *Brunson v. Ranks Army Store*, 73 N.W.2d 803 (Neb. 1955); *Howell v. N.Y. Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988); *Anderson v. Fisher Broad.*, 712 P.2d 803 (Or. 1986); see also *Doe v. Methodist Hosp.*, 690 N.E.2d 681 (Ind. 1997) (splitting 2-2-1 on whether the tort should be recognized, with one Justice expressing no opinion). I agree, and think the tort is too broad and vague to be constitutional. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1089-95 (2000) [hereinafter *Freedom of Speech and Information Privacy*]. But those courts and I are in the minority on this.

⁷¹ Gardner, *supra* note 12.

against media organizations: few *Gawker*-like sites are likely to display unauthorized sex videos in the coming years.

But, as with libel, liability for disclosure of private facts does little to deter judgment-proof defendants, especially when they victimize poor potential plaintiffs. Say John posts nude photographs of Mary; Mary can't afford to hire a lawyer; and John lacks the assets that would make the case appealing to a contingency fee lawyer. Unless Mary has a well-off supporter or a lawyer who will take the case pro bono — possible,⁷² but unlikely — a civil lawsuit is hard to envision.

B. Criminalizing Disclosure of Private Facts

And because of this, as with libel, litigants, prosecutors, and judges have been experimenting with other means for fighting what they see as invasions of privacy: criminal prosecution, as well as injunctions backed by the threat of criminal prosecution.⁷³

- Some jurisdictions have essentially criminalized the disclosure of privacy tort, something that had not been done until recently,⁷⁴ but that turns out to be an echo of the 19th-century formulation of criminal libel law.⁷⁵
- Some have authorized broad injunctions against the display of private information.
- Some have enacted specific statutes forbidding the distribution of specific information about people, such as nude photographs,⁷⁶ home addresses,⁷⁷ financial information, and the like.

⁷² Billionaire investor Peter Thiel famously supported the lawsuit against Gawker. *Id.* And in at least one prominent online speech case, the lawsuit by two Yale Law School students based on insulting, defamatory, and threatening postings on AutoAdmit.com, the plaintiffs got pro bono representation from Stanford law professor (and experienced practitioner) Mark Lemley and Connecticut lawyer (and Yale Law School research scholar) David N. Rosen. Amir Efrati, *Students File Suit Against Ex-AutoAdmit Director, Others*, WALL ST. J. (June 12, 2007), <https://www.wsj.com/articles/BL-LB-3962> [<https://perma.cc/CB8D-FNK2>]. Such help for plaintiffs, though, seems likely to be a rare exception.

⁷³ See Eugene Volokh, *Injunctions Against Disclosure of Private Facts* (unpublished manuscript) (on file with author).

⁷⁴ See *infra* Part II.B.

⁷⁵ See Volokh, *supra* note 73.

⁷⁶ See *infra* Part II.C.

⁷⁷ See *infra* Part II.D.

For instance, a North Dakota statute expressly criminalizes intentionally or recklessly “[e]ngag[ing] in harassing conduct by means of intrusive or unwanted acts, words, or gestures that are intended to adversely affect the . . . privacy of another person,” when this is done intending “to harass, annoy, or alarm” or recklessly disregarding the risk of harassing, annoying, or alarming.⁷⁸ Most tortious disclosure of private facts is likely to annoy the subject, and is said at least with recklessness about that possibility; it would thus be generally criminal.⁷⁹

A North Carolina statute banned “[p]osting . . . on the Internet [any] private, personal, or sexual information pertaining to a minor” “[w]ith the intent to intimidate or torment a minor.”⁸⁰ The state supreme court struck it down, though, partly because the ban on posting “personal . . . information” was unconstitutionally overbroad.⁸¹

The reasoning of the California cases involving the identity theft statute (discussed in Part I.E) likewise makes it a crime to engage in any intentional tort that uses a person’s name, which would include disclosure of private facts. Indeed, in *People v. Bollaert*, prosecutors used this theory to punish someone for running a revenge porn site (which also involved extortion), precisely because it involved tortious disclosure of private facts.⁸² And the rationale of the court’s decision upholding the conviction would apply to all “intentional civil torts” that use people’s names or other identifying information, “including . . . invasion of privacy by means of intrusion into private affairs and public disclosure of private facts”⁸³ — not just to the display of nude or sexual images.

Minnesota law expressly lets judges enjoin “repeated incidents of intrusive or unwanted acts, words, or gestures that . . . are intended to have a substantial adverse effect on the . . . privacy of another.”⁸⁴ Violating such an injunction is a crime.⁸⁵ And Minnesota cases show

⁷⁸ N.D. CENT. CODE § 12.1-31-01(1)(h) (2012).

⁷⁹ The material in much of the rest of this subsection is borrowed from Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 NW. U. L. REV. 731, 756-62 (2013) [hereinafter *One-to-One Speech*].

⁸⁰ N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2012).

⁸¹ *State v. Bishop*, 787 S.E.2d 814, 815 (N.C. 2016).

⁸² *People v. Bollaert*, 203 Cal. Rptr. 3d 814, 825 (Ct. App. 2016).

⁸³ *Id.*

⁸⁴ See MINN. STAT. §§ 609.748, subdivs. 1(a)(1), 4(a), 5(a), 6 (2009).

⁸⁵ *Id.* at subdivs. 6(b)-(d).

that such “substantial adverse effect” on “privacy” can include the disclosure of private facts:

- “[B]logging and communications to third parties” about one’s ex-girlfriend can be enjoined on the grounds that the speech interferes with her “privacy,” regardless of the communications’ “truth or falsity.”⁸⁶
- Sending letters to one’s son’s Catholic school alleging that the son’s grade school math teacher was gay, and implying that the teacher should be fired as a result, could likewise be enjoined.⁸⁷
- A fired employee’s retaliating against his ex-employer by sending the ex-employer’s “personal and business acquaintances” information about the ex-employer’s past misconduct could be enjoined, if it were not based on public record documents.⁸⁸

⁸⁶ Johnson v. Arlotta, No. A11-630, 2011 WL 6141651, at *3 (Minn. Ct. App. Dec. 12, 2011). The *Johnson* opinion also expressed concern that the statements were indirect attempts to contact the ex-girlfriend, and not just speech about her. But the appellate court affirmed the trial court order that specifically directed defendant to “remove his blog [about the ex-girlfriend] from the Internet.” *Id.* at *2. And the appellate court believed defendant’s misconduct rested in part on his sending “extremely personal, sensitive information about” the ex-girlfriend to third parties and “shar[ing] sensitive information about [the ex-girlfriend] in a manner that substantially and adversely impacted her privacy interests.” *Id.* at *3, *5.

⁸⁷ See *Faricy v. Schramm*, No. C8-02-689, 2002 WL 31500913, at *1 (Minn. Ct. App. Nov. 12, 2001); Statement of the Case of Appellant at 4-5, *Faricy*, No. C8-02-0689 (Minn. Ct. App. Apr. 29, 2002), <http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf> [<https://perma.cc/2TCS-YUTN>]; Restraining Order at 1, *Faricy*, No. C8-02-0689 (Minn. Dist. Ct. Mar. 1, 2002), <http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf> [<https://perma.cc/2TCS-YUTN>]. The court of appeals vacated the injunction, but only on the grounds that the statute applied only after repeated incidents of such speech, and the letter was a single incident. *Faricy*, 2002 WL 31500913, at *2.

⁸⁸ See *Beahrs v. Lake*, No. C3-97-2222, 1998 WL 268075, at *1-2 (Minn. Ct. App. May 26, 1998). The court of appeals vacated that particular injunction on the grounds that the ex-employer “had no legitimate expectation of privacy” in “accurate copies of public records,” but the reasoning suggests that the statute would apply to mailings of embarrassing information that is not in public records. Likewise, in *Tarlan v. Sorensen*, No. C2-98-1900, 1999 WL 243567 (Minn. Ct. App. Apr. 27, 1999), plaintiff wife sought a restraining order on the grounds that defendant husband “released [plaintiff wife’s] medical records without her permission.” *Id.* at *2. The appellate court affirmed the denial of a restraining order, but concluded that “while both parties have said inappropriate things about each other in front of, or to their employees, neither party’s conduct rose to the level necessary to require the issuance of a harassment restraining

Likewise, some courts even in other states have issued injunctions that ban people from revealing personal information about others, usually their ex-spouses or ex-lovers.⁸⁹

I'm skeptical of such criminalization of the disclosure of private facts tort, for reasons I discuss elsewhere.⁹⁰ But for now, the important point is simply that the era of "cheap speech" has pushed courts and legislatures to criminalization — either through specific statutes or through the use of injunctions backed by the threat of criminal contempt — in order to deal with the danger posed by judgment-proof speakers.

C. Nonconsensual Pornography

Though I think criminalizing the entire category of disclosure of private facts is a bad idea, narrower and clearer prohibitions may well be sound; and the criminalization of revenge porn — or, more precisely, nonconsensual porn⁹¹ — is one such.⁹²

Nonconsensual porn is an especially severe intrusion on privacy. Sexually themed pictures of ourselves naked, or having sex, are about as "highly offensive" to a reasonable person's sense of privacy as can

order under Minn. Stat. § 609.748." *Id.* The court's reasoning seems to be that revelations of private information about others would be actionable under the statute if they are more egregious than they were in that case — for instance, if the information wasn't just revealed to a few employees.

⁸⁹ See Volokh, *supra* note 73.

⁹⁰ *Id.*

⁹¹ As I've argued elsewhere, nonconsensual pornography should be banned regardless of whether the speaker is motivated by "revenge" or some other desire to distress. See Eugene Volokh, *Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1405-06 (2016) [hereinafter *Bad Purposes*]. Say, for instance, that Alan has sexual photos of his ex-girlfriend Betty, Betty becomes famous, and Alan sells them not because he wants revenge — indeed, he may regret the pain he is causing her — but just because he wants the money. That should be no less culpable than distributing the photos because of a desire to get back at Betty for leaving him.

⁹² See, e.g., CAL. PENAL CODE § 647(j)(4)(A) (2020); CAL. CIV. CODE § 1708.85 (2020); GA. CODE ANN. §§ 16-11-90(a)(1), (b)(1) (2020); HAW. REV. STAT. § 711-1110.9(1)(b) (2020); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016); Volokh, *Freedom of Speech and Information Privacy*, *supra* note 70, at 1094; cf. Cheatham v. Pohle, 789 N.E.2d 467, 470 (Ind. 2003) (discussing jury verdict for plaintiff whose ex-husband had distributed nude photographs of plaintiff); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (stating that disclosure of nude photographs would generally be actionable).

be.⁹³ They are also almost never “of legitimate concern to the public”:⁹⁴ they don’t contribute to the search of truth, democratic self-government, or people’s decision-making about their daily lives. And a ban on knowing distribution of nonconsensual porn is unlikely to deter valuable speech, because such a ban can be relatively precisely drafted.

A First Amendment exception for nonconsensual porn is also consistent with the Court’s recent shift to a tradition-based definition of the First Amendment exception.⁹⁵ There is much to dislike about the obscenity exception, but the strongest case for protecting pornography arises when it involves “consenting adults,”⁹⁶ and the strongest case for restricting it arises when not everyone involved is a consenting adult.

Obscenity doctrine thus already provides for a more relaxed substantive definition of obscenity when the material is distributed to people other than consenting adults, especially children⁹⁷ but perhaps also unwilling viewers.⁹⁸ Indeed, even the doctrine’s critics, such as Justice Brennan, have generally recognized that distribution of pornography to unwilling viewers might be restricted.⁹⁹ Distribution of pornography that involves unwilling models should be punishable as well, with the prurient interest and patent offensiveness requirements suitably relaxed.

To be sure, there are extraordinary situations in which even nonconsensual porn might be valuable — consider the Rep. Katie Hill scandal,¹⁰⁰ or a hypothetical Anthony Weiner scenario in which then-Congressman Weiner sent actual naked pictures of himself to someone, rather than just a photo of himself with an erection covered by his underwear.¹⁰¹

⁹³ See RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

⁹⁴ See *id.*

⁹⁵ See, e.g., *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011); *United States v. Stevens*, 559 U.S. 460, 468 (2010).

⁹⁶ See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-08 (1973) (Brennan, J., dissenting).

⁹⁷ See generally *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁹⁸ See *Redrup v. New York*, 386 U.S. 767, 769 (1967) (per curiam) (implying that material may be especially likely to be found obscene when it “assault[s] . . . individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it”).

⁹⁹ *Paris Adult Theatre I*, 413 U.S. at 84-85 (interpreting *Redrup*).

¹⁰⁰ *Hill v. Heslep*, No. 20STCV48797 (Cal. Super. Ct. L.A. Cnty. Apr. 7, 2021).

¹⁰¹ Cf. Anahad O’Connor, *Lawmaker in Twitter Case Assails Reporters*, N.Y. TIMES (May 31, 2011), <https://www.nytimes.com/2011/06/01/nyregion/weiner-assails-reporters-over-twitter-photo.html> [<https://perma.cc/7EFZ-EFCM>].

But an exception for images that have serious political, scientific, and perhaps artistic value should minimize this problem. In *United States v. Stevens*, the Court did hold that a ban on depictions of animal cruelty couldn't be upheld despite the existence of such an exception;¹⁰² that rejection of the exception, though, relied heavily on how facially overbroad the original ban was.¹⁰³ As the Court's reasoning in *New York v. Ferber* (the child pornography case) suggests, when a ban is focused almost exclusively on constitutionally valueless speech, an exception for valuable speech would suffice to keep the ban constitutional.¹⁰⁴

So a prohibition on nonconsensual porn is a legitimate means of protecting privacy. And, returning to the theme of this Article, a criminal prohibition is necessary here.

A trial court did strike down the Vermont nonconsensual porn ban, partly on the grounds that "Even if the court assumes the State meets its burden of a compelling governmental interest, being protecting its citizens privacy rights and perhaps reputational rights, it does not meet its burden of showing there are no less restrictive alternatives," such as civil liability.¹⁰⁵ But the prospect of civil liability will do next to nothing in order to deter judgment-proof speakers, of whom there are millions; and the Vermont Supreme Court reversed the trial court decision, though without specifically discussing the judgment-proof speaker problem.¹⁰⁶

¹⁰² *United States v. Stevens*, 559 U.S. 460, 479-80 (2010).

¹⁰³ *Id.* at 474.

¹⁰⁴ In *Ferber*, the Court held that a statutory exception for valuable speech wasn't necessary; all the Justices concluded that, at most, people who were distributing child pornography that nonetheless had serious value would be able to raise that as a defense in an as-applied challenge. Compare 458 U.S. 747, 775 (1982) (O'Connor, J., concurring) (arguing that no such as-applied defense was needed), with *id.* at 776-77 (Brennan, J., concurring in the judgment) (arguing that an as-applied defense had to be provided in the right cases). But the Court's reasoning makes clear that such a statutory exception, if it were provided, would be sufficient to deal with the rare instances of child pornography that has serious value.

¹⁰⁵ *State v. Vanburen*, No. 1144-12-15 (Vt. Super. Ct. July 1, 2016).

¹⁰⁶ *State v. Vanburen*, 214 A.3d 791 (Vt. 2019); see also *State v. Casillas*, 952 N.W.2d 629 (Minn. 2020) (likewise); *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, *14 (Tex. Ct. Crim. App. May 26, 2021) (likewise); *People v. Austin*, 155 N.E.3d 439 (Ill. 2019) (likewise, though I think the analysis in that opinion unsoundly labels the restriction content-neutral).

D. *Crime-Facilitating Personal Information: Home Addresses, Social Security Numbers, Bank Account Numbers*

The disclosure tort has generally been applied to the publication of private information that embarrasses. But in principle, it could also be applied to the publication of private information that helps facilitate crimes against the person and thus makes the person fearful.

Indeed, three 1980s cases concluded that publishing the name of a crime witness might be tortious on this theory, if the criminals didn't know the name before, and could thus use the name to intimidate or silence the witness.¹⁰⁷ I'm skeptical that these decisions were right, given that the names of witnesses may often be relevant to stories about crime, which are on a matter of public concern; and the decisions are undermined by the Supreme Court's 1989 decision in *Florida Star v. B.J.F.*, which held that the name of a rape victim in a story about the crime would be seen as speech on "a matter of public significance."¹⁰⁸ Still, the disclosure tort might well apply to publishing someone's social security number, bank account numbers, and similar facts that are hard to link to any matter of public significance.¹⁰⁹

But, as with nonconsensual pornography, cheap speech on the Internet makes it easier than ever for such information to get out. Newspapers often have strong nonlegal reasons not to publish the information: some of their customers or advertisers might object to what they see as invasion of privacy. (Consider the blowback against newspapers who publish the names and addresses of people who have permits to carry concealed weapons.¹¹⁰) Yet individual bloggers might face no such pressure, especially if they blog pseudonymously. And, as with libel, many judgment-proof individual authors may be undeterred by damages.

¹⁰⁷ *Capra v. Thoroughbred Racing Ass'n*, 787 F.2d 463, 464 (9th Cir. 1986); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 560 (Ct. App. 1988); *Hyde v. City of Columbia*, 637 S.W.2d 251, 254 (Mo. Ct. App. 1982).

¹⁰⁸ 491 U.S. 524, 536-37 (1989).

¹⁰⁹ *Ostergren v. Cuccinelli*, 615 F.3d 263, 280, 285-86 (4th Cir. 2010) (suggesting that private persons who make public records available could be required to redact social security numbers, but not so long as the government itself fails to redact such information on its own sites); *City of Kirkland v. Sheehan*, No. 01-2-09513-7, 2001 WL 1751590, at *6 (Wash. Super. Ct. May 10, 2001) (refusing to enjoin distribution of police officers' names and addresses, but enjoining distribution of their social security numbers); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1146 (2005).

¹¹⁰ See, e.g., KC Maas & Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012), <https://www.cnn.com/2012/12/25/us/new-york-gun-permit-map/index.html> [<https://perma.cc/Z2PM-QDZS>].

Perhaps because of this, some states have begun to criminalize the publication of certain personal information that they believe can facilitate crimes against people. California law, for instance, allows courts to issue injunctions forbidding “post[ing] . . . on the Internet the home address or telephone number of any elected or appointed official if that official has . . . made a written demand of [the poster] to not disclose his or her home address or telephone number.”¹¹¹ Illinois imposes a similar rule, though limited to judges.¹¹² A Florida statute forbids publishing the names or home addresses of police officers, if the posting is done “maliciously, with intent to obstruct the due execution of the law or with the intent to intimidate, hinder, or interrupt any law enforcement officer in the legal performance of his or her duties.”¹¹³ New Jersey criminalizes publishing the home addresses or phone numbers of judges, prosecutors, or police officers, if the speaker intends that the information be used to cause harassment, property damage, or physical injury, or is reckless about that possibility.¹¹⁴

Three district courts have struck down such bans on the publication of home addresses,¹¹⁵ and I think they were likely right, because such information has valuable uses. Picketing people’s homes is legal, unless it’s forbidden by a specific ordinance.¹¹⁶ Even if such an ordinance bans

¹¹¹ CAL. GOV’T CODE § 6254.21 (2020).

¹¹² 705 ILL. COMP. STAT. ANN. § 90/2-5 (2020).

¹¹³ FLA. STAT. § 843.17 (2020); *see also* KAN. STAT. ANN. § 21-5905 (2020) (outlawing “knowingly making available by any means personal information about a judge or the judge’s immediate family member” — including home addresses, photographs, family members’ places of employment, and family members’ schools — “if the dissemination of the personal information poses an imminent and serious threat to the judge’s safety or the safety of such judge’s immediate family member, and the person making the information available knows or reasonably should know of the imminent and serious threat”); COLO. REV. STAT. ANN. § 18-9-313 (2020) (similar, but applicable to police officers and prosecutors as well as judges, and excluding employment and schooling); 705 ILL. COMP. STAT. ANN. § 90/3-1 (2020) (similar to Kansas statute).

¹¹⁴ N.J. STATS. ANN. § 2C:20-31.1 (2020).

¹¹⁵ *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1029 (E.D. Cal. 2017); *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1250 (N.D. Fla. 2010); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149 (W.D. Wash. 2003). *But see* *Bui v. Dangelas*, No. 01-18-00790-CV, 2019 WL 7341671, at *5 (Tex. Ct. App. Dec. 31, 2019) (upholding injunction ordering a Facebook page operator to remove the home address of a person criticized in a post, when there had been “active threats against” the criticized person by third parties).

¹¹⁶ *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). Even if focused residential picketing is banned by a city ordinance, parading through the targets’ neighborhood is constitutionally protected. *See id.*; *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 775 (1994). I think it’s therefore not correct to say that information including a person’s address “is intrinsically lacking in expressive content.” *See* Susan W. Brenner, *Complicit*

focused residential picketing, the Court has upheld such bans in part because parading through the targets' neighborhood remains legal.¹¹⁷ Indeed, the Court struck down an injunction that banned all picketing within 300 feet of a person's home;¹¹⁸ such picketing near, even if not immediately in front of, a person's home must be constitutionally protected. And if parading past a person's home or picketing near it is protected, then people must be able to inform each other where that home is located.

Likewise, government officials' addresses may often be relevant to whether the officials are complying with local home maintenance ordinances, or whether they live in the proper district. In one recent incident, for instance, the mayor of a Los Angeles suburb was apparently faulting businesses for having bars on their windows, and about people having oil on their driveways. A critic responded by showing a photograph of the mayor's home at a city council meeting — the home's windows had bars, and there was oil on the mayor's driveway.¹¹⁹

And in *NAACP v. Claiborne Hardware Co.*, the Court held that people who were trying to enforce a black boycott of white-owned stores had a First Amendment right to post "store watchers" who would take down the names of noncomplying black residents, publish them in a mimeographed paper, and read them aloud at local NAACP meetings.¹²⁰ Though that didn't involve the publication of people's addresses, it seems likely that most black citizens of Claiborne County, Mississippi in 1965 would know or be able to easily find out each other's addresses;¹²¹ announcing the names was as good as telling people where all the noncompliers lived. Yet even though this was likely intimidating to many, especially since there were some violent incidents directed at noncompliers,¹²² the Court held that an injunction against such speech was unconstitutional.¹²³

More broadly, people's addresses have long been included in many public records, such as voter rolls, property tax records, and political candidacy registration forms. Indeed, law professors and law students

Publication: When Should the Dissemination of Ideas and Data Be Criminalized?, 13 ALB. L.J. SCI. & TECH. 273, 397, 404 (2003).

¹¹⁷ *Frisby*, 487 U.S. at 480-81.

¹¹⁸ *Madsen*, 512 U.S. at 775.

¹¹⁹ See E-mail from Paul Cook to author (Dec. 3, 2020) (on file with author).

¹²⁰ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04 (1982).

¹²¹ Claiborne County was a rural county that had only about 7,500 black residents. U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 1972, at 258 (1972).

¹²² See *Claiborne Hardware Co.*, 458 U.S. at 903-04.

¹²³ See *id.* at 934.

have free access to a massive database of address information in Lexis's People Search service. Others can get access to similar such services on an item-by-item basis online, and relatively cheaply.

I can certainly see why people would prefer not to have their names posted on free, high-profile political advocacy sites, where they can easily be seen by hotheads, a few of whom might be inclined to vandalism or worse. But so long as such information is broadly available, and is useful for at least some sorts of political advocacy, I think its distribution cannot be banned.

On the other hand, as I've argued before, certain kinds of information — such as social security numbers, computer passwords, bank account numbers, and other such material — generally lack lawful use. Their distribution therefore can be properly restricted, in order to prevent unlawful uses.¹²⁴

And if that is so, then such restrictions can only be effective if they carry the risk of criminal punishment — either direct punishment, or punishment for violating an injunction against distributing such material. Civil damages liability under the disclosure tort, or under some specialized statute, might have sufficed when mass distribution was almost entirely the province of the media (and of other established organizations). Such liability is largely ineffective when judgment-proof defendants can distribute the information online.

III. MORE CRIMINALIZATION: "HARASSMENT" AND STOP-TALKING-ABOUT-PLAINTIFF INJUNCTIONS

Some courts are also issuing broad injunctions against "harassment" or "stalking," often barring defendants from posting anything at all about plaintiffs. And these orders are often responses to defendants' merely repeatedly criticizing plaintiffs, even in the absence of defamation or true threats.

Let me offer three examples:

The poet: Linda Ellis wrote a poem called *The Dash*, about life and death.¹²⁵ Many people found the poem moving, and posted it on their own webpages — only to draw letters from Ellis threatening copyright

¹²⁴ See Volokh, *Crime-Facilitating Speech*, *supra* note 109, at 1146-50; Eugene Volokh, *The "Speech Integral to Unlawful Conduct" Exception*, 101 CORNELL L. REV. 981, 1032-33 (2016).

¹²⁵ See *Chan v. Ellis*, 770 S.E.2d 851, 852 (Ga. 2015); Jon Shirek, *GA Supreme Court Rules Online Criticisms Were 'Free Speech,' not Cyberstalking*, WXIA/11 ALIVE (Mar. 29, 2015), <https://www.11alive.com/article/news/local/marietta/ga-supreme-court-rules-online-criticisms-were-free-speech-not-cyberstalking/85-132101871> [https://perma.cc/8HWD-VVVG].

infringement lawsuits, and demanding payments of thousands of dollars as settlements.¹²⁶ People began to criticize her in discussions on a site run by Matthew Chan, which had been set up to criticize allegedly excessive demands by copyright owners; there were eventually thousands of posts condemning her.¹²⁷ Ellis then sued Chan and got an “antistalking” injunction, which ordered Chan to remove “all posts relating to Ms. Ellis” from the site — not just allegedly defamatory posts, not just allegedly threatening posts, but all posts.¹²⁸

The police officer: Patrick Neptune believed police officer Philip Lanoue cut him off in traffic, gave him an unjustifiable ticket, and then informed Neptune’s parents of the incident. Neptune responded by criticizing police officer Philip Lanoue on the site *copblock.org*,¹²⁹ sending several letters to public officials, and sending three letters to Lanoue’s home address. Lanoue got a court order barring Neptune from, among other things, “posting anything on the Internet regarding the Officer.”¹³⁰

The ex-girlfriend and successful video game developer: Zoë Quinn, a prominent video game developer, had a short romantic relationship with Eron Gjoni, also a video game programmer. After the relationship ended, Gjoni posted a webpage that condemned what he saw as Quinn’s emotional mistreatment of him. This led to a torrent of online criticism of Quinn by others, including some threats of violence, partly because Gjoni’s post was interpreted as suggesting that some of the favorable reviews of Quinn’s games were written by reviewers who were themselves romantically involved with Quinn. That in turn led to an ongoing debate between Quinn’s supporters and opponents — the Gamergate controversy, which is too long and complicated to detail here.¹³¹ But what is significant for our purposes is that Quinn got a court

¹²⁶ See *Chan*, 770 S.E.2d at 852.

¹²⁷ The site had been initially set up in the wake of Getty Images sending such demand letters — which Chan and others labeled “extortion letters” — in 2008; hence the name, <http://extortionletterinfo.com>. See Matthew Chan & Oscar Michelen, *Welcome to ExtortionLetterInfo.com*, ELI, <http://extortionletterinfo.com> (last visited Feb. 2, 2021) [<https://perma.cc/6QXK-EDVE>].

¹²⁸ *Chan*, 770 S.E.2d at 853.

¹²⁹ Kelly W. Patterson, *Florida Cop Tells His Mommy on Seat Belt Scofflaw Who Criticized Him on CopBlock*, COPBLOCK (Jan. 15, 2016), <http://www.copblock.org/150994/florida-cop-tells-mommy-seat-belt-scofflaw/> [<https://perma.cc/J8ZB-P8C4>].

¹³⁰ *Neptune v. Lanoue*, 178 So. 3d 520, 521 (Fla. Ct. App. 2015).

¹³¹ For accounts of this from somewhat different perspectives, see Zachary Jason, *Game of Fear*, BOS. MAG. (Apr. 28, 2015), <http://www.bostonmagazine.com/news/article/2015/04/28/gamergate/> [<https://perma.cc/8RMB-DQYZ>]; Cathy Young, *Gamergate: Part I: Sex, Lies, and Gender Games*, REASON (Oct. 12, 2014), <http://reason.com/archives/>

order forbidding Gjoni from “post[ing] any further information about [Quinn] or her personal life online or . . . encourag[ing] ‘hate mobs.’”¹³²

These are just a few examples out of many more that I can offer.¹³³ Many appellate courts have rejected such orders as unconstitutional,¹³⁴ though others have upheld them.¹³⁵ I discuss elsewhere why I think the injunctions do violate the First Amendment.¹³⁶

Here, I just want to speculate about why courts are so willing to enter such extraordinarily broad orders. And the reason, I suspect, is connected to the democratized, cheap speech provided by the Internet.

Repeated criticism, even if it consists of opinions and accurate factual statements, is undoubtedly disquieting. It can damage reputation, often using claims that a judge may view as unfair, even though not libelous. That is especially so if the criticism becomes prominent in Google searches for one’s name, and defines one to strangers or casual acquaintances. And if the criticism gets more of a direct readership, for instance if it gets redistributed via Twitter or Facebook, it can lead to threats against the person being criticized, or even physical attacks.¹³⁷

Such criticism can be perceived as intruding on privacy by making its targets feel that they have become the object of others’ hostility, or even just curiosity or amusement. The law does not generally treat that as

2014/10/12/gamergate-part-i-sex-lies-and-gender-gam [https://perma.cc/5XRL-4NRG]; Cathy Young, *Gamergate, Part 2: Videogames Meet Feminism*, REASON (Oct. 22, 2014), <http://reason.com/archives/2014/10/22/gamergate-part-2-videogames-meet-feminis> [https://perma.cc/3AG7-P5MM].

¹³² *Quinn v. Gjoni*, 50 N.E.3d 448, 449 (Mass. App. Ct. 2016).

¹³³ *See, e.g., Bey v. Rasaweher*, 161 N.E.3d 529 (Ohio 2020); Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 HARV. J.L. & PUB. POL. (forthcoming 2022) [hereinafter *Overbroad Injunctions*].

¹³⁴ *See* Volokh, *Overbroad Injunctions*, *supra* note 133 (manuscript at 51). Some courts have also rejected prosecutions under criminal harassment statutes, or even struck down some criminal harassment statutes as unconstitutionally overbroad. *See, e.g., Rynearson v. Ferguson*, 355 F. Supp. 3d 964 (W.D. Wash. 2019); *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017); *Commonwealth v. Bigelow*, 59 N.E.3d 1105 (Mass. 2016) (citing Volokh, *One-to-One Speech*, *supra* note 79); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016); *State v. Burkert*, 135 A.3d 150 (N.J. App. Div. 2016) (citing Volokh, *One-to-One Speech*, *supra* note 79), *aff’d*, 174 A.3d 987 (N.J. 2017); *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014). *But see* James Weinstein, *The Federal Cyberstalking Statute, Content Discrimination and the First Amendment*, 54 UC DAVIS L. REV. 2553, 2603 (2021) (arguing that certain such laws are constitutional, so long as they are limited to sufficiently distressing speech on matters of “private concern” about particular people).

¹³⁵ *See* Volokh, *Overbroad Injunctions*, *supra* note 133 (manuscript at 3).

¹³⁶ *See id.* (manuscript at 20-42).

¹³⁷ Indeed, this apparently happened, well before social media, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 904-05 (1982).

actionable invasion of privacy (outside the narrow zone of the disclosure of private facts), but I suspect many people perceive it as an intrusion, and some judges may agree. The criticism, especially if repeated and seemingly obsessive, may make the targets feel vaguely menaced, even in the absence of constitutionally unprotected true threats of violence.

Now all of this, by itself, cannot save the injunctions from being invalidated on First Amendment grounds,¹³⁸ and I think almost no judges would enjoin such speech in a newspaper.¹³⁹ Yet for some reason, some judges are willing to enjoin such speech by individuals. Why?

I suspect this flows from three related reasons, both again connected to cheap speech and the democratization caused by the Internet.

1. Precisely because newspapers cost money to publish, and try to make money from subscribers or advertisers, they tend to be accountable to their readers and tend to publish what their readers want, in the style the readers want. That a newspaper is printing something itself indicates the likely value of the speech. Even judges who found the speech loathsome or pointless might have thought twice about imposing their own views in preference to the views of editors.¹⁴⁰

¹³⁸ See Volokh, *Overbroad Injunctions*, *supra* note 133 (manuscript at 20-42).

¹³⁹ For a rare exception, see *Groner v. Wick Communications Co.*, No. 00126863 (La. Dist. Ct. Iberia Par. Aug. 25, 2015) (ordering a newspaper to refrain “from publishing or posting on its website any article or story in which plaintiff . . . is accused of dishonesty, fraud or deceit in connection with a Louisiana Supreme Court decision or similar matter,” even though plaintiff had indeed been found guilty of misrepresentation, see Temporary Restraining Order at 4, *Groner v. Wick Commc’ns Co.*, No. 00126863 (La. Dist. Ct. Iberia Par. Aug. 25, 2015); Joint Memorandum in Support of Consent Discipline, <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/08/GronerMemoRedacted.pdf> [<https://perma.cc/NUU9-W6VE>]).

¹⁴⁰ *Cf.* *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 163-65 (2d Cir. 2006) (finding a government employee’s speech to be on a matter of public concern in part because the topic was also covered by the media); Robert E. Drechsel, *Defining “Public Concern” in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1, 14-15 (1990) (concluding that “courts appear to consider the forum of the libel to be an important factor” in deciding whether speech is to be treated as a being on a matter of public concern; “[i]n only one of the ‘private concern’ cases was the defamation disseminated by or communicated to a mass medium,” but “in at least three-fourths of the ‘public concern’ cases, the allegedly defamatory material was either provided to or disseminated by the mass media”).

Occasional cases have concluded that speech in newspapers wasn’t “newsworthy” and thus could lead to liability for disclosure of private facts. *See, e.g.,* *Briscoe v. Reader’s Digest Ass’n, Inc.*, 483 P.2d 34 (Cal. 1971), *overruled by* *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct.

Likewise, if an established political advocacy group thought some speech worth saying, that was evidence that the speech had value to public debate.

2. Newspaper speech can have many motives, but the most plausible ones tend to be public-regarding — a desire to inform the public, or to spread a particular perspective about the world. Perhaps a newspaper is just pandering to readers' tastes, but even that means that its editors want to entertain or inform readers about something that many readers care about. It's possible that newspaper writers are just trying to wreak private vengeance, or are irrationally obsessed. But it seems unlikely, especially since such motivations (at least if transparent enough) are likely to lead to market pushback from readers.

And the same is likely true for speech by advocacy groups, even relatively little-known ones such as the Organization for a Better Austin in *Organization for a Better Austin v. Keefe*:¹⁴¹ whatever a judge might think of their ideology, it seems likely that the speech was motivated by ideology. Even a judge who suspects that base motives are at play (e.g., that a rich publisher is trying to get revenge against a politician or business leader who had frustrated the publisher's business plans) might be reluctant to enjoin such mainstream speech based on speculation about motive.

But once individuals can easily speak, without having to persuade any intermediary about the worth of their speech, judges are likely to see much more speech that seems pointless and ill-motivated. And motive turns out to be critical under many harassment or stalking statutes, which condemn speech that is said with "the intent to annoy" or with "no legitimate purpose."¹⁴² Indeed, some courts have taken the view, in government employee speech cases, that speech motivated by purely personal motives is to be treated as on a matter of "private concern," even when its content would suggest that it's on a matter of public concern.¹⁴³

Of course, such individual speakers would likely take a different view of the value of the speech, and of their own motives. I suspect that they

App. 1983). But I don't know of any incidents of an outright injunction against a newspaper's publishing anything further about a person.

¹⁴¹ 402 U.S. 415 (1971).

¹⁴² See Volokh, *One-to-One Speech*, *supra* note 79, at 773-83. I have argued that such motive is generally irrelevant to the value of the speech, and should thus not be used to justify restricting speech that has presumptively valuable content, Volokh, *Bad Purposes*, *supra* note 91, at 1402; Volokh, *One-to-One Speech*, *supra* note 79, at 773-83, but the statutes are premised on a different view.

¹⁴³ See Volokh, *Bad Purposes*, *supra* note 91, at 1373-75.

think they really do have valuable things to say, and that their motives are to inform the public.

Indeed, none of the cases I mentioned at the start of this section, with the possible exception of *Van Valkenburg v. Gjoni*, involve speech that would likely have been seen as “purely on a matter of private concern” if it had been published in a newspaper or had been distributed by a political advocacy group. And even Gjoni’s speech, tied as it is to broader discussions of romantic relationships, alleged emotional abuse, and the like, may well be seen as on a matter of public concern — compare, for instance, *Bonome v. Kaysen*, where a woman’s published book that discussed the sexual details of a past relationship was seen as being enough on a matter of public concern to defeat a disclosure of private facts lawsuit.¹⁴⁴ Explaining how one feels, and who made one feel that way, is an important part of telling the story of one’s life, whether in a memoir or a blog post.¹⁴⁵

If I’m right, then some judges just aren’t trusting individual speakers in the newly democratized mass communications system to define what is worth talking about, and to talk about it without being second-guessed about their motivations. Media organizations and political organizations are given latitude to say even things that judges may view as unfair or cruel.¹⁴⁶ But private speakers are sometimes given less latitude — and the judges think that threatening criminal punishment for violating an injunction is the necessary means for stopping such speech.

¹⁴⁴ The lover’s name wasn’t mentioned in the book, but he plausibly alleged that he could be easily identified by those who knew the couple. See *Bonome v. Kaysen*, 17 Mass. L. Rptr. 695, 2004 Mass. Super. LEXIS, at *20-21 (Mass. Super. Ct. Mar. 3, 2004); see also *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *Anonsen v. Donahue*, 857 S.W.2d 700, 701 (Tex. Ct. App. 1993).

¹⁴⁵ See Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 907-11 (2006); Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589, 591-93 (2010).

¹⁴⁶ For a similar argument about why courts are more likely to find actionable invasion of privacy in speech of non-mainstream-media sources, see Jeffrey Toobin, *Gawker’s Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), <https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment> [<https://perma.cc/FAK6-PGH9>] (“This kind of deference to journalistic judgment about what constitutes ‘truthful information of public concern’ may be a vestige of a more orderly period in journalistic history. The implicit trust in the news media reflected in these rulings may not extend today to the operators of Web sites, a change that could also have ramifications for traditional news organizations.”).

3. When a judge sees an individual defendant's speech as a campaign of defamation — and indeed thinks that the defendant is obsessed with criticizing the plaintiff, perhaps to the point of irrationality — trying to forbid only defamatory statements may seem futile. The judge may suspect that any future criticism by the defendant of the plaintiff, or perhaps any speech at all about the plaintiff, would just degenerate into further defamation, and a prophylactic prohibition is needed to keep that from happening.

Indeed, remedies law sometimes allows injunctions that go further than the initial violation, even injunctions that forbid behavior that, absent the initial misdeed, would not be tortious.¹⁴⁷ First Amendment law, I think, does not allow such preventative measures when they ban otherwise protected speech based on its content.¹⁴⁸ But judges who view an individual defendant as a dangerous kook may react in ways that they wouldn't when dealing with an established media outlet.

As I mentioned, I think that such a view is wrong, and that speech outside the traditional First Amendment exceptions (speech that isn't, for instance, libel or true threats) should remain free even if judges think it's worthless or ill-intentioned, without regard to the speaker's identity. But I think these injunctions come about because judges see that everyone can now speak the way that established media and political organization have long spoken — and judges often don't like it.

IV. THE RETURN TO INTERMEDIARY CONTROL

Cheap speech, as the Introduction noted, has made it easier for people to spread their own views, good or evil, and their own understandings of the facts, true or false. And the Internet has in many ways made it easier to speak anonymously, and in ways that hide one's identity. Foreign governments can take advantage of this, too, and so can foreign groups that might be under the influence of a foreign government. That too was much harder under the old media system, for better or for worse.

The spread of such bad ideas and factual falsehoods — or things that people think are bad ideas and factual falsehoods — may be constitutionally protected; but the public and Congress may still view it as dangerous. As a result, there has been pressure to get intermediaries into policing of supposed “hate speech,” “fake news,” and the like that

¹⁴⁷ See, e.g., *People v. Conrad*, 64 Cal. Rptr. 2d 248, 250-51 (Ct. App. 1997).

¹⁴⁸ See Volokh, *Overbroad Injunctions*, *supra* note 133 (manuscript at 50-51).

the First Amendment precludes the government from doing.¹⁴⁹ And even for speech that the government might be able to itself restrict, such as revenge porn,¹⁵⁰ intermediaries have been providing much more prompt takedown procedures than the legal system can practically provide.¹⁵¹

Curiously, then, we seem to be reinventing, and many of us seem to be approving of, intermediary control: it's just that instead of newspaper and broadcaster editors choosing what to block, we're having that done by Facebook, Twitter, and occasionally other companies.

In a sense, one can imagine four different approaches to control of public speech:

- (1) control by being regulated expressly by the government,
- (2) control by being too expensive for ordinary people,
- (3) control by private intermediaries, and
- (4) no real control (at least of people's viewpoints and broad factual claims, as opposed to, say, of spam).

Modern First Amendment law largely precludes option (1), so as option (2) has retreated in significance, option (3) is being promoted as a substitute by those who find option (4) unacceptable.

On one hand, this form of Internet intermediary power is a less comprehensive control — if your speech is banned from Facebook, you can still get it out through other platforms (at least for now, while the infrastructure companies, such as hosting companies and search engines, police things only rarely). Such intermediary power also covers fewer subject matters: Facebook excludes a tiny fraction of all content

¹⁴⁹ See, e.g., CASS R. SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION* 5 (2021); RICHARD L. HASEN, *CHEAP SPEECH: SAVING AMERICAN ELECTIONS IN THE DISINFORMATION ERA* ch. 4 (forthcoming 2022). I set aside here intermediaries providing extra speech, such as pointing to fact-checks of posts, cf. Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 UC DAVIS L. REV. 2491, 2522-26 (2021); such speech does not involve restrictions (private or governmental) on speech, and indeed the government could itself publish such fact-checks (though it likely couldn't require platforms to publish them).

¹⁵⁰ See *supra* Part II.C.

¹⁵¹ See, e.g., *Remove Non-Consensual Explicit or Intimate Personal Images from Google*, GOOGLE, <https://support.google.com/websearch/answer/6302812?hl=en> (last visited Feb. 2, 2021) [<https://perma.cc/7S7L-8VB6>]. Ordinary judicial processes can't act as quickly for many reasons, including the First Amendment limits on preliminary injunctions in libel cases, which would likely also apply to invasion of privacy and revenge porn cases. Volokh, *Anti-Libel Injunctions*, *supra* note 35, at 93-96.

that people try to post, while traditional editors excluded all except that which they chose to fit on their limited pages.

On the other hand, the control is more oligarchical than ever: a huge share of the control is in the hands of the people running three companies (Facebook, Google, and Twitter). In the past, the control was more broadly shared among executives and editors at broadcast networks, local broadcasters, national magazines, and mostly local newspapers.

And, unsurprisingly, this sort of oligarchical control is leading to resentment among many users who had gotten used to the early Internet's more egalitarian model.¹⁵² Why should Mark Zuckerberg get to say what's on my Facebook page, they might think, rather than me having exclusive control over that?

They might not have thought that back in the pre-Internet era, where of course the local newspaper editor got to say what was in the newspaper, or even on the letters to the editor page. But give people a taste of the power to publish, and some of them won't be happy to give it up.¹⁵³

Some have remarked on a certain degree of ideological reversal that seems to be happening here. These days, it is (some) conservatives who, perhaps perceiving that the platforms are run by liberals, are worried about the platforms' restricting conservative speech.¹⁵⁴ As a result, some conservatives are calling for extra regulation of privately owned businesses, something that conservatives generally tend to oppose.

Likewise, these days it is generally (some) liberals who enthusiastically support the power of large corporations — indeed, among the largest of corporations — to influence political speech.¹⁵⁵ A

¹⁵² See generally *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221-27 (2021) (Thomas, J., concurring) (discussing the possibility that social media platforms may come to be treated as common carriers); *id.* at 1227 (“[I]f the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms.”); Eugene Volokh, *Social Media Platforms as Common Carriers?*, 1 J. FREE SPEECH L. (forthcoming 2021).

¹⁵³ As the song asked about returning World War I soldiers, *How'ya Gonna Keep 'em Down on the Farm? (After They've Seen Patee)*, LIBRARY OF CONGRESS, <https://www.loc.gov/item/jukebox-660367/> (last visited Mar. 6, 2021) [<https://perma.cc/F42K-NXF2>].

¹⁵⁴ There's debate about the degree to which the platforms' editing does target conservative speech. But it's of course human nature for people faced with a massive, largely hidden editing process to assume the worst about the process, especially when it is run by those who seem to be largely on the other side of the political aisle.

¹⁵⁵ Of course, not all liberals take that view. See, e.g., Prasad Krishnamurthy & Erwin Chemerinsky, *How Congress Can Prevent Big Tech from Becoming the Speech Police*, HILL

decade ago, many liberals sharply condemned the Supreme Court's decision in *Citizens United v. FEC*, which held that corporations and unions have a First Amendment right to speak about political candidates (independently of those candidates' campaigns).¹⁵⁶ Thus, for instance, from one 2012 article from liberal think tank Demos, titled *10 Ways Citizens United Endangers Democracy*:¹⁵⁷ “[C]oncentrated wealth has a distorting effect on democracy, therefore, winners in the economic marketplace should not be allowed to dominate the political marketplace.”¹⁵⁸

Yet urging Facebook, Twitter, and similar companies to restrict alleged “hate speech” and to police alleged “fake news” involves some of the biggest “winners in the economic marketplace” using their power to affect “the political marketplace.” And while of course that power is limited, since Facebook and Twitter are indeed far from the whole of the Internet, corporate advertising about candidates after *Citizens United* was also comparatively modest.

According to OpenSecrets.org's *More Money, Less Transparency: A Decade Under Citizens United*, corporations contributed about \$300 million to outside spending groups in the 2012–18 federal election campaign cycles, and unions contributed about \$275 million.¹⁵⁹ The corporate contributions “made up 10 percent of funding to these groups in the 2012 cycle, a high water mark,” falling to 5% in 2018.¹⁶⁰ And “[w]hile corporations and unions gained potential political power as a result of *Citizens United*, it's individual donors who are fueling the explosion of money in recent elections.”¹⁶¹ Even taking into account the fact that the platforms generally don't overtly endorse one or another political candidate as such, their content policing likely affects politics

(Feb. 18, 2021), <https://thehill.com/opinion/judiciary/539341-how-congress-can-prevent-big-tech-from-becoming-the-speech-police> [<https://perma.cc/K38K-F2EL>].

¹⁵⁶ See *Citizens United v. FEC*, 558 U.S. 310, 392-93 (2010).

¹⁵⁷ Liz Kennedy, *10 Ways Citizens United Endangers Democracy*, DEMOS (Jan. 19, 2012), <https://www.demos.org/policy-briefs/10-ways-citizens-united-endangers-democracy> [<https://perma.cc/NMX4-NNUE>].

¹⁵⁸ *Id.*

¹⁵⁹ Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, OPENSECRETS.ORG (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united> [<https://perma.cc/KQ46-VUQM>]. There is also an unknown amount of undisclosed spending (which includes some corporate spending) through groups such as 501(c)(4) organizations that engage in both political and nonpolitical activities; the government could in principle require disclosure of contributions to such groups, but current law does not comprehensively do so.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

at least as much as does the corporate political advertising protected by *Citizens United*.

Now neither some conservatives' support for restraining private platforms' policing power, nor some liberals' support for increasing the political influence of giant corporations, necessarily reflects logical inconsistency. Few conservatives are categorical foes of all regulation of private business. (Those that are most skeptical of regulation — libertarian conservatives — tend to also oppose regulation of platforms.¹⁶²) And few liberals are categorical foes of all corporate influence on the political process.

Most such political principles are, quite sensibly, presumptions rather than categorical rules. The conservatives who back regulation and the liberals who back platform power may simply see those presumptions as being rebutted by sufficiently strong countervailing interests (whether in protecting user speech, or in fighting “hate speech” and “fake news”). But in both cases, it seems that we are seeing a reaction to the advent of cheap speech, and a reaction to that reaction.

CONCLUSION

Reno v. ACLU; *Ashcroft v. ACLU (I)*; *United States v. American Library Association*; *Ashcroft v. ACLU (II)*; *Packingham v. North Carolina*.¹⁶³ Perhaps *Elonis v. United States*¹⁶⁴ (if you focus on the facts of that case rather than the legal issue). Those are the Internet First Amendment cases that the Supreme Court has considered, mostly dealing with shielding children from sexually themed material, but also, in *Elonis*, online threats.¹⁶⁵

But this is not where most of the interesting recent Internet free speech developments have arisen. Rather, they have come in surprising places, including:

- the survival and perhaps resurgence of criminal libel law;
- trial courts' broad acceptance of anti-libel injunctions;

¹⁶² See, e.g., Clyde Wayne Crews, *The Case Against Social Media Content Regulation*, CEI (June 1, 2020), https://cei.org/issue_analysis/the-case-against-social-media-content-regulation/ [<https://perma.cc/NW74-7889>].

¹⁶³ 521 U.S. 844 (1997); 535 U.S. 564 (2002); 539 U.S. 194 (2003); 542 U.S. 656 (2004); 137 S. Ct. 1730 (2017).

¹⁶⁴ 135 S. Ct. 2001 (2015).

¹⁶⁵ *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015), also happened to involve online speech, as well as mailed letters, but that fact played very little role in the Court's reasoning.

- trial courts' willingness to issue remarkably broad bans on public online speech about people, in the name of preventing "harassment" or "stalking";
- the growing criminalization of the disclosure of private facts, whether through outright criminal laws or through injunctions enforced using the threat of contempt;
- the enactment or broader application of narrower restrictions on specific kinds of false statements and disclosure of private facts, such as impersonation¹⁶⁶ and nonconsensual porn; and
- the growth of calls for greater policing of online speech by the platforms.

For decades, the main lever for dealing with libel and disclosure of private facts has been the threat of civil damages liability. As that lever has become increasingly irrelevant for many speakers, the legal system has had to grasp for other levers, odd as they might have seemed in 1993. Likewise, for decades, the main lever for dealing with extremist speech and with conspiracy theories has been the control exerted by media intermediaries. As that lever has fallen away, people have called for the platforms to step into the gap.

Some of these developments have been promising. Some have been misguided. But they all represent, I think, the legal system's largely bottom-up struggle with the dark side of cheap speech and of the democratization of mass communications.

¹⁶⁶ See, e.g., *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014); People's Sentencing Brief, *People v. Castrejon*, No. 2020024335, 2021 WL 1226913 (Cal. Super. Ct. Ventura Cnty. Feb. 24, 2021); *Oxnard Man Sentenced for Falsely Portraying Others on the Internet*, VENTURA CNTY. DIST. ATT'Y OFF. (Mar. 17, 2021), <https://www.vcdistrictattorney.com/wp-content/uploads/2021/03/21-029-Edgar-Castrejon-Wise-Sentenced.pdf> [<https://perma.cc/5A2Z-J9AB>].