# COMMENTS

## MYSPACE, YOUR REPUTATION: A CALL TO CHANGE LIBEL LAWS FOR JUVENILES USING SOCIAL NETWORKING SITES

### I. INTRODUCTION

One afternoon in December 2005, at his grandmother's house outside Pittsburgh, seventeen-year-old Justin Layshock connected to the social networking site MySpace.com[1] and set in motion a series of events that spawned two lawsuits and raised serious questions about teenagers' First Amendment rights.[2]

MySpace, like other social networking sites, allows users to create online profiles where they can list personal information, post photographs, and link to the profiles of other site members they designate "friends."[3] The profile Layshock created that afternoon, however, was not in his own name, but that of his principal at Hickory High School, Eric Trosch.[4]

Using the profile template MySpace offers new members, Layshock copied and pasted a photo of the principal from the school's website.[5] He then turned a series of standard questions designed to elicit personal information into an extended fat joke, answering all of the queries with the word "big," a reference to Trosch's girth.[6] For example, in response to a question about thoughts upon waking up, Layshock wrote "too . . . damn . . . big."[7] "Big keg behind my desk" is the response to a question about alcohol use, while "big fag" is the answer to

1. MySpace, www.myspace.com, is a social networking site that allows an online user to create their own website, known as a profile, as a vehicle for communicating with other site members. See *infra* Part II.A for further explanation of MySpace and other social networking sites and their popularity among teenagers.

2. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 505 (W.D. Pa. 2006) (describing creation of MySpace profile).

3. *See* danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. COMPUTER-MEDIATED COMM., Oct. 2007, http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (describing content and function of social networking sites). Please note that danah m. boyd spells her name using lowercase letters.

4. *Layshock*, 412 F. Supp. 2d at 504.

5. *Id.* at 504–05.

6. *Id.*

7. Justin Layshock, MySpace Profile, http://www.aclupa.org/downloads/Justinswebsite.pdf (last visited Nov. 13, 2009).

"ever been beaten up?"[8] The profile also referred to the principal as a "big steroid freak," "big n beer gutted," a "big whore," and "too drunk to remember" his last birthday.[9]

Layshock spread the word of his prank by linking the fake profile to those of other students at Hermitage High School.[10] His profile was not the principal's only MySpace presence; there were three other student-authored profiles purporting to represent Trosch on the social networking site.[11] After Trosch learned about the profiles, the school technology teacher worked with the social networking site to take down the profiles and blocked access to the website on school grounds.[12]

When the principal discovered Layshock was behind one of the profiles, he contacted Layshock's parents and warned them there would be disciplinary action.[13] In addition to a ten-day suspension, Layshock was removed from his advanced placement classes and told he would finish his senior year in the school's remedial Alternative Education Program.[14] He was also removed from his position as a middle school French tutor and barred from attending his high school graduation.[15]

After the principal refused to reduce the punishment, Layshock and his parents sued the school district in federal court.[16] They argued that the discipline violated the seventeen-year-old's free-speech rights under the First Amendment, and that the school district did not have the authority to police activities conducted in a private home.[17] Trosch, meanwhile, filed a libel lawsuit in state court against Layshock and the three other students who created the rival fake profiles. He alleged the MySpace postings damaged his reputation and limited his earning potential.[18] Layshock's attorneys argued the profile was a parody never intended to be taken seriously and, therefore, was not libelous.[19] In July 2007, the federal district court judge ruled in the Layshocks' favor, finding the

8. *Id.*

9. *Id.*

10. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007) (describing how other students were alerted to MySpace profile).

11. *Id.*

12. *Id.* at 591–92.

13. *Id.* at 593.

14. Paula Reed Ward, *Punished for Parody, Student Sues School*, PITTSBURGH POST-GAZETTE, Jan. 28, 2006, at B1.

15. *Id.*

16. *Id.*

17. *See Layshock*, 496 F. Supp. 2d at 594 (explaining allegations in complaint).

18. Joe Pinchot, *Principal Sues 4 Ex-Students Over Profiles on MySpace*, THE HERALD (Sharon, Pa.), Apr. 4, 2007, *available at* http://www.sharon-herald.com/local/local_story_094195802.html. See *infra* Parts II.B.2 and II.C.2 for a discussion of lawsuits arising from social networking activities.

19. *See* Joe Pinchot, *Former Hickory High Student Denies Creating Online Profile of Principal*, THE HERALD (Sharon, Pa.), Dec. 28, 2007, *available at* http://www.sharon-herald.com/archivesearch/local_story_361191425.html (noting Layshock attorney argued profile was intended as joke). See *infra* Part II.B.2.a for a discussion of the principal's libel litigation.

school district's disciplinary response to the social networking site posting unconstitutional.[20] The decision was appealed to the Third Circuit, which heard oral arguments in December 2008. Trosch's defamation action against the students is still pending.

Similar conflicts over material students posted online have occurred across the country, from San Antonio, Texas to New Haven, Connecticut, since the social networking craze swept through high schools in 2005 and 2006.[21] Both types of lawsuits arising from students' social networking activities—defamation claims and student speech lawsuits—force state and federal courts to confront new and unanswered questions about the First Amendment in an Internet setting.

Because of the limitations posed by the First Amendment, the traditional remedy for reputation-based injuries in the United States is not state punishment, but private defamation lawsuits.[22] Courts today still consider libel claims according to the framework set out by the U.S. Supreme Court in the 1960s and 1970s,[23] despite the Internet revolution that gives ordinary citizens access to mass media tools that were once wielded only by professional journalists.[24] Perhaps because most defamation claims used to be against reporters, the Supreme Court's precedents account for diversity among libel plaintiffs, but not defendants.[25] Yet the popularity of social networking sites among teenagers has brought with it a spike in the number of libel lawsuits naming minors as defendants,[26] something defamation law has never seen before.

Although the Supreme Court has never considered a libel case against a teenager, it has spoken strongly about how the First Amendment applies to minors in other settings.[27] The Court has repeatedly emphasized, most recently in *Morse v. Frederick*,[28] decided in June 2007, that high school students do not

20. See *infra* Part II.C.2 for a discussion of the Layshocks' legal victory over the school district.

21. *See* Kelli Kennedy, *Not-So-MySpace Any More*, ASSOCIATED PRESS, Apr. 23, 2006 (recounting conflicts nationwide between schools and students over social networking site activity).

22. *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:28 (2d ed. 1991) (linking First Amendment to Founders' dislike of English government's prosecution of seditious libel and John Peter Zenger's trial in 1735).

23. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270, 276–83 (1964) (holding First Amendment limits state defamation law and establishing actual malice as new standard of fault in some libel actions); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–46 (1974) (reaffirming *Sullivan* and distinguishing four different types of libel plaintiffs).

24. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET 136 (2007) (noting that there is no longer dividing line between amateurs and professional journalists). "The Internet gives amateurs a power similar to what professionals have – to reach thousands, perhaps millions, of people." *Id.*

25. *See Gertz*, 418 U.S. at 344–45 (creating four categories of plaintiffs but referring to defamation defendants in solely media-based terms).

26. *See* Kennedy, *supra* note 21 (detailing defamation lawsuits against students).

27. See *infra* Part II.C.1 for a discussion of the Supreme Court's student speech jurisprudence.

28. 127 S. Ct. 2618 (2007).

have the same free speech rights as adults.[29] School administrators may punish students for activities, on or off school grounds, that cause a material and substantial disruption to the educational environment,[30] or any other speech that the "public might reasonably perceive to bear the imprimatur of the school."[31] Lower courts are divided, however, as to whether this authority includes the right to discipline teens for material they post on social networking sites from their home computers.[32]

Therefore, much like Layshock, students across the country may face unprecedented consequences for their online speech both in court and in the classroom. Both the lawsuits and the school discipline may have far-reaching effects on both minors and their parents, creating exactly the kind of "chilling effect" on free speech the Supreme Court has sought to avoid throughout its First Amendment jurisprudence.[33] These issues are particularly troublesome because authority figures seeking to police social networking sites may be fundamentally misinterpreting what they read there.[34] danah boyd, a communications scholar who specializes in studying social networking sites, argues that teenagers speak in an online parlance that adults simply do not understand, and uses the Layshock case as a key example of the consequences of the communication divide.[35]

This Comment seeks to alert courts, educators, and policymakers to the First Amendment concerns raised by the dual punishments minors may receive under current precedent and emphasizes the need to develop a framework that separates one student's silly online prank from another's damaging reputation-based injury. Courts should recognize that school administrators, with the Supreme Court's blessing, are filling the speech regulation role traditionally played by judges. They should therefore act now to reduce the burden of libel litigation liability on these students, lest the chilling effect of two punishments for one speech act deter a generation that embraced the "marketplace of ideas"[36] enshrined by the First Amendment earlier than any other.

29. *Morse*, 127 S. Ct. at 2622.

30. *See* Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (laying down broad rule to govern student speech).

31. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (declining to apply more lenient *Tinker* analysis).

32. See *infra* Part II.C.2 for a discussion of lower courts' application of the Supreme Court's student speech cases to claims arising from students' social networking activities.

33. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) (expressing concern about "chilling effect" of libel law on First Amendment freedoms).

34. *See* danah boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 134 (David Buckingham ed., 2008), *available at* http://www.mitpressjournals.org/doi/pdf/10.1162/dmal.9780262524834.119 (arguing generational divide is "further complicated by adults' misreadings of youth participation" in social networking activities).

35. *See id.* (noting "a student's parody of his principal was not read as such when the principal found this profile on MySpace").

36. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (invoking

Part II.A of this Comment explains the functions of social networking sites and their immense popularity among high school students. Parts II.B and II.B.1 will provide an overview of defamation law and Supreme Court precedent on the subject, while Part II.B.2 examines the application of libel law to the Internet and proposals for reform. Part II.B.2.a, notably, discusses some of the defamation claims filed against minors based on their social networking activities. Part II.C.1 outlines Supreme Court precedent in the area of student speech, and Part II.C.2 reviews lower courts' efforts to apply the Supreme Court's rulings to students' speech online.

Part III of this Comment discusses the outmoded state of libel law on the Internet and the need for policymakers to provide a more thorough overhaul than the band-aid that § 230 of the Communications Decency Act provides. It further argues that courts must step in now to aid teenagers embroiled in student speech battles and libel litigation as a result of their social networking activities online. This Comment thus offers a modest proposal for court-based defamation reform while awaiting legislative action: adopting the approach used by courts in other areas of tort law and holding high school students to the standard of care of other minors, rather than adults, and importing the requirement for economic harm used in slander cases to ensure the statements posted online caused real injury to the plaintiff.

## II. LIBEL LAW AS IT APPLIES TO SOCIAL NETWORKING SITES AND THE TEENAGERS WHO USE THEM

### *A. An Introduction to Social Networking Sites*

Social networking sites, or "friend sites," are vast gathering areas on the Internet that allow users to create online profiles where they can list personal information and post photographs and other content.[37] Profiles resemble the dating service advertisements that spawned them: They are created by filling out generic forms the site makes available, and contain demographic details, likes and dislikes, and carefully selected personal photographs or video.[38] A user can link her profile to those of her friends, compiling long lists of contacts, and post public messages on friends' profiles as well as send private messages to other

metaphor of "marketplace of ideas" as rationale for protecting freedom of speech as fundamental right).

37. *See* Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 96 (2006) (describing function and purpose of social networking sites).

38. *See* boyd, *supra* note 34, at 124 (explaining format of typical profile on social networking site).

users.[39] The websites typically have search functions that allow members to look up other users on the sites, or join groups of people with similar interests. Although other websites may also offer some of these features, social networking sites are distinguished by the way they create an online society with clearly drawn connections where "friends are publicly articulated, profiles are publicly viewed, and comments are publicly visible."[40]

Two social networking sites, MySpace.com and Facebook.com, have experienced explosive growth since they were established in 2003 and 2004, respectively, and now rank as the second- and seventh-most visited sites on the Internet, ahead of behemoth Amazon.com.[41] MySpace, for example, received eighty million unique visitors in August 2006 alone,[42] while Facebook received nearly sixteen million unique visitors in September 2006.[43] According to comScore World Metrix, a company that tracks Internet sites' popularity, sixty-eight million users logged onto MySpace and twenty-six million to Facebook in July 2007.[44]

Social networking sites attract a significantly younger population of users than the Internet at large. Many high school students report that participation on MySpace in particular is "essential to being seen as cool at school."[45] An October 2006 comScore study reported that nearly 12% of MySpace and 14% of Facebook users were between the ages of twelve and seventeen, compared to 9.5% of the Internet overall.[46] Similarly, 18.1% of MySpace and 34% of Facebook visitors were eighteen to twenty-four, compared to 11.3% of the Internet overall.[47] Although the social networking site Xanga.com received less than one-seventh of the visitors of MySpace and only a little more than half of that of Facebook, 20.3% of them were ages twelve to seventeen.[48]

A Pew Internet & American Life Project Report released in January 2007 found that fifty-five percent of American youths ages twelve to seventeen used

39. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, SOCIAL NETWORKING WEBSITES AND TEENS: AN OVERVIEW 6 (2007), *available at* http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_SNS_Data_Memo_Jan_2007.pdf.pdf.

40. boyd, *supra* note 34, at 124 (delineating differences between social networking sites and other websites).

41. Steve Rosenbush, *Facebook's on the Block*, BUS. WK. ONLINE, Mar. 28, 2006, http://www.businessweek.com/technology/content/mar2006/tc20060327_215976.htm.

42. Vauhini Vara, *MySpace Has Large Circle of Friends, but Rivals' Cliques Are Growing Too*, WALL ST. J., Oct. 2, 2006, at B1.

43. *Id.*

44. Maha Atal, *MySpace, Facebook: A Tale of Two Cultures*, BUS. WK. ONLINE, July 2, 2007, http://www.businessweek.com/innovate/content/jul2007/id2007072_502208.htm.

45. boyd, *supra* note 34, at 119.

46. Press Release, comScore, More than Half of MySpace Visitors Are Now Age 35 or Over, as the Site's Demographic Composition Continues to Shift (Oct. 5, 2006), *available at* http://www.comscore.com/Press_Events/Press_Releases/2006/10/More_than_Half_MySpace_Visitors_Age_35.

47. *Id.*

48. *Id.*

social networking sites, and half of them, in turn, visit the sites daily or several times a day.[49] Girls ages fifteen to seventeen were the heaviest users, with a full seventy percent reporting social networking online.[50] Nine out of ten teens who visited these sites said they created an online profile and used it to communicate with friends they see often, posting messages to friends' pages (eighty-four percent) or sending private messages within the system (eighty-two percent).[51] Students reported accessing the social networking sites at both home and school.[52]

Scholars who study social networking interactions on social networking sites report that teens have their own forms of communication on the sites that are susceptible to being misinterpreted by adults.[53] danah boyd found that "[w]hen outsiders search for and locate participants, they are ill prepared to understand the context; instead they project the context in which they relate to the individual offline onto the individual in this new online space."[54] Although they may speak in a different language they think shrouds them from adults, teenagers may forget that one of the key features of social networking sites is that they are publicly accessible by parents and other authority figures.[55] Thus, there is a generational divide on these sites that may be "further complicated by adults' misreadings" of what they read there, resulting in "expulsions, suspensions, probations, and being grounded."[56]

Most social networking sites have privacy settings that allow members to restrict who can view their profile.[57] The default privacy setting on many sites,

49. LENHART & MADDEN, *supra* note 39, at 2–6.

50. *Id.* at 2.

51. *Id.* at 2–6.

52. *Id.* at 4–5.

53. *See, e.g.*, boyd, *supra* note 34, at 124 (explaining online communication gap); Judith Donath & danah boyd, *Public Displays of Connection*, BT TECH. J., Oct. 2004, at 71, 71–82 (noting different communities have distinct habits online); Kevin Poulson, *Scenes from the MySpace Backlash*, WIRED NEWS, Feb. 27, 2006, *available at* http://www.wired.com/politics/law/news/2006/02/70254 (detailing teenagers' problems stemming from social networking sites).

54. boyd, *supra* note 34, at 133.

55. *See id.* (explaining teens may fail to recognize that "magnified public exposure" can increase stakes of communication on social networking sites).

56. *Id.* at 133–34. To underscore her point about miscommunication, boyd tells the story of Allen, who visited his daughter Sabrina's MySpace page and was startled to read "cocaine" as her answer to one of the social networking site's standard profile questions, "What kind of drug are you?" *Id.* at 134. When he asked Sabrina for an explanation, boyd recounts,

> She explained that she didn't want to be represented by marijuana because the kids who smoked pot were lame. She also thought that acid and mushrooms were stupid because she wasn't a hippie. She figured that cocaine made sense because she heard people did work on it and, "besides Dad, your generation did a lot of coke and you came out OK." This was not the explanation that Allen expected.

*Id.*

57. *See, e.g.*, SOLOVE, *supra* note 24, at 200–01 (arguing that key problem with social networking sites is "they are designed to encourage people to expose a lot of information with very little thought about the consequences"); boyd, *supra* note 34, at 123 (noting privacy features sites offer).

including MySpace, is to make profiles publicly accessible to anyone, but other variations, such as making profiles visible to only designated friends, are usually available.[58] Studies have found that social networking site members are aware of the privacy controls the sites offer, but simply choose not to make any changes to the default settings.[59] The resulting public accessibility may exacerbate any conflict arising from communication on these sites, because conversations are both searchable and "recorded for posterity."[60]

In addition to privacy settings, each social networking site has a code of conduct. To create a profile on MySpace or Facebook, users must agree to abide by the site's terms of use.[61] The MySpace Terms of Use details a twenty-seven-part "partial list" of content it says is illegal or prohibited on the site and the company reserves the right to remove any offending communication or terminate the membership of violators.[62] High on the list of prohibited conduct is posting information that is "false or misleading," or that is "abusive, threatening, obscene, defamatory or libelous."[63] Notwithstanding the lengthy rules, an additional section of the policy notes that users are "solely responsible for [their] interactions with other MySpace.com [m]embers" and that the site is "not responsible for any incorrect or inaccurate [c]ontent."[64] Prospective members must further agree to limitations on liability and indemnification.[65]

There are no limitations, however, on members or nonmembers suing one another over material posted on a social networking site, as evidenced by a growing number of cases percolating through trial courts across the country.[66] Because these sites freeze in cyberspace what otherwise would be fleeting personal conversations, plaintiffs' chief complaints are damage to their reputations.

58. SOLOVE, *supra* note 24, at 200–01.

59. *Id.* at 201. Solove suggests that teenagers' decisions to expose intimate details on social networking sites and other websites could be not a "product of lack of maturity but instead . . . a manifestation of generational differences." *Id.* at 197.

60. *See* boyd, *supra* note 34, at 126 (noting that social networking site communication "extends the . . . existence of any speech act," unlike the "ephemeral quality of speech in unmediated publics"); Tom Zeller, Jr., *Beware of the Web and Your 'Digital Trail'; MySpace Indiscretions May Last Forever*, INT'L HERALD TRIB., June 13, 2006, at Finance 17 (discussing difficulty of removing old versions of social networking profiles that search engines have "cached," or preserved).

61. *See* Facebook.com, Statement of Rights and Responsibilities, http://www.facebook.com/terms.php (last visited Nov. 13, 2009) (explaining social networking site rules and conduct regulations); MySpace.com, MySpace.com Terms of Use Agreement, http://www.myspace.com/index.cfm?fuseaction=misc.terms (last visited Nov. 13, 2009) (same).

62. MySpace.com, *supra* note 61.

63. *Id.*

64. *Id.*

65. *Id.*

66. See *infra* Part II.B.2.a for a discussion of defamation lawsuits spawned by social networking.

### *B. The Law of Defamation and the Internet*

Defamation encompasses an unusual category of torts that focuses not on an injury to the physical person but to his reputation.[67] The classic definition of defamation is a false and unprivileged expression, published with fault, which causes damage to an individual's character or his standing in the community.[68]

The "twin torts" of defamation are libel and slander.[69] The "simple distinction between the terms is that libel is defamation by written or printed words . . . while slander consists of communication of a defamatory statement by spoken words, or by transitory gestures."[70] At common law, libel was a more serious tort than slander because the written word was thought to leave a "more permanent blot" on the plaintiff's reputation.[71] That distinction was reflected by a rule that required slander plaintiffs to prove actual monetary loss, or "special damages," while in libel suits, damages were presumed.[72]

Although radio and television broadcasts are a form of oral communication, many jurisdictions treat defamatory content as libel. The *Restatement (Second) of Torts* embraced broadcasts by broadening its definition of libel to any "form of communication that has the potentially harmful qualities characteristic of written or printed words."[73] One of the justifications for this change was that broadcasters are typically reading from a carefully prepared written script.[74]

Given that communication on social networking sites is written, rather than oral, defamatory content on social networking sites—like other material on the Internet—falls into the category of libel.[75] Nevertheless, because much of the content on social networking sites is designed to replicate oral conversation, a key rationale for treating written words more harshly than spoken words is absent. Courts cannot assume, in the case of social networking sites, that

67. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (W. Page Keeton ed., West Publ'g Co. 5th ed. 1984) (commenting that "there is a great deal of the law of defamation that makes no sense").

68. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2.1 (2007) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

69. SMOLLA, *supra* note 22, § 1:10.

70. *Id.* § 1:11.

71. SACK, *supra* note 68, § 2.3.

72. *Id.*

73. RESTATEMENT (SECOND) OF TORTS § 568 (1977) (noting that factors considered in classifying defamatory speech as libel or slander are "the area of dissemination," the "deliberate and premeditated character of its publication," and "persistence of the defamation").

74. SACK, *supra* note 68, § 2.3.

75. *See* Batzel v. Smith, 333 F.3d 1018, 1020, 1026–30 (9th Cir. 2003) (finding defamatory Internet postings should be treated like other libelous content, except in cases where Congress has decreed otherwise). See *infra* Part II.B.2 for further discussion of libel law on the Internet.

"reducing a defamation to writing evidences greater deliberation and intention on the part of the one who records it."[76]

1. The Constitutional Framework of Modern Defamation Law

Until the Supreme Court's landmark 1964 decision in *New York Times Co. v. Sullivan*,[77] defamatory speech was thought to be outside the realm of constitutional protection.[78] Strict liability was the fault standard used for libelous publications.[79] In *Sullivan*, a government official in Montgomery, Alabama sued *The New York Times* over inaccuracies in a full-page advertisement detailing a series of police abuses and seeking support for the civil rights movement.[80] In a unanimous decision, the Supreme Court reversed the jury award in the official's favor and struck down as unconstitutional Alabama's libel statute, which recognized truth as the sole defense to defamation.[81]

The case established for the first time that state defamation laws are limited by the free-speech guarantees of the First Amendment.[82] The Court said the Constitution expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[83] Because "erroneous statement is inevitable in free debate," constitutional protection does not depend on the truth of the expression.[84]

To protect public criticism from the "chilling effect" of lawsuits like *Sullivan*, the Court announced a new standard of fault to govern cases brought by public officials.[85] These plaintiffs have the high hurdle of proving that the defamatory statement was published with "actual malice," which is knowledge of falsity or reckless disregard for the truth.[86]

In another watershed case, *Gertz v. Robert Welch, Inc.*,[87] the Court again struggled to balance the competing goals of a "vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[88] The Court reaffirmed *Sullivan* and distinguished four different categories of plaintiffs,

76. SACK, *supra* note 68, § 2.3 (citing Ward v. Zelikovsky, 643 A.2d 972, 974 (N.J. 1994)); *id.* § 2.3 n.25 (noting "there is also greater reluctance to sanction activity that is spontaneous rather than premeditated").

77. 376 U.S. 254 (1964).

78. SMOLLA, *supra* note 22, § 1:7.

79. KEETON ET AL., *supra* note 67, § 113.

80. *Sullivan*, 376 U.S. at 256–57.

81. *Id.* at 283–86.

82. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 931 (8th ed. 2004).

83. *Sullivan*, 376 U.S at 270.

84. *Id.* at 271–73.

85. *Id.* at 285–86.

86. *Id.* at 280.

87. 418 U.S. 323 (1974).

88. *Gertz*, 418 U.S. at 342.

maintaining its focus on the status of the plaintiff to determine the standard of fault in defamation cases.[89]

Public officials and public figures who assume positions of prominence in public affairs have the difficult task of proving that a defamatory statement was published with actual malice.[90]

The Court reasoned this burden was fair because these two categories of plaintiffs "voluntarily expos[e] themselves to increased risk of injury" by thrusting themselves into the public eye.[91] They also "enjoy significantly greater access to the channels of effective communication" and, therefore, are more likely to have opportunities to rebut damaging statements than private individuals.[92] The Court's third class of plaintiffs, limited-purpose public figures, must prove actual malice only if the challenged statement arises out of the area of their celebrity.[93]

Private individuals, the Court's last and largest category, have done little to draw the attention of the public and are thus "more vulnerable to injury" because they are unlikely to have access to the media to secure adequate redress.[94] The Court left the standard of fault that governs private individuals up to the states, but outlawed strict liability[95]—effectively requiring at least negligence, a familiar concept to the rest of tort law.[96] Most states have followed the Court's cue and instituted negligence in all libel actions brought by private individuals.[97] A cause of action for negligence consists of four elements: a duty of a certain level of care, a breach of that duty, causation of harm, and damages.[98]

*Gertz* also overhauled the traditional rule of presumed damages in libel cases, fearing that the practice of awarding damages without any proof of injury might "inhibit the vigorous exercise of First Amendment freedom."[99] The Court instituted as an alternative the requirement of proving "actual injury," which it said was "not limited to out-of-pocket loss," but may be proven by general

89. *Id.* at 344–47, 349–51. The four types of plaintiffs in libel actions are public officials who hold government positions, public figures who are involved in public affairs or are generally renowned, limited-purpose public figures who are well-known for their involvement in only one public controversy, and private individuals who have sought no fame or notoriety. *Id.* at 344–46.

90. *Id.* at 342.

91. *Id.* at 345.

92. *Gertz*, 418 U.S. at 345.

93. *Id.* For a further discussion of limited-purpose public figures and the *Gertz* Court's intent, see Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1292–94 (D.C. Cir. 1980).

94. *Gertz*, 418 U.S. at 345.

95. *Id.* at 347–49.

96. SMOLLA, *supra* note 22, § 1:19.

97. *Id.* § 3:31 (noting that only Alaska, Colorado, Indiana, and New Jersey use actual malice standard in private figure cases).

98. EPSTEIN, *supra* note 82, at 143–44.

99. *Gertz*, 418 U.S. at 349.

evidence of personal humiliation or mental anguish and suffering.[100] Some free-speech advocates say the "actual injury" limitation is easily manipulated by juries eager to punish defendants for their statements and, therefore, has little real effect.[101]

In contrast to libel, most jurisdictions still require slander plaintiffs to prove economic harm, or special damages. The effect is that it is more difficult, and therefore less common, for plaintiffs to bring a cause of action for slander.[102] The Supreme Court has never required special damages in a defamation case; such requirements are purely a matter of state law.[103] State courts have interpreted special damages in the slander context as requiring a "loss that is 'pecuniary' or 'capable of being estimated in money.'"[104] Because plaintiffs will not always be able to prove monetary harm, special damages are a way to "control the gates to defamation."[105]

The Court in *Gertz* thus set out the constitutional framework of modern libel law as it stands, essentially unaltered, today.[106] The case on its own terms limited its focus to media defendants, with the Court discussing the effect of its decision on "communications media," "press and broadcast media," "publishers," and "broadcasters."[107] Yet the news media today is not what it was in 1974: A corps of professional journalists working for established newspapers, magazines, and broadcasting outlets. Although the Supreme Court has never directly addressed the issue of whether the *Gertz* framework applies to nonmedia as well as media defendants, five justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[108] suggested there should be no distinction.[109]

Before the advent of the Internet, defamation actions against nonmedia defendants were rare because most individuals did not have access to widely

100. *Id.* at 349–50 (noting that "all awards must be supported by competent evidence concerning the injury").

101. *See* SACK, *supra* note 68, § 10.3.4 (arguing only way to avoid jury manipulation is for judges to be alert for overly generous damages awards or to allow recovery only for special damages).

102. *See id.* § 2.3 (noting greater difficulty of proving damages in slander suits).

103. SMOLLA, *supra* note 22, § 7:7.

104. *Id.* § 7:2.

105. *See id.* § 7:5 (noting "because many plaintiffs will not be able to point to any palpable pecuniary loss, they are likely to find the requirement of special harm an impediment impossible to overcome"); *id.* § 7:32 (commenting "special harm has always been a crude and clumsy screening device for separating deserving from undeserving plaintiffs").

106. *Id.* § 1:19.

107. SMOLLA, *supra* note 22, § 6:5.

108. 472 U.S. 749 (1985).

109. SMOLLA, *supra* note 22, § 3:9 (citing *Dun & Bradstreet*, 472 U.S. at 765 (White, J., concurring); *id.* at 774 (Brennan, J., dissenting)). Justices Marshall, Blackmun, and Stevens joined Justice Brennan's dissent. Both Justice White's concurring opinion and the dissent explicitly rejected any media/nonmedia distinction. *Id.*

disseminated publications.[110] Yet with the Internet—whether via e-mail, a blog, or a social networking site—anyone can cheaply and effectively distribute a message to thousands, or even hundreds of thousands, of people.[111] Technologically savvy minors have become some of the most prolific amateur publishers, chronicling many of their daily thoughts and activities online.[112]

Until now, there has been very little libel litigation against juveniles.[113] The Student Press Law Center warns that student reporters and editors may be sued over the content of student newspapers and notes that being a minor offers no shield against liability.[114] In the few cases that were filed against juveniles, courts conducted a traditional libel analysis, offering the student reporter no special consideration for status as a minor.[115]

This approach differs from other areas of tort law, where juveniles are routinely held to a lesser standard of care than adults for activities like driving, skiing, or using farm machinery.[116] The *Restatement (Third) of Torts* recommends holding a child to the standard "of a reasonably careful person of the same age, intelligence and experience" in most negligence claims.[117] The *Restatement (Second) of Torts* proposes a similar rule.[118] The rationale for a different standard is rooted in a desire for fairness and accommodation of

110. *See* GLENN REYNOLDS, AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS 89–114 (2006) (explaining effect of Internet revolution on individuals' access to publication).

111. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997) (noting "[a]ny person or organization with a computer connected to the Internet can 'publish' information").

112. See *supra* Part II.A for a discussion of juveniles' use of the Internet.

113. Mike Hiestand, *Balance Freedom, Responsibility to Avoid Lawsuits*, NAT'L SCHOLASTIC PRESS ASS'N, Dec. 10, 2001, http://www.studentpress.org/nspa/trends/~law1201hs.html. In this Comment, "juveniles" and "minors" are defined as individuals ages eighteen and under.

114. Mike Hiestand, *Student Media Law Bytes, Part 1*, NAT'L SCHOLASTIC PRESS ASS'N, Apr. 28, 2006, http://www.studentpress.org/nspa/trends/~law0406hs.html.

115. *See, e.g.*, Moyer v. Amador Valley Joint Union High Sch. Dist., 275 Cal. Rptr. 494, 498 (Ct. App. 1990) (finding statements published in student newspaper were not libelous, but holding student defendants to same standard of care as school official defendants). One rationale school administrators use for censoring student publications is the avoidance of defamation lawsuits. *See, e.g.*, Leeb v. DeLong, 243 Cal. Rptr. 494, 504 (Ct. App. 1988) (holding school district could censor story it reasonably believed was defamatory).

116. *See* EPSTEIN, *supra* note 82, at 155–57 (noting accommodations for minors in standard of care courts use for determining liability); *id.* at 155 (citing Charbonneau v. MacRury, 153 A. 457, 462 (N.H. 1931), which opined that "[f]or the law to hold children to the exercise of the care of adults would be to shut its eyes, ostrich-like to the facts of life and to burden unduly the child's growth to majority" (citations omitted)). Courts nevertheless often hold teenage and adult drivers to the same standard of care. *Id.* at 157.

117. RESTATEMENT (THIRD) OF TORTS § 10(a) (1997).

118. *See* RESTATEMENT (SECOND) OF TORTS § 283(A) (1974) (suggesting that if defendant "is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances").

immaturity—the recognition that young people act "thoughtlessly and upon childish impulses."[119]

2. The Evolution of Libel Law on the Internet

By revolutionizing the ease and accessibility of written content worldwide, the Internet has brought with it a corresponding increase in the realm of potential libel. As Judge Marsha S. Berzon of the Ninth Circuit noted in 2003, there is no reason inherent in tort law or technology to suggest the "First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world."[120]

Most distinctions in courts' treatment of online libel are attributable to a policy decision that Congress made more than a decade ago in response to a New York state case.[121] In 1995, when the Internet was in its nascent era, a New York court held Prodigy, an Internet Service Provider ("ISP"), liable for a defamatory statement a subscriber posted on one of its bulletin boards.[122] The court determined that Prodigy was the publisher of its website, and, applying traditional libel principles, held the ISP responsible for the site's content.[123]

Concerned about the decision's potential to cause an explosion in libel lawsuits that could stymie the growth of the Internet, Congress in 1996 passed § 230 of the Communications Decency Act in an attempt to shield online content providers from third-party liability.[124] The law was designed to provide an incentive to encourage ISPs to police their sites and remove defamatory or indecent material without fear such action would increase their liability.[125]

119. Hall v. Hall, 397 S.E.2d 829, 831 (Va. 1990) (quoting Wright v. Kelly, 122 S.E.2d 670, 673 (Va. 1961)); *see also* 42 AM. JUR. 2D *Infants* § 131 (2004) (noting reasons for different standard of care in negligence actions). For further discussion of the reasons a seventeen-and-a-half-year-old should be treated differently in the eyes of the law, see Yarborough v. Alvarado, 541 U.S. 652, 669 (2004) (Breyer, J., dissenting). In a negligence action, courts "may make 'allowance not only for external facts, but sometimes for certain characteristics of the actor himself,' including physical disability, youth, or advanced age. This allowance makes sense in light of the tort standard's recognized purpose: deterrence. Given that purpose, why pretend that a child is an adult . . . . ?" *Id.* at 674 (citations omitted).

120. Batzel v. Smith, 333 F.3d 1018, 1020 (9th Cir. 2003).

121. *See* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23.12 (describing origin of law).

122. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. 1794, 1796 (N.Y. Sup. Ct. 1995).

123. *Id.*

124. *See* 47 U.S.C. § 230(b)(2) (2006) (explaining goal of law is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); *id.* § 230(c)(1) (providing that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").

125. SMOLLA, *supra* note 22, § 23:12 (citing § 230); *see also* Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 855 (2006) (noting that § 230 was attempt to encourage "two seemingly conflicting interests: protecting children from indecent material and preserving the Internet's speech-enhancing characteristics").

Under § 230, publishers and distributors of Internet services are free from liability for defamatory online content posted by third parties; the expression's author is the only party who may be held liable.[126]

Beginning with the Fourth Circuit's 1997 ruling in *Zeran v. America Online, Inc.*,[127] courts have interpreted § 230 broadly, citing congressional intent, "[w]hether wise[] or not, . . . to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others."[128] More recent cases have used § 230 to exculpate bloggers who post, or allow readers to post, defamatory content created by a third party.[129]

In part because of the barrier presented by § 230, the crush of Internet libel lawsuits Congress predicted in 1996 has been slow to develop.[130] In addition to § 230's barriers, victims of online defamation may face procedural hurdles in securing personal jurisdiction over defendants[131] or become locked in protracted discovery battles seeking the identity of John Does who anonymously author online content.[132] Nevertheless, the number of suits alleging defamation online is climbing, according to the Media Law Resource Center, a nonprofit organization that advises media organizations about the law.[133] The center, which tracks lawsuits filed against bloggers in every state, reported 109 pending or resolved cases against bloggers as of November 2009.[134]

126. 47 U.S.C. § 230(c)(1); *id.* § 230(e)(3).

127. 129 F.3d 327, 334–35 (4th Cir. 1997) (holding that § 230 immunized America Online from liability for content third party posted on one of its bulletin boards).

128. Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) (finding America Online immune from liability for allegations of defamatory content in Drudge Report, which it distributed to subscribers according to terms of its contract with fellow defendant Matt Drudge).

129. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1035 (9th Cir. 2003) (holding listserv operator free from liability because he only made minor alterations to emails he selected and posted); Dimeo v. Max, 433 F. Supp. 2d 523, 533 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007) (instituting § 230 immunity for blogger who allowed readers to post anonymous comments); Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006) (ruling that § 230 did not allow lower court to distinguish between distributor or publisher of newsgroup content).

130. Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1158 (2006).

131. *See* Revell v. Lidov, 317 F.3d 467, 476–77 (5th Cir. 2002) (ruling Columbia University professor did not have sufficient contacts with plaintiff's home state of Texas to support personal jurisdiction in defamation suit).

132. *See* Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) (holding that defamation plaintiff must satisfy summary judgment standard before obtaining identity of anonymous defendant through discovery).

133. *See* Media Law Resource Center, Legal Actions Against Bloggers, http://mlrcblogsuits.blogspot.com (last visited Nov. 14, 2009) (listing over 100 defamation suits against bloggers); Laura Parker, *Courts Are Asked to Crack Down on Bloggers, Websites*, USA TODAY, Oct. 2, 2006, www.usatoday.com/tech/news/2006-10-02-bloggers-courts_x.htm (discussing growing number of lawsuits against bloggers).

134. Media Law Resource Center, *supra* note 133.

The largest jury award against a blogger came in April 2006, when a jury in the Eastern District of Virginia decided a $2.5 million defamation verdict against a blogger who erroneously included a travel agency on a list he maintained of companies who send unsolicited emails, or "spam."[135] That award was upheld by the Fourth Circuit in November 2006.[136] The Media Law Resource Center uses an even larger jury award—an $11.3 million verdict against a Florida woman in 2006 stemming from defamatory statements she posted on an online bulletin board—as a cautionary tale about the risks of libel on the Internet.[137]

*a. Social Networking Libel Lawsuits*

Although § 230 has been an effective barrier for many Internet libel lawsuits, the statute does little to deter defamation claims sparked by social networking sites. The companies behind MySpace and Facebook may be immunized under § 230, but the authors of individual profiles are liable for content they post there.[138] In addition, anonymity is not the hurdle on these sites that it is on others: many profiles proudly state the name of their creators; others, created anonymously, are easily traced by information filed with the site before the profile was posted.[139]

Of the 109 blog-related defamation cases monitored by the Media Law Resource Center, seven stem from content posted on MySpace.[140] Two of those MySpace cases are based on fictitious profiles developed by students posing as teachers or administrators at their schools.[141] School administrators from around the country report that defamatory content on parody profiles, as well as students' own sites, has become a big problem.[142] Still other cases are referred to

135. *See* Omega World Travel v. Mummagraphics, Inc., No. 05-122 (E.D. Va. Aug. 12, 2005), *aff'd*, 469 F.3d 348 (4th Cir. 2006) (holding against anti-spam blogger).

136. Omega World Travel v. Mummagraphics, 469 F.3d 348, 359 (4th Cir. 2006).

137. Media Law Resource Center, *supra* note 133 (citing Scheff v. Bock, No. CACE03022837 (Fla. Cir. Ct. Sept. 19, 2006)); s*ee also* Laura Parker, *Jury Awards $11.3M over Defamatory Internet Posts*, USA TODAY, Oct. 10, 2006, http://www.usatoday.com/tech/news/2006-10-10-internet-defamation-case_x.htm (noting *Scheff* jury award was largest judgment stemming from postings on Internet). Conscious of the potential for damage awards of this size, the Electronic Frontier Foundation, a nonprofit organization that defends bloggers in legal battles, offers a primer on defamation law and advice on how to blog safely. Electronic Frontier Foundation, Bloggers' Legal Guide: Online Defamation Law, http://www.eff.org/issues/bloggers/legal/liability/defamation (last visited Nov. 14, 2009); Electronic Frontier Foundation, How to Blog Safely (About Work or Anything Else), http://www.eff.org/wp/blog-safely (last visited Nov. 14, 2009).

138. *See, e.g.*, Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007) (dismissing case because MySpace is entitled to immunity under § 230).

139. *See* SOLOVE, *supra* note 24, at 26–29 (noting extraordinary amount of personal information authors of social networking profiles volunteer on sites).

140. Media Law Resource Center, *supra* note 133.

141. *Id.*

142. *See, e.g.*, David Andreatta, *MySpace Invaders for City Students – Schools Take Aim at Nasty Bloggers*, THE NEW YORK POST, July 25, 2006, at 5 (reporting on new disciplinary code that calls for harsh punishment, including expulsion, for students who post defamatory material online); Stephanie

local prosecutors, who have charged students with criminal libel or impersonation.[143] Some officials say they expect that parents of students who have been taunted or defamed online will start suing the parents of "cyber-bullies."[144] The defamation lawsuits filed against students in 2006 and 2007 demonstrate that these fears may be realized.

In *Draker v. Schreiber*,[145] an assistant principal from San Antonio sued two students and their parents after she discovered a fictitious MySpace profile the students had created in her name.[146] The profile identified her as a lesbian and featured lewd and obscene comments and pictures.[147] In her complaint, the school official claimed defamation, negligent supervision, and gross negligence.[148] The profile, created as retaliation for school discipline the principal imposed, was up on MySpace for about a month before a teacher at the school brought it to officials' attention.[149] The local district attorney also filed juvenile charges against one of the students related to the incident.[150]

In *Trosch v. Cooper*,[151] a high school principal from the Pittsburgh area sued four former students in Pennsylvania state court for defamation arising from three fake profiles posted on MySpace.[152] According to the complaint, the

Dunnewind, *Schools Trying to Prevent Harassment in Cyberspace*, THE SEATTLE TIMES, Oct. 12, 2006, at F1 (chronicling schools' troubles with social networking sites); Editorial, *Dot-Commentary's Lessons*, USA TODAY, June 5, 2006, at 10A (noting that postings on MySpace and other Internet sites have "replaced scrawlings on the bathroom walls"); Amy Hetzner, *Truth or Consequences: Student Postings Are Tricky Turf*, MILWAUKEE J. SENTINEL, June 15, 2006, at B1 (reporting on school officials asserting authority to discipline students for online postings); Rebecca Neal, *Schools Punishing Kids for What They Say Online*, THE INDIANAPOLIS STAR, Oct. 1, 2006, at 1 (discussing Indianapolis-area schools' problems with inappropriate comments posted online by students).

143. *See, e.g.*, Megan Boldt, *Teen Disciplined for Defaming Teacher on MySpace*, ST. PAUL PIONEER PRESS, Apr. 29, 2006, at B1 (discussing prosecutors' investigations of student postings); Jenny LaCoste-Caputo, *S.A. Educator Sues over Page on MySpace*, SAN ANTONIO EXPRESS-NEWS, at 1A (explaining that third-degree juvenile felony charges were pending against local high school student involving retaliation and fraudulent use of identifying information); *Schools Weigh Free Speech Against Objectionable Comments*, ASSOCIATED PRESS, Feb. 6, 2006 (noting that Knox County, Tennessee Attorney General's office would decide whether to prosecute students).

144. *See* Kennedy, *supra* note 21 (quoting Florida lawyer predicting parents of students who were defamed will sue parents of online bullies, known as "cyber-bullies"); Lindsey Poisson, *Board Sets Rules on Home Net Use*, THE FLINT J., Aug. 14, 2007, at A1 (noting online conversations spike fights and that student made fake MySpace account using another's information).

145. 271 S.W.3d 318 (Tex. App. 2008).

146. *Draker*, 271 S.W.3d at 320–21; *see also* LaCoste-Caputo, *supra* note 143 (detailing teacher's lawsuit against student).

147. *Draker*, 271 S.W.3d at 324.

148. *Id.* at 321.

149. *See* LaCoste-Caputo, *supra* note 143 (explaining how administrators discovered fake profile).

150. *Id.*

151. Complaint at 1, Trosch v. Cooper, No. 2006-4208 (Mercer County Ct. Com. Pl. Feb. 1, 2007) [hereinafter *Trosch* Complaint].

152. *Id.* at 2, 5, 7.

profiles, which were removed three days after they were posted, alleged that the principal had sex with students, kept a keg of beer behind his desk at school, and smoked marijuana.[153] One of the students named in the administrator's complaint, Justin Layshock, filed a federal lawsuit after he was suspended and placed in an alternative education program for creating one of the profiles.[154] The state court stayed hearings on the defamation action until the federal court ruled in July 2007 in the student's favor.[155] The principal's case remains pending after surviving the students' initial motions for dismissal.[156]

A similar case, *Waters v. Miller*,[157] recently settled in Sarasota, Florida.[158] A high school teacher sued a student who photographed her in the classroom while she was leaning over to help other students.[159] According to the complaint, the student cropped the photos in a sexually suggestive way and posted them on MySpace, accompanied by obscene captions.[160] The profile also stated, falsely, that the teacher hated her students and wished they would die.[161] The student was suspended from school, but the teacher filed the lawsuit because she felt administrators "turned their back on her complaint."[162]

In *State v. Bachert*,[163] the last MySpace case followed by the Media Law Resource Center, the local prosecutor's office charged a Wisconsin high school senior with criminal defamation in June 2007 for posting a fake profile of a school police officer.[164]

*b. Proposals for Reforming Libel Law Online*

Legal scholars troubled by the anachronistic structure of defamation law have struggled to suggest ways to adapt defamation law to an online world. Congress's decision to enact § 230 of the Communications Decency Act provided

153. *Id.* at 5, 7.

154. See *supra* Parts I, II.C.2 for a discussion of the student's federal lawsuit against the school district.

155. *Trosch*, No. 2006-4208, at 3 (Mercer County Ct. Com. Pl., Pa. filed Aug. 16, 2007) (ruling on defendant's preliminary objection).

156. *Trosch*, No. 2006-4208, at 7–9 (Mercer County Ct. Com. Pl., Pa. filed July 31, 2007) (ruling on defendants' preliminary objections).

157. Complaint at 1, Waters v. Miller, No. 2006 CA 002690 SC (Fla. Cir. Ct. Mar. 24, 2006) [hereinafter *Waters* Complaint]; *see also* Media Law Resource Center, *supra* note 133 (listing case docket information at http://mlrcblogsuits.blogspot.com/).

158. *See* Media Law Resource Center, *supra* note 133 (noting case apparently settled for an undisclosed amount).

159. *See Waters* Complaint, *supra* note 157, at 1 (describing photos taken in class while teacher was unaware).

160. *Id.* at 2.

161. *Id.* at 1.

162. *See* Kennedy, *supra* note 21 (explaining teacher felt that school administration did not adequately discipline student's behavior).

163. Complaint at 1, State v. Bachert, No. 2007WK000786 (Waukesha County Ct., Wis. filed June 14, 2007).

164. *Id.*

a modest update to defamation laws, but some commentators suggest § 230 is an incomplete solution.[165]

In a Comment published in the *California Law Review*, Aaron Perzanowski proposed that actual malice, rather than negligence, should be the standard of fault that governs most defamation actions stemming from online speech.[166] He noted that access to the media was one of the *Gertz* Court's main justifications for developing categories of plaintiffs with different burdens of proof in libel actions.[167] The Court in *Gertz* reasoned that public figures, because of their prominence in societal affairs, are better situated to utilize corrective speech to rebut defamatory statements.[168] The Internet, says Perzanowski, offers this type of defensive counterspeech to everyone, as the victim can in theory respond immediately with equal visibility in the same forum, addressing both the author and the audience of the defamatory statements.[169] Perzanowski suggests that the negligence standard that governs most private-figure plaintiffs' libel claims now "threatens to function as an unnecessary burden on the free exchange of information," and that courts should look at a plaintiff's access to corrective counterspeech to determine if actual malice is a more appropriate standard of fault.[170]

At a Harvard Law School symposium on bloggership,[171] University of Tennessee professor Glenn Reynolds, who maintains his own blog at the website Instapundit.com, presented a paper that proposed treating online defamation like slander rather than libel.[172] Reynolds noted slander is treated less harshly than libel because the written word can be immortal, and because people are not expected to be quite as careful in ordinary conversation as they are when aiming for publication:[173] "When people used to get their information from just a few sources, errors by those sources mattered a lot. When it was hard to research things, people's impressions, half-remembered from those sources, meant a lot . . . . It's not that way now."[174] Online, errors may be corrected in minutes, and the low-trust culture of the Internet means that an individual posting is unlikely

165. *See* Reynolds, *supra* note 130, at 1160 (noting that while legal and cultural factors have mitigated online libel lawsuits thus far, that trend might not last); Perzanowski, *supra* note 125, at 854 (suggesting that § 230 evidences congressional intent to alter defamation law to accommodate Internet speech, but is "ultimately [an] inadequate step toward a treatment of defamation that reflects the exigencies of internet communication").

166. Perzanowski, *supra* note 125, at 837.

167. *Id.* at 844.

168. *Id.* at 847.

169. *Id.* at 860.

170. *Id.* at 861–62.

171. Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, The Berkman Center for Internet & Society, Harvard Law School (Apr. 28, 2006).

172. Reynolds, *supra* note 130, at 1162–65.

173. *Id.* at 1162.

174. *Id.* at 1165.

to be relied upon as a sole source of information.[175] Thus, Reynolds suggests, because "defamation law is intended to remedy actual harm to people's reputations," the threshold of harm for libel in the blogosphere should be "fairly high," much as it is for slander.[176]

Other scholars suggest that defamation laws need to be strengthened, or the status quo at least maintained. In *The Future of Reputation*, George Washington University professor Daniel J. Solove argues that § 230 creates the wrong incentive for the creators of online content, "providing a broad immunity that can foster irresponsibility."[177] "Blogging has given amateurs an unprecedented amount of media power, and although we should encourage blogging, we shouldn't scuttle our privacy and defamation laws in the process."[178] Moreover, he said, courts are interpreting § 230 in a way that "exalts free speech to the detriment of privacy and reputation. As a result, a host of websites have arisen that encourage others to post gossip and rumors as well as to engage in online shaming."[179] Defamation laws need to be strengthened, he suggests, because without the credible threat of a lawsuit, the individuals and companies behind websites have no incentive to remove posts or resolve disputes informally.[180]

Aware that bolstering libel laws could usher in a flood of lawsuits, Solove proposes that the law should require libel plaintiffs to exhaust informal remedies, such as seeking removal of the offending information online, before filing suit.[181] To prevent too much litigation, the law should encourage websites to develop a process where bad information can be removed swiftly and false statements can be corrected, thus "achiev[ing] control without having to be invoked."[182] He further recommends limiting damage awards, asserting that people who sue for defamation do not want money—they want vindication.[183]

### *C. Juveniles and the First Amendment*

A recurring theme in the Supreme Court's defamation cases is a fear of chilling defendants' exercise of their free speech rights.[184] Yet perhaps because there has been so little libel litigation against juveniles,[185] the Court has never considered that one class of defendants, by virtue of its own decisions, has fewer speech rights to exercise than others. While defamation laws do not distinguish

175. *Id.* at 1162, 1166.

176. *Id.* at 1166.

177. SOLOVE, *supra* note 24, at 159.

178. *Id.*

179. *Id.*

180. *Id.* at 120.

181. *Id.* at 122–23.

182. SOLOVE, *supra* note 24, at 123.

183. *Id.* at 122, 124.

184. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) (expressing concern about "chilling effect" of libel law on First Amendment freedoms).

185. See *supra* Part II.B.1 for a discussion of the paucity of libel litigation against minors.

between minors and other tortfeasors,[186] the Court has made it very clear that age has an enormous impact on the free speech rights afforded individuals under the First Amendment. The Supreme Court's student speech precedents grant administrators the authority to reach outside school grounds to punish students for their conduct online. Teenagers may therefore be subject to severe in-school punishments in addition to facing defamation lawsuits for their social networking activities.

1. From *Tinker* to *Bong Hits 4 Jesus*

In the first student speech case, *Tinker v. Des Moines Independent Community School District*,[187] the Court famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[188] Yet *Tinker* and the cases that came after it noted the "special characteristics of the school environment,"[189] and underlined that the shape of those First Amendment rights may not necessarily mirror constitutional protections in other contexts.[190]

In *Tinker*, a group of high school students resolved to wear black armbands to protest the Vietnam War, but school officials learned of the plan and adopted a policy prohibiting the action.[191] Students who wore the armbands were suspended and sued the school district, and the Supreme Court found that the officials had violated the students' First Amendment rights.[192] The Court held that school administrators may constitutionally control and discipline student conduct at school, but emphasized that a mere "apprehension of disturbance is not enough to overcome the right to freedom of expression."[193] The Court laid down a broad rule to govern student speech: expression either inside or outside of the classroom may not be suppressed unless school officials decide it would "materially and substantially disrupt the work and discipline of the school."[194]

186. *But see* EPSTEIN, *supra* note 82, at 155–57 (discussing cases where minors are held to different standard of care than adults). The Third Restatement holds a child to the standard "of a reasonably careful person of the same age, intelligence and experience." RESTATEMENT (THIRD) OF TORTS § 10 (1997). Many jurisdictions have statutes indemnifying parents for the torts of their minor children. B.C. Ricketts, Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 A.L.R.3d 612, 626–27 (1966).

187. 393 U.S. 503 (1969).

188. *Tinker*, 393 U.S. at 506.

189. *Id.*

190. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 252 (3d Cir. 2002); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (noting that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

191. *Tinker*, 393 U.S. at 504.

192. *Id.*

193. *Id.* at 507–08.

194. *Id.* at 513.

Yet the Court's subsequent cases, *Bethel School District Number 403 v. Fraser*[195] and *Hazelwood School District v. Kuhlmeier*,[196] emphasized that certain categories of student speech could be regulated more closely than the *Tinker* framework suggested. In *Fraser*, a student who gave a speech that used crude language and an "explicit sexual metaphor" at a school assembly was suspended for three days.[197] The Court declined to apply the analysis it established in *Tinker*, finding instead that the school district could censor lewd, vulgar, or profane on-campus speech that it determined "would undermine the school's basic educational mission."[198] The Court found that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[199]

*Kuhlmeier* gave school authorities similar leeway to regulate school-sponsored speech, endorsing a school principal's decision to censor school newspaper articles he considered inappropriate.[200] The Court held that educators could limit speech that the "public might reasonably perceive to bear the imprimatur of the school" as long as "their actions are reasonably related to legitimate pedagogical concerns."[201]

The Court's most recent student speech case, *Morse v. Frederick*,[202] again distinguished *Tinker*, and extended *Fraser* to endorse a school district's punishment of expression at an off-campus yet school-sponsored event.[203] The Court upheld the suspension of a student who unfurled a "Bong Hits 4 Jesus" banner at an Olympic torch relay parade, holding that schools may constitutionally restrict speech that is "reasonably viewed as promoting illegal drug use."[204] *Morse*, however, is an expressly limited opinion. Chief Justice Roberts, who wrote the majority opinion, noted that "there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents."[205] Indeed, the five separate opinions in *Morse* illustrate the Court's struggles with its careful First Amendment balancing act.[206] While Justice Thomas urged members of the Court to take an additional step and overrule

195. 478 U.S. 675 (1986).

196. 484 U.S. 260 (1988).

197. *Fraser*, 478 U.S. at 678.

198. *Id.* at 685.

199. *Id.* at 681.

200. *Kuhlmeier*, 484 U.S. at 271–72.

201. *Id.* at 271, 273.

202. 127 S. Ct. 2618 (2007).

203. *Morse*, 127 S. Ct. at 2625.

204. *Id.*

205. *Id.* at 2624.

206. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 595 (W.D. Pa. 2007) (commenting that "[t]he five separate opinions in *Morse* illustrate the complexity and diversity of approaches to this evolving area of law").

*Tinker* altogether,[207] Justice Alito's concurring opinion emphasized that the discipline at issue in the case was "at the far reaches of what the First Amendment permits."[208]

2. Schools' Cyber-Policing of Student Speech

The explosion in juvenile use of social networking sites has brought with it a new disciplinary challenge for school officials as students use online outlets to disparage school discipline and mock, parody, and even impersonate school officials.[209] Courts, in turn, are increasingly confronted with cases challenging schools' authority to police off-campus cyber-conduct that impacts on-campus activities.[210] Like *Morse*, these cases struggle to interpret the Supreme Court's early student speech cases and determine the boundaries of school authority. Three recent federal district court opinions, *Layshock v. Hermitage School District*,[211] *Doninger v. Niehoff*,[212] and *J.S. v. Blue Mountain School District*[213] illustrate the different legal approaches to school discipline stemming from students' social networking activities. Another case, *J.S. ex rel. H.S. v. Bethlehem Area School District*,[214] demonstrates that a school district's authority to punish students for their off-campus online conduct may be upheld under even the most lenient of the Supreme Court's student speech tests.

In *Layshock*, as discussed in Part I, seventeen-year-old Justin Layshock created the MySpace profile in his principal's name on an off-campus computer.[215] Layshock accessed the profile while at school to show it to classmates, some of whom disrupted class by giggling and joking as they showed it to other students.[216] After Layshock admitted creating the profile, school officials removed him from his advanced placement classes and placed him in an Alternative Education Program for the remainder of the school year.[217] They also suspended him for ten days and barred him from participating in the high

207. *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring).

208. *Id.* at 2638 (Alito, J., concurring) (noting that he joined "the opinion of the Court with the understanding that the opinion does not endorse any further extension" of school authority over student speech).

209. *See* Kennedy, *supra* note 21 (finding that schools' crackdowns on bullying online leaves them vulnerable to First Amendment challenges).

210. DAVID L. HUDSON JR., FIRST AMENDMENT CENTER, STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS? (2006), *available at* http://www.firstamendmentcenter.org/about.aspx?id=17913 (follow "Download report" hyperlink).

211. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

212. 514 F. Supp. 2d 199 (D. Conn. 2007).

213. No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008).

214. 807 A.2d 847 (Pa. 2002).

215. *Layshock*, 496 F. Supp. 2d at 591. See *supra* Part I for further information about Layshock's MySpace profile and the school administrators' disciplinary and legal responses.

216. *Layshock*, 496 F. Supp. 2d at 592.

217. *Id.* at 593–94.

school's graduation ceremony or any school-sponsored athletic activities.[218] Layshock and his parents sued the school district, arguing that his punishment for off-campus speech violated his First Amendment rights.[219]

In *Doninger*, seventeen-year-old Avery Doninger vented her frustration at school officials' response to a music festival she had been planning by posting misleading information about the festival on her profile at LiveJournal.com, a social networking and blogging site.[220] Doninger wrote that the festival, which officials had postponed, was "cancelled due to douchebags in central office," and encouraged fellow students to complain to the school superintendent, who she called "a dirty whore," to "piss her off more."[221] After school officials discovered Doninger's posting, they disqualified her from running for senior class secretary in the school's upcoming elections.[222] Doninger and her mother filed a lawsuit alleging the school district had violated her First Amendment rights and sought an injunction requiring the school to hold new student elections so that she could participate.[223]

In *Blue Mountain School District*, fourteen-year-old J.S. created a MySpace profile with an eighth grade friend on her home computer using the Blue Mountain Middle School principal's photo but not his name.[224] The profile described its subject as a forty-year-old school principal living in Alabama interested in "hitting on students and their parents" and "pervert[ing] the mind of other principals."[225] Teachers reported that students discussed the profile in class and created a general "buzz" in the school.[226] After J.S. admitted creating the profile, she received a ten-day out-of-school suspension.[227] Instead of appealing the punishment to the school board, J.S. and her parents sued the principal and the school district, asserting the punishment violated her First Amendment rights.[228]

In all three cases, the threshold question the courts considered was whether school officials had the authority to punish the students for their speech-related actions.[229] In *Layshock*, the court noted that while school officials can police off-campus speech, they must demonstrate an appropriate nexus to school

218. *Id.*

219. *Id.* at 594.

220. Doninger v. Niehoff, 514 F. Supp. 2d 199, 202–06 (D. Conn. 2007).

221. *Id.* at 206–07.

222. *Id.* at 207–08.

223. *Id.* at 209–10.

224. J.S. v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685, at *1–2 (M.D. Pa. Sept. 11, 2008).

225. *Id.* at *2–3.

226. *Id.* at *3–4.

227. *Id.* at *5–6.

228. *Id.* at *6–7.

229. *Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685, at *18–26; Doninger v. Niehoff, 514 F. Supp. 2d 199, 211–12 (D. Conn. 2007); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

activities.[230] The court found that this nexus did not exist, because while *Fraser* allowed the school to punish lewd and profane on-campus speech, it could not discipline lewd and profane off-campus speech like Justin's.[231]

In *Doninger* and *Blue Mountain School District*, by contrast, both courts held school officials could discipline students for speech the officials found offensive, even if it originated off campus.[232] The court ruled that Doninger's online posting could be characterized as on-campus speech because, while created outside of school, it was "purposely designed . . . to come onto the campus."[233] The court thus determined that *Fraser* controlled the case, and that school officials could permissibly punish Doninger as they did because they were charged with prohibiting vulgar and offensive speech, and encouraging the values of civility and cooperation.[234] The court noted that while the school district could have imposed a more "fitting punishment," it nevertheless met constitutional muster.[235] The decision was affirmed by the Second Circuit, which said "the record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property."[236]

Similarly, in *Blue Mountain School District*, the court upheld the school district's authority under *Fraser*, emphasizing the "vulgar, lewd, and potentially illegal" nature of the speech on the MySpace profile.[237] Even though the profile was created by J.S. at her home, the court found the facts established a sufficient "connection between the off-campus action and the on-campus effect."[238] J.S. and her parents appealed the decision to the Third Circuit, which heard oral arguments in June.

While the *Doninger* court's analysis ended with the court's threshold inquiry, the *Layshock* court next applied the Supreme Court's *Tinker* "material and substantial disruption" test.[239] The school district asserted that the profile was defamatory and, therefore, a disruption, but the court rejected that argument, noting that "the school could not usurp the judicial system's role in resolving tort actions."[240] Given that the school swiftly and successfully disabled Layshock's MySpace profile and blocked access to the website, no classes were canceled, and no widespread disorder occurred, the court found no material or substantial disruption to school activities.[241] The court held that, under *Tinker*,

230. *Layshock*, 496 F. Supp. 2d at 599.

231. *Id.* at 595–600 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

232. *Doninger*, 514 F. Supp. 2d at 216–18; *Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685, at *19.

233. *Doninger*, 514 F. Supp. 2d at 216–18.

234. *Id.* at 217 (citing *Fraser*, 478 U.S. at 683).

235. *Id.* at 215.

236. Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

237. *Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685, at *18.

238. *Id.* at *21.

239. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007).

240. *Id.* at 603.

241. *Id.* at 601.

the "school's right to maintain an environment conducive to learning does not trump Justin's First Amendment right to freedom of expression."[242]

Yet even under the more lenient *Tinker* analysis, a school's disciplinary authority may trump a student's free speech rights. In *J.S. ex rel. H.S.*, the Pennsylvania Supreme Court considered the case of an eighth-grade student who created a "Teacher Sux" website with derogatory and offensive statements about the school principal and his algebra teacher, who was so upset by the comments that she took a medical leave.[243] Because the website was specifically aimed at the school community and created the very sort of classroom upheaval the student intended, the court found that the web posting qualified as a "material and substantial disruption" under *Tinker* and upheld the school district's decision to expel him.[244]

## III. SOCIAL NETWORKING SITES DEMAND A REVISION TO LIBEL LAW

Today, when a plaintiff sues a defendant for online defamation, 1970s law is applied to a twenty-first century medium. By its very language, the *Gertz v. Robert Welch, Inc.*[245] standard was developed for the media as it existed in 1974: A corps of professional journalists working for established newspapers, magazines, and broadcast outlets.[246] The *Gertz* standard translated well to the Internet setting when professional journalists took their craft online. It took the explosion in social blogging generally, and the teenage social networking craze in particular, to expose the *Gertz* framework as an anachronism.

The framework the Supreme Court established in *Gertz* for analyzing defamation cases accounts for variety among plaintiffs, but not defendants.[247] It is still possible to divide plaintiffs into public officials, public figures, limited-purpose public figures, and private individuals.[248] Yet the revolution in communication ushered in by the Internet created a vast expansion in potential defamation defendants.[249] The way students eighteen and under embraced social networking sites has produced an online superhighway crowded with immature speech. Thoughts that heretofore would have been scrawled on a bathroom wall may now be seen by scores more people.[250] Online, anyone can become a journalist or a publisher—but they also can be held responsible anytime they

242. *Id.*

243. J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

244. *Id.* at 869.

245. 418 U.S. 323 (1974).

246. See *supra* Part II.B.1 for a discussion of how *Gertz* only contained references to media defendants.

247. *See Gertz*, 418 U.S. at 323 (distinguishing four different categories of plaintiffs).

248. *Id.*

249. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997) (noting that with modern technology, anyone with a computer and Internet access can become a publisher).

250. *See* boyd, *supra* note 34, at 124 (explaining Facebook feature called "*The Wall*" that encourages members to write comments about their friends for profile's visitors to read).

print a false, unprivileged, and damaging statement of fact and publish it to a third person.[251]

Section 230 of the Communications Decency Act of 1996[252] and its abandonment of a basic tenet of defamation law—third-party liability—represent congressional recognition that the Internet is fundamentally different than other mediums.[253] Although § 230 immunizes most Internet Service Providers and many bloggers from liability for defamatory content, it does little to protect individuals who create profiles on social networking sites and are legally responsible for all content they post there.[254] Given that MySpace and Facebook respectively represent the second- and seventh-most visited sights on the Internet,[255] the explosion in liability stemming from these sites, particularly among juveniles, could be enormous.

Woefully out-of-date defamation law needs to be fundamentally remodeled for an Internet world where social networking sites dominate other online outlets,[256] including blogs. True reform requires careful consideration of the variety of online speakers as well as their subjects, and of defamation defendants in addition to plaintiffs. Thoughtful change, rather than a quick fix like § 230, will require time.

But the problem of juveniles' activities on social networking sites simply cannot wait, as evidenced by the spike in defamation and student speech lawsuits.[257] Teenagers may receive harsh discipline at school for their online speech, and be punished again when the same teachers and school administrators file lawsuits against them. Recent Supreme Court cases authorize, and even encourage, school officials to maximize their oversight of student speech that occurs either on or off campus by minimizing these students' First Amendment rights.[258] Reading this line of Supreme Court precedent in tandem with the Court's much older defamation cases produces a clear call to change the way juveniles are treated in libel lawsuits: Because these students have fewer free

251. *See* SACK, *supra* note 68, § 2.1 (explaining four elements of cause of action for defamation, which are "a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting to at least negligence on the part of the publisher; and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication").

252. 47 U.S.C. § 230(c)(1) (2006).

253. *See* Perzanowski, *supra* note 125, at 856 (arguing that § 230 represents imperfect attempt to update defamation laws).

254. See *supra* notes 121–34 and accompanying text for a discussion of the congressional purpose of § 230.

255. *See* Rosenbush, *supra* note 41 (noting that MySpace and Facebook receive more visitors than Amazon.com).

256. *Id.*

257. See *supra* Parts II.B.2.a and II.C.2 for a discussion of libel lawsuits and student speech lawsuits stemming from social networking sites.

258. *See* Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007) (extending discipline authorized in *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986) and distinguishing more lenient *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)).

speech rights than adults,[259] it is unfair to hold them equally responsible for their speech in a court of law. Out of deference to the Court's direction as well as solicitude for immature teenagers facing dual punishments, judges should implement some simple solutions familiar to the rest of defamation and tort law while awaiting more comprehensive legislative action.[260]

Part III.A of this Discussion examines the issues posed by juveniles' activities on social networking sites and school administrators' responses in an effort to underscore the need for swift action. It recommends adopting the practice used in other areas of tort law and holding teenagers posting on social networking sites to the standard of other teens their age, rather than that of adults. Part III.B considers the special nature of social networking sites as opposed to the Internet as a whole, and outlines additional reasons these sites require modification of current defamation laws. Part III.C examines scholars' proposals for updating Internet libel law and considers whether these suggestions could be adapted to aid the quandary posed by students' use and abuse of social networking sites. It concludes that Glenn Reynolds' recommendation to import the standard traditionally used in slander cases holds the most promise: Requiring plaintiffs who assert they were defamed on social networking sites to prove real economic harm could separate frivolous claims from those deserving redress.[261]

### *A. Juveniles: A Reduced Right of Free Speech Should Mean Less Responsibility*

The key reason social networking sites demand a revision to defamation laws is the population using them. Statistics show that juveniles gather on the sites in disproportionate numbers.[262] The Pew Internet & American Life Project study reported a whopping seventy percent of girls ages fifteen to seventeen use the websites as online hangouts.[263] Impetuous and potentially defamatory statements that in previous decades would have taken the form of a note passed between just one or two students can now be accessed by an enormous web of "friends."[264] Perhaps predictably, students are the ones getting in trouble for what they write on social networking sites, both in school and in court.[265] Their

259. *See Fraser*, 478 U.S. at 682 (noting "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

260. *See* Reynolds, *supra* note 130, at 1158–59 (noting inherent complexities of Internet-based libel litigation, where questions of personal jurisdiction, immunity under § 230, discovery battles, and choice of law are all unsettled). It is thus unrealistic for this Comment to propose a comprehensive solution for defamation litigation relating to social networking sites when legal regulation of the Internet as a whole remains in a state of flux.

261. *See id.* at 1166 (suggesting online libel should be treated more like slander).

262. *See* boyd, *supra* note 34, at 120–21 (noting teenage dominance on social networking sites).

263. LENHART & MADDEN, *supra* note 39, at 2, 3.

264. *See* SOLOVE, *supra* note 24, at 24–29 (discussing framework of social networking sites).

265. See *supra* Parts II.B.2a and II.C.2 for a discussion of teens' legal and disciplinary troubles stemming from social networking activities.

conduct ranges from flippant postings about school friends or grades to malicious profiles impersonating school officials.[266]

The law of defamation needs a method for differentiating between published comments that are merely obnoxious or inappropriate—excusable, maybe, by a lack of maturity—from those that are truly damaging and vicious. The current standards are blind to the categories of defamatory statements written on social networking sites and the varying degrees of damage they may cause. Because of the generational communication divide on social networking sites,[267] adult libel plaintiffs may misconstrue material on a profile as defamatory that was never intended nor interpreted as such by its teenage author and readers. Libel law is thus vulnerable to exploitation and at risk for an explosion in frivolous social networking litigation.

Given libel law's traditional focus on the plaintiff, rather than the defendant,[268] it is unsurprising that the law has no provisions for treating juvenile defendants differently. The only area of defamation law where the age of a defendant has been consistently considered is with reference to rarely used criminal libel statutes,[269] and that reflects the criminal justice system's view that juveniles are fundamentally different.

The paucity of law demonstrates that, until now, libelous comments by minors were simply not a problem. Outside of student newspapers, juveniles have had no access to mass-distributed media. High school newspapers are so heavily regulated by school administrators that the predominant legal issue has been that of censorship, not defamation.[270] The advent of blogging and social networking sites created a sea change in the number of widely disseminated, published statements made by minors.[271]

In other areas of tort law, courts have made the policy decision to treat juveniles differently. *The Restatement (Second)* and *(Third) of Torts* offer the general rule that minors should be held to the standard of care of a reasonable person of the same age and maturity.[272] In the areas of sports or the operation of machinery—all more physically dangerous activities than posting comments

266. *See* Kennedy, *supra* note 21 (explaining high school students' conduct on social networking sites). See *supra* Parts II.B.2.a and II.C.2 for a discussion of lawsuits arising from conduct on social networking sites.

267. *See* boyd, *supra* note 34, at 134 (arguing that "generational divide" on social networking sites "is further complicated by adults' misreadings of youth participation").

268. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–46 (1974) (distinguishing four different categories of plaintiffs but referring to defendants solely in terms of media).

269. *See* SACK, *supra* note 68, § 2.10.1 (noting that charges under criminal libel laws are rare and of doubtful constitutionality).

270. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (upholding school district's decision to censor school newspaper articles officials considered inappropriate).

271. *See* SOLOVE, *supra* note 24, at 24 (noting that "the most common blogger is 'a teenage girl who uses the medium primarily to communicate with five to 10 friends'" (quoting G. Jeffrey MacDonald, *Teens: It's a Diary. Adults: It's Unsafe*, CHRISTIAN SCIENCE MONITOR, May 25, 2005)).

272. *See* RESTATEMENT (THIRD) OF TORTS § 10 (1997) (recommending holding children and other minors to a lower standard of care); RESTATEMENT (SECOND) OF TORTS § 283A (1965) (same).

online—minors are consistently held to a different standard.[273] This represents the recognition that teenagers are fundamentally immature and that it would be unfair for the law to expect otherwise.[274]

Defamation is different from most torts, however, because of the constitutional concerns that accompany it. Since *New York Times Co. v. Sullivan*,[275] the Supreme Court has required libel laws to be considered along with the contradictory goals of the First Amendment.[276] The Court has emphasized that its libel law jurisprudence embodies a careful balancing act that weighs the ideal of free speech and the First Amendment's interest in the free flow of information, against an individual's legitimate interest in protecting his reputation.[277]

While the Supreme Court's defamation opinions focus primarily on plaintiffs, there is one clear message with reference to defendants: Libel punishments must not create a chilling effect on future speech. The Court in *Gertz* opined that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."[278] Moreover, the Court noted "we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise."[279] An obvious conclusion, therefore, is that defendants with fewer free speech rights are more likely to be chilled from exercising them when punished for errors.

It is the Court's focus on freedom of speech in its libel opinions that, when paired with its student speech cases, compels a different standard for minors in defamation cases. As the Court's opinions in the area of student speech have made abundantly clear, juveniles do not have the same rights of free speech as adults.[280] School administrators are encouraged to police student conduct—including speech—that may impact school activities, even if it occurs away from campus. The Court's careful balancing act in one area of the law thus upends another: Without the unfettered right of free speech, it raises grave First Amendment concerns, under the Court's logic, to make libel laws apply with equal force to minors who have already received in-school punishments for offensive speech. An entire generation that embraced the free-speech

273. *See* EPSTEIN, *supra* note 82, at 155–57 (noting differences in standard of care many jurisdictions use for minors' activities).

274. *Id.*

275. 376 U.S. 254 (1964).

276. *See* SMOLLA, *supra* note 22, § 1:7 (explaining that before Supreme Court's decision in *Sullivan*, defamatory speech was thought to be outside realm of First Amendment protection).

277. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (noting struggle to balance competing goals of "vigorous and uninhibited press and the legitimate interest in redressing wrongful injury").

278. *Gertz*, 418 U.S. at 340.

279. *Id.* at 342.

280. See *supra* Part II.C for a discussion of the Supreme Court's jurisprudence in the area of student speech.

opportunities the Internet offered them may be chilled by the threat of multiple punishments from exercising their First Amendment freedoms online or in other contexts.

The Court has developed a variety of tests for student speech since *Tinker v. Des Moines Independent Community School District*,[281] yet under none of them does the First Amendment provide the same shield for minors that it does for adults.[282] *Morse v. Frederick*,[283] the Court's most recent ruling, endorses an expansion of schools' authority to discipline students for speech deemed inappropriate.[284] The court in *Layshock v. Hermitage School District*[285] found the *Morse* opinion inapplicable to a student's off-campus use—and abuse—of social networking sites,[286] but it is probable that many other courts will draw the opposite conclusion, as the *Doninger v. Niehoff*[287] and the *J.S. v. Blue Mountain School District*[288] courts did.[289] Moreover, as the Pennsylvania Supreme Court's opinion in *J.S. ex rel. H.S. v. Bethlehem Area School District*[290] demonstrates, school discipline for off-campus online activities may be upheld even under the Supreme Court's most lenient framework for analyzing student speech.[291]

Courts' sanction of students' in-school punishment for speech seems antithetical to their nearly universal condemnation of states' criminal libel statutes.[292] Scholars agree that the founders established the First Amendment in part as a reaction to the English law of seditious libel enforced by the state.[293] The traditional remedy for reputational injury in the United States is thus the private defamation lawsuit, rather than government regulation.[294] High school discipline, however, certainly from the teenager's perspective, is the juvenile

281. 393 U.S. 503 (1969).

282. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (explaining that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"); Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (noting "special characteristics of the school environment").

283. 127 S. Ct. 2618 (2007).

284. *See Morse*, 127 S. Ct. at 2625 (permitting school to prohibit display of material promoting use of illegal drugs).

285. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

286. *See Layshock*, 496 F. Supp. 2d at 595 (distinguishing *Morse*).

287. 514 F. Supp. 2d 199 (D. Conn. 2007).

288. No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008).

289. *See Doninger*, 514 F. Supp. 2d at 215–18 (finding that *Fraser*, as expanded in *Morse*, controlled outcome of case); *Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685, at *15–18 (same).

290. 807 A.2d 847 (Pa. 2002).

291. *See Bethlehem Area Sch. Dist.*, 807 A.2d at 867–75 (applying *Tinker*'s "material and substantial disruption" test and yet still upholding school district's decision to expel student).

292. *See* SACK, *supra* note 68, § 6.3 (noting that states' criminal libel laws may be unconstitutional).

293. *See* SMOLLA, *supra* note 22, § 1:28 (analyzing influence of John Peter Zenger's trial in 1735 and Blackstone's theories on free speech upon drafters of First Amendment).

294. *See id.* § 1:1 (noting that state common law largely defines current body of tort law).

counterpart to police punishment by the state. In *Draker v. Schreiber*,[295] *Trosch v. Cooper*,[296] and *Waters v. Miller*,[297] the student had already been punished by the school for material administrators considered libelous when the school official decided to sue for defamation. Recognizing the irony and injustice in this multilayered punishment, the court in *Layshock*—an action filed by the affected student against the district—rebuked the school district, arguing "the school could not usurp the judicial system's role in tort actions."[298]

Yet with the Supreme Court's clear endorsement of expanding the realm of school discipline in the area of student speech in 2007's *Morse*,[299] school districts are unlikely to heed the *Layshock* court's warning. And if students are to receive in-school punishments for their off-campus speech, it is inappropriate to also hold them responsible in court for a tort that does not recognize their status as juveniles. Therefore, it should be decades-old defamation law that bends, as judges can be confident that school officials will fill the regulating role traditionally held by libel law.

Courts should hold minor defendants in libel actions to a different standard in part out of concerns of fairness; immature teenagers who have already been punished at school do not need to learn another lesson by further discipline in court. The other issue, of course, is constitutional: Courts must be especially cautious not to chill the free speech rights of students who do not have the same First Amendment rights as adults.

One clear and simple way for courts to show greater solicitude for minor libel defendants is to hold them not to the standard of care of other adults, but to other teenagers their own age. Other areas of tort law offer precedent and guidance for how courts can implement this technique.[300] Adopting a standard of care expected of other students their own age, rather than that of adults, does not in any way eliminate teenagers' responsibility for what they write. The new standard, like that used in other torts, would merely make an allowance for immaturity by acknowledging students act "thoughtlessly and upon childish impulses."[301] Moreover, it is appropriate to judge juveniles against those who

295. 271 S.W.3d 318 (Tex. App. 2008). See *supra* notes 145–50 and accompanying text for a discussion of this case.

296. *Trosch*, No. 2006-4208, at 2 (Mercer County Ct. Com. Pl., Pa. filed Aug. 16, 2007) (ruling on defendant's preliminary objection). See *supra* notes 151–56 and accompanying text for a discussion of this case.

297. *Waters* Complaint, *supra* note 157, at 1; *see also* Media Law Resource Center, *supra* note 133 (listing case docket information). See *supra* notes 157–62 for a discussion of this case.

298. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 603 (W.D. Pa. 2007).

299. *See* Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007) (holding that speech at school-sanctioned event, occurring during normal school hours and in proximity of other students, is school speech).

300. *See* RESTATEMENT (THIRD) OF TORTS § 10 (1997) (stating that children and other minors should be held to lower standard of care); RESTATEMENT (SECOND) OF TORTS § 283A (1965) (same).

301. *See* 42 AM. JUR. 2D *Infants* § 131 (2004) (noting reasons for different standard of care in negligence actions); boyd, *supra* note 34, at 135 (commenting that social interaction in public life is

have the same free speech rights as they do. Determining other methods for relaxing the burden of liability for teenagers in libel actions requires consideration of both the technology and use of social networking sites.

### *B. The Special Nature of Social Networking Sites*

The unique characteristics of social networking sites and individuals' behavior there demand a different legal standard in defamation cases. Interactions on the sites are casual and smack more of a spur-of-the-moment conversation than thoughtful prose.[302] Social networking culture puts a premium on witty, almost boastful, repartee—not accuracy or sensitivity.[303] As Daniel Solove wrote in *The Future of Reputation*, in a passage on blogging that is particularly applicable to social networking sites:

> One of the main differences between blogs and mainstream media publications is style. Blog posts are edgy, not polished and buffed into the typical prefabricated write-by-the-numbers stock that often gets produced by the mainstream media. Discourse on the Internet is pungent. In many respects, this is a virtue . . . . But blog posts are created with no editors and published with no time delays. There's little time to cool down before sounding off. Just click the Publish button and unleash it to the world . . . . It goes without saying that this is a recipe for some problems.[304]

The law also needs to consider that readers do not expect the level of care from an obviously juvenile profile on a social networking site as they do from the *New York Times*. Although the accuracy of postings on social networking sites may be questionable, and defamatory content therefore more likely, readers are also less apt to believe what they see there, reducing reputational damage.[305] As Glenn Reynolds suggested, "[t]he blogosphere . . . is a low-trust culture. . . . Newspapers, on the other hand, used to operating in a higher-trust environment, more commonly require readers to take their word regarding factual assertions."[306] Courts should account for the fact that even though content on a social networking site might be defamatory, libel law's framework for awarding damages based on limited evidence of injury is inappropriate.[307]

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part of what helps young people grow, and "[m]aking mistakes and testing limits are fundamental parts of this").

302. *See* boyd, *supra* note 34, at 123–24 (explaining content of social networking site profiles and listing examples).

303. *Id.* at 124, 130 (noting playful love odes to salt from pepper and drama between friends over who is chosen as "Top Friend" on MySpace).

304. SOLOVE, *supra* note 24, at 199.

305. *See* Reynolds, *supra* note 130, at 1165–66 (discussing accuracy on Internet and reader skepticism of what they read there).

306. *Id.* at 1159 (internal parentheses omitted).

307. See *supra* notes 99–105 and accompanying text for a discussion of damages awarded in defamation cases.

Courts weighing allegations of defamation on a social networking site should also consider a victim's access to the media, which, as Aaron Perzanowski notes, was a key consideration for the *Gertz* Court as it developed different categories of plaintiffs.[308] Rarely in libel law do plaintiffs and defendants have precisely the same access to the media.[309] Even in other online contexts, one blogger might attract a larger audience than another. Yet on social networking sites, each user has to work within the same format. Anyone (over the age of thirteen) can join one of the sites and begin creating a profile.[310] Users can join groups organized around school or work communities, allowing one speaker to rebut statements to exactly the same audience that read the defamatory statements.[311] Depending on the profile's privacy settings, an offended reader is likely able to post his version of the story on the author's own profile.[312] Thus, unlike a plaintiff who asserts he was libeled in a newspaper article, a plaintiff in a social networking case may have immediate access to the same kind of media to correct his injury, posting his version of the story on his own profile.

These sites are also different than other corners of the Internet because profile authors do not have ultimate control over content they post there—the companies who offer the networking service do. It is true that without official removal, social networking profiles may be "cached" on search engines like Google or Yahoo in their original, and potentially defamatory form, even after their author changes the content.[313] But the codes of conduct on both Facebook and MySpace give the companies the authority to remove offending postings or entire profiles.[314] In each case where students have impersonated school officials, the schools have successfully worked with MySpace to take the offending profile down.[315] Although the sites cannot be expected to monitor each profile, they can

308. *See* Gertz v. Robert Welch, Inc. 418 U.S. 323, 344 (1974) (emphasizing "public officials and public figures enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy"); Perzanowski, *supra* note 125, at 836 (noting that access to media was one of Supreme Court's main justifications for distinguishing different categories of plaintiffs with different burdens of proof).

309. *See, e.g.*, Perzanowski, *supra* note 125, at 861–62 (observing that actual malice may not always be appropriate burden of proof because plaintiff may not have same access to media as defendant).

310. *See, e.g.*, MySpace.com, *supra* note 61 (allowing access to all users over thirteen who promise to abide by site's rules).

311. *See* boyd, *supra* note 34, at 123–24 (describing function of social networking sites).

312. *See id.* at 124 (describing users' ability to post messages on another member's profile that every other visitor will be able to read).

313. *See* Tom Zeller Jr., *Lest We Regret Our Digital Breadcrumbs*, N.Y. TIMES, June 12, 2006, at C5 (discussing difficulty of removing old versions of social networking profiles that search engines have "cached," or preserved).

314. *See* Facebook.com, *supra* note 61 (outlining conditions of membership); MySpace.com, *supra* note 61 (same).

315. *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007) (finding school swiftly and successfully disabled MySpace profile); LaCoste-Caputo, *supra* note 143 (noting profile was up for month before school official located it and worked with MySpace to have it removed).

and should, as Solove suggests, investigate complaints of defamation.[316] Swift removal is a simpler and far more affordable alternative than a lawsuit.[317]

### *C. Applying Proposals for Libel Law Reform to Social Networking Sites*

Policymakers face an enormous challenge in crafting a legal approach that addresses both the unique challenges of the new technology and the special concerns of the juveniles who use it. Lawmakers should incorporate scholars' proposals for online reform that have special resonance for social networking sites.[318] As none of these ideas were created with minors in mind, none of them are perfect solutions for reducing teenagers' liability for defamatory content on social networking sites. Reynolds' focus on damages nevertheless represents the proposal best-suited for limiting defamation suits against teenagers to those alleging the most egregious violations.

Perzanowski's proposal to broaden the use of actual malice in online defamation actions[319] is an interesting but ultimately imperfect solution to the problems posed by social networking sites. His Comment recognizes, appropriately, that plaintiffs alleging injury on social networking sites have access to the media to immediately correct injurious statements.[320] Yet even though Perzanowski's proposal is designed to loosen libel law's application online,[321] using actual malice as the default standard of fault would do little to stem liability in many juveniles' cases.

The danger of adopting actual malice as the test for social networking sites generally, or for juveniles in particular, is that many plaintiffs would likely satisfy that heavy burden just as easily as negligence. Given that actual malice is knowing falsehood or reckless disregard for the truth,[322] a teenager on a social networking site who irresponsibly passes on speculative rumors she knows are likely untrue has arguably published a statement with actual malice. Similarly, in the cases pending where students have created fictitious MySpace profiles using the names of school officials, proving actual malice is not a high hurdle, as the students in question made up the statements they posted online. The students' attorneys would be better served, as the parties in *Trosch v. Layshock* have done, arguing that the profiles are not defamatory because they are attempts at opinion-laced parody.[323]

316. *See* SOLOVE, *supra* note 24, at 123–24 (arguing that it is simple for social networking sites to disable profiles after receiving complaints).

317. *See id.* (suggesting legal incentive for Internet companies to remove inaccurate information).

318. See *supra* Part II.B.2.b for a summary of scholars' proposals for reforming defamation law as it applies to the Internet.

319. Perzanowski, *supra* note 125, at 860–71.

320. *Id.* at 860.

321. *Id.* at 861.

322. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

323. Trosch v. Cooper, No. 2006-4208, at 7–9 (Mercer County Ct. Com. Pl., Pa. filed July 31, 2007) (ruling on defendants' preliminary objections).

Another problem with using actual malice more broadly is that it retains the Supreme Court's dogged focus on the plaintiff in defamation cases.[324] Libel actions arising from social networking sites should consider the status of the defendant, who is in many cases a juvenile.[325] Focusing on the defendant as well as the plaintiff allows courts to consider the context in which defamatory statements were made. This is more important in the case of a Facebook profile that was posted for three weeks and viewed by a limited number of people than a newspaper article delivered to the doorsteps of hundreds of thousands.

Because the goal of Solove's proposal is increased online privacy, rather than libel law reform, he recommends strengthening defamation laws even though he acknowledges the inevitable result would be increased litigation.[326] Ushering in an era of more litigation without fundamentally changing the way the law applies to the Internet is misguided. Moreover, instituting tougher libel laws could create a chilling effect on online speech, the Supreme Court's chief First Amendment concern.[327] Solove's suggestion to mitigate the effect of more lawsuits by lowering damage awards[328] seems unlikely to fare well in the litigious American tort system.

Solove's ideas for resolving defamation complaints outside the courtroom,[329] however, are more practical. Plaintiffs should indeed be required to exhaust informal remedies, such as seeking removal of the damaging comments, before filing suit. Unlike newspapers, where a correction does not run until the next day's editions, social networking sites are uniquely suited to remove bad information swiftly. The sites' disclaimers note that they do not police members' profiles, but they should, as Solove suggests, set up a method for would-be plaintiffs to report defamatory comments.[330]

Reynolds' recommendation to treat online libel more like slander is well suited for social networking sites.[331] Requiring special damages, or proof of monetary loss, makes sense for social networking sites and the juveniles who make up so many of their members because it would provide courts with an objective mechanism for determining whether any reputational damage actually

324. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 323 (1974) (distinguishing four different categories of plaintiffs).

325. *See* Press Release, comScore, *supra* note 46 (reporting age breakdown of visitors to social networking sites).

326. SOLOVE, *supra* note 24, at 120.

327. *See Sullivan*, 376 U.S. at 270 (expressing concern that strict libel laws might chill free debate).

328. *See* SOLOVE, *supra* note 24, at 122, 124 (asserting damage awards should be limited because people who sue for defamation want vindication rather than money).

329. *See id.* at 122–24 (urging requirement for plaintiff to use informal mechanisms to resolve complaints before resorting to litigation).

330. *Id.* at 123.

331. Reynolds, *supra* note 130, at 1162–68.

occurred. This is important for a medium whose readers may not believe statements posted there[332] or could misinterpret them.[333]

It is ironic that the best framework for analyzing modern Internet libel comes from the ancient tort of slander. Yet because slander is designed to cover spoken or impermanent defamation that is published to a limited audience,[334] it is an excellent approach for social networking sites and the casual, conversational communication that occurs on them. Rather than overhauling defamation laws exclusively for Internet-based applications like social networking sites, Reynolds' proposal provides a solution for limiting liability that already exists in defamation law.[335] Reynolds' proposal accomplishes Solove's suggestion to temper damage awards in a practical way by limiting the defamatory conduct that is actionable.

Some commentators have argued that special damages should be eliminated from defamation law, not resurrected.[336] They say that requiring proof of economic harm in some cases and not others is a confusing and unwieldy rule that belongs in the past.[337] First Amendment scholar Rodney A. Smolla has recommended abolishing the libel and slander distinction altogether, by condensing the two torts into one claim for defamation.[338] While this proposal is simpler, to be sure, it ignores the fact that the Internet has resurrected some of the reasons these rules were created in the first place. Special damages are an ideal way to determine whether allegedly defamatory statements made online and read by an unknown audience materially injured a plaintiff's reputation.

Another concern with requiring proof of economic harm, of course, is that this strict threshold may, for some plaintiffs, entirely foreclose recovery. Smolla argues that the special damages are thus a "crude and clumsy screening device"[339] that may "artificially penaliz[e] deserving plaintiffs."[340] Yet the most flagrant violations on social networking sites could still be addressed, as indeed they should, and the danger of frivolous litigation would be largely eliminated.[341]

Most importantly, juveniles could be allowed special consideration under this proposal without upending the Supreme Court's legal framework for analyzing defamation cases. The economic harm threshold provides a method for courts to distinguish between comments about a fellow high school student that sting momentarily and those that might cause a college admissions officer to

332. *See id.* at 1159 (noting low-trust culture of the Internet).

333. *See* boyd, *supra* note 34, at 134 (noting generational communication divide on social networking sites and arguing that adults misinterpret what they read there).

334. *See* Reynolds, *supra* note 130, at 1162–63 (distinguishing slander from libel).

335. *Id.* at 1162–68.

336. *See* SMOLLA, *supra* note 22, § 7:32 (arguing that special damages should never be required).

337. *See id.* § 7:30 (opining that special damages rules are archaic and arbitrary).

338. *See id.* §§ 7:31, 7:32 (proposing method for "simplified, fair reform").

339. *Id.* § 7:32.

340. *Id.* § 7:30.

341. *See* SMOLLA, *supra* note 22, § 7:5 (noting special damages "control the gates to defamation").

withdraw an acceptance. It would also differentiate between harmlessly offensive fat jokes and allegations of alcohol abuse on a fictitious profile about a high school principal.[342] Adapting Reynolds' proposal for social networking sites would effectively limit the total number of defamation suits filed against juveniles,[343] who are almost assuredly facing in-school discipline as well as civil action. Above all, it would ensure that those cases that do proceed through the courts assert real reputation-based injury, not merely a teacher's judgment that a student was insufficiently punished at school.[344]

## IV. CONCLUSION

Teenagers' inappropriate and potentially defamatory behavior on social networking sites is a problem that courts, in addition to school administrators, are increasingly forced to confront.[345] Juvenile libel defendants present novel and yet pressing concerns for courts that must attempt to reconcile two lines of Supreme Court precedent that at first blush may appear to be contradictory. In its defamation cases, the Court commands judges to avoid chilling defendants' First Amendment rights of free speech.[346] And yet in its student speech cases, the Court has clearly ruled that teenagers are not entitled to the same First Amendment rights as adults.[347] By encouraging school discipline of students' off-campus speech acts,[348] the Court has signaled that it expects school administrators to take over the regulatory role that defamation law has traditionally reserved for courts. When students who have received in-school punishment are sued in civil defamation lawsuits for the same online activities, courts should offer these defendants special consideration out of concern both for their immaturity and the potential chilling effect of additional punishment.

Two steps courts can take now, independent of legislative action, to address the special needs of students using—and abusing—social networking sites are changing the standard of care for juvenile defendants and requiring defamation

342. See *supra* Part II.C.2 for a discussion of the *Layshock v. Hermitage School District* litigation detailing a fictitious profile that included a series of fat jokes and suggested that the school official had an alcohol problem.

343. *See* SMOLLA, *supra* note 22, § 7:5 (finding many plaintiffs cannot sue if they must prove monetary harm).

344. See *supra* notes 157–62 and accompanying text for a discussion of how the plaintiff in *Waters v. Miller* sued in part because she felt that school administrators' discipline did not properly respond to her complaint.

345. *See* Kennedy, *supra* note 21 (detailing defamation lawsuits against students).

346. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (noting "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press").

347. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (finding that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

348. *See* Morse v. Frederick, 127 S. Ct. 2618, 2625–26 (2007) (extending discipline authorized in *Bethel* and distinguishing the more lenient *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)).

plaintiffs to plead economic harm. These approaches offer an important and yet modest update to defamation laws for a teenage population addicted to social networking sites. By following the lead of other areas of tort law and holding teenage libel defendants to the standard of other students their age, courts can take into account minors' immaturity and reduced rights of free speech. Importing to social networking cases the requirement that slander plaintiffs prove economic harm[349] would limit the potential for duplicative court punishment to cases alleging the most egregious online conduct.[350] Above all, these approaches are true to the Court's edict in *Gertz v. Robert Welch, Inc.*[351] that still remains relevant today: The law should encourage public discourse to be "uninhibited, robust, and wide-open,"[352] and yet be respectful of "an individual's legitimate interest in redressing wrongful injury."[353]

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349. *See* Reynolds, *supra* note 130, at 1162–68 (proposing Internet libel be treated more like slander, where plaintiffs must prove economic harm).

350. *See* SMOLLA, *supra* note 22, § 7:5 (noting special damages "control the gates to defamation").

351. 418 U.S. 323 (1974).

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

353. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (noting interest in protecting against wrongful injury to individual's reputation).

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