

# Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law

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## INTRODUCTION

Imagine that you are a moderately successful actor named Ron Livingston, having starred in the cult hit *Office Space*. On your return from your honeymoon, your publicist calls you to say that someone edited your Wikipedia entry to falsely state that you are in a gay relationship with a casting director you have never heard of before. You do not see any problem with being gay, but you are concerned that it might reduce your chances of landing another acting job in Hollywood. You want the information removed, and you think a defamation lawsuit might be the best solution.<sup>1</sup>

Filing a lawsuit, however, raises some obvious concerns. Defamation suits are complex and take a long time to litigate. You are not certain you will win, given that society's view of being homosexual is changing. If you file a lawsuit, will the public perceive you as homophobic and an enemy of free speech? Do people believe what they read on Web sites such as Wikipedia, especially when the source is anonymous? Even if you do win, won't the information likely still reside somewhere in the dark corners of the Internet? In the end, is anyone going to know or care that a court in Los Angeles has found the person liable for defamation?

Using Mr. Livingston's case as a lens through which to examine defamation law's operation in our increasingly networked society, this article argues that defamation law suffers from significant doctrinal and practical limitations that preclude it from achieving its goal of protecting reputation. Cognizant of these limitations, it offers some guidelines for reforming defamation law, suggesting that existing monetary remedies should be deemphasized while alternative approaches that seek to correct inaccurate information and provide opportunities for contextualization should be emphasized.

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<sup>1</sup> This scenario is predominately based on a recent lawsuit filed in Los Angeles County Superior Court. See *Coupleguys, Inc. v. John Doe*, No. BC-427389 (L.A. Super. Ct. filed Dec. 4, 2009). The complaint in the case was filed by Coupleguys, Inc., "a 'loan-out' corporation that furnishes the professional services of Ron Livingston in the entertainment industry." *Id.* at 2.

It is time again to rethink defamation law.<sup>2</sup> The law we know today saw its origin in feudal times, expanded to serve as a counterweight to the disruption occasioned by the printing press, and was constitutionalized by the Supreme Court in the low-participation age of broadcast and print mass media. The journalistic institutions that led the fight for constitutional reform are now in decline while online platforms optimized for high participation, such as blogs, social networks, and discussion forums, are in ascendency. In this age of the “networked information economy,”<sup>3</sup> reputation occupies a very different role in the social order than it did even twenty years ago.

Existing legal doctrines that seek to protect reputation do so by providing remedies—almost exclusively financial—that account for injuries to the affected individual without regard to societal interests. Yet injuries to reputation are not borne exclusively, or even primarily, by the affected individual. In many ways, reputation is a quintessential public good. We cannot have a reputation except insofar as it is created in cooperation with others and relative to our relationships with them.<sup>4</sup> Reputation is an emergent property of these interactions. It serves an important signaling function by communicating complex information about the individual and about the individual’s place within society. When an individual’s reputation is improperly maligned, it degrades the value and reliability of this information and devalues community identity.

Global communication networks such as the Internet have made reputation more enduring and yet more ephemeral. Reputation is more enduring because information about us, whether good or bad, can exist—and be easily retrievable—forever. Powerful search engines scour and index photos, videos, and text. Semantic connections link previously disparate pieces of information to individuals and to each other. In the past, much personal information was publicly inaccessible because of practical impediments to its access. The Internet is largely eliminating these impediments.

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<sup>2</sup> There have been many past attempts to reform the law of defamation; the last significant effort occurred in the 1980s. *See, e.g.*, THE ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW (1988) (“Annenberg Proposal”); REFORMING LIBEL LAW (John Soloski & Randall P. Bezanson eds., 1992) (presenting and summarizing various reform proposals). In fact, it is difficult to find anyone who believes defamation law should continue unchanged. *See, e.g.*, David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 487 n.3 (1991) (collecting scholarly and popular criticism of defamation law). Yet there is little agreement on how it should be modified. I do not, in this article, attempt to layout another comprehensive reform proposal, but only to offer a way of conceptualizing reputation in a networked world that may benefit the discussion of whether and how defamation law should be reformed.

<sup>3</sup> YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 44 (2006) (observing that due in part to the Internet, “[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one’s meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe.”).

<sup>4</sup> Of course, reputation is not solely an individual interest. It holds enormous importance for business entities, which are covered by doctrines such as trade libel and trademark law. The focus of this article, however, is on personal reputation.

At the same time, our reputations are more ephemeral because they are open to onslaughts from many more sources. Indeed, maintaining a “good” reputation is no simple matter. The Internet is replete with anonymous and pseudonymous speech that criticizes, disparages, and defames.<sup>5</sup> The old approach of sending a cease and desist letter or demanding a retraction no longer accomplishes its purpose. Even if an embarrassing video has been removed from YouTube or a defamatory statement has resulted in a finding of liability, the injurious information often lives on in social networks, blogs, and vast online data repositories easily accessed with a search engine.

Indeed, many of the social norms that underlie defamation law were established when individuals were connected to a relatively small number of people defined largely by physical geography. But the Internet now connects us to hundreds of millions of people. Our existing notions of how to establish trust and maintain social ties do not always translate to this networked world. As a result, traditional approaches to protecting reputation that were blunt and ineffective before the networked self arose, are even less effective today.

The legal doctrines that deal with reputational harms have not kept pace with these changes. The heterogeneous networked society we know today is far different from the feudal system that predominated during the thirteenth century when the law of slander got its start or even the more enlightened seventeenth century, when the Court of Star Chamber developed the law of libel in response to the printing press. While the way we use reputation has evolved—and is evolving—along with our communication, political, and social systems, defamation law remains distressingly out of step with our increasingly networked society.

The article begins in Part I by defining reputation and tracing its evolution and importance in humans and other social species. Reviewing recent research on reputation in evolutionary science, social science, and economics, Part I shows that reputation is part of a complex set of feedback mechanisms within human social systems and has been a key driver in our evolution.

Part II then considers how our networked society creates, disseminates, and uses reputational information, noting that reputation plays many roles, from facilitating transactions between disparate parties to constituting a form of “social currency” in the production of goods in sharing economies. Indeed, studies examining the use of reputational information have forced us to reassess our theories about human rationality and revealed to us the importance of reputation to a cooperative society.

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<sup>5</sup> You do not have to look far to find false, harmful, and degrading speech online. In fact, some have argued that harmful and degrading speech on the Internet should be considered a civil rights violation because the societal harm from such speech would otherwise go undressed. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 89 (2009).

Framing the legal analysis that follows, Part III briefly describes the various common law doctrines that protect reputation and explores the uneasy truce between defamation law and the First Amendment. Part III then turns to the Livingston case described at the start of the Article to illustrate the challenges courts face in identifying the relevant community in whose eyes a party has been defamed. This inquiry is an essential part of every defamation case because it is the community's norms that define the line between defamatory and non-defamatory speech. The identification of the relevant community, however, is fraught with normative judgments and assumptions about society that do not account for how our modern networked society actually functions.

Part IV suggests that we should take as our touchstone that reputation is a societal interest and devise remedies that leverage the power of communities to deal with reputational harm. Although the global communication networks that are the hallmarks of our networked society have brought new reputational challenges, they also provide novel solutions to prevent and ameliorate those harms. One such solution is to enlist, through legal and social incentives, the help of private online intermediaries such as content hosts and search providers. These intermediaries play a central role in community governance and are often in a position to recognize and respond to reputational harms. By harnessing the power of communities to deter and mitigate reputational harm, we will be better able to balance the protection of reputation with society's desire to maintain an environment for speech that is conducive to public engagement and vigorous debate.

## I. THE NATURE OF REPUTATION

Reputation plays an integral role in how others see us and how we see ourselves in the world. It is also essential to the proper functioning of our social and economic systems. Reputation allows us to make assessments about individuals and entities that we cannot directly observe. It makes complex social arrangements possible because it functions as a heuristic for predicting the behavior of others, creating what political scientist Robert Axelrod refers to as the "shadow of the future."<sup>6</sup>

Although reputational information is pervasive—we use it, for example, to buy a car, choose a physician, select a law school, or decide on a mate—it remains a "mysterious thing."<sup>7</sup> Indeed, we often rely on this information without thinking about how it was created and whether it is reliably correlated with the attributes that are important. What do we mean when we speak of reputation?

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<sup>6</sup> ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 125–26 (1984).

<sup>7</sup> Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986).

As discussed in Part III below, the common law has not attempted to define reputation and we ultimately come away dissatisfied with how judges treat the topic.<sup>8</sup> Hinting at reputation's abstract social nature, *Black's Law Dictionary* defines it as the "esteem in which a person is held by others."<sup>9</sup> We gain a far better understanding of reputation, however, by examining the biological and social sciences, which have long studied how humans and other social species use reputation to build long-term relationships, detect and respond to cheaters and free riders, and influence the behavior of peers.<sup>10</sup>

Indeed, research on reputation in evolutionary science, social science, and economics is forcing us to reevaluate many long-held beliefs about human rationality and motivation. This research reveals that reputation is an essential component in all human social systems.<sup>11</sup> It is valuable not just to the individual, but to society as a whole because it serves as a means of facilitating the communication of complex social information.

### A. *The Evolution of Reputation*

In a world with scarce resources, those who out-compete others generally enjoy greater success.<sup>12</sup> In numerous human endeavors, from business to politics, sports, and academics, individuals strive against others for the purpose of achieving individual success. One might assume from this competition that cooperative behavior is exceedingly rare. Indeed, many problems of human society stem from or are exacerbated by a lack of cooperation. Most public goods problems fit this description; when individuals are free to overuse a public good, such as fish stocks or health care, they

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<sup>8</sup> The common law merely defines categories of reputational harm that the law will recognize. See *infra* Part III.B.

<sup>9</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>10</sup> Human behavior is similar to that of many other social species. See generally Carel P. van Schaik & Peter M. Kappeler, *Cooperation in Primates and Humans: Closing the Gap*, in COOPERATION IN PRIMATES AND HUMANS 4, 13–18 (P. Kappeler & C.P. van Schaik eds., 2006). Among social species, however, humans engage in far more cooperative behaviors than other species. See, e.g., Simon Gächter & Benedikt Herrmann, *Human Cooperation From an Economic Perspective*, in COOPERATION IN PRIMATES AND HUMANS 279 (P. Kappeler & C.P. van Schaik eds., 2006); Peter Hammerstein, *Why is Reciprocity So Rare in Social Animals? A Protestant Appeal*, in GENETIC AND CULTURAL EVOLUTION OF COOPERATION 83 (P. Hammerstein ed., 2003).

<sup>11</sup> See, e.g., Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137 (2003); Manfred Milinski et al., *Reputation Helps Solve the "Tragedy of the Commons"*, 415 NATURE 424 (2002).

<sup>12</sup> The animating theory underlying evolutionary biology is Charles Darwin's theory of natural selection, which posits that individuals who out-compete others for access to resources and mates enjoy greater reproductive success and therefore pass on more of their genes to the next generation. See generally CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (1859).

usually act in their individual best interest and over use it.<sup>13</sup> This dilemma is well known as the “tragedy of the commons.”<sup>14</sup>

Yet, despite the prevalence of competition, cooperative behavior is widespread throughout human societies. In fact, humans exhibit the most interesting and perplexing form of cooperative behavior observed in biological systems: altruistic behavior, which involves individuals enduring personal cost for the benefit of others.<sup>15</sup> On the surface, evidence of altruistic behavior would seem to challenge established theories of evolution. As anyone who has completed a course in biology knows, there is a selective advantage to being selfish.<sup>16</sup> Charles Darwin recognized that altruistic behavior presented a “‘special difficulty,’ potentially fatal to his whole theory of natural selection.”<sup>17</sup> The challenge for social scientists and evolutionary biologists is to explain how and why such apparently self-sacrificing behavior evolved.<sup>18</sup>

Why do a good deed for another? Why endure the risk of exploitation and free riding? It is not much of a stretch to envision altruistic acts between related individuals or between individuals who have repeated and frequent interactions. When individuals interact within small groups, an individual who benefited from the altruistic act or directly observed the behavior will likely reciprocate. But the fact that altruistic behavior persisted as the human social sphere expanded from kin groups to a globally networked public requires something far more profound.<sup>19</sup> Indeed, humans maintain social ties across great distances and across disparate human communities where the ability to directly observe the behavior of partners is impossible.<sup>20</sup> And we do so primarily through a trade-based economic system that requires not only the ability to compare the relative values of another’s goods and

<sup>13</sup> The overfishing of many of the world’s fish species is an example of the over use of a “public good” and the general failure to attain cooperation among coastal nations. See David Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT’L L. 497, 505–08 (1998).

<sup>14</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968).

<sup>15</sup> For biologists, cooperative acts that are beneficial for both actor and recipient are called mutualistic; cooperative acts that are costly to the actor but beneficial to the recipient are termed altruistic. van Schaik & Kappeler, *supra* note 10, at 3.

<sup>16</sup> See generally RICHARD DAWKINS, *THE SELFISH GENE* (1976).

<sup>17</sup> van Schaik & Kappeler, *supra* note 10, at 5; see also L.A. DUGATKIN, *COOPERATION AMONG ANIMALS: AN EVOLUTIONARY PERSPECTIVE* (1997).

<sup>18</sup> Among social species, humans often engage in what biologists call “reciprocal behavior,” responding to helpful and harmful acts in kind. Most surprisingly, we do so even if those acts have been directed not at us but at others. The term biologists use to describe this form of behavior is “indirect reciprocity.” See Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOL. 35, 35 (1971). Roughly speaking, indirect reciprocity equates to the principle: “‘You scratch my back and I’ll scratch someone else’s’ or ‘I scratch your back and someone else will scratch mine.’” Martin Nowack & Karl Sigmund, *Evolution of Indirect Reciprocity*, 437 NATURE 1291, 1291 (2005).

<sup>19</sup> See, e.g., Sam Bowles, *Conflict: Altruism’s Midwife*, 456 NATURE 326, 327 (2008).

<sup>20</sup> Gachter & Herrmann, *supra* note 10, at 287 (finding that “humans often help each other or cooperate even if this act of altruism is not likely to be reciprocated”).

services, but also to assess and accept—on faith—tokens as symbolic payment.<sup>21</sup>

What makes humankind uniquely capable of creating complex social systems is our ability to assess, process, and communicate reputational information.<sup>22</sup> This reputational information is distinguishable from other behavioral cues in that it allows third parties—who have had no previous involvement with the original parties—to make assessments about the characteristics (e.g., honesty, skill, kindness) of others. The ability to assess a previously unknown party's reputation helps explain how cooperation was achievable at all when human interactions moved beyond small villages where one could rely on a history of personal interactions.

### B. *The Social Foundations of Reputation*

It should be clear from the preceding discussion that reputation is an emergent property of social interactions.<sup>23</sup> Reputation is continuously being constituted through our interactions with others. This web of connections leaves impressions, the sum of which comprises our reputation. Reputation is thus a form of social “capital” that is amassed within social networks.<sup>24</sup> But reputation is not something we create ourselves. It is socially constructed.<sup>25</sup> We cannot have a reputation except insofar as it is produced in cooperation with others and relative to our relationships with them.<sup>26</sup> As a

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., Nowack & Sigmund, *supra* note 18, at 1291. While the use of reputation has been hypothesized in some non-human primates, it has been observed primarily in humans. See John Mitani, *Reciprocal Exchange in Chimpanzees and Other Primates*, in COOPERATION IN PRIMATES AND HUMANS 116–17 (P. Kappeler & C. van Schaik eds., 2006). Not surprisingly, humankind's use of reputational information has played a “pivotal role in the evolution of collaboration and communication” and “may have provided the selective challenge driving the cerebral expansion in human evolution.” Nowack & Sigmund, *supra* note 18, at 1291. Intriguingly, reputation also is believed to be connected with the origins of moral norms. *Id.* (observing that “humans not only feel strongly about interactions that involve them directly, they also judge the actions between third parties, as demonstrated by the contents of gossip”) (internal citation omitted).

<sup>23</sup> Reputation is emergent in the same way that prices are created by the interaction of economic actors in a market; the value of a good, as reflected by its price, emerges from the interaction of buyers and sellers. See Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, And The Economic Analysis Of Law*, 93 IOWA L. REV. 559, 582 (2008) (noting that “market price for a particular good or service emerges from the decentralized interaction of many individuals.”).

<sup>24</sup> Christian Hahn et al., *Social Reputation: A Mechanism for Flexible Self-Regulation of Multiagent Systems*, 10 J. ARTIFICIAL SOC'YS & SOC. SIMULATION 3.1 (2007) (referring to reputation as a form of “symbolic capital”).

<sup>25</sup> See Lyriisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 6 (1996) (observing that reputation “is defined more by its effect on the ‘others’ who make up the plaintiff's ‘community’ than by its effect on the individual plaintiff”).

<sup>26</sup> As Susan Crawford notes, “[e]veryone who makes up our ‘group’ has a hand in our identity, and we emerge over and over again changed by the interactions we have with that group (or those groups).” Susan Crawford, *Who's In Charge of Who I Am?: Identity and Law Online*, 1 N.Y.L. SCH. L. REV. 211, 213 (2004-2005).

consequence, “[reputation’s] very nature is indelibly social.”<sup>27</sup> We may be able to influence, to a limited extent, the information others use to assess our reputation, but the ultimate opinions that others hold of us are outside our control.

It is clear, then, that our reputation does not reside in us at all.<sup>28</sup> Reputation, “inheres in the social apprehension we have of each other.”<sup>29</sup> As Count Annibale Romei observed in the *Courtiers Academie*, a sixteenth century treatise on honor, “good opinion is the proper essence of honor . . . that honor essentially is in the honorer . . . because [sic] in him remaineth the opinion.”<sup>30</sup> This latter point highlights the distinction between reputation and character. “Character is what a person really is; reputation is what he seems to be.”<sup>31</sup>

This view of reputation is in keeping with current sociological theories of identity formation that posit that a coherent identity is formed in relation to others and develops and changes over time.<sup>32</sup> In *The Presentation of Self in Everyday Life*, Erving Goffman wrote that our identities are developed and maintained through the interaction and cooperation of other people.<sup>33</sup> According to Goffman, each “individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts.”<sup>34</sup> One need look no further than the fads and fashions that characterize adolescent social groups to see how identities are formed and affected by the groups themselves.<sup>35</sup> Not only is reputation created by social interactions

<sup>27</sup> Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 743 (1986).

<sup>28</sup> See Frederick George Bailey, *Gifts and Poison*, in GIFTS AND POISON: THE POLITICS OF REPUTATION 1, 4 (F.G. Bailey ed., 1971) (observing that “[a] man’s reputation is not a quality that he possesses, but rather the opinions which other people have about him”); Bellah, *supra* note 27, at 743 (noting that “although we think of a person as ‘having’ a reputation, reputation is not a property or possession of individuals—it is a relation between persons”).

<sup>29</sup> Post, *supra* note 7, at 692.

<sup>30</sup> COUNT ANNIBALE ROMEI, *THE COURTIERS ACADEMIE: COMPREHENDING SEUEN SEUER-ALL DAYES DISCOURSES* 109 (1598) (emphasis added).

<sup>31</sup> Von Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 33 (1904) (observing that “it is reputation, not character, which the law aims to protect”).

<sup>32</sup> See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 208 (1959); WILLIAM JAMES, *PRINCIPLES OF PSYCHOLOGY* 279-80 (1890) (“[A] man’s Self is the sum total of what he calls his, not only his body and his psychic powers, but his clothes and his house . . . his reputation and works . . . If they wax and prosper, he feels triumphant; if they dwindle and die away, he feels cast down.”).

<sup>33</sup> GOFFMAN, *supra* note 32, at 208.

<sup>34</sup> ERVING GOFFMAN, *INTERACTION RITUAL* 84-85 (1967) (“While it may be true that the individual has a unique self all his own, evidence of this possession is thoroughly a product of joint ceremonial labor, the part expressed through the individual’s demeanor being no more significant than the part conveyed by others through their deferential behavior toward him.”).

<sup>35</sup> See Danah Boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in DIGITAL LEARNING—YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 129-31 (David Buckingham ed., 2007). As John Clippinger observes, “[b]eing able to control an identity boundary is equivalent to carving out a social niche and is as critical to social survival as an ecological niche is to environmental survival.” JOHN HENRY CLIPPINGER, *A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY* 154 (2007). Theodor Seuss Geissel

between individuals within communities, it is contextual. Reputational value is idiosyncratically determined by community members. For example, scientists, artists, and academics typically have unique criteria for assessing reputation and standing within their peer groups “that are not easily accessible to those outside their networks.”<sup>36</sup> As discussed in the next section, this is especially apparent on the Internet, which has facilitated the flourishing of communities organized around idiosyncratic and esoteric subjects.<sup>37</sup>

That being said, reputational judgment will even vary from person to person. Each person makes her own individualized assessments of individuals based on the information she has. Even when others have the same information about us, they see things, and attach values, in different ways. The killing of another person provides a clear illustration of this point. As Judge Learned Hand observed in *Burton v. Crowell Publishing Co.*, even this act is not universally condemned:

We are sensitive to the charge of murder only because our fellows deprecate it in most forms; but a head-hunter . . . or a gangster, would regard such an accusation as a distinction, and during the Great War an “ace,” a man who had killed five others, was held in high regard.<sup>38</sup>

The elusive nature of reputation, however, has not diminished its importance to society. Reputation serves an essential function by communicating complex information about individuals and their places within society. By projecting the repercussions of actions into the future, it makes altruistic, cooperative social interactions possible. Evolutionary biologists also tell us that our use of reputational information has been a significant driver of social complexity, and our use of reputation is continuing to evolve. For these biologists, many of whom view the emergence of human society as the “last (up to now) . . . major transition[ ] in evolution,”<sup>39</sup> the question of how our

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(Dr. Seuss) captures this phenomenon in *The Sneetches and Other Stories*, in which Sylvester McMonkey McBean first offers the Sneetches the opportunity to put stars on their bellies and then offers to remove them, all for a price. See DR. SEUSS, *THE SNEETCHES AND OTHER STORIES* 1, 19 (1961).

<sup>36</sup> CLIPPINGER, *supra* note 35, at 93; see also *Ben-Oliel v. Press Publishing Co.*, 167 N.E. 432, 433–34 (N.Y. Ct. App. 1929) (finding statement defamatory even though plaintiff’s reputation would only be harmed amongst experts on Palestinian history and customs).

<sup>37</sup> See *infra* Part II.

<sup>38</sup> 82 F.2d 154, 156 (2d Cir. 1936). While the law in Shakespeare’s time considered Othello’s killing of his wife to be murder, the importance of reputation and a man’s need to preserve it was viewed as strong justification for such a killing. “[A] man arraigned for either [killing an adulterous wife or another man in a duel] would be respected by his fellow aristocrats, as many contemporary authors admitted, more or less reluctantly. Gentlemen of the Renaissance not only respected those who lived by the code, but they also disdained action from civil courts in almost any area of honor, especially in cases of dueling or adultery.” Jean Klene, *Othello: A Fixed Figure for the Time of Scorn*, 26 SHAKESPEARE Q. 139, 149 (1975); see also RUTH KELSO, *THE DOCTRINE OF THE ENGLISH GENTLEMAN IN THE SIXTEENTH CENTURY* 103–04 (1929).

<sup>39</sup> Nowack & Sigmund, *supra* note 18, at 1291.

use of reputation can keep pace with our social systems is quite profound. This question sparks a veritable gold rush within the social, natural, and computer sciences to understand how complex social systems create, disseminate, and ensure the reliability of reputational information.<sup>40</sup>

Applying some of this work to the online environment, Professor Judith Donath, founder of the Sociable Media Group at the Massachusetts Institute of Technology, suggests that online social network sites such as MySpace and Facebook may be “the harbinger of the next stage in human social evolution.”<sup>41</sup> The potential impact of this observation on the common law of defamation is explored in Parts II and III.

## II. REPUTATION IN A NETWORKED WORLD

Throughout most of human history, reputational information was created through direct observation and communicated with word of mouth.<sup>42</sup> Face-to-face sharing of “gossip” was the primary means of transmitting this information signal.<sup>43</sup> Human society expanded by using increasingly sophisticated networks for communicating reputational information.<sup>44</sup> The Internet we know today is simply the current phase of this evolution.<sup>45</sup> Society has been becoming more networked over the past five centuries with the introduction of new transportation and communication technologies, from sail to steam, to the telegraph, telephone, and Internet.<sup>46</sup> For example, early American communities relied on town criers, individuals who traveled—mostly on

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<sup>40</sup> See Lik Mui et al., *Notions of Reputation in Multi-Agents Systems: A Review*, in PROCEEDINGS OF THE FIRST INTERNATIONAL JOINT CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS: PART 1, July 15–19, 2002, Bologna, Italy (summarizing research across various disciplines).

<sup>41</sup> Judith Donath, *Signals in Social Supernet*, 13 J. COMPUTER-MEDIATED COMM. 12, 14 (2007).

<sup>42</sup> See Chrysanthos Dellarocas, *The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 MGMT. SCI. 1407, 1407 (2003).

<sup>43</sup> See ROBIN DUNBAR, GROOMING, GOSSIP AND THE EVOLUTION OF LANGUAGE 171–74 (1996); LAWRENCE M. FRIEDMAN, GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 7 (2007); Bailey, *supra* note 28, at 4.

<sup>44</sup> For a definition of network-based social structures, see MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 501–03 (2000). Pioneering work on the study of human social networks was begun in the 1970s by Barry Wellman. See, e.g., Barry Wellman, *The Community Question: The Intimate Networks of East Yorkers*, 84 AM. J. SOC. 1201 (1979).

<sup>45</sup> The advent of writing and papyrus has been described as the first “revolution” in information technology. IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 3 (1997). There is strong evidence, however, that our path toward a networked society began when *homo sapiens* learned language. “One reason to suspect that language may have initially evolved . . . is that individual reputations—in which individuals become known as liars or as good sources of information—may provide an important ‘cost’ to deception in human communication.” CARL T. BERGSTROM ET AL., THE PEACOCK, THE SPARROW, AND THE EVOLUTION OF LANGUAGE 25 (2001).

<sup>46</sup> For a view of how these technologies have affected American society, see generally RUTH SCHWARTZ COWAN, A SOCIAL HISTORY OF AMERICAN TECHNOLOGY (1997).

foot—from town to town carrying news and gossip.<sup>47</sup> In those days, information traveled only as fast as existing transportation systems allowed.<sup>48</sup> Communities were relatively small and insular; most people knew each other and information was filtered through personal interactions.<sup>49</sup>

While nineteenth-century America could be described as networked in the sense that there were roads and courier systems that connected villages and cities, society did not begin to transcend physical space until the widespread use of railroads and telegraphs. These tools offered efficient transportation and “revolutioniz[ed] the way humans communicated, leading to what one historian has termed the ‘Victorian Internet.’”<sup>50</sup> With the telegraph came “national” newspapers that could print and distribute news from all over the country.<sup>51</sup> Radio further connected communities, and broadcast television ushered in the age of mass media. People and information thus became increasingly mobile.<sup>52</sup>

By the end of the twentieth century, a networked world existed. Today, low-cost, high-bandwidth data communication networks stretch across the nation and the globe, creating what Professor Yochai Benkler calls the “networked information economy.”<sup>53</sup> According to Benkler, “[t]he technical conditions of communication and information processing are enabling the emergence of new social and economic practices of information and knowledge production.”<sup>54</sup> This has “fundamentally altered the capacity of individuals, acting alone or with others, to be active participants in the public sphere.”<sup>55</sup>

As a result, communities, and the individuals that comprise them, are no longer constrained by physical and social space.<sup>56</sup> Virtual communities

<sup>47</sup> See JOSEPH DILLAWAY SAWYER, *HISTORY OF THE PILGRIMS AND PURITANS: THEIR ANCESTRY AND DESCENDENTS* 28 (1922); WILLIAM DAVID SLOAN ET AL., *THE MEDIA IN AMERICA: A HISTORY* 28 (1993).

<sup>48</sup> Historian Gordon Wood notes that in 1790 it took “more than a month for news to travel from Pittsburgh to Philadelphia.” GORDON WOOD, *EMPIRE OF LIBERTY* 479 (2009).

<sup>49</sup> See NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 21–22 (1986).

<sup>50</sup> David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 *LOY. L.A. L. REV.* (forthcoming 2010) (quoting TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS* vii–ix (1998)).

<sup>51</sup> This is where the term “wire service” news came from. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 4 (1981).

<sup>52</sup> For an insightful analysis of American status and mobility in the nineteenth and early twentieth centuries, see FRIEDMAN, *supra* note 43, at 22–34.

<sup>53</sup> BENKLER, *supra* note 3, at 32. The Internet “is a network of networks, consisting of privately owned servers, routers, and backbones that communicate using a suite of common languages.” Ardia, *supra* note 50, at 16.

<sup>54</sup> BENKLER, *supra* note 3, at 33.

<sup>55</sup> *Id.* at 212.

<sup>56</sup> This has resulted in what some claim is the weakened effectiveness and legitimacy of the nation state. See, e.g., David R. Johnson & David Post, *Law and Border—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1370–75 (1996) (arguing that cyberspace is a jurisdiction independent of territorial sovereigns). But see JACK GOLDSMITH & TIM WU, *WHO CON-*

have sprung up, social networks have bloomed, and individuals are rushing onto the Internet to engage, argue, and disparage each other.<sup>57</sup> Indeed, it is now possible for someone to have formed an opinion about me on the other side of the world without ever meeting me. In fact, that person may not even speak the same language or have anything in common with me, but if she has access to the Internet, she can read my writings or engage in a conversation with others about me.<sup>58</sup>

We see some of the changes engendered by the Internet's facilitation of disbursed information production in the Livingston case described in the introduction. Mr. Livingston, a modest celebrity, has an entry devoted to his life and work on Wikipedia, the world's largest collaboratively edited online encyclopedia.<sup>59</sup> Anyone, anywhere in the world, can create an entry or edit an existing entry on Wikipedia.<sup>60</sup> On sites such as Wikipedia, professional editors do not verify the information. Instead, this function is "crowd-sourced" through the work of thousands of volunteers.<sup>61</sup> Remarkably, because this editing work is done in public view—and tracked via Wikipedia's extensive editing and history tools—we actually know quite a bit about how the information ended up on Mr. Livingston's entry on Wikipedia. For example, the editing logs appear to show that a user "made his first attempt to romantically link the heterosexual (and real) Livingston with the gay,

TROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD ix (2006) (noting that territorial sovereigns are no less relevant and important in the Internet age).

<sup>57</sup> See Ardia, *supra* note 50, at 16 (noting that the Internet "facilitate[s] a diverse array of platforms for speech, including blogs, social networks, discussion forums, video and photo hosting services, and collaboratively edited wikis").

<sup>58</sup> The widespread availability of free translation services such as Google Language and Babelfish allow vast parts of the world to access information with little regard to language barriers. See, e.g., Federico Gaspari, *The Added Value of Free Online MT Services: Confidence Boosters for Linguistically-Challenged Internet Users, a Case Study for the Language Pair Italian-English*, in PROCEEDINGS OF THE 7TH CONFERENCE OF THE ASSOCIATION FOR MACHINE TRANSLATION IN THE AMERICAS 46, 54 (2006); Michael Liedtke, *Google Introduces Search Translation Tools*, ASSOCIATED PRESS, May 24, 2007 (reporting that Google is providing an automatic search translation service that allows non-English language searching of Google's English-language search index).

<sup>59</sup> Wikipedia, Ron Livingston, [http://www.wikipedia.org/wiki/Ron\\_Livingston](http://www.wikipedia.org/wiki/Ron_Livingston) (last modified on Jan. 25, 2010). Wikipedia formally launched on January 15, 2001. See <http://en.wikipedia.org/wiki/Wikipedia#History>.

<sup>60</sup> See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 164 (2006) ("Contributing to [Wikipedia] are hundreds of thousands of volunteers scattered across the globe, with varying levels of expertise. Anyone may edit or contribute to Wikipedia, and the contribution is immediately available to the world.").

<sup>61</sup> See David A. Hoffman, *Wikitruth Through Wikiorder*, 59 EMORY L. J. 151, 154 (2009) ("Wikipedia has developed a volunteer-run, highly articulated dispute resolution system. That system starts with the informal, guided exchange of views, muddles through mediation, and ends with referral to an Arbitration Committee that hears evidence presented by the parties before issuing findings of fact and conclusions of policy and law."); see also Wikipedia, *Dispute Resolution*, [http://en.wikipedia.org/wiki/Wikipedia:Dispute\\_resolution](http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution) (last modified on Feb. 15, 2010).

non-existent [casting director]” on May 8, 2006.<sup>62</sup> An “editing war” ensued, culminating in the lawsuit filed on December 5, 2009.<sup>63</sup>

Not surprisingly, the changes occasioned by the Internet have profoundly altered the way individuals create, disseminate and use reputational information. The following sections highlight two of these changes.

#### A. Reputation: The Coin of the Online Realm

Reputation can be a strong motivating influence for altruistic behavior.<sup>64</sup> Reputation serves this function by acting as a form of “social currency,” bringing improved standing, access, and financial benefits.<sup>65</sup> Competitive altruism can even develop as individuals seek to increase their reputation through repeated good deeds.<sup>66</sup> As human society has become more networked, the opportunities to build and make use of this social currency have increased.

We see this quite clearly in the context of “sharing economies,”<sup>67</sup> where reputation, rather than money, is a primary motivation for the work.<sup>68</sup> Free, or open source,<sup>69</sup> software development is a vivid example of the power of reputation to drive cooperation in a highly complex, expertise-in-

<sup>62</sup> Somey, *It's the Casting Director Lee Dennison Story!*, WIKIPEDIA REV. (Dec. 11, 2009), <http://wikipediareview.com/blog/20091211/its-the-casting-director-lee-dennison-story/>.

<sup>63</sup> For a discussion of how the Wikipedia community handled the false information that is the subject of the lawsuit, see *infra* notes 422-425 and accompanying text.

<sup>64</sup> See *supra* notes 10-11 and accompanying text.

<sup>65</sup> In the economics literature, the term “social capital” has been used to capture some of these functions. See, e.g., Kenneth Arrow, *Observations on Social Capital*, in SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 3 (Partha Dasgupta & Ismail Serageldin eds., 1999); Edward L. Glaeser et al., *An Economic Approach to Social Capital*, 112 ECON. J. F437, F438 (2002). A number of economists, particularly Sam Bowles and Herbert Gintis, have argued that the use of the term “social capital” is misleading because “capital refers to thing that can be owned,” but “the attributes said to make up social capital describe relationships among people.” Sam Bowles & Herbert Gintis, *Social Capital and Community Governance*, 112 ECON. J. F419, F420 (2002).

<sup>66</sup> Empirical studies involving social dilemma games have shown this effect. See Milinski, *supra* note 12, at 270 (noting that players who alternate between indirect reciprocity and public goods games engaged in more cooperative behavior in both games). This can serve as important motivation for individuals to contribute to public goods problems. *Id.* at 271.

<sup>67</sup> Lawrence Lessig, *Do You Floss?*, 27 LONDON REV. BOOKS 16 (2005), available at [http://www.lrb.co.uk/v27/n16/less01\\_.html](http://www.lrb.co.uk/v27/n16/less01_.html); see also Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369, 375 (2002). According to Lawrence Lessig, this is an economy “in which unrelated individuals, often in remote parts of the world, ‘work’ together to produce private and collective goods. The sharing economy is no less an economy for that . . . . [I]t, too, produces significant wealth. But the way this wealth is created is different from the ways of the *quid pro quo* economy.” Lessig, *supra* at 16.

<sup>68</sup> See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 73–74 (2008).

<sup>69</sup> Free software is characterized by the fact that the underlying source code is made available to the public. Some free software is also “copylefted,” in that it incorporates license restrictions designed to ensure that anyone who uses the software code must release any new software under copyleft’s permissive terms. See Severine Dusollier, *Open Source and Copyright: Authorship Reconsidered?*, 26 COLUM. J. L. & ARTS 281, 282–88 (2003).

tensive enterprise.<sup>70</sup> For open source software developers, monetary rewards are often secondary to the improved reputation they receive within their peer communities.<sup>71</sup>

To many economists, open source software development makes no sense because it relies on the irrational and altruistic behavior of volunteers who give away valuable code, reveal proprietary information, and help strangers solve their software problems.<sup>72</sup> Yet open source development, which involves the voluntary contributions of thousands of programmers, most of whom have never met each other, “can produce more reliable and robust software than that produced by commercial enterprises.”<sup>73</sup> To be successful, the open source software movement has leveraged the Internet’s facilitation of high-bandwidth communication and distributed computing. Equally important, open source software developers have created sophisticated systems for building trust among disparate contributors. They have done this by creating protocols that leverage reputation, allowing other developers to evaluate contributors and the pieces of software they create.<sup>74</sup>

While noncommercial economies are not unique to the Internet, the Internet has allowed them to expand in ways that would have been impossible when physical geography set the limits on our ability to interact with others. Indeed, the Internet’s facilitation of near-instantaneous worldwide communication can be likened to the impact that some theorists believe language has had on cooperative endeavors where knowledge of trustworthiness is essential.<sup>75</sup> Like human language, the communicative aspects of the Internet unlock the power of reputation in dispersed communities and are creating highly efficient systems for using reputational information to address real world problems.

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<sup>70</sup> Examples of successful open source software include the Linux operating system, Apache web server, PHP programming language, and Firefox browser. Although a complicated set of motivations exist in free/open source software communities, one of the important motivations is reputation. See STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* 141–42 (2005). While many software developers expend time and resources to develop software because they are interested in fixing a problem or addressing a need that they are themselves experiencing. Yet they share their work with the world—without compensation—because of the “kudos that flows to the programmer from others in his community.” Lessig, *supra* note 67, at 16.

<sup>71</sup> See, e.g., WEBER, *supra* note 70, at 141; Andrea Bonaccorsi and Cristina Rossi, *Altruistic Individuals, Selfish Firms? The Structure of Motivation in Open Source Software*, 9 *FIRST MONDAY* 1 (2004), <http://www.firstmonday.org/nthin/cgiwrap/bin/ojs/index.php/fm/article/view/1113/1033>.

<sup>72</sup> See Josh Lerner & Jean Triole, *Some Simple Economics of Open Source*, 52 *J. INDUS. ECON.* 197, 197–99 (2002).

<sup>73</sup> CLIPPINGER, *supra* note 35, at 121.

<sup>74</sup> *Id.* at 122 (concluding that the “success of the open source movement has been propelled by the power of peer review, which is achieved through the same combination of visibility, ratings, and accountability that worked for eBay”).

<sup>75</sup> See *supra* note 22.

### B. *Virtual Communities: Real Reputations*

We also see the powerful role that reputation can play in the development of virtual communities that mimic community life in the corporeal world. One such virtual community is Second Life, a persistent three-dimensional virtual world on the Internet that boasts several million registered users.<sup>76</sup> Users of the service, which are called “residents,” are encouraged to change and develop their appearance and identity, build their own virtual domiciles, acquire personal items, and collaborate with each other.<sup>77</sup>

Users of Second Life create pseudonymous identities and interact with each other through “avatars” that include associated profiles containing, among other things, biographical information, group affiliations, interests, and ratings given by other users. Originally Second Life had a rating system that allowed users to rate others in one of three categories: overall behavior, skill at appearance, and skill at building.<sup>78</sup> Users paid a small fee for each rating they gave and could leave a short message accompanying the rating.<sup>79</sup> This system was later replaced with a system that allows third-party software developers to create reputation tools that Second Life users can implement in the virtual world.<sup>80</sup> While ratings have no functional effect, they are an important determinate of social status within Second Life’s virtual world.<sup>81</sup>

As these community rating systems become more complex, they approximate the way reputation is used in everyday life. It is natural, however, to discount the pseudonymous reputation systems in place in Second Life by assuming they have no relevance to the corporeal world. But substantial real

<sup>76</sup> See <http://secondlife.com/statistics/economy-data.php> (real time user metrics for Second Life). The number of active users is estimated to be quite small; in 2007 when Second Life stated that it had five million members, others estimated the actual number at 250,000. See Clay Shirky, *Real Second Life Numbers, Thanks to David Kirkpatrick*, CORANTE (Jan. 4, 2007), [http://many.corante.com/archives/2007/01/04/real\\_second\\_life\\_numbers\\_thanks\\_to\\_david\\_kirkpatrick.php](http://many.corante.com/archives/2007/01/04/real_second_life_numbers_thanks_to_david_kirkpatrick.php). Although information on the demographics of Second Life’s users is scant, it is believed that twenty-five percent to forty-five percent of users come from outside the United States, mostly from Canada, the United Kingdom, Australia and Western Europe. See Fiend Ludwig, *In the Metaverse, No One Can Hear Your Accent*, SECOND LIFE HERALD, May 26, 2006, [http://www.secondlifeherald.com/slh/2006/05/in\\_the\\_metavers.html](http://www.secondlifeherald.com/slh/2006/05/in_the_metavers.html).

<sup>77</sup> Andrew Herman et al., *Your Second Life? Goodwill and the Performativity of Intellectual Property in Online Digital Gaming*, 20 CULTURAL STUD. 184, 196 (2006).

<sup>78</sup> Posting of Jeska Linden to Second Life Blogs, *Removal of Ratings in Beta*, <https://blogs.secondlife.com/community/features/blog/2007/04/12/removal-of-ratings-in-beta> (Apr. 12, 2007, 19:27 EST).

<sup>79</sup> Posting of Akela Talamasca to Second Life Insider, *Just Askin’: How Useful is a Reputation System?*, <http://www.secondlifeinsider.com/2006/12/12/just-askin-how-useful-is-a-reputation-system/> (Dec. 12, 2006, 17:45 EST).

<sup>80</sup> Posting of Jeska Linden to Second Life Blogs, *Removal of Ratings in Beta*, <https://blogs.secondlife.com/community/features/blog/2007/04/12/removal-of-ratings-in-beta> (Apr. 12, 2007, 19:27 EST).

<sup>81</sup> See Matt McKeon and Susan Wyche, *Life Across Boundaries: Design, Identity, and Gender in SL* 15 (2005), <http://www.mattmckeon.com/portfolio/second-life.pdf>. Researchers at the Georgia Institute of Technology examined the social structure within Second Life and found “four axes of social status, along which residents may occupy different positions: citizenship, wealth, reputation, and building.” *Id.* at 13.

world dollars flow through these online worlds,<sup>82</sup> and in the case of Second Life, established businesses rushed to open virtual stores in order to cash in.<sup>83</sup> For some people, their virtual reputations are as important as their corporeal reputations, especially participants who use these virtual worlds to sell goods and services.<sup>84</sup> Moreover, many participants in these online worlds consider their activities within the virtual space as creative *work*, not simply leisurely play, and many are “happy to make such play a big part of their life work.”<sup>85</sup>

These virtual communities clearly show the emergent nature of reputation.<sup>86</sup> Indeed, in the online context, identity is often determined by reputation tags: “Who you are in many networked environments depends on how others see and rate you.”<sup>87</sup> As a consequence, reputation can take on added importance in online communities where individuals must rely on reputation signals to decide with whom to interact.

The sense of presence experienced by those who participate in these virtual worlds makes them feel more real than other forms of electronic communication; therefore their experiences in virtual worlds can be more important to self-identity and reputation than in previous forms of mediated communication.<sup>88</sup> This phenomenon should not be surprising. As Goffman observed in 1959, in face-to-face encounters much information about the self is communicated—often involuntarily—in ways incidental to the main purpose of the interaction.<sup>89</sup> This depth and richness is lacking in most online encounters, but the problem of communicating an identity remains. The three-dimensional nature of virtual worlds helps to rectify this deficiency by

<sup>82</sup> Overall, participants spend a total of \$880 million a year for virtual goods and services produced in online games, according to Steve Salyer, president of Internet Gaming Entertainment. Mark Wallace, *The Game is Virtual. The Profit is Real*, N.Y. TIMES, May 29, 2005, at 7.

<sup>83</sup> “In the past year, dozens of companies have bought land, launched businesses and started marketing campaigns in Second Life, including IBM, Dell, CBS, NBC and Toyota.” L.A. Lorek, *Real Money in a Virtual World*, SAN ANTONIO EXPRESS-NEWS, Mar. 20, 2007, at 1E.

<sup>84</sup> A thirty-one-year-old user of Cyworld (a Korean social networking site) quit her job and opened an online shopping site after the collection of dolls and clothes she showed on her Cyworld “home page” drew 2.7 million visitors. *E-Society: My World Is Cyworld*, BUSINESSWEEK ONLINE (Sept. 26, 2005), [http://www.businessweek.com/magazine/content/05\\_39/b3952405.htm](http://www.businessweek.com/magazine/content/05_39/b3952405.htm).

<sup>85</sup> Herman et al., *supra* note 77, at 188. For some sociologists, this phenomenon has negative repercussions. Aaron Wittel has opined that personal and social identity is increasingly becoming dislodged from the traditional loci of social interaction, such as family and work, and progressively embedded in the medium of information networks. Aaron Wittel, *Toward a Network Sociality*, 18 THEORY, CULTURE & SOC’Y 51 (2001).

<sup>86</sup> See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 386 (2009); Susan Crawford, *Who’s In Charge of Who I Am?: Identity and Law Online*, 1 N.Y.L. SCH. L. REV. 211, 214 (2004) (noting that in the identity context “[w]hat is interesting and new about virtual worlds is that they make this group-shaping explicit”).

<sup>87</sup> CLIPPINGER, *supra* note 35, at 92.

<sup>88</sup> See RICHARD BARTLE, *DESIGNING VIRTUAL WORLDS* 159 (2003) (“The celebration of identity is the fundamental, critical, absolutely core point of virtual worlds.”).

<sup>89</sup> GOFFMAN, *supra* note 32, at 208.

creating personal avatars and environments that echo the corporeal world and provide visual, as well as other, signals of a user's reputation.<sup>90</sup>

As more and more activity is conducted on the Internet, reputation will further increase in importance as a means of communicating complex social information. Formal reputation systems allow reputation to be defined and measured precisely, if not always fairly or accurately, by the opinions and actions of others. As reputation systems become prevalent in virtual and social networking spaces, distinctions between the real and virtual world will further blur.<sup>91</sup>

### III. EXISTING LEGAL DOCTRINE AND THE PROTECTION OF REPUTATION

As the preceding sections illustrate, reputational information is constantly being created and spread through our interactions with others. The common law interposes itself across this flow of information in three primary ways: through defamation law, privacy law, and a form of privacy and intellectual property hybrid called misappropriation.<sup>92</sup> Although the latter two doctrines are not intended to protect reputation per se, the types of harm they redress often have just as deleterious effects on reputation as defamatory falsehoods.<sup>93</sup> Indeed, the Ron Livingston lawsuit, discussed throughout this article, includes claims for false light invasion of privacy and misappropriation of name and likeness in addition to defamation.<sup>94</sup>

The focus of this article is on defamation, the branch of tort law most directly concerned with protecting reputation. As a product of state law, the precise contours of the tort<sup>95</sup> will vary from state to state. Generally speaking, however, a cause of action for defamation requires: (1) a false and

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<sup>90</sup> Following on Erving Goffman's insights, Hugh Miller notes that "as the culture of electronic communication develops, people will construct expressive resources out of whatever facilities are available. Electronic communication will become more and more human communication to the extent that there is more to it than just efficiently passing information to each other." Hugh Miller, *The Presentation of Self in Electronic Life: Goffman on the Internet* (paper presented at Embodied Knowledge and Virtual Space conference, Goldsmiths' College, University of London, June 1995), <http://www.ntu.ac.uk/soc/psych/miller/goffman.htm>.

<sup>91</sup> Crawford, *supra* note 26, at 211 (2004) (predicting that "[s]omeday 'virtual world' identities will be indistinguishable from 'real' identities—just as 'e-commerce' has become indistinguishable from 'commerce'").

<sup>92</sup> See *infra* notes 101-103 and accompanying text. The law also seeks to protect and regulate reputation through various statutory approaches, including the Fair Credit Reporting Act and Lanham Act. Fair Credit Reporting Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1693); Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1141n). The focus of this article is on the legal protections afforded to individuals through the common law, particularly defamation law.

<sup>93</sup> See *infra* Part IV.A.

<sup>94</sup> See *Coupleguys, Inc. v. John Doe*, No. BC-427389 (L.A. Super. Ct., filed Dec. 4, 2009).

<sup>95</sup> Defamation law actually comprises two torts: libel and slander. Libel covers defamatory statements that are written or communicated in such a way that they persist similar to the printed word; slander generally covers defamatory statements published orally or in a manner that is not likely to be preserved in a physical form or broadcast widely. See ROBERT D. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 43-45, 96-98 (1980).

defamatory statement concerning another; (2) an unprivileged communication of that statement to a third party; (3) fault amounting to at least negligence on the part of the speaker; and (4) either actionability of the statement irrespective of special harm (*per se*) or the existence of special harm caused by the publication (*per quod*).<sup>96</sup>

The *sine qua non* of defamation is a false statement of fact.<sup>97</sup> Statements of opinion typically cannot support a cause of action for defamation, even if they are outrageous or widely off the mark.<sup>98</sup> Defamation law also does not permit recovery for the exposure of private but truthful information,<sup>99</sup> or for false communications that may hurt an individual's feelings but do not cause reputational harm. The four privacy torts—false light, unreasonable intrusion into seclusion, unreasonable publication of private facts, and misappropriation of one's name or likeness—developed to provide a remedy in such situations.<sup>100</sup> Although these torts do not require a plaintiff to allege reputational harm, as defamation law does, they permit individuals to protect the manner in which they are exposed to the world and therefore the way in which they are perceived by others.<sup>101</sup>

All of the privacy torts are based on the right to lead a life outside of prying eyes and ears,<sup>102</sup> although the last of the four—misappropriation—is often considered to be more about protecting an individual's property interest than privacy interests.<sup>103</sup> The privacy tort that comes closest to protecting

<sup>96</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>97</sup> *Ardia*, *supra* note 50, at 45.

<sup>98</sup> *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988).

<sup>99</sup> *See, e.g., Campanelli v. Regents of Univ. of Cal.*, 51 Cal.Rptr.2d 891, 896 (Ct. App. 1996); RESTATEMENT (SECOND) OF TORTS § 581A (1977). *But see Noonan v. Staples, Inc.*, 556 F.3d 20, 26 (1st Cir. 2009) (finding that truthful speech on a matter of private concern can create liability under Massachusetts law if published with actual malice).

<sup>100</sup> RESTATEMENT (SECOND) OF TORTS § 652A (1977).

<sup>101</sup> Courts first began to recognize the privacy torts after Samuel Warren and Louis Brandeis published *The Right to Privacy* in the *Harvard Law Review* in 1890. 4 HARV. L. REV. 193 (1890). In their article, Warren and Brandeis expressed concern over the increasingly sensationalist press that was “overstepping in every direction the obvious bounds of propriety and decency,” and noted that various technological developments—particularly “instantaneous photography”—posed a grave threat to privacy. *Id.* at 196. The notion of a privacy tort was first accepted by Georgia, *see Pasevich v. New England Life Ins. Co.*, 50 S.E. 58 (Ga. 1905), and gradually gained recognition in most states.

<sup>102</sup> The privacy tort of intrusion upon seclusion demonstrates this most clearly. It is defined as the intentional intrusion, “physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977). Unlike defamation, false light, and public disclosure of private facts, publication is not an element of intrusion. Intrusion covers some activities also prohibited by other laws, such as laws against trespass, wiretapping, and breaking and entering, but also includes things like surveillance in public that frightens or torments the plaintiff. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (upholding intrusion claim brought by Jacqueline Onassis against a photographer who had been hounding her and her children).

<sup>103</sup> Misappropriation, which varies widely from state to state, is defined in the *Restatement (Second) of Torts*, as subjecting a person to liability if he “appropriates to his own use or benefit the name or likeness of another.” RESTATEMENT (SECOND) OF TORTS § 652C (1977).

reputational interests is the tort of public disclosure of private facts. The Restatement defines this tort in the following manner: “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.”<sup>104</sup>

One of the elements distinguishing a publication of private facts claim from a defamation claim is that truth is not a defense; instead, truth of the challenged communication is an essential element of the tort. An individual has no claim for publication of private facts if the publication is false.<sup>105</sup> In addition, the disclosed information must be private.<sup>106</sup> Information that is a matter of public record cannot be the basis for a claim,<sup>107</sup> and anything that occurs in a public place is by definition not private and cannot be the subject of a cause of action.<sup>108</sup>

The privacy tort that is most similar to defamation is called “false light.” A claim for false light will exist when one gives publicity to a matter concerning another that places the other before the public in a false light,

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Although the origins of this tort arose out of concern for the emotional distress and loss of dignity an individual might suffer when his name or likeness is used without his permission, it has come to be seen as more of a way of protecting an individual’s property interests in her identity. See William Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960) (arguing that the interest the misappropriation tort protects is “not so much mental as a propriety one”); Daniel Solove, *Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 546–47 (2006). As a result, in some states plaintiffs can recover under a misappropriation theory only if they can demonstrate some commercial value in their name or likeness. See, e.g., *Barnako v. Foto Kirsch, Ltd.*, 13 Media L. Rep. (BNA) 2373 (D.D.C. 1987) (prohibiting recovery in a case where a photography studio used a picture it had taken of the plaintiff in promotional materials). Other courts recognize that misappropriation claims can provide relief for both mental distress and for lost profits resulting from unauthorized use of a plaintiff’s name or likeness. See, e.g., *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 753 (N.D. Cal. 1993).

<sup>104</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>105</sup> See, e.g., *Fellows v. Nat’l Enquirer, Inc.*, 42 Cal. 3d 234, 242 (1986).

<sup>106</sup> See, e.g., *Forsher v. Bugliosi*, 26 Cal. 3d 792, 808 (1998).

<sup>107</sup> See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that the accurate identification of a rape victim’s name that was inadvertently revealed in a sheriff’s press office was protected under the First Amendment); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (rejecting claim based on publication of name of rape victim contained in public court documents).

<sup>108</sup> Rare exceptions to this rule have been made in situations where a private person has been caught in a very embarrassing event outside of her control. See *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964) (allowing a woman to recover for a published picture of her emerging from a fun house where a fan had blown up her skirt without her knowledge). But many courts have refused to recognize an exception in similar contexts. See, e.g., *Neff v. Time*, 406 F. Supp. 858 (W.D. Pa. 1976); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. App. 1991). In an effort to square the publication of private facts tort with the First Amendment, courts also require that the matter disclosed cannot be “newsworthy.” See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 484–85 (Cal. 1998). In making this determination, judges have expressed concern that it is improper for a court to determine what is newsworthy, see, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), particularly when they are asked to second guess a media defendant, *Shulman*, 955 P.2d at 485 (rejecting public disclosure claim based on broadcast of pictures of plaintiff receiving medical attention at accident scene).

provided that the false light in which the other was placed would be highly offensive to a reasonable person.<sup>109</sup> This tort compensates for subjective, emotional injury, and not injury to reputation.<sup>110</sup> Because defamation and false light invasion of privacy are similar, plaintiffs often assert claims for both defamation and false light.<sup>111</sup> As a result, courts concerned with plaintiffs doing an end-run around the fault requirements of *New York Times v. Sullivan* (discussed in the following section) and its progeny typically require the same level of fault in a false light claim as would be required for a defamation claim.<sup>112</sup>

### A. *The Uneasy Truce Between Defamation and the First Amendment*

One of the most challenging—and interesting—aspects of defamation law is that it deals with the clash of two important, but admittedly ambiguous, societal values: freedom of speech and the protection of reputation. Defamation law does not impose liability for every lie that harms reputation. That would be unworkable. The law must draw lines, which it does by defining defamatory speech. But as the Supreme Court has repeatedly noted, even false speech can have value.

Until the Supreme Court decided *New York Times v. Sullivan*<sup>113</sup> in 1964, it was assumed that defamation law existed outside the scope of the First Amendment. In *Sullivan*, however, the Court “constitutionalized” defamation law by proclaiming that even false defamatory speech was deserving of some First Amendment protection.<sup>114</sup> The Court was concerned that public officials could stifle free debate by bringing defamation actions against their critics, much as they had stifled debate using the Sedition Act of 1798. The Court explained that an “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>115</sup>

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<sup>109</sup> RESTATEMENT (SECOND) OF TORTS § 652A (1977). Not all states recognize the tort of false light.

<sup>110</sup> Actionable statements under a false light theory include those that may not be defamatory but falsely represent a person’s characteristics, conduct, or beliefs. *Id.*

<sup>111</sup> ROBERT D. SACK, SACK ON DEFAMATION § 12.3.7 (3d ed. 2007). Several states have refused to recognize the false light tort because it is too similar to defamation. *See, e.g.*, *Albright v. Morton*, 321 F. Supp.2d 130 (D. Mass. 2004); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235-36 (Minn. 1998); *Renwick v. News & Observer Publ’g Co.*, 312 S.E.2d 405, 412 (N.C. 1984).

<sup>112</sup> SACK, *supra* note 111, § 12.3; *see also* *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Because *Time, Inc.* was decided before *Gertz*, when the Court held that actual malice is required in cases involving matters of public concern when a public official or public figure is the plaintiff, some courts have held that the actual malice standard applies in a false light case only when the plaintiff is a public official or public figure. *See, e.g.*, *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1091-92 (5th Cir. 1984).

<sup>113</sup> 376 U.S. 254 (1964).

<sup>114</sup> *Id.* at 273.

<sup>115</sup> *Id.* at 271-72.

Although the Court recognized the importance of tolerating some false speech in order to ensure a full and vigorous public debate, it was unwilling to hold that false defamatory speech was unconditionally and absolutely privileged under the First Amendment.<sup>116</sup> Instead, the Court declared that public officials bringing defamation claims had to demonstrate that the defendant published the challenged statements about her with “actual malice.”<sup>117</sup> This fault standard represents the Court’s attempt to balance the value of robust public debate with the reputational harm to public officials that such debate might bring.

In subsequent cases, the Court has continued to struggle in striking the right balance between vigorous debate and the protection of reputation. In *Gertz v. Robert Welch, Inc.*, the Court made explicit its attempts to balance uninhibited public debate and “the compensation of individuals for the harm inflicted on them by defamatory falsehood.”<sup>118</sup> In striking this balance, the Court held that private figures involved in matters of public concern did not need to demonstrate actual malice to recover actual damages, although they still needed to prove a high level of fault in order to recover punitive or presumed damages.<sup>119</sup>

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court shifted the balance closer to the protection of reputational interests when the plaintiff is a private figure and the challenged statements involve a matter of private concern.<sup>120</sup> A divided Court concluded that in such cases, the plaintiff need not demonstrate actual malice to recover any sort of damages. In reaching this conclusion, the plurality explained that speech that does not concern matters of public concern is not at the “core” of the First Amendment.<sup>121</sup>

### B. *The Social Foundations of Defamation Law*

The balancing metaphor alluded to in the Court’s decisions addressing the constitutionally permissible scope of defamation law suggests that the nature of reputation and the state’s interest in its protection are self evident and universally understood.<sup>122</sup> But this is not the situation at all. In fact, courts engage in “relatively little discussion of the nature and importance of

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<sup>116</sup> This contrasts sharply with the absolutist views of Justices Black and Douglas, who concurred with the result in *New York Times v. Sullivan*. See *id.* at 295–96 (Black, J., dissenting).

<sup>117</sup> *Id.* at 282–83.

<sup>118</sup> 418 U.S. 323, 341 (1974).

<sup>119</sup> *Id.* at 349.

<sup>120</sup> 472 U.S. 749 (1985).

<sup>121</sup> *Id.* at 760.

<sup>122</sup> As Professor Post observes, “[i]t is all too easy to assume that everyone knows the value of reputation, and to let the matter drop with the obligatory reference to Shakespeare’s characterization of a ‘good name’ as the ‘immediate jewel’ of the soul.” Post, *supra* note 7, at 692 (quoting WILLIAM SHAKESPEARE, *OTHELLO*, act III, scene iii).

‘the State’s interest’ in protecting reputation,” as that would require an “exploration into the obscure purposes and functions of [the] common law.”<sup>123</sup> As a result, courts typically do not undertake the difficult task of defining reputation,<sup>124</sup> choosing instead to delineate categories of reputational harm and “right thinking” communities that defamation law will recognize.

We see this most clearly in defamation law’s threshold inquiry: whether a given communication is defamatory. Given that the gravamen of a defamation claim is injury to reputation, it would seem logical to assume that a false statement would be actionable “whenever the plaintiff’s reputation has been [harmed], even in the extreme case where the esteem lost be that of but one man, and he a moron, a lunatic, or a murderer.”<sup>125</sup> This, however, has never been the case for the law of defamation because courts long ago developed doctrinal limitations that “curtail the operation of the basic policy of defamation law.”<sup>126</sup>

We see these doctrinal limitations operating in two areas of defamation law that are the focus of this article. First, courts must determine whether the meaning conveyed by the speech at issue has the tendency to harm an interest in reputation that the law will recognize. Second, in assessing whether a statement is capable of a defamatory meaning, courts must determine the appropriate and proper community in whose esteem the plaintiff has been harmed. Both of these inquiries require a court to make assumptions about how society is, or should be, structured and the nature of social interactions.

The first of these threshold inquiries—whether the allegedly defamatory speech has the tendency to harm an interest in reputation that the law will recognize—is addressed in this section. A discussion of the challenges associated with defining the appropriate community in whose esteem the plaintiff has been harmed follows in Part III.C.

### 1. *The Social Construction of Reputational Harm*

In deciding whether a given statement is defamatory, courts ask whether the statement at issue would be likely to elicit certain specific responses from others.<sup>127</sup> Although the precise contours of this element of a

<sup>123</sup> Post, *supra* note 7, at 692.

<sup>124</sup> *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 877 (1956) (noting that “courts have not attempted to define reputation as an abstract entity”).

<sup>125</sup> Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 YALE L.J. 1387, 1390 (1949) [hereinafter *The Community Segment in Defamation Actions*].

<sup>126</sup> *Id.* at 1390.

<sup>127</sup> *The Community Segment in Defamation Actions*, *supra* note 125, at 1390. This requires the court to undertake both a linguistic inquiry to determine the “tendencies” of the words at issue, see Marc A. Franklin & Daniel J. Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 (1984), and a sociological inquiry to determine the nature of the reputational harm occasioned by those words. See *infra* Part III.C. Although a jury must decide the ultimate question of whether a plaintiff has been defamed, it is the duty of the court to determine “whether the statement alleged to have caused

defamation claim vary from state to state, there is universal agreement that expression that is merely unflattering, annoying, irksome, embarrassing, or which simply hurts the plaintiff's feelings is not actionable.<sup>128</sup> New York, for example, defines a defamatory publication as one that "tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."<sup>129</sup>

Unlike other torts,<sup>130</sup> defamation law is not concerned primarily with the impact of the defendant's statement on the plaintiff,<sup>131</sup> but rather with the impact of the statement on those who make up the plaintiff's "community."<sup>132</sup> Moreover, it is important to note that it is not necessary that the statement *actually cause harm* to the plaintiff's reputation.<sup>133</sup> It is enough if the statement has the *general tendency* to cause harm.<sup>134</sup> Because a statement's defamatory character turns on "the opinion which others in the community may have, or tend to have,"<sup>135</sup> it is by necessity socially constructed.

Defamation law does not, however, protect against all such harms to reputation. It recognizes some harms and ignores others; in doing so, it elevates some interests over others.<sup>136</sup> In his seminal work describing the social foundations of defamation law, Professor Robert Post identified three largely distinct conceptions of reputation in the common law: reputation as property, honor, and dignity.<sup>137</sup> By examining how defamation law defines and advances these interests, we gain considerable insight into the assumptions the law embodies about the structure of society and how defamation law operates in our increasingly networked world.

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plaintiff an injury is reasonably susceptible to the defamatory meaning imputed to it." Levin v. McPhee, 119 F.3d 189, 195 (2d Cir. 1997). In this analysis, the court must consider both the "meaning of the words as they would be commonly understood" as well as the context in which they appear. *Id.*

<sup>128</sup> SACK, *supra* note 111, § 2.4.1.

<sup>129</sup> Foster v. Churchill, 87 N.Y.2d 744, 751 (1996).

<sup>130</sup> There are a few exceptions, including tortious interference with contract or tortious interference with prospective economic advantage. See RESTATEMENT (SECOND) OF TORTS § 766 (1977).

<sup>131</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (observing that common law defamation is "not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action"); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18 (1983) (noting that "defamation does not provide compensation for emotional disturbance, but rather remedies a wrongful disruption in the 'relational interest' that an individual has in maintaining personal esteem in the eyes of others").

<sup>132</sup> Lidsky, *supra* note 25, at 6.

<sup>133</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977). This is because of defamation law's doctrine of presumed harm. See *infra* note 142 and accompanying text.

<sup>134</sup> *Id.*

<sup>135</sup> KEETON ET AL., *supra* note 131, at 771.

<sup>136</sup> See *infra* notes 142 and accompanying text.

<sup>137</sup> See Post, *supra* note 7, at 693–719. As Professor Post conceded in 1986, other conceptions of reputation exist, but the three concepts enumerated in the text "have been most influential in the development of common law defamation." *Id.* at 720.

a. *Reputation as Honor*

The view of reputation as a form of personal honor is perhaps the oldest conception of reputation evident in the law of defamation, which saw its genesis in feudal England.<sup>138</sup> Honor in this context is “defined as a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.”<sup>139</sup> While an individual can lose honor, he cannot earn it “through effort or labor; he claims a right to it by virtue of the status with which society endows his social role.”<sup>140</sup>

We see this conception of reputation most clearly in defamation law’s imposition of presumed damages. Under this “anomalous doctrine,”<sup>141</sup> a plaintiff may recover damages without proof of actual harm.<sup>142</sup> A court simply asks whether the statement has the *tendency* to cause the type of harm to reputation the law will protect. The doctrine of presumed damages is potentially available in every libel case.<sup>143</sup> In contrast, in slander cases, a plaintiff must prove actual harm, called “special damages,” unless the communication falls into one of the enumerated categories of slander per se, which generally involve the imputation of a crime, of a loathsome disease, of practices or conditions that harm the plaintiff in his trade, profession, or business, or of serious sexual misconduct.<sup>144</sup> The fact that the presumption of damages operates even if the defendant proves that the plaintiff has suffered no harm,<sup>145</sup> suggests that courts are protecting a reputational interest akin to honor.<sup>146</sup>

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<sup>138</sup> See Pat O’Malley, *From Feudal Honour to Bourgeois Reputation: Ideology, Law and the Rise of Industrial Capitalism*, 15 Soc. 79 (1981).

<sup>139</sup> Post, *supra* note 7, at 699–700.

<sup>140</sup> Post, *supra* note 7, at 700 (citing Pitt-Rivers, *Honour and Social Status*, in HONOUR AND SHAME: THE VALUES OF THE MEDITERRANEAN 21–22, 35 (J. G. Peristiany ed., 1966)).

<sup>141</sup> Lidsky, *supra* note 25, at 6 n.20; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (describing “the common law of defamation [as] an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss”). In fact, “[d]efamation is the only tort that allows substantial recovery without proof of injury.” David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984).

<sup>142</sup> See Anderson, *supra* note 141, at 748–52. The “special harm” that a plaintiff must show in a libel per quod case is merely a pleading requirement, not a limitation on recovery. *Id.* at 748. “In those cases, the plaintiff has no cause of action without proof of special damage. Once the plaintiff proves special damage, however, he is entitled not only to those damages, but to presumed damages as well.” *Id.*

<sup>143</sup> Lidsky, *supra* note 25, at 6 n.20.

<sup>144</sup> *Id.*

<sup>145</sup> See RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977).

<sup>146</sup> Post, *supra* note 7, at 698. In fact, historically the law of defamation has taken its role of protecting honor so seriously that truth or falsity was deemed immaterial for purposes of criminal libel: “the greater truth, the greater the libel.” David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 735 (1942).

The view of reputation as honor also sets the limit on what types of statements the law will find defamatory. In other words, a plaintiff who has suffered actual harm within her community may still be precluded from using the law of defamation to vindicate her reputation if the statements at issue do not have a tendency to impugn certain personal characteristics.<sup>147</sup> For example, a false statement that an individual is dead will surely damage the individual's credit or business opportunities, but it will not support a defamation claim.<sup>148</sup> The fact that defamation law "leave[s] some actual injuries inexplicably uncompensated, can be conceptualized as a method of distinguishing between those communications that are relevant to the question of honor, and those that are not."<sup>149</sup>

Defamation law's conception of reputation as honor assumes that society is hierarchical and structured around clearly defined—and largely immutable—social roles. It also assumes that individuals and their social roles are interdependent.<sup>150</sup> That is, individuals can only be understood with regard to their place in the social hierarchy. But that is an archaic—and un-American—view of society.<sup>151</sup> As our society has become more networked, the idea that individuals exist within a hierarchical structure of rigidly defined social roles seems increasingly anachronistic.<sup>152</sup> Of course, in some professions, such as the military, personal honor still plays an important role.<sup>153</sup> But it certainly is not the case on the Internet, where there is truth to the adage captured in Peter Steiner's familiar cartoon in *The New Yorker*: "On the Internet, nobody knows you're a dog."<sup>154</sup>

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<sup>147</sup> These personal characteristics generally fall into such categories as criminality, integrity, honesty, and competence, as well as physical and mental attributes such as disease or insanity. See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>148</sup> See, e.g., *O'Neill v. Edmonds*, 157 F. Supp. 649 (E.D. Va. 1958); *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 553 (Ga. App. 1989); *Cohen v. New York Times Co.*, 153 A.D. 242 (N.Y. App. Div. 1912).

<sup>149</sup> Post, *supra* note 7, at 706.

<sup>150</sup> *Id.*

<sup>151</sup> Alexis de Tocqueville, noting Americans' disdain for honor, wrote that "the dissimilarities and inequalities of men gave rise to the notion of honor; that notion is weakened in proportion as these differences are obliterated, and with them it would disappear." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* Vol. II 255 (H. Reeve trans. 1945).

<sup>152</sup> See Barry Wellman et al., *The Social Affordances of the Internet for Networked Individualism*, 3 J. COMP. MEDIATED COMM. 8 (2003) ("Communities and societies have been changing towards networked societies where boundaries are more permeable, interactions are with diverse others, linkages switch between multiple networks, and hierarchies are flatter and more recursive.").

<sup>153</sup> See Volker C. Franke, *Duty, Honor, Country: The Social Identity of West Point Cadets*, 26 ARMED FORCES & SOC'Y 175 (2000). In other professions, such as medicine, there are still those who seem eager to impose restrictions on speech that would grant them honorific status. See Jeffrey Segal et al., *Legal Remedies for Online Defamation of Physicians*, 30 J. LEGAL MED. 349, 374 (2009) (suggesting that doctors should have their patients sign "contracts purporting to limit, through mutual agreement, the patient's physician-rating commentary on the Internet").

<sup>154</sup> Peter Steiner, *Cartoon*, THE NEW YORKER, July 5, 1993, at 61. Thought to capture of the spirit of the Internet, see Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, N.Y. TIMES, Dec. 14, 2000, at G8, Steiner's cartoon has been understood to convey that "cyberspace

*b. Reputation as Dignity*

A second influential strain that runs through defamation law is the view of reputation as dignity. Under this conception of reputation, “[t]he dignity that defamation law protects is . . . the respect (and self-respect) that arises from full membership in society.”<sup>155</sup> Membership in society is typically established through “rules of civility” that define and maintain an individual’s dignity.<sup>156</sup> While the concept of reputation as dignity is similar to the concept of reputation as honor, “dignity is concerned with the aspects of personal identity that stem from membership in the general community.”<sup>157</sup> By contrast, “honor is concerned with the relationship between attributes of personal identity that stem from the characteristics of particular social roles.”<sup>158</sup>

The conception of reputation as dignity has been enormously influential both inside and outside the courtroom. We understand intuitively that the opinions of others play a role in defining us.<sup>159</sup> The philosopher Jean-Jacques Rousseau believed that no sooner did humankind emerge from the “state of nature” into communal existence than our need for reputation took hold: “Man lives constantly outside himself, and only knows how to live in the opinion of others, so that he seems to receive the consciousness of his own existence merely from the judgment of others concerning him.”<sup>160</sup>

The sociologist Erving Goffman offers an explanation for how the perceptions of others influence our self-identity. According to Goffman, identity is continuously being constituted through social interactions.<sup>161</sup> “Rules of conduct . . . bind the actor and the recipient together” and “are the bindings of society.”<sup>162</sup> By following socially established rules of deference and demeanor, “individuals both confirm the social order in which they live and

will be liberatory because gender, race, age, looks, or even ‘dogness’ are potentially absent or alternatively fabricated or exaggerated with unchecked creative license.” TIM JORDAN, *THE CULTURE AND POLITICS OF CYBERSPACE AND THE INTERNET* 66 (1999).

<sup>155</sup> Post, *supra* note 7, at 711.

<sup>156</sup> Post, *supra* note 7, at 711 (observing that “[p]ersons who are socially acceptable will be included within the forms of respect that constitute social dignity; persons who are stigmatized as deviants will be excluded”).

<sup>157</sup> Post, *supra* note 7, at 715.

<sup>158</sup> *Id.*

<sup>159</sup> See, e.g., ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 243 (1974) (“People generally judge themselves by how they fall along the most important dimensions in which they differ from others.”); Crawford, *supra* note 26, at 213 (stating that “[i]dentity and reputation go hand in hand, as individuals gain reputations that are connected to particular contexts and groups”); Solove, *supra* note 103, at 551 (noting that “[t]hroughout most of western history, one’s reputation and character have been viewed as indispensable to self-identity and the ability to engage in public life”).

<sup>160</sup> Jean-Jacques Rousseau, *A Discourse on the Origin of Inequality*, in *THE SOCIAL CONTRACT AND DISCOURSES* 237 (G. Cole, trans. 1935); see also JOHN CHARVET, *THE SOCIAL PROBLEM IN THE PHILOSOPHY OF ROUSSEAU* 26 (1974) (stating that “[w]hat Rousseau seems to be saying is that . . . these comparative evaluations create in men a desire to be distinguished in the opinions of others and thus at the same time both a concern for their relative status and a dependence for their self-identity on how they exist in the eyes of others”).

<sup>161</sup> ERVING GOFFMAN, *INTERACTION RITUAL* 84–85 (1967).

<sup>162</sup> *Id.* at 90.

constitute ‘ritual’ and ‘sacred’ aspects of their own identity.”<sup>163</sup> As a result, each “individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts.”<sup>164</sup>

The conception of reputation as dignity also has been extremely influential on the courts. Supreme Court Justice Potter Stewart’s concurring opinion in *Rosenblatt v. Baer*, in which the defendant falsely implied that the plaintiff had engaged in financial mismanagement at a publicly owned ski resort, captures this view of reputation: “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.”<sup>165</sup> While the majority in *Rosenblatt* did not adopt Justice Stewart’s description of the reputational interest at issue in the case, his characterization of the interest has been quoted with great frequency by other courts.<sup>166</sup>

Yet the view of reputation as dignity transcends the interests of the individual, as civility rules also function as a means of defining and maintaining a community’s boundaries.<sup>167</sup> While individual identity is constituted by identification with the community and internalization of its rules and values, “the community, in turn, is constituted by the shared values of individuals, and the community depends for its continued existence on the ‘reciprocal observance’ of the ‘rules of civility’ that it has prescribed.”<sup>168</sup> As Professor Post notes:

Implicit in the concept of reputation as dignity, therefore, is the potential for a dual function for defamation law: the protection of an individual’s interest in dignity, which is to say his interest in being included within the forms of social respect; and the enforcement of society’s interest in its rules of civility, which is to say its interest in defining and maintaining the contours of its own social constitution.<sup>169</sup>

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<sup>163</sup> Post, *supra* note 7, at 708 (quoting GOFFMAN, *supra* note 34, at 91).

<sup>164</sup> GOFFMAN, *supra* note 34, at 84–85 (“While it may be true that the individual has a unique self all his own, evidence of this possession is thoroughly a product of joint ceremonial labor, the part expressed through the individual’s demeanor being no more significant than the part conveyed by others through their deferential behavior toward him.”).

<sup>165</sup> 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

<sup>166</sup> See, e.g., *Kanaga v. Gannet Co., Inc.*, 687 A.2d 173, 183 (Del. 1996); *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 475 (Ind. 1999); *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 168 (Mass. 1975); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985); *Canino v. N.Y. News, Inc.*, 475 A.2d 528, 532 (N.J. 1984); *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389, 395 (Pa. 2007).

<sup>167</sup> Post, *supra* note 7, at 711 (“The maintenance of such social boundaries is an important method by which societies ‘develop an orderly sense of their own cultural identity’ and hence preserve ‘the stability of social life.’” (quoting K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 13 (1966))). The role that defamation law plays in defining and maintaining community is discussed *infra* in Part III.C.

<sup>168</sup> Lidsky, *supra* note 25, at 37 (quoting Post, *supra* note 7, at 716).

<sup>169</sup> Post, *supra* note 7, at 711. Gossip has traditionally been one of the ways by which communities informally enforce social norms. See Diane Zimmerman, *Requiem for a Heavy-*

This raises two difficult questions for courts tasked with determining whether a plaintiff has made out a viable defamation claim. Modern societies are made up of multiple “communities” with differing norms and rules of civility.<sup>170</sup> How should a court determine which community’s norms govern the claim? Moreover, how should a court go about identifying the relevant norms and determining whether they should be enforced through the judicial application of defamation law? Neither task is amenable to objective measurement as they are both freighted with normative judgments about how society is, or should be, constituted.

In deciding which norms to enforce, a court necessarily advances some interests over others. Defamation law can enforce only a small subset of a community’s norms. In addition to ensuring that courts are not inundated with trivial lawsuits, this limitation “preserves the flexibility and vitality of social life, which undoubtedly would be hardened and otherwise altered for the worse if every indiscretion could be transformed into formal legal action.”<sup>171</sup>

Defamation law does this, as an initial matter, by requiring that a breach of civility be accompanied by “publication to a third party.”<sup>172</sup> It also seeks to enforce only the most important breaches of civility by limiting the tort to statements that “tend[ ] to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society,”<sup>173</sup> an admittedly ambiguous and less than helpful guide for courts.<sup>174</sup>

Surprisingly, defamation doctrines “presuppose[ ] that identification of a community’s rules of civility is a relatively straight-forward task and that the ‘community’ whose ‘rules’ the law is assigned to police is an organized, cohesive unit.”<sup>175</sup> But civility rules change over time and often vary be-

weight: *A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 326–37 (1983).

<sup>170</sup> See *infra* Part III.C.

<sup>171</sup> Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 975 (1989).

<sup>172</sup> RESTATEMENT (SECOND) OF TORTS § 558(b) (1977). Interestingly, the requirement that the communication be published to a third party has not always been an element of a defamation claim. See THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 483–84 (5th ed. 2001) (noting that early English common law “was particularly concerned with insulting words addressed by one person to another”).

<sup>173</sup> *Foster v. Churchill*, 87 N.Y.2d 744 (1996).

<sup>174</sup> The definition included in the *Restatement* is even less helpful: “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” RESTATEMENT (SECOND) OF TORTS § 559 (1977). Not surprisingly, “variations among definitions of defamation have little apparent effect on the actual outcome of cases.” ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* 74 (2d ed. 1994). Instead, case outcomes are “far more likely to reflect different social circumstances.” *Id.*

<sup>175</sup> Lidsky, *supra* note 25, at 38.

tween individuals, even within established communities.<sup>176</sup> Furthermore, because defamation law takes as a given that members of a community define the community's civility rules through their shared adoption of those rules, when community membership changes rapidly it stands to reason that the community's civility rules will be in flux.<sup>177</sup>

We see this phenomenon play out with remarkable frequency on the Internet, where community boundaries are porous and community composition faces few constraints.<sup>178</sup> A fascinating example is Usenet, one of the first distributed Internet discussion systems, which is "policed" through a set of loosely articulated norms that a new user is expected to read and understand.<sup>179</sup> As new users flow in and community composition changes within the many Usenet discussion groups, rules of civility are constantly being constituted and reconstituted, often through "flame wars."<sup>180</sup>

As the preceding discussion shows, the concept of reputation as dignity rests on an idealized view of society that sees communities as relatively homogenous and static, and in which there has been a general diffusion of shared social norms. Indeed this view is so ingrained that "[j]udges often seem to assume that in run-of-the-mill defamation cases, the existence of a general consensus of opinion in the community is so obvious that it merely takes common sense to discover it."<sup>181</sup> While this may have been true when most of the human population lived in widely-dispersed rural villages, it is certainly no longer an accurate view of our modern networked society.<sup>182</sup>

<sup>176</sup> To see this change play out in the case law, one need look no further than the decisions addressing the question of whether it is defamatory to state that someone is a communist in the first half of the twentieth century. The Red Scare of the 1920s produced several decisions holding that such a charge was defamatory per se. See, e.g., *Washington Times Co. v. Murray*, 299 Fed. 903 (D.C. Cir. 1924). But that changed in the period before WWII, when courts held that so long as the Communist Party was a legal political party, an accusation of membership was not defamatory per se. See *Garriga v. Richfield*, 20 N.Y.S.2d 544 (Sup.Ct. 1940). Once Russia joined with the Nazis to divide Poland, however, the communist label again became intrinsically defamatory. See, e.g., *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir. 1945); *Levy v. Gelber*, 25 N.Y.S.2d 148 (Sup. Ct. 1941).

<sup>177</sup> See Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267 (1998) ("Norms develop most clearly and most easily in a static community."); cf. Post, *supra* note 171, at 1009 (observing that "privacy understood as subsisting in the ritual idiom of civility rules can exist only where social life has the density and intensity to generate and sustain such rules").

<sup>178</sup> See Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 978 (1998); Barry Wellman et al., *The Social Affordances of the Internet for Networked Individualism*, 3 J. COMP. MEDIATED COMM. 8 (2003).

<sup>179</sup> See CHRISTOPHER LUEG & DANYEL FISHER, FROM USENET TO CoWEBS: INTERACTING WITH SOCIAL INFORMATION SPACES 139 (2003).

<sup>180</sup> Vivian Franco et al., *Anatomy of a Flame: Conflict and Community Building on the Internet*, in KNOWLEDGE AND COMMUNITIES 210 (Eric L. Lesser et al. eds., 2000) ("Contrary to existing literature that treats 'flames' as undesirable, we suggest that a 'flame' can help communities identify common values.").

<sup>181</sup> Lidsky, *supra* note 25, at 38.

<sup>182</sup> See Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 55-56 (1968) ("To assume a common culture or normative consensus in American society, as in most modern societies, is to ignore the deep and divisive

c. *Reputation as Property*

The third, and most dominant, conception of reputation embodied in American defamation law is that of reputation as property. This is the view of reputation in the marketplace. Under such a view of reputation, an individual earns her reputation through “the exertion of talent” or by demonstrating “mechanical skill and ingenuity.”<sup>183</sup> When there is harm to reputation, it is “capable of pecuniary admeasurement.”<sup>184</sup> Indeed, the value of the resulting loss is “determined by the marketplace in exactly the same manner that the marketplace determines the cash value of any property loss.”<sup>185</sup>

As Professor Post observes, “[t]he concept of reputation as property, together with the image of the market society that it carries within it, can create a powerful and internally coherent account of defamation law.”<sup>186</sup> For example, because reputation as property views the purpose of defamation law as protecting individuals within the market, the law should not remedy “purely private injuries which are independent of the market.”<sup>187</sup> This limitation is reflected in defamation law’s admonition that statements that are merely unflattering, annoying, irksome, or embarrassing are not actionable.<sup>188</sup> It is also reflected in the fact that corporations and other entities can sue for defamation,<sup>189</sup> which can only be understood as advancing a conception of reputation as property.<sup>190</sup>

We see evidence of the view of reputation as property in the Supreme Court’s decision in *Gertz v. Robert Welch, Inc.*<sup>191</sup> In *Gertz*, the Court held that absent proof of actual malice, the common law’s presumption of damages is unconstitutional when matters of public concern are involved<sup>192</sup>:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. . . . [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compen-

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role of class, ethnic, religious, status, and regional culture conflicts which often produce widely opposing definitions of goodness, truth, and moral virtue.”)

<sup>183</sup> THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS xx (1826).

<sup>184</sup> STARKIE, *supra* note 183, at 101.

<sup>185</sup> Post, *supra* note 7, at 694. This view can be traced to Thomas Hobbes who wrote that the “Value, or WORTH of a man, is, as of all other things, his Price.” THOMAS HOBBS, LEVIATHAN 42 (1651).

<sup>186</sup> Post, *supra* note 7, at 696. But the view of reputation as property is not entirely commensurate with the law of defamation, fundamental aspects of defamation law remain “inexplicable from the perspective of reputation as property.” *Id.* at 699.

<sup>187</sup> *Id.* at 695.

<sup>188</sup> SACK, *supra* note 111, § 2.4.1.

<sup>189</sup> See RESTATEMENT (SECOND) OF TORTS §§ 561-562 (1977).

<sup>190</sup> Post, *supra* note 7, at 696.

<sup>191</sup> 418 U.S. 323, 349 (1974).

<sup>192</sup> The majority did not explain why the presumption of damages was nevertheless constitutional if a defendant had actual malice. See *id.* at 395 (White, J., dissenting).

sate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.<sup>193</sup>

The conclusion that defamation law should only provide compensation for “actual injury” and that the state has “no substantial interest” in awarding additional damages, is a view “plainly within the framework of reputation as property.”<sup>194</sup>

Yet the Court in *Gertz* did not entirely adopt the view of reputation as property, as the Court included within its list of compensable harms “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”<sup>195</sup> This expansive definition of actual injury is inconsistent with the concept of reputation as property because it remedies harms that are not “capable of pecuniary admeasurement.”<sup>196</sup>

Although certain aspects of defamation law can only be understood by reference to the view of reputation as property, this view fails to account for the constitutive role that society plays in creating reputation.<sup>197</sup> Instead, reputation as property is a highly individual-centric view of reputation in which “[o]ne’s good name is . . . as truly the product of one’s efforts as any physical possession.”<sup>198</sup> Perhaps this view should not be surprising, given that American defamation law arose during the period of the ascendancy of individualism.<sup>199</sup> It was, and remains, strongly shaped by this worldview. As the sociologist Robert Bellah observed, “[o]ur tendency to think of reputation in individualistic terms is rooted in our cultural emphasis on the autonomy, independence, and achievements of individuals.”<sup>200</sup>

Moreover, unlike the view of reputation as honor or dignity, the view of reputation as property embodies a starkly different conception of society. It is a conception in which “individuals are connected to each other through the institution of the market.”<sup>201</sup> And it is one in which the role that social

<sup>193</sup> *Id.*

<sup>194</sup> Post, *supra* note 7, at 730.

<sup>195</sup> 418 U.S. at 350.

<sup>196</sup> STARKIE, *supra* note 183, at xxvi. Professor Post concludes that the Court’s expansive definition of actual injury indicates that it was influenced by the conception of reputation as dignity, which would permit the recovery of mental anguish stemming from violations of social norms. Post, *supra* note 7, at 729–30 (“The influence of the concept of dignity is entirely implicit, perceptible only in the actual outcome reached by the Court. . . . If a plaintiff has had his dignity impaired by the violation of a civility rule, it is *prima facie* defensible to compensate him for all injuries which flow from that violation, including mental anguish and personal humiliation.”).

<sup>197</sup> See *supra* notes 39–46 and accompanying text.

<sup>198</sup> Von Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 33 (1904).

<sup>199</sup> See Bellah, *supra* note 27, at 743 (“America is a culture that focuses on the individual, a culture in which ‘individualism’ is a central value.”).

<sup>200</sup> *Id.*

<sup>201</sup> Post, *supra* note 7, at 695.

interactions have in creating reputation and individual identity is remarkably limited. Under the view of reputation as property, social interactions are essentially meaningless unless they are mediated by the market.

While it may be the case that the “market” provides a convenient measuring stick for evaluating reputation, it is an incomplete measure.<sup>202</sup> As noted in Parts I and II, altruistic behavior, which is remarkably commonplace in human social systems, is strongly motivated by reputation. Such altruism is perplexing to economists because it cannot be valued in the market.<sup>203</sup> But that does not mean that those behaviors and the reputational interests that underlie them are valueless.

As human society has become more networked, “nonmarket economies” have proliferated. These are economies in which reputation functions as a form of “social currency.” We see this quite clearly in the context of peer production, such as open source software development, where reputation, rather than money, is a primary motivation for the work.<sup>204</sup>

## 2. *Defamation Law Serves Competing Interests*

As the preceding discussion reveals, once we probe below the surface of the various conceptions of reputation inherent in the law of defamation, we see that defamation law is built on the shifting sands of assumptions and policymaking. It should come as no surprise then that “the state’s interest in reputation can have no single outcome.”<sup>205</sup>

Nevertheless, a court must choose between competing interests in individual cases. The preceding abstract discussion of the interests protected by defamation law can be further clarified focusing on the specific harms the parties and society experience as a result of defamatory speech.<sup>206</sup> These harms basically fall into five categories: (i) pecuniary loss by the plaintiff caused by the defamatory statement (i.e., loss of property); (ii) non-pecuniary loss by the plaintiff consisting of emotional and physical distress (i.e., loss of dignity); (iii) non-pecuniary loss by the plaintiff and society consisting of reduced standing (i.e., loss of relations); (iv) loss by society stemming from the defendant’s failure to adhere to community norms (i.e., loss of civility); and (v) loss by society occasioned by impoverished discourse.

The first of these harms clearly implicates the view of reputation as property, whereas the remaining harms fall largely within the conception of

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<sup>202</sup> Indeed, the common law has a “passion for reducing disputes to money damages, a passion that for defamation law has been ‘a crippling experience.’” *Id.* at 720 (quoting J. G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 207 (2d ed. 1986)).

<sup>203</sup> See *supra* notes 18-22 and accompanying text.

<sup>204</sup> *Id.*

<sup>205</sup> Post, *supra* note 7, at 693.

<sup>206</sup> See Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J. LEGAL STUD. 603, 611 (2009) (“It is submitted that the only principled approach is to look at the type of losses which the wrong seeks to remedy, and consider that the correlative interests are those which come within the scope of protection of the tort.”).

reputation as dignity. While the conception of reputation as dignity and the conception of reputation as property both remain influential in American defamation law, these conceptions of reputation are, in important ways, doctrinally incompatible.<sup>207</sup> Indeed, “[t]he conflict within defamation law is so severe that it is incapable even of specifying coherent criteria by which publications can be distinguished as defamatory or nondefamatory.”<sup>208</sup> It should come as no surprise, then, that defamation law is largely unsuccessful at advancing either the plaintiff’s interests or society’s interests, even when those interests are aligned.<sup>209</sup>

Moreover, society’s interests do not all point in the same direction. For example, society clearly has an interest in proscribing “antisocial communications” that harm reputation because these communications pose a challenge to its proper functioning and identity.<sup>210</sup> In addition, society has an interest in ensuring that speech that impacts reputation has some measure of reliability because its members rely on reputational information to make assessments about the character and standing of others.<sup>211</sup>

Yet society also has an interest in maintaining “a suitable *level of discourse* within the body politic”<sup>212</sup> which can be in tension with these other concerns. This interest bears directly on the “marketplace of ideas” rationale for freedom of speech in First Amendment jurisprudence,<sup>213</sup> and embodies the notion “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>214</sup> In *Cohen v. California*, in which the defendant challenged his conviction for “wearing a jacket bear-

<sup>207</sup> For example, the doctrine of presumption of damages is consistent with the view of reputation as dignity, but not with the view of reputation as property. See *supra* note 142 and accompanying text. On the other hand, the fact that corporations can sue for defamation is consistent with the view of reputation as property, but not with the view of reputation as dignity.

<sup>208</sup> Post, *supra* note 7, at 717.

<sup>209</sup> See *infra* Part IV.

<sup>210</sup> Defamation law’s proscription of “antisocial communications that harm reputation” acts to preserve a community’s identity, “for it is the existence of shared values and shared beliefs that defines community life.” Lidsky, *supra* note 25, at 37. By remedying “a wrongful disruption in the ‘relational interest’ that an individual has in maintaining personal esteem in the eyes of others,” Smolla, *supra* note 131, at 18, it necessarily brings within its purview the civility rules that define communities and hold society together.

<sup>211</sup> See *Lumbermen’s Mut. Cas. Co. v. United Services Auto Ass’n*, 528 A.2d 64, 67 (N.J. App. Div. 1987) (observing that “defamation is an impairment of a ‘relational’ interest, i.e., it denigrates the opinion which others in the community have of plaintiff”); Solove, *supra* note 103, at 551 (“We are thus deceived in our relationships with others; these relationships are tainted by false information that prevents us from making sound and fair judgments.”).

<sup>212</sup> *Cohen v. California*, 403 U.S. 15, 23 (1971) (emphasis added).

<sup>213</sup> See *Citizens United v. Fed. Election Com’n*, 130 S. Ct. 876, 906 (2010) (holding that restrictions on independent corporate expenditures “interfer[e] with the ‘open marketplace’ of ideas protected by the First Amendment”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (“[A] central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978))); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 10-33 (1982).

<sup>214</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

ing the words ‘Fuck the Draft,’”<sup>215</sup> Justice Harlan described society’s interest as follows:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.<sup>216</sup>

This is a powerful articulation of free speech principles grounded in tolerance and individual autonomy.<sup>217</sup> But even Justice Harlan conceded in *Cohen* that this tolerance must exist “within established limits.”<sup>218</sup> One such limit, for example, is obscene speech.<sup>219</sup> Another is intentional—or at least negligent—defamatory speech,<sup>220</sup> but exactly where that limit should reside with regard to such speech “depends a great deal on the importance one attaches to the intensity of community life and to the exercise of freedom of expression as a reflection of individual autonomy.”<sup>221</sup>

The problem, however, is that judges usually frame the issue as an abstract conflict between the First Amendment’s free speech protections and “reputation.” But reputation is not a single, undifferentiated interest. It is a

<sup>215</sup> 403 U.S. at 16.

<sup>216</sup> *Id.* at 24-25. According to Robert Post, this passage from *Cohen* “rests flatly upon a repudiation of the maintenance of community cohesion and identity as a legitimate justification for the regulation of speech” and therefore “greatly undermines the reasoning of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which held that defamatory speech should be exempt from constitutional protection in part because of the ‘social interest in order and morality.’” Post, *supra* note 7, at 734 (quoting *Chaplinsky*, 315 U.S. at 572).

<sup>217</sup> See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 172 (1986).

<sup>218</sup> *Cohen*, 403 U.S. at 25.

<sup>219</sup> See *Miller v. California*, 413 U.S. 15, 33 (1973). Interestingly, criminal libel originally penalized obscenity, as well as defamation, sedition, and blasphemy. See J.R. Spencer, *Criminal Libel—A Skeleton in the Cupboard*, 1977 CRIM. L. REV. 383, 383.

<sup>220</sup> See *supra* Part III.A.

<sup>221</sup> Post, *supra* note 7, at 736-37.

multifaceted concept that poses many challenges for defamation law. As we have seen, the various conceptions of reputation embody markedly different assumptions about the nature of social life. The strains created by these divergent beliefs have only increased as our society has become more complex.

It may simply be that the assumptions underlying important parts of defamation doctrine are no longer, if they ever were, accurate reflections of how our networked society functions. As Professor Post suggested while the Internet was in its infancy, judges “would do well to abandon the fiction of protecting a unitary concept of reputation.”<sup>222</sup> And society would do well to consider the “limitations and desirability” of using defamation law “to maintain community identity and cohesion through the enforcement of rules of civility.”<sup>223</sup>

### C. *The Role of Community in Defamation Law*

In this section we move to the more concrete question of how courts determine whether a statement is capable of a defamatory meaning. To engage this issue, we return to the Ron Livingston case described in the introduction.

According to the complaint in that case, the defendant allegedly “maintained an ongoing campaign to spread lies about Livingston on the internet.”<sup>224</sup> This included, among other things, “falsely asserting that Livingston is in a romantic relationship with [another] man”; “creating websites devoted to propagating his or her lies”; and “altering legitimate websites about Livingston to include false statements about Livingston’s relationship status and sexual orientation.”<sup>225</sup> The complaint goes on to state that the “misrepresentations contained in the Wikipedia Page, the Facebook Profiles, and the Facebook ‘fan page’ . . . are libelous per se because they have a tendency on their face to injure Plaintiff’s business and reputation.”<sup>226</sup>

At first blush, the question of whether these statements are capable of a defamatory meaning appears to be relatively straightforward. After all, a communication is defamatory if it tends to harm the plaintiff’s reputation.<sup>227</sup> In California, where Mr. Livingston filed his case, “libel” is defined as a

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<sup>222</sup> *Id.* at 721. Professor Post recommended nearly a quarter-century ago: “Instead of constructing rules and definitions that awkwardly attempt to span the gulf separating reputation as property from reputation as dignity, the two aspects of reputation can be distinguished and managed through different doctrinal structures.” *Id.* at 741.

<sup>223</sup> *Id.* at 741.

<sup>224</sup> Complaint at 2, *Coupleguys, Inc. v. John Doe*, No. BC-427389 (L.A. Super. Ct., filed Dec. 4, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-12-04-Coupleguys%20Inc.%20v.%20Doe.pdf>.

<sup>225</sup> *Id.* at 2, ¶5.

<sup>226</sup> *Id.* at 4, ¶12.

<sup>227</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”). Although, as

false statement of fact that “exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”<sup>228</sup> But the “tendency” of a statement to cause reputational harm cannot be determined merely by reference to the words themselves.<sup>229</sup> Because harm to reputation is a socially constructed injury,<sup>230</sup> a court must measure its effects by the “attitudes, beliefs, and prejudices of the relevant community.”<sup>231</sup>

### 1. Identifying the Relevant Community

As a threshold matter then, the court<sup>232</sup> must first select the community in whose esteem Mr. Livingston’s reputation may have been diminished.<sup>233</sup> Not surprisingly, this choice can have a profound effect on the viability of his defamation claim. After all, “[t]hat which is defamatory in the eyes of one segment of the population may be laudatory in the eyes of another and a matter of complete indifference to a third.”<sup>234</sup>

It is not necessary for Mr. Livingston to prove that every member of society regards him with contempt as a result of the false information. As far back as 1909, the Supreme Court recognized that a defamatory statement “need not entail universal hatred to constitute a cause of action,” given that “[n]o conduct is hated by all.”<sup>235</sup> The Court explained that it is sufficient that “an appreciable fraction” of those who are exposed to the false information “regard the plaintiff with contempt.”<sup>236</sup> In making this determination, courts consider the effect of the challenged speech on “right-thinking peo-

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discussed in Part III.B.1, defamation law only provides a remedy for certain types of reputational harm.

<sup>228</sup> CAL. CIV. CODE § 45 (2009).

<sup>229</sup> Defamation usually involves verbal statements, whether written in the case of libel or spoken in the case of slander. See Lidsky, *supra* note 25, at 11 n.49. Nonverbal forms of expression, however, such as photos and drawings may also be defamatory. See, e.g., *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1118 (9th Cir. 1989) (cartoon); *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936) (libel claim based on photograph).

<sup>230</sup> See *supra* Part III.B.1.

<sup>231</sup> Lidsky, *supra* note 25, at 13.

<sup>232</sup> At common law, the judge decides as a matter of law whether the statement at issue is susceptible of a defamatory meaning. See KEETON ET AL., *supra* note 131, § 111, at 774, 780–83.

<sup>233</sup> See SACK & BARON, *supra* note 174, at 48–49.

<sup>234</sup> *The Community Segment in Defamation Actions*, *supra* note 125, at 1387.

<sup>235</sup> *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (permitting case for libel based on unauthorized use of plaintiff’s photograph in advertisement to go forward even though the ad “seems to be regarded by many with pride”).

<sup>236</sup> *Id.* The Restatement follows this approach, noting that it is not necessary that the communication expose the plaintiff to the hatred, ridicule or contempt of the entire community; instead, “it is enough that the communication would tend to prejudice [the plaintiff] in the eyes of a substantial and respectable minority” of those who hear the challenged speech. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

ple”<sup>237</sup> or among “a substantial and respectable minority” within society,<sup>238</sup> with the latter test now the prevailing American rule.<sup>239</sup>

For purposes of Mr. Livingston’s case, his concern is not with how society writ broadly views homosexuality, but rather whether those in his profession, moviemakers in Hollywood, are intolerant toward homosexuals. Where is a court to turn to make this determination? The evidence appears to be conflicting. As Gabriel Arana, who recently questioned whether actors suffer any reputational harm from being labeled as homosexual, wrote in *Slate*: “Ellen DeGeneres came out . . . to an audience of 42 million; when Clay Aiken did so . . . no one blinked. Dozens of shows . . . have openly gay cast members. Movies like *Milk* and *Brokeback Mountain*—with plots focusing on gay rights—are mainstream.”<sup>240</sup> Others are less sanguine, cautioning: “I would not advise any actor necessarily, if he was really thinking of his career, to come out.”<sup>241</sup>

One might assume that all Mr. Livingston needs to do is put forth a witness to testify that Hollywood casting directors avoided him or overlooked him for movie roles because of the false imputation of homosexuality. At this stage in a defamation case, however, the question is not whether casting directors did, in fact, avoid or overlook Mr. Livingston. Rather, the question is whether the statements at issue have the tendency to create the type of reputational harm the tort of defamation will recognize.<sup>242</sup> Just because a plaintiff has actually suffered harm is not dispositive of this question and, surprisingly, may not ever be relevant given defamation law’s presumption of damages.<sup>243</sup>

Moreover, despite the objective veneer that accompanies the “substantial and respectable minority” test, courts rarely seek evidence such as witness testimony, polls or surveys on this question.<sup>244</sup> Instead, the determination “often involves a largely ‘intuitive’ judgment about the beliefs and attitudes of society at large and of particular groups within it, a judgment largely based on the judge’s own ‘common knowledge’ and common sense.”<sup>245</sup>

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<sup>237</sup> *Kimmerle v. N.Y. Evening Journal*, 186 N.E. 217, 218 (N.Y. 1930).

<sup>238</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

<sup>239</sup> Lidsky, *supra* note 25, at 16–17.

<sup>240</sup> Gabriel Arana, *Queer Eye for the Libel Guy: Should Stars Really Be Able to Sue For Libel if Someone Says They’re Gay?*, SLATE, Feb. 27, 2009, <http://www.slate.com/id/2212339>.

<sup>241</sup> Carole Cadwalladr, *I Wouldn’t Advise Any Actor Thinking of His Career to Come Out*, OBSERVER REVIEW, Nov. 29, 2009 at 4 (interview with actor Rupert Everett), <http://www.guardian.co.uk/film/2009/nov/29/rupert-everett-madonna-carole-cadwalladr>; see also *McKellen Slams Producers for ‘Keeping Stars in Closet,’* HOLLYWOOD.COM, Apr. 2, 2007, [http://www.hollywood.com/news/McKellen\\_Slams\\_Producers\\_for\\_Keeping\\_Stars\\_in\\_Closet/3676824](http://www.hollywood.com/news/McKellen_Slams_Producers_for_Keeping_Stars_in_Closet/3676824).

<sup>242</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>243</sup> See *supra* note 142 and accompanying text.

<sup>244</sup> Lidsky, *supra* note 25, at 18 (citing David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1304–08 (1942)).

<sup>245</sup> Lidsky, *supra* note 25, at 18 (quoting *The Community Segment in Defamation Actions*, *supra* note 125, at 1389).

We see the problems inherent in this approach when we examine how courts have treated the question of whether a false imputation of homosexuality can support a defamation claim. Over the years, a number of defamation cases have been filed based on the imputation of homosexuality.<sup>246</sup> As recently as 1996, scholars were reporting that “the overwhelming majority of courts that have addressed the issue have held that a false allegation of homosexuality is defamatory.”<sup>247</sup> But norms can “evolve from one generation to the next.”<sup>248</sup> And as one court aptly put it, whether a statement is defamatory depends “upon the temper of the times, the current of contemporary public opinions, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place.”<sup>249</sup> For example, whereas it was once regarded as defamatory to falsely imply that a white person is black,<sup>250</sup> that is no longer a view held by courts today.<sup>251</sup>

But norms do not change overnight nor are they susceptible to easy quantification. Unlike defamation claims based on false racial or ethnic identifications, courts “have not been so eager to validate a progressive point of view in cases dealing with homosexuality.”<sup>252</sup> But this is beginning to change. While some courts still hold that an imputation of homosexuality

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<sup>246</sup> One of the earliest cases involved Oscar Wilde, who in 1895 initiated a criminal libel action against Lord Queensbury in response to written note that said: “For Oscar Wilde posing as a sodomite [sic].” Dean R. Knight, “*I’m Not Gay—Not That There’s Anything Wrong with That!*”: *Are Unwanted Imputations of Gayness Defamatory?*, 37 VICT. U. WELLINGTON L. REV. 249, 258 (2006) (citing THE THREE TRIALS OF OSCAR WILDE (H. Montgomery Hyde, ed. 1956)). “On the third day of the trial, Wilde’s counsel withdrew the prosecution, not because the allegations did not convey a defamatory meaning, but instead because of Lord Queensbury’s pleas of justification. Lord Queensbury argued ‘his resort to ‘sodom’ mimicked the law and therefore was for the public good.’” *Id.*

<sup>247</sup> Lidsky, *supra* note 25, at 34–35 (citing Schomer v. Smidt, 170 Cal. Rptr. 662 (Ct. App. 1980); see generally Moricoli v. Schwartz, 361 N.E.2d 74 (Ill. Ct. App. 1977); Nazeri v. Missouri Valley Coll., 860 S.W.2d 303 (Mo. 1993) (en banc); Rejent v. Liberation Publ’g, Inc., 611 N.Y.S.2d 866 (App. Div. 1994); Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980); Buck v. Savage, 323 S.W.2d 363 (Tex. Ct. App. 1959)).

<sup>248</sup> Stern v. Cosby, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009).

<sup>249</sup> Beamer v. Nishiki, 670 P.2d 1264, 1267 (Cal. 1983).

<sup>250</sup> See, e.g., May v. Shreveport Traction Co., 53 So. 671 (La. 1910); Bowen v. Indep. Publ’g Co., 96 S.E.2d 564 (S.C. 1957). In *Bowen v. Independent Publishing Co.*, the South Carolina Supreme Court reasoned:

Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.

96 S.E.2d at 566.

<sup>251</sup> “Whereas the earlier cases take the attitude that it obviously is defamatory to call someone a Negro, the more modern cases (to the extent they exist) tend to assume it is equally obvious that such an allegation is not defamatory.” Lidsky, *supra* note 25, at 30-31 (summarizing recent cases).

<sup>252</sup> *Id.* at 34.

is defamatory per se,<sup>253</sup> a number of recent decisions have rejected this conclusion.<sup>254</sup> What splits these courts, however, is not whether being falsely identified as homosexual would result in some opprobrium. They all seem to accept that prejudice exists in the dark corners of every community. Rather, they view their role as standing up against this prejudice.

Judge Denny Chin's recent decision in *Stern v. Cosby* exemplifies this approach.<sup>255</sup> Judge Chin cited a "veritable sea change" in attitudes about homosexuality over the past few decades and concluded that New Yorkers do not "view gays and lesbians as shameful or odious."<sup>256</sup> Although Judge Chin conceded that "gays and lesbians continue to face prejudice," he made it a point to note that "such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals."<sup>257</sup> Quoting Judge Nancy Gertner's earlier decision in *Albright v. Morton*,<sup>258</sup> in which she cautioned that if a court "were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status,"<sup>259</sup> Judge Chin held that an imputation of homosexuality is not defamatory per se.<sup>260</sup>

One of the societal changes cited in both *Stern* and *Albright* was the Supreme Court's 2003 decision in *Lawrence v. Texas*, which invalidated state laws criminalizing homosexual sodomy between consenting adults.<sup>261</sup> *Lawrence* undercut an argument that many of the cases coming to the opposite conclusion had relied upon, namely that an allegation of homosexuality imputed criminal conduct. Other cases, including a California appellate decision from 1980,<sup>262</sup> relied on the "equally outdated—but probably less legally

<sup>253</sup> See, e.g., *Gallo v. Alitalia-Linee Aeree italiane-Societa Per Azioni*, 585 F. Supp. 2d 520, 549-50 (S.D.N.Y. 2008); *Thomas v. BET Sound-Stage Restaurant/Brettco, Inc.*, 61 F. Supp. 2d 448, 457 (D. Md. 1999); *Plumley v. Landmark Chevrolet*, 122 F.3d 308, 310-11 (5th Cir. 1997); *Murphy v. Pizarrio*, No. 94 Civ. 0471 (JFK), 1995 WL 565990, \*3 (S.D.N.Y. Sept. 22, 1995); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 312 (Mo. 1993).

<sup>254</sup> See, e.g., *Stern v. Cosby*, 645 F. Supp. 2d 258, 273 (S.D.N.Y. 2009); *Albright v. Morton*, 321 F. Supp. 2d 130, 136-39 (D. Mass. 2004); *Hayes v. Smith*, 832 P.2d 1022, 1023-25 (Colo. Ct. App. 1991); *Donovan v. Fiumara*, 442 S.E.2d 572, 575-76 (N.C. Ct. App. 1994); *Key v. Ohio Dep't of Rehab. & Corr.*, 598 N.E.2d 207, 209 (Ohio Ct. Cl. 1990). None of these decisions, however, have gone as far to hold that an imputation of homosexuality cannot be libelous. Instead, they leave open the possibility of recovery if the plaintiff can show specific harm flowing from the allegedly defamatory statements. See, e.g., *Stern*, 645 F. Supp. 2d at 275 (holding that statements imputing homosexuality are not defamatory per se but may "nonetheless [be] susceptible to a defamatory meaning"); *Hayes*, 832 P.2d at 1025 (holding that imputation of homosexuality is not slander per se while questioning in dicta whether such imputation should be defamatory at all).

<sup>255</sup> 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

<sup>256</sup> *Id.* at 273-74.

<sup>257</sup> *Id.* at 275.

<sup>258</sup> 321 F. Supp. 2d 130 (D. Mass. 2004).

<sup>259</sup> *Id.* at 138.

<sup>260</sup> *Stern*, 645 F. Supp. 2d at 275.

<sup>261</sup> 539 U.S. 558 (2003).

<sup>262</sup> *Schomer v. Smidt*, 113 Cal. App. 3d 828, 835 (Cal. Ct. App. 1980).

vulnerable—argument that calling someone a homosexual imputes lack of chastity.”<sup>263</sup> Whether this argument would still carry the day is an open question.<sup>264</sup> “Many adult American women [and men, no doubt] might well consider it more harmful to be called ‘unchased’ than ‘unchaste,’ the common law to the contrary notwithstanding.”<sup>265</sup>

The purpose of analyzing the defamatory character of the allegations in the Livingston case, however, was not to definitively answer the question of whether an imputation of homosexuality is, or should be, defamatory. Rather, it was to shed light on the normative judgments inherent in defamation law’s assessment of whether a statement is capable of a defamatory meaning and to highlight the difficulty of applying these doctrines when social mores are changing.

What this discussion makes plain is that it is not at all clear how a court would come out on the question of whether the false imputation of homosexuality is defamatory. Moreover, the answer cannot be determined by polls, surveys, or even past precedent. The answer turns on the proper role the court sees defamation law—and by extension, itself—playing in enforcing conflicting social norms, which, in turn, is influenced by normative judgments a court makes about the acceptability of the norms themselves.

When even members of the LGBT community are conflicted over which strategy to pursue in their efforts to change social norms,<sup>266</sup> judges seem especially ill-equipped to make these decisions, particularly when they are doing so through guise of defamation law. Naturally, the question then becomes whether this is the proper role for the law of defamation in the first place.

## 2. *The Myth of Community*

As the preceding discussion reveals, defamation law rests on normative judgments that are deeply reflective of how judges envision society.<sup>267</sup> While we might fervently wish that in our pluralistic society people would not hold irrational and invidious prejudices, judges, of all people, know that this is not the case.<sup>268</sup> As a result, judges are forced to decide whether they

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<sup>263</sup> Sam Bayard, *Office Space Star Ron Livingston Sues Wikipedia Prankster, Community Norms at Issue*, CITIZEN MEDIA LAW PROJECT BLOG (Dec. 9, 2009), <http://www.citmedialaw.org/blog/2009/office-space-star-ron-livingston-sues-wikipedia-prankster-community-norms-issue>.

<sup>264</sup> See Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 461–64 (2004).

<sup>265</sup> SACK, *supra* note 111, § 2.4.4.

<sup>266</sup> See, e.g., Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 L. & SEXUALITY 119, 152–55 (2003) (describing the arguments on both sides).

<sup>267</sup> We see this in both the community segment determination and in a court’s assessment of what harms defamation law will recognize. See *supra* Part III.B.1.

<sup>268</sup> See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 42–43 (1985) (noting that we resort to “subterfuges and wishful thinking” because we “are unwilling to admit

should take society as it exists, warts and all, or as they desire it to be. And on this critical question, defamation law offers little guidance other than the admonition that the community chosen be “substantial and respectable.”<sup>269</sup>

While the substantial and respectable minority doctrine offers the “promise of recognition and respect for subcommunity values,” it fails to live up to this promise because it “imports a normative vision of the community into the process of identifying defamatory communications through the loaded words ‘substantial and respectable.’”<sup>270</sup> By labeling certain communities insubstantial or disreputable, judges are free to ignore the norms of communities they find disagreeable. As a result, defamation law is naturally and unavoidably hegemonically structured. Instead of enforcing norms extant in the plaintiff’s actual community, it enforces “the views of the dominant groups in society or, more aptly, what the judge believes to be the dominant groups in society.”<sup>271</sup>

We also see these normative judgments operating in the many cases involving allegations that the plaintiff was an informer.<sup>272</sup> In one such case involving a prisoner, the court noted that although the general prison population may regard the plaintiff with contempt as a result of a broadcast that labeled him an informer, “it is not one’s reputation in a limited community in which attitudes and social values may depart substantially from those prevailing generally which an action for defamation is designed to protect.”<sup>273</sup> A court reaching the same conclusion in a similar case explained that “those who would think ill of one who legitimately cooperates with law enforcement officials are not [right-thinking persons].”<sup>274</sup>

Moreover, there is an inherent circularity in the task of determining which community’s norms are entitled to enforcement. The community defines the norms that bind its members,<sup>275</sup> but the community is itself defined by the norms its members share.<sup>276</sup> As a result, a society can have as many communities as there are shared norms.<sup>277</sup> This presents a fundamental, and perhaps insurmountable, challenge for the law of defamation.

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openly that some groups in our flawed society may have attributes which are undesirable and even dangerous”).

<sup>269</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

<sup>270</sup> Lidsky, *supra* note 25, at 40. “Moreover, the doctrine makes it appear as if it applies only in special cases, those relatively rare cases where no general consensus can be found[, and] in effect papers over ideological conflict within the society and obscures the extent to which mores are in a state of flux.” *Id.* at 40–41.

<sup>271</sup> *Id.* at 9.

<sup>272</sup> See, e.g., *Agnat v. Shakur*, 30 F. Supp. 2d 420, 424 (S.D.N.Y. 1998); *Saunders v. Board of Directors, WHYY-TV*, 382 A.2d 257 (Del. Super. 1978); *Connelly v. McKay*, 28 N.Y.S.2d 327, 329–30 (Sup. Ct. N.Y. County 1941).

<sup>273</sup> *Saunders*, 382 A.2d at 259.

<sup>274</sup> *Agnat*, 30 F. Supp.2d at 424.

<sup>275</sup> See *supra* notes 25–28 and accompanying text.

<sup>276</sup> *Id.*

<sup>277</sup> The noted social anthropologist F.G. Bailey, who studied social interactions in pastoral villages in Europe, India, and Cyprus, remarked in his influential work on reputation, *Gifts and Poison: The Politics of Reputation*, that “[c]ommunities and societies are made up of people

In 1996, at the very start of the popularization of the Internet, Professor Lyriisa Lidsky observed that defamation law was laboring under the “myth of community.”<sup>278</sup> That is, a myth that there is “such a thing as a ‘community’ characterized by ‘groups of like-minded individuals . . . who share a common heritage, have similar values and norms, and share a common perception of social order.’”<sup>279</sup> This observation is even more apt today.

The community segment determination that lies at the heart of defamation law’s defamatoriness inquiry is premised on the belief that community norms are widely shared and relatively static.<sup>280</sup> While the view of social life inherent in the law of defamation—that society is comprised of relatively homogeneous communities that enjoy widespread consensus on social norms—may have been accurate during the common law’s formative period, it is no longer accurate today.<sup>281</sup> Indeed, no one would call the Internet a static community with widespread consensus.<sup>282</sup>

Instead, our networked society is comprised of countless communities and subcommunities, many of which are “diffuse, sparsely knit, with vague, overlapping, social and spatial boundaries.”<sup>283</sup> As Yochai Benkler has observed: “[T]he image of ‘community’ that seeks a facsimile of a distant pastoral village is simply the wrong image of how we interact as social beings. We are a networked society now—networked individuals connected with each other in a mesh of loosely knit, overlapping, flat connections.”<sup>284</sup>

Moreover, we are likely to be members of multiple communities, both substantial and insubstantial, that span racial, socioeconomic status, and personal interests.<sup>285</sup> And we are likely to play different roles in these communities simultaneously as we endeavor to navigate the potentially conflicting norms and social demands of each community. What matters to us is not the

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but we only recognize them as a community or as a society, because the people who belong share some ideas about how things are and how things should be . . . .” Bailey, *supra* note 28, at 8.

<sup>278</sup> Lidsky, *supra* note 25, at 38.

<sup>279</sup> *Id.* (quoting John Crank, *Watchman and Community: Myth and Institutionalization in Policing*, 28 L. & Soc. Rev. 325, 325 (1994)).

<sup>280</sup> Cf. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267 (1998) (“Norms develop most clearly and most easily in a static community.”).

<sup>281</sup> See WENDY L. WALL, *INVENTING THE “AMERICAN WAY”: THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT* 289 (2009) (observing that the Internet, among other factors, has “increasingly divided Americans by age, income, race, and interest”); Lidsky, *supra* note 25, at 41 (noting that in American society “[i]t is possible to speak of widespread consensus only in small, closely knit, and relatively homogeneous communities (if they exist)”).

<sup>282</sup> See Lemley, *supra* note 280, at 1267 (observing that “what Internet norms have managed to develop have regularly been blown apart by entry”).

<sup>283</sup> Barry Wellman et al., *The Social Affordances of the Internet for Networked Individualism*, 3 J. COMP. MEDIATED COMM’N 8 (2003); see also JAN VAN DIJK, *THE NETWORK SOCIETY: SOCIAL ASPECTS OF NEW MEDIA* 171 (2006).

<sup>284</sup> BENKLER, *supra* note 3, at 376.

<sup>285</sup> See ROBERT H. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* (1975).

size of these communities or whether their norms conform to some artificial benchmark, but rather the importance that individuals within those communities hold for us.<sup>286</sup>

The challenge associated with these multiple roles is especially apparent in the context of sexual orientation.<sup>287</sup> While an individual's reputation in one community may not be harmed by an imputation of homosexuality, it could prove anathema in another community in which she is a member.<sup>288</sup> Yet the substantial and respectable minority test invites judges to make normative judgments about whether these communities warrant recognition. And if they do not, a plaintiff will receive no recovery despite suffering actual harm to her reputation within a community that is important to her. As a result, whole communities fall outside defamation law's protections.

Most disturbingly, while the choice of which community's norms are to govern the case "is one of the chief determinants of liability," judges rarely articulate their reasons for choosing one set of community norms over another.<sup>289</sup> Instead, they implicitly rely on an idealized vision of society that simply does not comport with the complex web of social interactions that make up our complex, multicultural, multiethnic society.

#### IV. REASSESSING THE PROTECTION OF REPUTATION IN A NETWORKED WORLD

With so many competing interests vying for advancement, it is no wonder that the law of defamation is strained by the pull of divergent expectations. As with all branches of tort law, defamation law defines and enforces social norms. But unlike other torts,<sup>290</sup> defamation law operates in the realm of speech. As a result, its power to affect these norms is unrivaled. Indeed, when we review the historical sweep of defamation law, we see that the law has often operated to impose its assumptions of how society is structured and operates. When those assumptions diverge from reality—as is often the case when community boundaries are porous and social norms are chang-

<sup>286</sup> See Daniel More, *Informers Defamation and Public Policy*, 19 GA. J. INT'L & COMP. L. 503, 517 (1989) ("If the statement lowers the plaintiff in the eyes of relatively few recipients, but if their opinion is highly important to him, his defamation action should not be denied on the basis of the small size of this index group.").

<sup>287</sup> In Mary Gray's fascinating account of how "queer rural youth" are using the Internet to connect with others and build out social networks, she notes that "rural LGBTQ young people understand new media, particularly the Internet, as technologies that craft and expand their access to and the boundaries of their local and extralocal public spheres." MARY L. GRAY, *OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA* 106 (2009).

<sup>288</sup> See, e.g., *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 667 (Ct. App. 1984) (claim stemming from media reports of plaintiff's role in thwarting assassination attempt of President Ford that reported, accurately, that he was gay).

<sup>289</sup> *The Community Segment in Defamation Actions*, *supra* note 125, at 1387.

<sup>290</sup> A few exceptions do exist, including tortious interference with business relations and its related torts. See RESTATEMENT (SECOND) OF TORTS §§ 766–74 (1977).

ing—defamation law is not only ineffective, but also works to hinder social advancement.<sup>291</sup>

Given that defamation law serves so many important functions, one would expect that it has evolved along with our networked society. But, alas, defamation law looks today much as it did in 1964, when the Supreme Court issued its landmark decision in *New York Times v. Sullivan*,<sup>292</sup> or even in 1764, when colonial Americans began to tinker with the common law's English roots.<sup>293</sup> Defamation law remains "perplexed with minute and barren distinctions,"<sup>294</sup> "filled with technicalities and traps for the unwary,"<sup>295</sup> and "riddled with 'anomalies and absurdities.'" <sup>296</sup>

The limitations inherent in American defamation law have been caused in large part by the law's failure to adapt to the realities of how our modern networked society creates and uses reputational information.<sup>297</sup> As a result, defamation law does little to protect the interests of individuals or society.<sup>298</sup> But it is not just the aforementioned doctrinal limitations that make defamation law ineffective. It also faces practical impediments stemming from the law's failure to account for how reputational information actually flows through our networked society and to provide remedies that are embedded within these flows.

With all of these doctrinal and practical limitations, one has to ask whether defamation law is simply obsolete. Indeed, no less of an authority than David Anderson has suggested that "libel law is not worth reforming."<sup>299</sup> According to Professor Anderson:

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<sup>291</sup> Jerome H. Skolnick, *Forward: The Sociological Tort of Defamation*, 74 CAL. L. REV. 677, 677 (1986) ("Remedies that seem reasonable and proper at one time, in one community, may appear legally and morally flawed in another.").

<sup>292</sup> 376 U.S. 254 (1964). Of course, *Sullivan* and its progeny occasioned significant changes in the doctrines of fault, but much of the rest of the law of defamation was not affected.

<sup>293</sup> See Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1449 (2009) (noting that "if you go back and read English Law, long before the framing, it would not be much different from many of the principles that are followed in American state and federal courts today").

<sup>294</sup> FREDERICK POLLOCK, *THE LAW OF TORTS* 243 (13th ed. 1929).

<sup>295</sup> David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1285 (1942).

<sup>296</sup> Lidsky, *supra* note 25, at 4 (quoting WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 737 (4th ed. 1971)).

<sup>297</sup> See Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11 (1983) (stating that the "doctrinal confusion" in American defamation law is "caused in large part by a pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications").

<sup>298</sup> See, e.g., Anderson, *supra* note 2, at 488 ("The remnants of American libel law provide little protection for reputation."); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 810 (1986) (concluding that defamation law "serves the purposes of neither the parties nor the public").

<sup>299</sup> Anderson, *supra* note 2, at 489.

Abolition would leave victims of defamation little worse off than they are today. A few would give up recoveries, but many would be spared the costs, emotional as well as financial, of hopeless litigation. The public would get the benefit of information that is now suppressed by the chill of libel law, and would be disabused of the inferences that may be drawn from a mistaken belief that defamatory falsehoods are generally actionable.<sup>300</sup>

As Professor Anderson concedes, “[n]o matter how much it values speech, however, a civilized society cannot refuse to protect reputation.”<sup>301</sup> Fortunately, as Part B argues, our networked society offers, perhaps for the first time in centuries, the opportunity for communities to instantiate feedback mechanisms that might be able to rectify many of defamation law’s deficiencies.

### A. Network Challenges

In the not so distant past, most of our social and commercial interactions were ephemeral. Conversations quickly passed into memory. Newspaper articles ended up on microfiche in a cabinet in the library. Words on television and radio dissipated into the ether. Today, these conversations, words, and images are occurring online, where they remain accessible forever.<sup>302</sup> As we enter the twenty-first century, it is clear that we are living a substantial portion of our lives online.<sup>303</sup> We work, interact with others, and consume and create the information that we and others use to form opinions about the world and about each other. In short, “the Internet allows for a radically more diverse suite of communications models than any of the twentieth century systems permitted.”<sup>304</sup>

A number of implications flow from these changes. First, with all of this information now available to others, it is clear that defamation law, with its conflicted view of reputational harm and normative judgments about which community norms to enforce, can only address a small portion of the information flowing through our networked society. At the same time, our

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<sup>300</sup> *Id.* at 490.

<sup>301</sup> *Id.*

<sup>302</sup> With so much information about us and our interactions with others flowing as digital bits through communication networks, MIT Professor Judith Donath asked in a provocative essay for *The Publius Project*, is reputation obsolete? “In a world in which all action is recorded, is there still need for reputation information? If I can see the events of the past for myself, is getting other people’s potentially biased and self-serving opinions about it worth anything? Or, has reputation become obsolete?” Judith Donath, *Is Reputation Obsolete?*, THE PUBLIUS PROJECT, Sept. 11, 2008, [http://publius.cc/reputation\\_obsolete](http://publius.cc/reputation_obsolete).

<sup>303</sup> A recent study by the Pew Research Center’s Internet & American Life Project found that “Internet use is near-ubiquitous among teens and young adults.” Amanda Lenhart et al., *Social Media and Young Adults* 4 (Feb. 3, 2010), <http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx>.

<sup>304</sup> BENKLER, *supra* note 3, at 370.

reputational spheres are expanding rapidly as more of our lives are lived in “public” view. In fact, much of the information that escapes the scrutiny of defamation law has as much, if not more, of an effect on an individual’s reputation than defamatory falsehoods.

Second, as our society has become more networked we have come to expect that information will be available at our fingertips instantaneously. Information sources that are not part of the network are largely ignored. When a matter is in dispute, we look for answers within the network. Because our judicial system largely exists outside the network, its ability to influence our collective view of the world and of each other is limited.

Third, the fact that reputational information flows *through networks* makes defamation law’s task of protecting reputation more challenging and its remedies less effective. Traditional remedies simply do not account for the way information flows across community boundaries, facilitated by linking and search.

### 1. *Our Expanding Reputational Spheres*

Throughout human history the scope of an individual’s reputation was defined by physical geography and the limits of communication technology. With the introduction of low-cost global communication systems such as the Internet, identity and reputation are increasingly being decoupled from physical space. In addition, the ubiquity of cheap cameras and Internet-enabled video is blurring the line between public and private behavior.<sup>305</sup>

As a consequence, our reputational spheres are expanding coincident with the reductions in privacy we are experiencing in the online and offline worlds. Powerful search technologies coupled with commercial databases that unrelentingly collect, aggregate, and distribute information about us—including financial records, mobile phone records, and global positioning system data—are extending public scrutiny into areas that have traditionally been private.

To understand this phenomenon it is helpful to untangle three interrelated identity concepts: anonymity, pseudonymity, and authentication.<sup>306</sup> Reputation and identity, although related, are distinct concepts.<sup>307</sup> In order for reputation to have value it must be associated with an identity, but that

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<sup>305</sup> The impact of this change extends far beyond reputation and has been the subject of considerable study by sociologists and psychologists. *See, e.g.*, JOSHUA MEYROWITZ, *NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR* (1985) (observing that the adoption of new media results in a blurring of the boundaries between public and private).

<sup>306</sup> Of course, none of these concepts is unique to the Internet, but their use has expanded greatly with the capture devices developed and made available on the Internet. *See* DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 35–38 (2007).

<sup>307</sup> It is beyond the scope of this article to offer a detailed definition of identity in the Internet context. *See, e.g.*, Andreas Pfitzmann & Marit Köhntopp, *Anonymity, Unobservability, and Pseudonymity: A Proposal for Terminology*, in *ANONYMITY* 1–9 (H. Federrath

identity need not include all identifying characteristics so long as reputation can be tied in a persistent way to an individual or entity at some reasonable, but persistent, level of abstraction.<sup>308</sup> The use of identity abstractions, such as social security numbers, school IDs, and even nicknames, is pervasive in our society. These identifiers are typically referred to as pseudonyms.

Unlike pseudonymity, anonymity generally refers to a situation where the individual or entity discloses no identifying characteristics.<sup>309</sup> Anonymity, however, is never absolute in practice. Traceable details always exist; it is just a matter of how hard one looks. This is especially true on the Internet where every computer that connects to the network must have a unique Internet Protocol address and communications are routinely logged by servers and routers within the network.<sup>310</sup> Accordingly, the degree of anonymity one can maintain will vary depending on the nature of the communication, the system used, and other circumstances.

Identity, therefore, is better understood as a continuum. On one end is true anonymity, in which no personally identifying characteristics are disclosed. At the other end is fully disclosed personal identification. In the middle of this identity continuum is pseudonymity, an especially common form of identity on the Internet.<sup>311</sup> The Internet lends itself to pseudonymous identity because users can generally determine for themselves how much identifying information they disclose when they access services on the Internet. It is also relatively easy and costless to maintain multiple pseudonymous identities on the Internet and change them at will;<sup>312</sup> whereas in the

ed., 2000). For purposes of this discussion, identity is defined as the bundle of characteristics, some immutable, others merely superficial, that are associated with an individual or entity.

<sup>308</sup> Reputational information is of little value unless it can be tied to an identity. University of Chicago law professor Lior Strahilevitz found this to be the case when he examined the effectiveness of the “How’s My Driving” program, which encouraged other drivers to report poor driving. Strahilevitz concluded that the use of bumper stickers *with identity markers* resulted in fleet accident reductions from twenty to fifty percent. Lior Strahilevitz, “How’s My Driving?” *For Everyone (And Everything)*, 81 N.Y.U. L. REV. 1699, 1709 (2006). He suggests that the program should be extended to all drivers and ultimately to other non-driving conduct as well. *Id.* at 1759–65. Economists have also found that individuals will invest more in reputation building when the likelihood of their being recognized for their good behavior is greater. See, e.g., Milinski, *supra* note 12, at 272.

<sup>309</sup> Anonymity is derived from the Greek word *ἄνωμια*, which means without a name or name-less. Anonymity has a long history in American society; the drafters of the Constitution embraced anonymity—and, in fact, some relied on it themselves—for speech in the political sphere, which they viewed as essential for the expression of unpopular opinions that would have opened the speaker up to public approbation. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342–43 (1995). The Federalist Papers were signed by Publius, a pseudonym representing the authorship of James Madison, Alexander Hamilton, and John Jay. See DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* (1974). The Anti-Federalists, who wrote in opposition to Publius, also used pseudonyms. *McIntyre*, 514 U.S. at 343.

<sup>310</sup> See Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1445–50 (2008).

<sup>311</sup> See Ken D. Kumayara, *A Right to Pseudonymity*, 51 ARIZ. L. REV. 427, 448–51 (2009).

<sup>312</sup> See Eric Friedman & Paul Resnick, *The Social Cost of Cheap Pseudonyms*, 10 J. ECON. & MGMT. STRATEGY 173, 199 (2001). Most Web sites allow users to choose a pseudonym when they register. Even services that identify users based on their email addresses do not

corporeal world this is a complex process, often involving governmental intervention and cosmetic surgery. Unless someone chooses to use her real name, most individuals interact on the Internet while maintaining pseudonymous identities.<sup>313</sup>

Individuals typically have more than one online identity, each with a distinct reputation. These identities may be associated with different merchants, online forums, social networking sites, and virtual worlds. In online communities that permit pseudonymity, individuals may be required to identify themselves to the system administrator, but to others within the community they merely expose a pseudonym identifier to which the site will associate a set of attributes or credentials. As a result, a single individual will likely have multiple reputations to go along with their multiple identities. While someone may have good reasons for needing multiple pseudonyms, this can create problems with authentication and reliance in the context of reputation.<sup>314</sup>

As the discussion on anonymity and pseudonymity shows, we can limit, at least to some degree, the extent of ourselves that we reveal to the world on the Internet. Opposite forces are at work in this digital medium, however, that drag some individuals into the public eye and unmask others who seek to maintain some level of privacy.

In many ways, privacy is the other side of the reputational coin in that it defines the sphere of our activities that are open to reputational scrutiny. Generally speaking, the fewer people who know us, or the less they know about us, the smaller our reputational spheres will be.<sup>315</sup> As discussed in Part III, we typically present multiple identities at different times and in different contexts. We present one side of ourselves when we are with our friends on Friday night, another on Monday morning at the office, and a third when we make purchases online. We strive to keep these identities distinct, and privacy allows us to do so.

But our reputational spheres are expanding as more activity becomes open to public scrutiny, a trend that has been accelerating with the proliferation of digital capture devices and broadband Internet connections. While

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prevent identity changes because users can easily acquire new email addresses through free services like Gmail or Hotmail.

<sup>313</sup> In the blogging context, for example, an estimated fifty-five percent of bloggers use pseudonyms rather than their real names. Amanda Lenhart & Susannah Fox, *Bloggers: A Portrait of the Internet's New Storytellers*, Pew Internet & American Life Project, July 19, 2006, [http://www.pewinternet.org/PPF/r/186/report\\_display.asp](http://www.pewinternet.org/PPF/r/186/report_display.asp).

<sup>314</sup> Accordingly, in order for reputation to be reliable over the long-term, verification of an individual's identity must be accomplished in a trusted way so that third-parties can rely on the identification and associated reputational information. One approach, which has received considerable public attention, is to have governments issue national identification cards that include biometric authentication such as fingerprints, facial recognition, or retinal scans. See, e.g., Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 6 C.F.R. § 37 (2006).

<sup>315</sup> See STEVEN L. NOCK, *THE COSTS OF PRIVACY: SURVEILLANCE AND REPUTATION IN AMERICA* 124 (1993) (observing that privacy "makes it difficult to know others' reputations").

polling reveals widespread concern about personal privacy,<sup>316</sup> our willingness to accept encroachments on our privacy belie this concern.<sup>317</sup> For example, we post pictures and videos of ourselves online and tacitly or expressly approve of others who post pictures and videos of us engaging in public—and private—activities.<sup>318</sup> We also routinely provide personal information when we sign up for a Web site, use a discount shopping card, or merely browse the web.<sup>319</sup>

The degree of penetration into what has historically been viewed as private activity is having a profound impact on reputation because behavior once believed to be outside public scrutiny is now available for viewing by anyone with an Internet connection. Moreover, even when we are in places that are ostensibly public, we assume the circle of those who can observe our behavior extends only so far as the ear can hear and the eyes can see. This assumption no longer holds true in our schools,<sup>320</sup> on our roads,<sup>321</sup> or almost anywhere else.

The aggregation of this information in digital databases is also changing the nature of access to human knowledge. Not long ago, when reputations were built through face-to-face interactions, scant physical records of these interactions were left behind.<sup>322</sup> Today, our interactions with others often leave a digital trail, especially when those interactions involve financial

<sup>316</sup> See, e.g., Oscar Gandy, *Public Opinion Surveys and the Formation of Privacy Policy*, 59 J. SOC. ISSUES 283 (2003); Electronic Privacy Information Center, *Public Opinion on Privacy*, <http://www.epic.org/privacy/survey/#polls>.

<sup>317</sup> See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 202 (2008); Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN UK (Jan. 11, 2010), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>. Privacy skeptics have argued that because people do not act to stop these encroachments, they do not care about privacy. See, e.g., Calvin Gotlieb, *Privacy: A Concept Whose Time Has Come and Gone*, in *COMPUTERS, SURVEILLANCE, AND PRIVACY* 156 (David Lyon & Elia Zureik eds., 1996); but see Kevin Lewis et al., *The Taste for Privacy: An Analysis of College Student Privacy Settings in an Online Social Network*, 14 J. COMPUTER-MEDIATED COMM. 79, 96 (2008) (finding that “public/private boundary on Facebook is implicit, normative, and internally negotiated”).

<sup>318</sup> In the United States, more than 85% of university students are estimated to have a profile on Facebook.com. ZITTRAIN, *supra* note 317, at 231.

<sup>319</sup> Web site privacy policies have been largely ineffective in preserving privacy as to information expressly or passively supplied by users. See, e.g., *id.* at 203. These policies usually comprise “little-read boilerplate answering questions about what information a Web site gathers about a user and what it does with the information. Frequently the answers are, respectively, ‘as much as it can’ and ‘whatever it wants.’” *Id.*

<sup>320</sup> A search on a video aggregation site such as YouTube or BlipTV for “angry teacher” generates hundreds of hits.

<sup>321</sup> Another popular genre on YouTube and BlipTV is “road rage” videos which capture bad behavior—and license plates. In California, some people who were frustrated by single drivers using the carpool lanes took pictures of the “offenders” and posted the photos on a Web site. John Borland, *Privacy Jam on California Highway*, CNET NEWS.COM, May 13, 2004, [http://news.com.com/Privacy+jam+on+California+highway/2100-1038\\_3-5212280.html](http://news.com.com/Privacy+jam+on+California+highway/2100-1038_3-5212280.html).

<sup>322</sup> See Lior Jacob Strahilevitz, *Reputation Nation: Law in the Era of Ubiquitous Personal Information*, 102 Nw. U. L. REV. 1667, 1670 (2008).

transactions.<sup>323</sup> The collection of vast amounts of commercial and personal information is compiled into “credit reports” that are used by landlords, utility companies, creditors, and employers to evaluate and assess the reputations of individuals. Thus, “[a] data entry thousands of miles away, created from a transaction that never involved a face, may be the single most significant piece of information to a potential creditor, employer, or government official.”<sup>324</sup>

Moreover, much personal information used to be publicly inaccessible because of practical impediments to its access. These impediments came in the form of having to trek down to the courthouse to get the information and the difficulty of finding information that was not indexed or otherwise searchable. Today, many of these information repositories are rushing to digitize their data and make them available online.<sup>325</sup>

In the past, the difficulty of identifying a specific individual in a photograph and the inability to search by name for someone made it almost impossible, from a practical standpoint, for others to find me in a sea of digital bits. But these practical impediments are becoming a thing of the past. Most photo and video sharing sites now include extensive metadata with the photos and videos that describes their contents, who the subjects are, and other relevant information such as date and location.<sup>326</sup> Moreover, digital cameras routinely time and date stamp each photo and many now include Global Positioning Systems data to mark the location where the picture or video was taken.

New search technology is taking this one step further. Facial recognition software is making it possible to search millions of photographs for someone, even when those photos have no associated metadata. In Massachusetts, officials are using “computerized biometric technology” to search

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<sup>323</sup> See DANIEL J. SOLOVE, *THE DIGITAL PERSON 1* (2004); Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U. L. REV. 1061, 1063–67 (2007) (describing the types of information collected).

<sup>324</sup> De Armond, *supra* note 323, at 1068; see also Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 126–28 (2000) (characterizing the aggregated data about consumer transactions as “gossip”). The collection and reporting of personal financial information is primarily governed by the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681-1681u (2006), which is beyond the subject of this article. For an excellent discussion of the FCRA’s shortcomings, see De Armond, *supra* note 323, at 1098–1131.

<sup>325</sup> See, e.g., Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1. As Adam Liptak reports, the

expungement [of criminal records] is becoming significantly harder to accomplish in the electronic age. Records once held only in paper form by law enforcement agencies, courts and corrections departments are now routinely digitized and sold in bulk to the private sector. Some commercial databases now contain more than 100 million criminal records. They are updated only fitfully, and expunged records now often turn up in criminal background checks ordered by employers and landlords.

*Id.*

<sup>326</sup> Flickr, a popular photo site, contains metadata fields for title, description, author, GPS location, and tags. See, e.g., <http://www.flickr.com/help/tags/#37>.

the state's database of nine million digital driver's license photographs.<sup>327</sup> Massachusetts officials, starting with a mug shot from the Web site of "America's Most Wanted," found a match to a man who had a Massachusetts driver's license under another name who was eventually arrested in New York City, where he was receiving welfare benefits under the alias on his driver's license.<sup>328</sup> These technologies are unlocking vast stores of information that were previously beyond the reach of any search engine. With Google's index of Web sites, facial recognition software, and extensive commercial databases, it is easy—and largely possible without cost—for anyone to search billions of pieces of personal data in seconds.<sup>329</sup>

The expansion of our reputational spheres is also blurring the line between what has traditionally been defined as defamatory speech and the publication of private facts. How should I respond to photographs or videos taken out of context that make me look drunk? Or what about a situation where the metadata attached to an unflattering photo incorrectly identifies me as the subject of the photo? The photos themselves could be perfectly accurate, but the implication that comes from them may not be.

Because defamation law does not permit recovery for the exposure of private but truthful information, or for false communications that are merely embarrassing, many of these activities fall outside the law's protections, although they clearly have an impact on reputation.<sup>330</sup>

## 2. *Accounting for Networked Information Flows*

As discussed in Part I, reputation is not just the "facts" about a person. It is not, for example, how many articles I have written or how little I give to charity. Nor is it the opinion you hold of me, no matter how well you know me. And it is not the sum total of everything anyone has said or written about me. Reputation begins to form only when all of this information is filtered through the experiences, beliefs, and biases of others. And it comes to fruition only in the complex and nonlinear way this information diffuses through society.<sup>331</sup>

The majority of debate concerning the law of defamation has been focused on the remarkably low success rate plaintiffs achieve in winning

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<sup>327</sup> Adam Liptak, *Driver's License Emerges as Crime-Fighting Tool, But Privacy Advocates Worry*, N.Y. TIMES, Feb. 17, 2007, at A1.

<sup>328</sup> *Id.* Use of this technology is not limited to law enforcement. Using similar technology, a Web site called MyHeritage.com provides genealogy services and states that it can automatically detect faces in uploaded photos, which it then can sort into family trees. See MyHeritage, <http://www.myheritage.com/FP/Company/face-recognition.php>.

<sup>329</sup> The next phase of search technology is to integrate all of these search methods into one integrated interface. Google is already making strides in this direction, having announced that its new "universal search" will find videos, images, maps, text, and other content. Miguel Helft, *Google's One-Stop Search to Yield Text and Images*, N.Y. TIMES, May 17, 2007, at C3.

<sup>330</sup> See *supra* note 143 and accompanying text.

<sup>331</sup> Of course, an individual's reputation is not static. It is constantly being constituted and reconstituted.

money judgments.<sup>332</sup> There has been far less discussion of whether plaintiffs have been able to correct the false perceptions created by the defamatory statements about which they sued. This may be due in part to the difficulty of determining success in what is essentially a subjective inquiry, but it points to a significant blind spot in the scholarship and commentary concerning the law of defamation.

Fascinating work is, however, being done by psychologists and information theorists who are examining how information is assimilated and beliefs are formed.<sup>333</sup> What this work has revealed is that belief formation is a complicated process and that even when the facts themselves are not disputed, interpretations of them can vary.<sup>334</sup> Indeed, there are countless examples of “facts” that are widely believed but nevertheless clearly erroneous.<sup>335</sup> Despite the wide availability of counter factual information, many falsehoods persist.<sup>336</sup>

The traditional method for dealing with reputational injuries is to invoke the state’s judicial machinery by filing a defamation lawsuit in an effort to vindicate the aggrieved individual’s legal rights. This is done primarily by seeking money damages because defamation law does not typically permit a party to seek injunctive relief.<sup>337</sup> Yet studies have shown that money is not what plaintiffs want most.<sup>338</sup> Instead, what they desire most is a correction or retraction.<sup>339</sup> Accordingly, even in the corporeal world, the traditional

<sup>332</sup> In a study of libel litigation during the period 1974–1984, researchers at the University of Iowa found that plaintiffs succeeded in imposing liability on media defendants in only 12.6% of the cases. See RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 116 tbl.6-6 (1987); see also David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 511 (2001) (reporting that media defendants won pretrial dismissal in nearly 77% of defamation cases studied for the period 1980-1996).

<sup>333</sup> See generally CASS R. SUNSTEIN, *INFOTOPIA* (2006); HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002).

<sup>334</sup> See Frederick Schauer, *Facts and the First Amendment*, 57 U.C.L.A. L. REV. (forthcoming 2010).

<sup>335</sup> See generally CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007).

<sup>336</sup> See Frederick Schauer, *Facts and the First Amendment*, 57 U.C.L.A. L. REV. (forthcoming 2010). Holocaust denial is one of the most studied examples of this phenomenon. See generally DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993).

<sup>337</sup> While it is generally believed that “equity will not enjoin a libel,” courts have on occasion upheld such remedies. See Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 158–59 (2007); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 675 (2008).

<sup>338</sup> See Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (reporting that only 20% of the surveyed plaintiffs sued to obtain money as compensation for the alleged libel).

<sup>339</sup> The study conducted by researchers at the University of Iowa found that seventy-one percent of the plaintiffs said they would have been satisfied with a correction or retraction. LIBEL LAW AND THE PRESS, *supra* note 332, at 24.

method of dealing with reputational harm is often inefficient and ineffective.<sup>340</sup>

For reputational injuries on the Internet, the traditional approach is likely to be even less effective. This is due to several reasons. First, almost everything on the Internet is disaggregated: reputation is disaggregated;<sup>341</sup> information is disaggregated; and liability is disaggregated.<sup>342</sup> While legal vindication may come in the end, the genie cannot be fully put back in the bottle. Injurious falsehoods will live indefinitely in the vast data repositories on the Internet, waiting to be pulled up and recycled by a search engine. To quote the sociologist Gary Marx, “one’s past is always present.”<sup>343</sup> Moreover, because our judicial system largely exists outside the network, its ability to correct the false perceptions created by defamatory statements is quite limited.

*a. Judicial Forums Are Not Part of the Network*

Throughout most of defamation law’s history, lawsuits took place in a legal culture that was very different from the one we know today.<sup>344</sup> Judicial forums were embedded in communities. “In most early American defamation trials, jurors knew the litigants and, very likely, something about relations between the parties.”<sup>345</sup> Just as we are finding today when we examine lawsuits directed at bloggers and other online publishers,<sup>346</sup> defamation lawsuits in colonial times often “accompanied, or closely followed, other types of disputes” between the parties.<sup>347</sup> Because judges had some context within which to understand these disputes, they were able to apply “flexible rules that in many ways resembled the practices of local and church tribunals of medieval England more than the complicated doctrines and procedures of modern defamation law.”<sup>348</sup>

Moreover, early American courts “placed little emphasis on determining winners and losers according to a monetary calculation.”<sup>349</sup> Instead,

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<sup>340</sup> See Anderson, *supra* note 2, at 542 (noting that “a plaintiff must incur substantial expense” to bring a lawsuit but “[v]ery few plaintiffs suffer enough provable pecuniary loss to justify litigating [without being able to recover presumed and punitive damages]”).

<sup>341</sup> See *supra* Part I.

<sup>342</sup> Section 230 of the Communications Decency Act (“Section 230”) grants operators of Web sites and other interactive computer services broad protection from defamation claims based on the speech of third parties. 47 U.S.C. § 230 (2000).

<sup>343</sup> GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 223 (1988).

<sup>344</sup> See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, VOL. 1, 1–3 (1977).

<sup>345</sup> ROSENBERG, *supra* note 49, at 16.

<sup>346</sup> The Citizen Media Law Project, which the author directs, maintains a publicly accessible database of lawsuits, cease & desist letters, subpoenas, and other legal threats directed at those who engage in online speech. See Citizen Media Law Project, Legal Threats Database, <http://www.citmedialaw.org/database>.

<sup>347</sup> ROSENBERG, *supra* note 49, at 16.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

their primary aim was to settle disputes over reputation as quickly as possible and to restore a balance in the community.<sup>350</sup> As the historian Norman Rosenberg notes:

Following the practice of local and church courts in England, colonial tribunals also required many defendants to acknowledge in open court or some other public forum that they had wrongly defamed the plaintiff. News of such retractions traveled quickly in small villages, and plaintiffs could hope to have their reputations effectively vindicated.<sup>351</sup>

The situation is markedly different today. Our current legal system offers ordinary persons little hope of settling disputes over reputation expeditiously.<sup>352</sup> Defamation lawsuits take months, if not years, to be resolved in far away courtrooms. Rarely is the court a part of plaintiff's community, either literally or figuratively. Courthouses are generally located in an imposing building "somewhere downtown." As a result, judges are no longer embedded in the relevant communities.<sup>353</sup> Nor, for that matter, are jurors. Of course, the same criticism can be directed at any judicially enforced legal doctrine, but defamation is not just applied by courts, it is defined by communities.<sup>354</sup>

In short, we have erected doctrinal, institutional, and procedural barriers to the effective resolution of disputes over reputation. It should come as no surprise that these barriers have made defamation law's remedies largely ineffective as well.

*b. Judicial Remedies Are Ineffective*

There is an old saying that "a lie can make it half way around the world before the truth has time to put its boots on."<sup>355</sup> This statement undoubtedly resonates with anyone who has spent time on the Internet. We simply cannot assume that a court's decision will reach the same audience that saw the defamatory falsehood in the first place or that it will have the hoped-for effect on what people believe.

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<sup>350</sup> See Post, *supra* note 7, at 739 ("In this country defamation law is ultimately local law and, as such, is enlisted in the aspiration of local communities to create a good and wholesome life for their members.").

<sup>351</sup> ROSENBERG, *supra* note 337, at 16.

<sup>352</sup> See Anderson, *supra* note 2, at 510.

<sup>353</sup> In fact, a recent advisory opinion by the Judicial Ethics Advisory Committee of the Florida Supreme Court admonishes judges not to add lawyers who may appear before the judge as "friends" on social networks like Facebook and MySpace. See Dan Macsai, *Objection! Florida Bans Judges From "Friending" Lawyers on All Social-Networking Sites*, FASTCOMPANY (Dec. 10, 2009), <http://www.fastcompany.com/blog/dan-macsai/popwise/objection-florida-bans-judges-friending-lawyers-any-social-networking-site>. This means that judges are even more disconnected from the network.

<sup>354</sup> See *supra* Part III.C.

<sup>355</sup> The origins of this quote are disputed, but it is generally believed to have been uttered by Mark Twain. See Wikipedia, Wikiquote, [http://en.wikiquote.org/wiki/Mark\\_Twain#Truth](http://en.wikiquote.org/wiki/Mark_Twain#Truth).

As an unnamed author of a note in the *Yale Law Journal* wrote in 1949, somewhat facetiously, “[l]et it be assumed that judicial opinions delivered in defamation litigation are widely read and are important operative factors in determining social behavior.”<sup>356</sup> But, of course, we know that judicial decisions are neither widely read nor important operative factors in determining social behavior. While the few decisions issued by the Supreme Court may fit this description, the vast majority of court decisions do not. Indeed, judges have long recognized that their decisions were largely ineffective in correcting defamatory falsehoods. As Justice Stewart remarked in his concurring opinion in *Rosenblatt v. Baer*, “[t]he destruction that defamatory falsehoods can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.”<sup>357</sup>

But the “hope for vindication” Justice Stewart refers to is largely illusory. As countless scholars have shown, the common law’s complex and contradictory doctrines do little to advance defamation law’s instrumental objectives. Plaintiffs rarely win cases and society fails to benefit from protracted litigation that has minimal, if any, impact on social norms. Take the informant cases discussed in Part III. A court’s refusal to recognize that a plaintiff’s reputation has been harmed because those who think less of an informant are not worthy of society’s respect results in a decision that fails to compensate the plaintiff for actual harm, and fails to “swell the ranks” of informants.<sup>358</sup> Similarly, “ignoring the reality of prejudice against homosexuals will not make homophobia go away but will leave the plaintiff who has been falsely labeled a homosexual without compensation for his very real injury.”<sup>359</sup>

Nor is it the case that plaintiffs are finding vindication through a court’s determination of truth. Because most defamation cases are focused on trying to overcome, and typically lost as a result of, the fault requirements mandated by the First Amendment, the truth or falsity of a statement often gets little attention.<sup>360</sup> But a finding on the question of truth is exactly what plaintiffs—and society—really want.

While there have been few empirical studies examining plaintiffs’ motivations in filing defamation lawsuits, in a study of approximately 900 libel

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<sup>356</sup> *Community Segment in Defamation Actions*, *supra* note 125, at 1391.

<sup>357</sup> 383 U.S. 75, 93 (1966) (Stewart, J., concurring).

<sup>358</sup> See Lidsky, *supra* note 25 at 39; *Community Segment in Defamation Actions*, *supra* note 125, at 1391–92.

<sup>359</sup> Lidsky, *supra* note 25, at 39.

<sup>360</sup> See Anderson, *supra* note 2, at 521 (noting that “[t]ruth is little used as a defense, though it would enable a decisive confrontation, because it may be very expensive to establish”) (quoting MARC A. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 137 (3d ed. 1987)); David A. Barrett, *Libel Reform and Declaratory Judgments: A Better Alternative*, 74 CAL. L. REV. 847, 861 (1986) (observing that “truth has become almost irrelevant in libel actions”).

cases between 1974 and 1984, Randall Bezanson and his colleagues at the Iowa Libel Research Project reported that of the 114 libel plaintiffs they interviewed, fewer than twenty-five percent stated that they brought suit primarily to win money damages.<sup>361</sup> Most of the plaintiffs had lived in their communities for more than thirty years and brought suit primarily to “vindicate” their reputations.<sup>362</sup> The legal outcome, including financial reparation, was secondary. As the researchers put it, “underlying [the decision to sue] in virtually every instance was a perception that falsity was at the bottom of their grievance, and their action was directed at correcting that falsity.”<sup>363</sup>

### B. Network Solutions

It is clear that the global communication networks that are the hallmarks of our networked society have brought new challenges. At the same time, however, they also provide novel solutions to prevent and ameliorate reputational harms. While we have experienced revolutions in information technology in the past—such as the printing press, telegraph, radio, and television—the Internet revolution is different in important ways.<sup>364</sup> Those earlier technologies were what could be described as one-to-many forms of communication.<sup>365</sup> With the Internet, we now have a many-to-many form of communication in which individuals are both consumer-receivers and creator-contributors of information.<sup>366</sup> This new medium offers unprecedented ways for individuals to interact, collaborate, and share information across diffuse, dynamic communities.

The question is how to adapt to these changes and develop a set of procedures—legal, social, and technological—that protect reputation while ensuring an environment for speech that is conducive to public engagement and vigorous debate.<sup>367</sup> As we consider various approaches, it is obvious

<sup>361</sup> BEZANSON ET AL., *supra* note 332, at 79.

<sup>362</sup> *Id.* at 79–82.

<sup>363</sup> *Id.* at 94; see also Walter Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis*, 15 VAND. L. REV. 1173, 1177 (1962) (observing that “a plaintiff does not sue simply because his reputation has been hurt”).

<sup>364</sup> See BENKLER, *supra* note 3, at 1 (“The change brought about by the networked information environment is deep. It is structural. It goes to the very foundations of how liberal markets and liberal democracies have coevolved for almost two centuries.”).

<sup>365</sup> See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 13 (2006) (quoting science fiction writer Bruce Sterling who wrote that “[t]he centralized, dinosaurian one-to-many media that roared and trampled through the twentieth century are poorly adapted to the postmodern technological environment”).

<sup>366</sup> See David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL. F. 139, 162 (observing that “everyone in cyberspace is connected to everyone else through the magic of interconnectivity protocols and can communicate instantaneously on a one-to-one, one-to-many, many-to-one, or many-to-many basis with a constantly shifting (but enormous) population of other individuals”).

<sup>367</sup> See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 428 (2009) (observing that “in the twenty-first century, the values of freedom of expres-

that we should look for lessons in how communities, both past and present, have dealt with these kinds of issues. As Daniel Solove reminds us, “[g]ossip, rumor, and shaming have been with us since the dawn of civilization.”<sup>368</sup> Indeed, reputation is essential to all human social systems, and communities have always played a central role in ensuring the reliability of reputational information.

The following sections explore the roles that law and technology should command in crafting solutions to the challenges that come from managing reputation in our networked world.

### 1. *Alternative Forms and Forums for Redress*

While most lawyers acknowledge that defamation law is ineffective at protecting reputation,<sup>369</sup> there is little agreement about what should be done. Some scholars, for example, have proposed that we expand the legal remedies available to those who have suffered reputational and other harms as the result of false or degrading speech.<sup>370</sup> Others have proposed more modest reforms that seek to make libel litigation less contentious and costly.<sup>371</sup> For example, some of the more developed proposals suggest converting traditional defamation claims into actions for declaratory judgment.<sup>372</sup> Marc Franklin, a leading proponent of this approach, would permit a plaintiff to obtain a libel judgment without the burden of proving fault.<sup>373</sup> In return for this expansion in the scope of liability, recovery of damages would be precluded and the plaintiff would have to prove all elements of the cause of action by clear and convincing evidence, including falsity.<sup>374</sup>

While many of these reforms have laudable attributes, it is important to note that they would not address the core problems identified in previous sections. Society could not function if every lie or harmful word were capable of supporting a lawsuit, nor would the First Amendment countenance such a regime. Judges will inevitably need to make normative judgments

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sion will become subsumed under an even larger set of concerns that I call knowledge and information policy”).

<sup>368</sup> SOLOVE, *supra* note 306, at 105.

<sup>369</sup> See Anderson, *supra* note 2, at 487 n.3 (collecting scholarly and popular criticism of defamation law).

<sup>370</sup> See, e.g., Citron, *supra* note 5, at 89; Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMM.LAW CONSPICUOUS 231, 264–65 (2008).

<sup>371</sup> See REFORMING LIBEL LAW, *supra* note 2 (presenting reform proposals from a number of scholars and organizations).

<sup>372</sup> See, e.g., David A. Barrett, *Libel Reform and Declaratory Judgments: A Better Alternative*, 74 CAL. L. REV. 847 (1986); Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988).

<sup>373</sup> Franklin, *supra* note 298, at 810.

<sup>374</sup> *Id.* at 812–13. There are a number of concerns associated with such a dramatic change to defamation law, including some that have been raised by its early proponents. See Rodney A. Smolla, *The Annenberg Libel Reform Proposal*, in REFORMING LIBEL LAW 273–74 (Soloski & Bezanson eds., 1992).

about which harms to recognize and which social norms to enforce. In addition, these reforms do not address the reality that judicial forums are not part of the networks people actually use to communicate. Moreover, even the most well intentioned reforms face significant political and practical obstacles, given the lack of organized support for reform and the fact that defamation law would need to be reformed on a state-by-state basis.<sup>375</sup>

Accordingly, this article does not attempt to lay out another reform proposal. Instead, it looks for social and technological solutions that might ameliorate some of defamation law's deficiencies. It does so by asking: if we were to design a system for the protection of reputation, what essential characteristics should it have?

We have learned from studies in the biological, social, and computer sciences that the system should embrace three design imperatives. First, the procedures for resolving disputes over reputation should be engaged quickly.<sup>376</sup> Second, the procedures should be embedded in the networks people actually use. Third, the focus should be on ensuring the reliability of reputational information rather than on imposing liability. This section touches on these characteristics only briefly, as a full treatment would warrant several articles.

*The procedures for resolving disputes over reputation should be engaged quickly.* One of the most frequent complaints directed at defamation law is that it takes too long to have any benefit.<sup>377</sup> Yet we know that the longer a defamatory falsehood goes unchallenged, the more likely it is to cause reputational harm. Accordingly, as Thomas Starkie observed nearly two centuries ago in his *Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours*, the opportunity to “openly rebut[ ] the calumny” may be the most effective way to deal with reputational harm.<sup>378</sup>

On the Internet, those who believe they have been defamed can quickly add their side of the story to the comments section or, perhaps, be accorded the ability to have a link to their own Web site included with the original statement or added to search results.<sup>379</sup> In fact, responding to an injurious

<sup>375</sup> See Anderson, *supra* note 2, at 490–91 (noting that past reform proposals “so far [ ] have been stillborn because of opposition by the media bar and the absence of any organized support”).

<sup>376</sup> This is not the same thing as saying that disputes must be *resolved* quickly. In the context of dispute resolution discussed in this section, truth is not an always an “end point.” Rather, it is more like an asymptotic line we approach over time with contributions from many sources. See Morris B. Hoffman, *Law Without Values: The Life, Work and Legacy of Justice Holmes*, 54 STAN. L. REV. 597, 622–23 (2001) (noting that the “scientific method of the rationalists of the Enlightenment” involved seeing “[t]he path to truth [as] often winding and always asymptotic”).

<sup>377</sup> See Anderson, *supra* note 2, at 510.

<sup>378</sup> THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS 2 (1826).

<sup>379</sup> See Frank A. Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61 (2008) (suggesting a libel victim should get a chance to reply on a search page or at least to indicate with an asterisk that the information is disputed); but see James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 49, 49 (2007) (argu-

statement might actually be more effective on the Internet than it is in the corporeal world. Every day in every major newspaper there are retractions and corrections that address stories published at an earlier date. These corrections almost always appear much less prominently than the original story, usually in a box on page A2, and many readers of the original story do not even see the correction, let alone future readers.

*The procedures should be embedded in the networks people actually use.* As noted in Part I, self-organizing social systems naturally develop feedback mechanisms that act to ensure the reliability of reputational information.<sup>380</sup> For example, in close-knit communities, members are likely to know first-hand whether reputational information is false or biased. If a member of the community is known for passing on inaccurate information, her credibility—and reputation—will suffer and other members of the community will temper the future information from her accordingly.<sup>381</sup>

Some of the most exciting work in this area is being done by MIT Professor Judith Donath. In her forthcoming book, *Signals, Truth and Design*, she notes that in the online world where interactions are mediated by technology, design can shape these feedback processes:

Mediated communication is significantly different from face to face communication because the whole environment is constructed. Here, deliberate design decisions affect every aspect of communication: whether you communicate by typing or speaking, whether your comments are ephemeral or archived, whether you are communicating with one known person or a horde of faceless strangers. These design decisions deeply affect the dynamics of signaling; they determine everything from what will be reliable to how inventive the signalers can be.<sup>382</sup>

As discussed in the next section, we are starting to see various types of feedback mechanisms in use on the Internet. In fact, some of these mechanisms operate within individuals. We intuitively know that not all state-

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ing that this approach “pressures the wrong intermediary”). Such a requirement would have to be narrowly drawn so as to avoid First Amendment problems. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974) (declaring a statutory right of reply in newspapers unconstitutional).

<sup>380</sup> See *supra* Part I.A. A branch of biology known as signaling theory studies how organisms communicate honestly despite the temptation to deceive one another when interests conflict. See generally John Maynard Smith & D.G.C. Harper, *Animal Signals: Models and Terminology*, 177 J. THEOR. BIOL. 305 (1995). Much of this work is relevant to the question of feedback mechanisms. Because human language usually involves “cheap” signal costs, thus increasing the potential for dishonest communication, humans have developed “social enforcement” mechanisms to help ensure the reliability of the information being conveyed. Michael Lachmann et al., *Cost and Conflict in Animal Signals and Human Language*, 98 PROCEEDINGS OF THE NAT’L ACAD. SCI. 13189, 13194 (2001).

<sup>381</sup> See BAILEY, *supra* note 28, at 285–88.

<sup>382</sup> JUDITH DONATH, *SIGNALS, TRUTH AND DESIGN* 24 (forthcoming 2010); see also Chrysanthos Dellarocas et al., *Designing Reputation (Feedback) Mechanisms*, in HANDBOOK OF PROCUREMENT (Nicola Dimitri et al. eds., 2006).

ments or speakers should be given the same amount of credibility.<sup>383</sup> As a result, we are more likely to place greater weight on a statement made by someone we view highly and lesser weight on statements from those we question or do not know. This can be analogized to the writing on a bathroom wall. If I read something negative about myself on a bathroom wall, I do not seek to discover who wrote the offensive statement so I can sue them to vindicate my reputation.<sup>384</sup> I simply assume that anyone who reads anonymous graffiti on a bathroom wall is going to discount that speech. A similar form of psychological adaptation for assessing the veracity of speech is undoubtedly happening online.<sup>385</sup>

Indeed, the nature of the way we access information online is having a profound effect on how people make judgments about what to believe. In an information environment where there were only a few authoritative sources, errors by those sources mattered a lot. Now we have search engines and other tools to find information that bring thousands of potential sources to our fingertips. As law professor and blogger Glenn Reynolds notes: “When it was hard to research things, people’s impressions, half-remembered from those sources, meant a lot. People used to fight duels over such things. It’s not that way now.”<sup>386</sup>

*The focus should be on ensuring the reliability of reputational information rather than on imposing liability.*<sup>387</sup> This means developing procedures for correcting false information or placing it in a more accurate context.<sup>388</sup> One such approach is to enlist, through legal and social incentives, the help of private intermediaries who are often in a position to recognize reputa-

<sup>383</sup> See Skolnick, *supra* note 291, at 681 (stating that “[s]ociety, under a marketplace theory, may best be served if the citizens do not *rely* on the truth of defamatory statements . . . but rather consider these statements skeptically”); see also *id.* at 687 (“The *New York Times* doctrine assumes that consumers of information are supposed to *question*, not necessarily to *believe*, what they read and hear.”).

<sup>384</sup> Of course some people do sue based on such writings. See *Hellar v. Bianco*, 244 P.2d 757, 758 (Cal. Ct. App. 1952) (defamation lawsuit against tavern owner over statement on bathroom wall in a local tavern stating that plaintiff “was an unchaste woman who indulged in illicit amatory ventures.”).

<sup>385</sup> Cf. Nicole H. Hess & Edward H. Hagen, *Psychological Adaptations for Assessing Gossip Veracity*, 17 HUMAN NATURE 337, 352 (2006) (concluding that experiments showing psychological adaptations for assessing gossip “play an important role in the evolution of reputation-based cooperation and could be used more broadly to evaluate information received from others”).

<sup>386</sup> Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1165 (2006).

<sup>387</sup> As other scholars have concluded, the Supreme Court’s decisions in this area do not preclude these alternative approaches. See, e.g., David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1054 (2006) (noting that “the Court has never said the actual malice rule is the only constitutionally acceptable accommodation of free speech and reputational interests”).

<sup>388</sup> This form of “contextualization” should be contrasted with the idea of “contextual integrity” proposed by Helen Nissenbaum in the privacy context, which ties data privacy protection to norms of specific contexts, demanding that information gathering and dissemination be appropriate to that context. See generally Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004).

tional harms and instantiate feedback mechanisms that are essential to the proper functioning of reputation systems. While this may mean that some individuals who have suffered actual harm will not be able to attain redress,<sup>389</sup> it will allow for greater innovation in approaches and, perhaps, more effective solutions.

## 2. *Looking to Communities for Solutions*

Some of the most promising approaches are being adopted by online “communities” that serve as “curators of public discourse.”<sup>390</sup> Even without the specter of legal liability hanging over them, a number of online “communities” are experimenting with various forms of dispute resolution procedures and reputation management systems. While much work remains to be done, we can learn a great deal from these efforts.

The term “community” is used in this section in its broadest sense as an interacting population of various kinds of individuals or “a group linked by a common policy.”<sup>391</sup> As discussed in Part III, communities are no longer constrained by physical space or direct interaction. Communities may be diverse, decentralized, and populated by individuals who act independently of one another.<sup>392</sup> While they are bounded in some way, perhaps by a single shared social norm, that boundary can remain fluid. Under this broad definition, examples of communities would include neighborhood groups, business networks, and buyers and sellers on eBay, as well as users of Facebook, YouTube, and Google Search. As this list suggests, connection, not affection, is the defining characteristic of a community.

Once we examine the many online communities fitting this definition, we find that reputation systems already pervade the Internet and range from the relatively simple Web site ranking system used by Technorati to determine the “authority” of weblogs<sup>393</sup> to the news ranking system in use at

<sup>389</sup> In fact, this is the state of law as it exists today. See *supra* Part III.

<sup>390</sup> Cornell professor of communication Tarleton Gillespie refers to online intermediaries such as YouTube and Facebook as “platforms” that serve as “curators of public discourse.” See generally Tarleton Gillespie, *The Politics of Platforms*, in *NEW MEDIA & SOCIETY* (forthcoming 2010) available at <http://ecommons.library.cornell.edu/handle/1813/12774>.

<sup>391</sup> MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>392</sup> In many ways this definition of “community” is similar to Michael Madison’s definition of “informal groups,” which he argues should be given broad discretion to organize and manage their own affairs:

A group is bounded in some way, culturally, socially, or materially—it may be bounded by geography, territory, or other place; by discipline or practice; by membership, identity or interest, among other things—but that boundedness is neither fixed nor firm. Informal groups, as I conceive them, are not limited to small groups or to groups that are sanctioned or recognized by formal but non-legal rules.

Michael J. Madison, *Social Software, Groups, and Governance*, 2006 MICH. ST. L. REV. 153, 178.

<sup>393</sup> See Technorati Authority FAQ, <http://technorati.com/what-is-technorati-authority/> (last visited May 23, 2010).

Slashdot.com, where users select the site's content by voting on stories.<sup>394</sup> At its heart, Google Search is also a reputation system. While Google's ranking algorithms are a closely held secret, its search engine relies heavily on a Web site's reputation within a community of sites to determine its place in the search results.<sup>395</sup> Reputation comes into play in two ways. First, a site's search ranking is determined based on how many other sites find it important enough to link to it. Second, Google analyzes the reputation of each site that does the linking; sites that are themselves "important" weigh more heavily and help to make other sites "important."<sup>396</sup> In other words, a Web site's reputation is influenced by the reputations of all the sites that link to it (i.e., its community).

Reputation systems are being used on the Internet not just to recommend news stories or search results, however, but to provide assessments of the behavior of individuals. One of the most developed and studied reputation systems is used by the online auction company eBay.<sup>397</sup> Users on eBay rate other users with whom they have transacted by giving a positive, negative, or neutral evaluation along with a short comment.<sup>398</sup> Visitors to eBay can use these ratings to assess a buyer or seller's reputation before entering into a transaction. Although eBay's reputation system is relatively crude in that people can simply start new accounts if they receive negative ratings,<sup>399</sup> empirical studies have shown that users with established reputations fare better than new users, with buyers willing to pay, on average, 7.6% more for items sold by established sellers with good reputations.<sup>400</sup>

There are many compelling reasons to look to communities to manage reputational information. Because reputation is contextual and community-created, it makes sense to deploy communities' assistance in resolving disputes. Communities already have some "jurisdiction" over reputation and identity questions, at least as a matter of norm enforcement. Indeed, a com-

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<sup>394</sup> See Cliff Lampe & Paul Resnick, *Slash(dot) and Burn: Distributed Moderation in a Large Online Conversation Space*, Paper presented at CHI 2004, Vienna, Austria, April 24-29, 2004, available at <http://presnick.people.si.umich.edu/papers/chi04/LampeResnick.pdf>.

<sup>395</sup> See, e.g., Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, available at <http://infolab.stanford.edu/~backrub/google.html> (last visited February 24, 2010).

<sup>396</sup> See Google, Technology Overview, <http://www.google.com/technology/> (last visited Apr. 14, 2010).

<sup>397</sup> Considerable academic attention has been devoted to eBay's reputation system. See, e.g., Patrick Bajari & Ali Hortaçsu, *Economic Insights from Internet Auctions*, 42 J. ECON. LITERATURE 457 (2004); Chrysanthos Dellarocas, *The Digitization of Word-of-Mouth: Promise and Challenges of Online Reputation Mechanisms*, 49 MGMT. SCI. (SPECIAL ISSUE) 1407 (2003); Paul Resnick et al., *The Value of Reputation on eBay: A Controlled Experiment*, 9 EXPERIMENTAL ECON. 79, 82 (2006).

<sup>398</sup> Resnick, *supra* note 398, at 82.

<sup>399</sup> The ratings are also subject to abuse. For example, some sellers on eBay have created alter-egos who purchase 1-cent eBooks and then post positive feedback on the transaction. "One such 'feedback farm' earned a seller 1,000 positive reviews over four days." ZITTRAIN, *supra* note 317, at 218.

<sup>400</sup> Resnick, *supra* note 398, at 100.

munity's interest in enforcing its norms and ensuring the reliability of reputational information will likely result in its taking matters into its own hands anyway. "[A] group's assertion of some control over what happens to identities and reputations are very likely to occur whether or not legal rules exist supporting this assertion."<sup>401</sup>

Indeed, communities may form just to deal with these types of disputes. Some of the more interesting examples include the state "news councils," which are quasi-legal forums where private individuals, corporations, public figures, and public officials can bring their complaints about allegedly defamatory news coverage.<sup>402</sup> Although the specific procedures vary, typically the complainant waives his right to bring a defamation lawsuit in exchange for the opportunity to have the dispute resolved by the news council, which is composed of journalists and members of the general public.<sup>403</sup> In the case of Minnesota's News Council, which has been in continuous operation for more than thirty-five years, the members encourage the parties to resolve the dispute themselves; if that is not successful, the council schedules a hearing in which it assesses "whether the publication was unfair, rather than a determination of whether it meets the legal definition of defamatory."<sup>404</sup>

A less formal, but more ambitious, model for this form of dispute resolution on the Internet is currently being tested by Intel and the University of California at Berkeley. Dispute Finder is a cross-platform tool that notifies users when something they read on the web is disputed by a source they trust.<sup>405</sup> Utilizing the "wisdom of the crowd,"<sup>406</sup> the open-source browser plug-in allows users to designate sources they trust and flag statements they think are incorrect or disputed. The software then aggregates this information to provide a visual overlay that informs users when they are viewing something that is disputed and directs them to information on both sides of the issue.<sup>407</sup>

Online communities have also given us tremendous new laboratories within which to study reputation and human behavior. Persistent virtual worlds, for example, are especially useful for studying reputation because

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<sup>401</sup> Susan Crawford, *Who's In Charge of Who I Am?: Identity and Law Online*, 1 N.Y.L. SCH. L. REV. 211, 219 (2004).

<sup>402</sup> Shannon M. Heim, *The Role of Extra-Judicial Bodies in Vindicating Reputational Harm*, 15 COMM.LAW CONSP. 401, 422 (2007). "Currently, Minnesota, Washington, and Hawaii have news councils." *Id.* at 421. The Washington News Council's mission is "to help maintain public trust and confidence in the news media by promoting fairness, accuracy and balance." Washington News Council, <http://www.wanewscouncil.org/>.

<sup>403</sup> Heim, *supra* note 403, at 422.

<sup>404</sup> *Id.* at 424 ("Most cases that come before the news council do not meet the legal burden established by *Sullivan* and its progeny, but that does not mean that the complaints lack merit." Most complaints submitted to the MNC decry inaccuracy or leaving the wrong impression.).

<sup>405</sup> See Intel Labs, Dispute Finder, <http://disputefinder.cs.berkeley.edu/> (last visited February 25, 2010).

<sup>406</sup> See generally JAMES SUROWIECKI, *THE WISDOM OF THE CROWDS* (2005).

<sup>407</sup> See Intel Labs, Dispute Finder, Frequently Asked Questions, <http://disputefinder.cs.berkeley.edu/thinklink/docs/faq.html> (last visited February 25, 2010).

“they function as ongoing social systems replete with their own forms of governance and moral economies of practice.”<sup>408</sup> While there are similarities between virtual worlds, each world embodies Lawrence Lessig’s truism that “code is law.”<sup>409</sup> The structure of social relations is established and defined by each world’s programming code and the associated end user license agreements and terms of service. As a result, virtual worlds provide valuable environments in which to study social interactions and test legal rules.<sup>410</sup>

As reputation systems improve and become more pervasive, we are likely to end up with a bifurcated medium for speech online. One “space” within this medium will be characterized by relatively persistent identities, both real and pseudonymous, in which reputation systems provide feedback mechanisms for resolving and deterring disputes over reputation.<sup>411</sup> A second space will be defined by the failure of these feedback systems, which will not function because of high concentrations of anonymous speech or because users choose to operate outside of the feedback systems. These two spaces will not be physically or functionally separate; they could, for example, exist side-by-side in the same online forum. Rather, they will be discursively distinct. As a result, we will understand them differently. Speech in the first environment will be viewed as more relevant, credible, and useful. Speech in the second environment, like graffiti on a bathroom wall, will be discounted and largely ignored.<sup>412</sup>

We can expect, at least with regard to many of the private intermediaries that serve as platforms for public discourse, that they will take on a greater role in managing reputational information as they strive to make their platforms and services more relevant and reliable. In a recent article in *Nature*, Peter Norvig, director of research at Google, noted that one of the

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<sup>408</sup> Herman et al., *supra* note 77, at 191.

<sup>409</sup> LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 3 (2000).

<sup>410</sup> See generally Caroline Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules*, 49 N.Y.L. SCH. L. REV. 103 (2004).

<sup>411</sup> Lior Strahilevitz calls these changes the “reputation revolution” and suggests that “[o]ur cities and suburbs are increasingly going to resemble the small towns of lore, for better and worse.” Strahilevitz, *supra* note 322, at 1668, 1671.

<sup>412</sup> We are beginning to see this happen already. In mid-2009, Gawker Media, the operator of a number of popular websites such as Gawker, Gizmodo, and Deadspin, implemented a new, tiered commenting system in which comments from highly rated commenters are given preferential exposure. See Joshua Benton, *Tough Love: Gawker Finds Making it Harder for Comments to be Seen Leads to More (and Better) Comments*, NIEMAN JOURNALISM LAB (Apr. 13, 2010), <http://www.niemanlab.org/2010/04/tough-love-gawker-finds-making-it-harder-for-comments-to-be-seen-leads-to-more-and-better-comments/>. While this change resulted in an immediate decline in comment volume at Gawker’s sites, comments have since increased dramatically in number, with “average comment quality [now] higher than before.” *Id.* The Washington Post, among other website operators, is planning to implement a similar tiered system based on the credibility of contributors. See Richard Pérez-Peña, *News Sites Rethink Anonymous Online Comments*, N.Y. TIMES (Apr. 12, 2010), at B1.

challenges facing search engines “is to implement a measure of quality that is not based solely on popularity.”<sup>413</sup>

Search engines must determine both relevance (is the item pertinent to the user’s query?) and quality (is the item inherently accurate, useful and understandable, independent of the query?). Current relevance measures do reasonably well. Measures of quality require better models of the concepts and relations expressed in documents and how they relate to the reality of the world, as well as models of the trustworthiness of authors. Thus, a site that claims that the moon landings were a hoax and seems to have a coherent argument structure will be judged to be of a lower quality than a legitimate astronomy site, because the premises of the hoax argument are at odds with reality.<sup>414</sup>

Returning to the Livingston case that opened this article, we see this desire to improve relevance and reliability playing out in the Wikipedia community. Over the years, the Wikipedia community has developed a set of policies for dealing with disputes over information on the site.<sup>415</sup> These policies lay out a multi-step process involving discussion on a user’s talk page, informal mediation, and arbitration.<sup>416</sup> If the dispute resolution procedures fail and action is taken against a user, the policies incorporate fundamental notions of fairness: notice and an opportunity to be heard. The administrator who issued the punishment must state the reason on the user’s talk page and in the administrators’ block log. The user is then granted a right of appeal.<sup>417</sup> In the end, Wikipedia’s procedures are generally perceived to be just because its rules are created and enforced by the community itself. Its success is largely due to the core principles embodied in the community: openness, transparency, dispersed authority, trust, and kindness.<sup>418</sup>

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<sup>413</sup> 2020 *Visions*, 463 NATURE 26, 26 (2010), available at <http://www.nature.com/nature/journal/v463/n7277/full/463026a.html>.

<sup>414</sup> *Id.* Mark Zuckerberg, CEO of Facebook, recently suggested the same interests are central to Facebook’s future as well. See Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN UK (Jan. 11, 2010), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy> (“Zuckerberg said that it was important for companies like his to reflect the changing social norms in order to remain relevant and competitive.”).

<sup>415</sup> See David A. Hoffman & Salil K. Mehra, *Wikitruth Through Wikiorde*, 59 EMORY L.J. 151, 163-70 (describing the history of Wikipedia’s dispute resolution procedures).

<sup>416</sup> *Id.* at 170-75. See also Wikipedia, Wikipedia: Dispute Resolution, [http://en.wikipedia.org/wiki/Wikipedia:Dispute\\_resolution](http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution) (last visited February 25, 2010).

<sup>417</sup> The first level of appeal is to the administrators as a group. A second level of appeal can be made to the Wikipedia Arbitration Committee which will review the user’s editing history and prior conduct to determine whether a block or ban is appropriate. See Wikipedia, Wikipedia: Appealing a Block, [http://en.wikipedia.org/wiki/Wikipedia:Appealing\\_a\\_block](http://en.wikipedia.org/wiki/Wikipedia:Appealing_a_block) (last visited Apr. 14, 2010).

<sup>418</sup> See e.g., Wikipedia, User: Jimbo Wales/Statement of Principles, [http://en.wikipedia.org/wiki/User:Jimbo\\_Wales/Statement\\_of\\_principles](http://en.wikipedia.org/wiki/User:Jimbo_Wales/Statement_of_principles) (last visited Feb. 25, 2010); Wikipedia, Wikipedia: Assume Good Faith, <http://en.wikipedia.org/wiki/WP:FAITH> (last visited Feb. 25, 2010). Or, as one essay on Wikipedia’s policy succinctly states: “Don’t be a dick.” Wikimedia, Meta Wiki, Don’t be a dick, [http://meta.wikimedia.org/wiki/Don%27t\\_be\\_a\\_dick](http://meta.wikimedia.org/wiki/Don%27t_be_a_dick) (last visited Apr. 14, 2010).

With regard to the information on Mr. Livingston's profile that falsely stated that he was in a gay relationship with another man, the Wikipedia community took action long before the lawsuit was filed.<sup>419</sup> In a detailed expose, *The Wikipedia Review* traced the trail of edits to Mr. Livingston's profile and reported that a Wikipedia user named Blahblax, who described himself as an "Irish guy, [who] just created this [account] after noticing stupid things and wanting to correct them in a non-anonymous way," was instrumental in removing the false information.<sup>420</sup> Over many months, the Livingston entry was the subject of a fierce "revert war" between these Wikipedia users. Finally, on December 5, 2009, the false information was permanently removed when another user with administrator privileges protected the entry from further changes, noting that she had done so because of "[e]xcessive violations of [Wikipedia's] biographies of living persons policy."<sup>421</sup>

### CONCLUSION

Nearly a quarter century ago, Professor Robert Post observed that defamation law was being "strained by the pull of divergent underlying assumptions about the nature of social reality."<sup>422</sup> As our society has become more networked, it is clear that these strains have only increased. Perhaps we are asking defamation law to do too much: protect individual honor, dignity, and property; define community boundaries; enforce existing norms; validate new norms; and determine which communities are right-thinking and respectable.<sup>423</sup>

Although defamation law has an important role to play in shaping social norms,<sup>424</sup> we must be mindful that there are limits to what the law can realistically accomplish, especially with regard to its ability to identify (very challenging) and enforce (practically impossible) social norms that are in flux. Because we live in a pluralistic society that is undergoing dramatic

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<sup>419</sup> Wikipedia has not been sued in the Livingston case. Because of section 230 of the Communications Decency Act, it is highly unlikely that Wikipedia or its administrators would face liability for the content on Mr. Livingston's profile. See generally Ardia, *supra* note 50.

<sup>420</sup> It's the Casting Director Lee Dennison Story! (Dec. 11, 2009), <http://wikipediareview.com/blog/20091211/its-the-casting-director-lee-dennison-story/>.

<sup>421</sup> *Id.* Wikipedia's biographies of living persons policy states, inter alia: "Editors must take particular care adding information about living persons to *any* Wikipedia page. Such material requires a high degree of sensitivity, and must adhere strictly to all applicable laws in the United States and to all of our content policies . . ." Wikipedia, Wikipedia: Biographies of Living Persons, <http://en.wikipedia.org/wiki/Wikipedia:BLP> (last visited Apr. 14, 2010).

<sup>422</sup> Post, *supra* note 7, at 721.

<sup>423</sup> And all this is supposed to be done through defamation law's threshold inquiry: whether a statement is capable of a defamatory meaning. See *supra* Parts III.B & III.C. This list does not even begin to address the free speech interests implicated by the fault element of a defamation claim. See, e.g., Smolla, *supra* note 131, at 22–36.

<sup>424</sup> See generally NORMS AND THE LAW (John N. Drobak ed., 2006) (examining the relationship between norms and law from the perspective of law, economics, political science, cognitive science, and philosophy).

change, no single approach is, or should be, appropriate for all of the social relationships defamation law brings within its ambit. The challenge is to devise a doctrine that accounts for how individuals and society currently use reputation while also being capable of further adaptation as our social systems evolve in the future.

There are no simple answers. Exploring in detail the ways this might be accomplished is beyond the scope of this article, for the changes implicate the broader realm of communication and technology policy. Moreover, given that comprehensive reform of defamation law is unlikely to succeed at the present time — or be successful in achieving the law’s myriad objectives — this article suggests that the best approach is to focus on the role that communities can play in dealing with reputational issues.

There are, of course, reasons to be skeptical that communities will be able to deal with disputes over reputation. As others have noted, successful community governance may not be replicable on the Internet, where communities are diffuse, heterogeneous, and often anonymous.<sup>425</sup> “But sociological work suggests that this pessimism about online ordering might be premature.”<sup>426</sup> Indeed, the use of reputation and other forms of social capital in online communities is now widespread. And as Sam Bowles and Herbert Gintis, two of the leading thinkers on cooperative human behavior have noted:

Far from being an anachronism, community governance appears likely to assume more rather than less importance in the future. . . . In an economy increasingly based on qualities rather than quantities, the superior governance capabilities of communities are likely to be manifested in increasing reliance on the kinds of multilateral monitoring and risk-sharing exemplified above.<sup>427</sup>

In fact, online communities may be able to solve problems that the law could never reach. “An effective community monitors the behavior of its members, rendering them accountable for their actions.”<sup>428</sup> It does this by relying on dispersed information that is often unavailable to government or other organizations.<sup>429</sup> “In contrast with states and markets, communities more effectively foster and utilise the incentives that people have traditionally deployed to regulate their common activity: trust, solidarity, reciprocity, [and] reputation . . . .”<sup>430</sup>

We have to keep in mind that the choice is not between a legal system that ensures that no harmful or harassing speech goes unpunished or uncom-

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<sup>425</sup> See, e.g., Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1309-10 (1998).

<sup>426</sup> Hoffman & Mehra, *supra* note 414, at 192.

<sup>427</sup> Bowles & Gintis, *supra* note 65, at F433.

<sup>428</sup> *Id.* at F424.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

pensated and an imperfect system of self-help non-regulation. As discussed in Part III, much harmful speech is beyond the reach of defamation law because the harm it inflicts is not a type of harm the law will protect, the social norms it violates are not worthy of enforcement, or the remedies the law provides are not effective in addressing the harm. Some of these problems may be addressable through doctrinal reforms, but no solution will completely eradicate defamatory speech.<sup>431</sup> Instead, we must recognize that law, alone, cannot solve the problems we face.

Accordingly, the most effective solutions will likely involve a combination of technology, policy, and law. The final section of this article lays out a framework for evaluating the role that technology should play. On this point, we have reasons to be optimistic that technology can instantiate some of the most important aspects of community governance. New social technologies are allowing informal communities to rapidly form and take on many of the functions traditional communities once played in managing disputes over reputation.<sup>432</sup> Wikipedia is the best example, but it is not the only one. Reputation systems are proliferating and are already enabling further experimentation, providing “a base of theory and practice with which to design the next generation of [reputation] platforms.”<sup>433</sup>

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<sup>431</sup> Nor would such a solution be permissible under the First Amendment. *See supra* Part III.A.

<sup>432</sup> *See* Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 *FORDHAM L. REV.* 695, 699 n.12 (2005) (“Arguably, yet another layer is now evolving that facilitates the formation of complex social groups based on exchanges of bits and effective use of the metainformation that is generated by these exchanges.”).

<sup>433</sup> Hassan Masum & Yi-Cheng Zhang, *Manifesto for the Reputation Society*, 9 *FIRST MONDAY* 7 (2004), <http://firstmonday.org/article/view/1158/1078>.