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Giving the Internet An Acid Bath of Economics: Electronic Defamation Viewed Through a New Lens[*]

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I. Introduction

1. The freedom of speech has been characterized as the matri, the indispensable condition of nearly every other form of freedom, and is clearly the touchstone of individual liberties embodied in the Constitution.[1] It comes as no surprise, therefore, that the free speech guarantee of the First Amendment has been subject to intense judicial scrutiny and formulation. As a result, constitutional scholars are apt to spend much intellectual effort in theorizing various judicial approaches to the tremendous body of First Amendment law.[2] The effort is complicated enormously through First Amendment jurisprudence dictating that the free speech guarantees apply differently to various information media — print, radio broadcasting, television broadcasting, and cable broadcasting.[3] With the recent prevalence of the Internet[4] as a popular tool for information dissemination, constitutional scholars and jurists face yet another dimension

to the First Amendment spectrum of application.

2. One of the more traditional analytical tools in addressing this issue has been the use of precedent and reasoning by analogy. Indeed, this process is the hallmark of Anglo-American legal reasoning and is certainly not limited to free speech cases of first impression.[5] This is the vocabulary best understood by traditional jurists, so it is not surprising that many Internet cases would strive to find analogies to the print media and examine their applicability to the case at bar. However, as this paper will suggest, the usefulness of print analogies to the Internet may prove somewhat limited given the technological complexities involved — especially in the case of electronic defamation and libel law. This paper will explore an alternative model of legal analysis and its application to the Internet. Specifically, this paper will explore the usefulness of the law and economics model of legal analysis as applied to defamation issues over the Internet. Initially, the paper will provide a brief and stylized description of the model and its utility in free speech analysis. The paper will then explore the possibility of modifying that model, if necessary, in its application to a new electronic medium. Finally, the paper will suggest that the model, as applied to the Internet, provides a more useful tool for analysis in explaining electronic defamation. Indeed, as proposed by Judge Posner in his First Amendment analysis, it is time to give the Internet an acid bath of economics, viewing issues of free speech over the Internet through an alternative mechanism of legal analysis.[6]

II. Free Speech in an Economic Perspective

A. The General Model

3. As a general model of analysis, law and economics starts with the proposition that that the First Amendment free speech provision is not a sacrosanct right beyond the realm of government regulation.[7] First Amendment jurisprudence itself has recognized this basic supposition, generally rejecting absolutist readings of constitutional guarantees to free speech.[8] The question then posed by both First Amendment jurists and economic legal scholars is how much governmental regulation is permissible given the marketplace of ideas first articulated by Justice Holmes.[9] For the economist, the optimal level of regulation is one that is the most efficient, which is simply short-hand for the idea that resources are allocated to maximize value.[10] Because society is not composed of one individual, the maximization of value must take into consideration every party involved in a crude conception of societal value.[11] This value necessarily involves a rudimentary calculus of possible monetary or utility loss by some individuals versus the monetary or utility gain by other individuals all occurring as a result of governmental regulation. Thus, the permissible amount of regulation — or freedom of speech — is one that balances these factors and produces the highest net societal gain.
4. Curiously enough, the earliest economic formulations of free speech were not announced by economists, but rather jurists.[12] In considering the constitutionality of a regulation that limits the freedom of speech, Judge Learned Hand announced that a court must ask whether the gravity of the ‘evil’ [resulting from not regulating harmful speech], discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[13] This celebrated Dennis

formula, clearly the First Amendment counterpart to Judge Hand's negligence equation,[14] laid the groundwork for subsequent economic analysis of free speech issues. The basic idea is one of efficiency, or value maximization; the regulation of free speech is constitutional only if the costs associated with suppressing free speech are less than the harm of not regulating it discounted by the probability of the harm occurring. In mathematical terms, the Dennis formulation may be expressed as: B < P x L, where B is defined as the burden (or costs) of regulation (including the social cost involved in suppressing information as well as the cost of administering the regulation), P as the probability of the unregulated speech causing injury, and L as the liability or social cost of harmful speech.

5. Economists have further refined the basic Dennis formula articulated by Judge Hand.[15] The costs of suppressing free speech — B in the Dennis equation — may be further broken down into the social cost of losing valuable information in addition to the legal-error costs incurred. That is, economists recognize that any valuation of social costs is inextricably accompanied by legal error in the attempt to distinguish the information society desires to suppress from valuable information. Furthermore, drawing from Justice Holmes' clear and present danger test, economists have discounted the net harm of regulating free speech — P x L in the Dennis formula — to reflect a present value.[16] Taking this considerations into account, the revised Dennis formula becomes: $V+E<(PL/(1+ i)^n)$, where V is the value loss of suppressing information, E is the cost of legal error, n is the lapse of time between the utterance of speech and the harms associated, and i is the discount rate which translates a future social cost amount into a present social cost amount. The $(1+ i)^n$ portion of the formula is simply a mathematical device used to express the present day value of a future harm.
6. Several applications of the formula illustrate the usefulness of the economic approach as an accurate descriptive framework to First Amendment law. Taking political speech as an example, the Dennis formula would suggest a high degree of First Amendment protection.[17] The value of unfettered political speech is tantamount to democratic society, as the most dangerous of monopolies is a monopoly of political power.[18] Governmental regulation of opposing political views necessarily involves a high social loss; the suppression of political speech impedes the process of popular sovereignty itself and threatens governmental sensitivity to popular opinion. This would imply an inordinately high V in the Dennis formula that favors unregulated First Amendment protection.[19] On the other side of the formula, the costs of not regulating dangerous political speech — for example, refusing to ban all Nazi propaganda — are more limited. Radically dangerous and harmful political views are not mainstream in democratic society (suggesting a low P) and their harm is generally dependent on the acquisition of political power sometime in the future (suggesting a high $(1+ i)^n$ factor, or low present day value). From an economic perspective, therefore, the Dennis formula dictates a high degree of constitutional protection for political speech, and this is precisely the current state of the law.[20]
7. On the other end of the spectrum, the Dennis formula would suggest a lower degree of First Amendment protection for commercial speech.[21] The burden borne by regulated advertisers — for example, money already spent on cigarette television advertisements that were subsequently regulated by statute, or even a lost market share — can be theoretically recouped through product sales.[22] Similarly, the social costs of suppressing commercial information, even if truthful and

legal, is not substantial, given the narrower scope of persons affected by the commercial speech regulation.[23] In the mathematical terms of the Dennis formulation, regulation of commercial speech insinuates a low V.[24] The costs of not regulating commercial speech, on the other hand, are relatively high when compared to the traditional market place of ideas.[25] Competing producers of goods and services have little or no incentive to unmask misleading or harmful advertising if they depend on the sale of similar products. Also, the harms associated with damaging advertising are not generally divorced in time from the moment they were made, suggesting a high present cost value.[26] Thus, the PxL $/(1+i)^n$ side of the Dennis formula would be relatively higher than the burdens imposed from regulation, and would ultimately dictate that commercial speech should not afford unhindered constitutional protection. This is the eact position announced by First Amendment law.[27]

B. The Model Applied to Defamation Law

8. The economic case for the regulation of defamatory statements stems from a simple application of the Dennis formulation.[28] There is a high cost — L in formulaic terms — of not regulating defamation because, by definition, defamatory statements damage the reputation of the person defamed.[29] The probability of defamatory statements occurring is quite high, given that the costs of making defamatory statements are negligible and that the author is part of the intended audience for the speech in question. On the burden side of the formula, the costs of imposing liability for libel are relatively low. Defamatory statements are, after all, false statements that are presented as a true fact so that there are little social costs in suppressing the information.[30] As a general proposition, therefore, the Dennis formula suggests that defamatory statements should not be subject to government protection claimed by the author, and the law has generally followed suit.[31] For public figures, the economic model would implicate a higher cost for regulation; public figures are traditionally more newsworthy then private individuals and have a greater access to the media to correct misleading information.[32] Thus, the Dennis formula would implicate a higher standard of governmental protection toward defamatory statements against public figures, which is an accurate description of the law.[33]
9. Perhaps most interesting — from an economic vantage point — is the common law attachment of liability to the publishing of libelous statements, as opposed to strictly limiting damages to the person authoring the libel.[34] The economic analysis of defamation should point the law in the opposite direction, so that only the author of defamatory statements bears the cost of libel.[35] A basic corollary of efficiency theory dictates that legal liability should be placed on those best able to avoid the harm without excessive costs.[36] Otherwise, placing liability on individuals more removed from the injury would incur unnecessary and inefficient costs that are ultimately passed on to the consumer. First Amendment law and constitutional protections to free speech are subject to the same analysis. Holding a publisher, distributor, printer, vendor or anyone other than the author of libelous information liable would eternalize the cost of defamatory statements. This produces unnecessary burdens to the freedom of speech,[37] and missaligned incentives where the author of libelous information has no motive to stop the production of defamation. In the case of

the news, or other public information, the argument is strengthened further. Because the news is a common good, it is likely to be underproduced.[38] Imposing liability on a class of individuals other than the author would only exacererbate the problem.[39]

10. Perhaps recognizing this tension, the Supreme Court has insulated publishers from liability through a rigorous standard of First Amendment protection:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice— that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[40]

11. An economic critique suggests that this analysis is a step in the right direction. The New York Times standard has the principal effect of confining liability to cases where avoiding defamation is inexpensive; presumably, the had notice that the information published is libelous. Moreover, the rule allows individuals other than the author of defamatory information to spread the costs of libel, which ultimately corrects for the underproduction of news as a common good.[41]
12. The Court, however, has declined to apply the New York Times rule to private individuals, leaving a significant gap between First Amendment law and economic analysis.[42] This position — that public individuals should not easily recover for defamatory information — may be defended on traditional notions of political speech; there is a genuine suspicion surrounding politicians who are able to recover damages for information that is either unflattering or expressive of a different political perspective. Posner has argued, for example, that

> [w]hen the plaintiff is a public official, a constitutional defense against the suit is consistent with the traditional and well-grounded suspicion of the impartiality of efforts by government to rexpress speech critical of it. But if a defamation suit is brought by a private individual (who may be a public figure in the sense of being a participant in public controversy or a celebrity), it is hard to see why the courts might be suspected of undue partiality to the plaintiff, and why, therefore, they cannot be trusted to balance the relevant interests in an even-handed manner.[43]

13. This analysis may be justified in economic terms. Once again returning to the Dennis formula, court-enforced suppression of defamatory statements in favor of the government suggests a higher magnitude of legal error due to the well-grounded suspicion against governmental self-regulation. The increased probability of legal error, coupled with the higher costs involved with judicial misbehavior, strongly suggest a higher level of constitutional protection. When the plaintiffs are private individuals, however, these concerns dissipate, ultimately allowing the courts to formulate a judicial policy that accurately reflects the maximization of social value. The Supreme Court, in one sense, espoused that approach in Gertz when it held that the constitutional standard for private individual defamation cases was a matter left open to the States: [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[44]
14. Yet, the federal rule announced in New York Times and subsequent cases still leaves a significant misalignment between the constitutionalization of defamation law and economic efficiency achieved through the law. The Court's refusal to encompass private plaintiffs within First Amendment protection allows state tort law to impose demanding and inefficient liability regimes

on publishers.[45] In fact, the vast majority of states impose a mere negligence rule where the publisher of defamatory information is liable without exercising due care.[46] The Court's approach in Gertz — allowing states to formulate individual legal regimes for private plaintiffs — is sensible only to the extent that state tort law recognizes the need to insulate publishers from liability. Thus, Gertz was clearly a missed opportunity for the Court, where legal efficiency and First Amendment law could have converged into one standard that encouraged the production of information.

15. Moreover, New York Times and its progeny did not address the issue of whether First Amendment constitutional standards depend on the particular function of the defendant — publisher, printer, distributor, vendor, broadcaster, and so on.[47] Although the Supreme Court limited the New York Times rule to publishers, it is ambiguous whether the Court meant to use the term in the legal sense. The word publisher is generally a term of art in tort law signifying an element of communication ... that may be oral, or conveyed by means of gestures, or the ehibition of a picture or statue.[48] Publishers, in the legal sense of the word, may include [t]hose who manufacture books by way of printing and selling them, and those who print and sell newspaper, magazines, journals and the like....[49] It is possible that the Supreme Court intended to extend the First Amendment privilege to printers and other individuals involved in the simple manufacture of books, magazines, newspapers, or other print media. Such an interpretation, however, extends far beyond the factual issue presented in New York Times and overrules a significant body of defamation law without comment.[50]
16. Earlier Supreme Court precedent suggests that First Amendment protection extends to news vendors and other publishers (in the legal sense) who have no notice of defamatory material. In Smith v. California, the Court considered the constitutionality of a criminal statute that barred the mere possession of obscene materials by booksellers — regardless of whether the sellers had knowledge of the book's contents.[51] The Court concluded that such a strict liability regime imposed a restriction upon the distribution of constitutionally protected as well as obscene literature, and therefore ran counter to the freedom of speech.[52] In dicta, the Court reasoned:

    > If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.[53]

17. Nonetheless, it would be difficult to assert that Smith is immediately controlling in the defamatory context. Smith involved criminal liability instead of the usual money damages awarded for defamation and was litigated in the context of obscenity. Some courts, however, extend the Smith rationale to defamation suits and effectively insulate, as a constitutional matter, news vendors, booksellers, and distributors from liability by requiring notice.[54]
18. Outside of the constitutional context, state tort law has often drawn narrow distinctions between individuals involved in primary and secondary roles of dissemination:

    > It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines, and

the like — as in the case of libraries, news vendors, distributors, and carriers — would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published. But this would not be the extent of the protection that should be accorded most of those who have commonly been regarded as disseminators or transmitters of defamatory matter who simply assist primary publishers in distributing information. . . . This could easily depend upon the type of transmitter and the transmitter's relationship to the originating publisher.[55]

19. Viewed through an economic lens, this distinction is only a small step in the right direction. For reasons argued above, the law must shield all individuals other than the author from defamation liability.[56] Narrowing the class of potential defendants to publishers, or those involved in a primary role in disseminating defamatory matter, brings the law in line with sensible economics, but it does not go far enough. For example, the imposition of liability on printers — individuals who generally fall within the scope of liability[57] — raises the cost of printing, which inevitably makes it more expensive to publish information. The ultimate effect is a higher cost of publishing and the classic under-production of information. Moreover, once a court draws narrow, and often arbitrary, distinctions between printers, publishers, news vendors, libraries, and so on, the magnitude of legal error increases dramatically. The Dennis formula would suggest that these two factors — the high cost of regulation coupled with a dramatic increase of legal error — preclude the incremental approach adopted by traditional tort law. Some states have taken the lead in rectifying this problem. Michigan,[58] Tennessee,[59] and Wisconsin,[60] for example, have significantly shielded printers from liability by either statutorily applying the New York Times standard, requiring notice, or simply abolishing the action altogether.

III. An Economic Analysis of the Internet Cases

A. The Internet Cases — Cubby and Stratton Oakmont

20. This issue — the optimal level of liability the law should place on publishers and other individuals involved in the dissemination of defamatory information — has raised new questions of application regarding the Internet. In Cubby, Inc. v. Compuserve, Inc., the Southern District of New York faced the issue of how to treat defamatory information carried by Compuserve in its capacity as an electronic provider of special interest forums.[61] Compuserve itself did not actually produce the information posted on the electronic bulletin boards in question. Instead, it had sub-contracted a subordinate service provider, who in turn sub-contracted another organization to actually author the information and upload it to the relevant electronic fora via Compuserve's physical server.[62] Because of the immediate electronic transmission to its electronic facility Compuserve did not afford the opportunity to review or edit the information before it was made available to the public.[63] Stratton Oakmont v. Prodigy Service Co. presented precisely the same legal question when Prodigy carried a defamatory article under its Money Talk bulletin board.[64] As with Compuserve, Prodigy did not produce the information in question. Rather, it had contracted various individuals to act as Board Leaders to monitor and participate in the public discussions occurring on Prodigy bulletin boards. Prodigy argued that, because of the

instantaneous uploading to Prodigy servers, it did not exercise any sort of editorial control over electronic discussions and could not have prevented the defamatory statements.[65]

21. Both the Stratton Oakmont and Cubby courts approached the legal issues in traditional form by posing the question of whether electronic bulletin board providers constituted publishers within the tort meaning of the word. The Southern District of New York found that an electronic bulletin board service such as Compuserve more closely resembled an electronic, for-profit library, a book-store, an electronic newsstand, and an electronic news distributor.[66] The Stratton Oakmont court, on the other hand, held that an electronic bulletin board such as Prodigy constituted a publisher because of the editorial control it commanded over the content of postings on the electronic service.[67] The Stratton Oakmont opinion professed its concurrence with the Cubby holding, in that electronic bulletin board providers are, on their face, distributors rather than publishers.[68] Yet, the Stratton Oakmont court strove to find factual differences distinguishing Cubby. In particular, the court noted that:

> . . . Prodigy has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that Prodigy's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is eactly what Prodigy wants, but for the legal liability that attaches to such censorship.[69]

22. These facts alone, however, are inapposite. Presumably, the sub-contractors involved in Cubby engaged in precisely the same activity before uploading the information to Compuserve's electronic bulletin boards.[70] The automatic screening mentioned by the Stratton Oakmont court is, on occasion, similarly used by Compuserve.[71] Moreover, the quasi editorial staff created by Prodigy was also present in Compuserve through the sub-contracting of various service providers to maintain the electronic fora. The Stratton Oakmont court also emphasized the existence of submission guidelines adopted by Prodigy,[72] but it is questionable whether the Board Leaders actually enforced those guidelines so as to grant Prodigy editorial control of electronic submissions. In all practical effect, Compuserve and Prodigy are the same service providers with the same electronic procedures for producing electronically available information.[73] The most basic case comparison would suggest, at the very least, that Internet applications of traditional print media concepts raise difficult and inconsistent analyses of the law.

B. The Model Applied

23. Setting legal rhetoric aside, the economic model of free speech law may provide a useful insight of how to treat traditional defamation applications to a new media such as the Internet. As both the Stratton Oakmont and Cubby cases suggest, the question of whether on-line bulletin board providers constitute publishers is not an easy one to distill. Using print analogies to examine the issue only provides limited utility as it may lead a court towards either side of the publisher spectrum. In fact, the most telling facet of the Stratton Oakmont and Cubby decisions is the simple fact that both courts relied heavily on print analogies in their effort to find the appropriate legal rule. This clearly leads to a high cost of legal error that only serves to confuse the courts and future

electronic services who may wish to engage in on-line bulletin board services. To once again borrow the analogy from Judge Posner, it is time to give the Internet an acid-bath of economics.[74]

1. Possible Corrections to the Model?

24. A much derided aspect of First Amendment law is the variation in free speech protections regarding the particular media involved.[75] Traditional Supreme Court holdings have rested on the physical limitations of the electromagnetic spectrum when it announced such concepts as spectrum scarcity and broadcast frequency.[76] These ideas, however, have been described as economic nonsense since the print media is subject to many of the same scarcities as the broadcast media.[77] The economic model, on the other hand, may provide a more persuasive reasoning. As explained by Posner,

    The real distinction lies in the different educational levels of the audiences for books, magazines, and newspapers, on the one hand, and for radio and television on the other, and also (and relatedly), in the different emotional impact of written compared to visual or oral communication. Readers are on average (an important qualification!) better educated than viewers and listeners, precisely because the print media are addressed to a more reflective sensibility than the pictorial, and to a lesser extent the aural, media. The ratio of information to emotional arousal is greater in the print than in the other media. On average, therefore, the marketplace for ideas operates more effectively with respect to the printed word than with respect to pictures and sounds and so there is less need for government regulation.[78]

25. Phrasing the argument in terms of the Dennis formula, P, on average, is likely to be lower in quantifying the damaging effects of not regulating free speech on the print media. Put differently, the probability of harm is likely to be less for damaging information in print because of the higher educational level of the audience, the greater ratio of information to emotional arousal, and so on. As a result, the print media affords a higher degree of constitutional protection than broadcast.
26. Do these assumptions hold true for the Internet? It would be difficult to frame a general answer across the board. Different facets of the Internet may resemble characteristics that are traditionally associated with either the print media or the more lively television broadcasting. Simple Internet news services, text-based chat groups, or on-line databases may resemble the more desensitized print media. Other characteristics of the Internet — vivid multi-media web sites, live audio and video broadcasting, and a comprehensive archive of images and audio clips, for example — clearly parallels the more arousing features of television or radio broadcast. It is inapposite, therefore, to analogize the Internet to a single medium in order to derive the correct legal standard of constitutional protection.
27. However, one consistent facet of the Internet is that its users are, on average, better educated than radio or television audiences.[79] Access to the Internet mandates a more sophisticated level of computer literacy and, at the very least, requires access to a computer. This would suggest that Internet users would be less prone to suffering harm from unregulated and damaging speech that

may find its way through computer lines. In terms of the Dennis formula, P is more likely to be lower when compared to traditional broadcast media.[80] The regulation of defamatory speech is illustrative. Where Internet users access libelous information — such as those involved in the Stratton Oakmont and Cubby cases — it is more likely such information will be discounted by the educated Internet audience as unsubstantiated drivel. Of course, this is more so where the bulletin board itself is called Rumorville, as in Cubby,[81] but it may also be true even where the board name is more innocuous, such as Prodigy's Money Talk.[82] Presumably, the more educated electronic audiences may be already habituated to Internet culture, where it is understood that news groups and bulletin boards often post unsubstantiated, tasteless, and vituperative information. This is not to say that no damage to the defamed individual is possible in the Internet. It does nonetheless suggest that the likelihood of the harm is somewhat lower than other media.

28. Others have argued that Internet users are more apt to self-correction due to the unique anonymity features available on the Internet.[83] Because Internet users may cloak their comments within the veil of anonymity, these netizens are more apt to correct defamatory or other misleading information accessible over the Internet.[84] Although it would be difficult to ascertain the accuracy of such a claim, it seems intuitively correct; access to the print, television, or broadcast media is not only prohibitive to the vast majority of people, but also does not guaranty the benefits of anonymity. This would suggest that if people do indeed have an incentive to correct false information, access to the public is more readily provided through the Internet via anonymous postings to electronic bulletin boards. At the very least, it is certainly true that the victim of defamatory statements — the person with the most incentive to correct false information, anonymity or not — is more likely to do so with the relative Internet ease of access.[85] In economic terms, these factors would translate into both a decreased magnitude of harm and a lower probability of its occurrence, ultimately suggesting less need for judicially enforced defamation liability as applied to the Internet.

2. The Case for No Regulation

29. Should electronic bulletin board providers over the Internet fall within the liability scheme for carrying defamatory statements? Or, to pose the question in more doctrinal terms, are bulletin board providers publishers of defamatory information as opposed to mere distributors? The answer, from a law and economics perspective, is a resounding no. The case for no regulation stems from simple applications of the Dennis formula as well as the general legal corrections for the Internet media discussed above.

30. First, the economic approach requires the law to recognize the burdens imposed by the suppression of speech — or V in the Dennis formula. For Internet service providers, the attachment of defamation liability would essentially require bulletin board operators to filter information for any unsubstantiated or false information. With over 27 million Internet users[86] who are potential tort-feasors, requiring Internet providers to screen incoming information would undoubtedly constitute a monumental financial and technological burden.[87] To date, it is not technologically feasible to place effective automated filters since defamatory information may be cloaked within the guise of simple news, analysis, special interest groups, or other more innocuous

headings.[88] A widespread liability regime placing Internet providers squarely at risk would ultimately cause either the removal of newsgroups altogether or enormous financial strain (which is of course eventually passed on to the consumer) through a network of editors charged with reading incoming information. This would undoubtedly result in the loss of overall information — both true and deleterious — to Internet users. To borrow the reasoning from Smith, imposing liability on defendants who could not reasonably know of the offending information, would tend to restrict the public's access to forms of [information] which the State could not constitutionally suppress directly.[89] It was precisely these costs the Cubby court had in mind when it held that imposing such a rule on Compuserve would place an impermissible burden on the First Amendment.[90] Phrasing the argument in term of the Dennis equation, the costs regulation — the financial and technological burden imposed on Internet providers as well as the resulting loss of information to Internet users — outweighs the harm occurring to victims of defamation and the probability of its occurrence. Furthermore, as argued above,[91] defamation on the Internet tends to suggest an overall decrease in both the likelihood of harm as well as its magnitude.

31. Secondly, law and economics mandates an inquiry into the potential costs of judicial error, or E in the Dennis equation. With a new medium such as the Internet, importing legal distinctions based on print analogies would only frustrate judicial purpose. As argued by one scholar:

> There is . . . a difficulty in applying existing legal metaphors to a Networld in which an information provider may logically seem to fall under the ambit of several legal regimes. On some channels . . . the information provider is acting in the normal manner a publisher editing content; in others it is delivering e-mail and acting as a carrier legally forbidden to monitor content; in others it is offering a public forum for the discussion of public issues; and in still others it is acting as a distributor that would not be required to monitor content. Thus, [Internet information providers] represent a truly unique type of information utility. To impose existing legal metaphors on commercial information providers would be unwise without differentiating the ways in which these providers represent different modes of information transport, not all of which have real-world counterparts. In a digital data stream it is not easy to tell the difference between what, in former times, might have been a newspaper, or cable television system, or a broadcaster, or a common carrier — each of which would have been entitled to its own legal regime and practicing bar.[92]

32. Thus, when a court frames the issue in doctrinal terms — whether the defendant is more analogous to a distributor, or publisher — the query begs judicial obfuscation and invites the wrong result. The question is complicated further by the evolving technologies and functions of Internet providers. Anonymous re-mailers, for example, pose a novel legal question: are they more like printers, where defamation liability would normally attach, or do they more closely resemble distributors who can claim a First Amendment privilege?[93] To once again borrow the mathematical parlance of the Dennis formula, traditional legal analogies result in a high E variable that promotes the case for no regulation.

IV. Conclusions

33. In a positivist sense, the law and economics paradigm presents a useful analytical model in

eplaining First Amendment case law. Applied to the Internet, the model may have even predicted the outcome in Cubby, once a court was fully able to appreciate the potential costs of regulation involved. But is this the right result? In the normative sense, the law and economics model dictates the case for no regulation. The unique characteristics of the information market — in particular, its sensitivity to costs — mandates a legal regime which imposes the strictest level of First Amendment protection. The costs of regulation in the Internet (as applied to defamatory information) far outweigh the potential benefits, and the possibilities of legal error geometrically increase once a court ventures into the legal realm of analogies. Moreover, the law and economics model provides a more workable tool for analysis once new and undecided issues present themselves for litigation. A court's reliance on print analogies is essentially limited to the persuasiveness of arguments specifically directed at a particular issue, and only invites more litigation to determine future issues. Of course, this is not to say that law and economics provides the utmost certainty of a legal rule, as opposed to the more amorphous constitutional standard. Nonetheless, the model does frame the issue in such a manner so as to allow a greater level of predictability and future planning. As a result, it is perhaps time to bathe the courts in an acid bath of economics, with a strong dose of legal sensitivity in applying a consistent methodology toward First Amendment issues on the Internet.

Footnotes

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[1] Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.)

[2] See e.g., Frederick Schauer, Free Speech: A Philosophical Inquiry 80-86 (1982) (surveying free speech theories and endorsing a negative theory of First Amendment); Ronald A. Cass, Commercial Speech and the First Amendment: Commercial Speech, Constitutionalism, Collective Choice, 56 U. Cin. L. Rev. 1317, 1322-45 (1988) (categorizing theories of speech regulation as ontological, economic, or constitutional); Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. Rev. 1615, 1617-56 (1987) (surveying and critiquing foundational First Amendment theories and advocating practical reason as an alternative). But see Lawrence H. Tribe, American Constitutional Law 12.1, at 785-89 (2d ed. 1988) (rejecting any single theory of freedom of expression).

[3] See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) ([D]ifferences in the characteristics of a new media justify in the First Amendment standards applied to them.). The Supreme Court also has stated, each method [of expression] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). Notwithstanding this dicta, the Court has applied varying First Amendment standards to different

media. See, e.g., Mark Nadel, A Technology Transparent Theory of the First Amendment and Access to Communications Media, 43 Fed. Comm. L.J. 157 (1991).

[4] In order to limit the complexities involved, this paper will use the term internet to connote the communication electronic media in general, including the Worldwide Web, e-mail facilities, electronic newsgroups, bulletin boards, public FTP sites, and so on.

[5] See, e.g., Karl Lewellyn, The Bramble Bush; On Our Law and Its Study 72 (2d ed. 1951); Edward Hirsch Levi, An Introduction to Legal Reasoning 2 (1949).

[6] Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 7 (1986).

[7] See Posner, supra note , at 6-7.

[8] See generally John E. Nowak & Rotunda, Constitutional Law 16.7, at 942-943 (1991). Justice Harlan has often been associated with the balancing view of the First Amendment:[W]e reject the view that the freedom of speech and association ... as protected by the First and Fourteenth Amendments, are absolutes, not only in the undoubted sense that where the constitutional protection eists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection.... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the State to pass, when they have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which has necessarily involved a weighing of the governmental interest involved....Konigsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961) (citations omitted).

[9] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[10] See Richard A. Posner, Economic Analysis of the Law 1.2, at 13 (4th ed. 1992).

[11] Id.

[12] Posner even postulates that Justice Holmes clear and present danger test formulated in Schenk v. United States, 249 U.S. 47, 51 (1919), is essentially an economic analysis of the First Amendment. Id. 27.2, at 667.

[13] United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951)

[14] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (defining negligence as instances where the burden of avoiding harm is less than the resulting liability discounted by the probability of its occurrence).

[15] See, e.g., Posner, supra note , at 7-36.

[16] Schenk v. U.S, 249 U.S. 47, 52 (1919), for example, involved the prosecution of Communist Party, U.S.A. leaders for plotting to overthrow the government — eventually. The Court recognized that the dangers of First Amendment protections in this case were divorced from a requisite sense of immediacy. Thus, the present dangers of free speech in this case were discounted for present day analysis and did not warrant governmental intrusion.

[17] See Posner, supra note , at 36

[18] See Posner, Economic Analysis of Law, supra note , 27.1, at 665.

[19] Of course, this assumes that the courts can distinguish between political speech and non-political speech. Nevertheless, even if there are high legal error costs involved — E in the Dennis formula — the economic analysis would still dictate a high degree of constitutional protection. Because E is placed on the burden side of the formula (or the costs associated with regulation), ambiguous situations favor no regulation, so that close-calls go against the government. But see Peter J. Hammer, Note, Free Speech and the Acid Bath: An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment, 87 Mich. L. Rev. 499 (1988) (arguing that the error costs in the Dennis formula are always too high to provide a useful analysis of the law).

[20] See, e.g., Nowak & Rotunda, supra note , 16.7-16.10.

[21] See Posner, supra note , at 39-40. See also Aaron Directory, The Parity of the Economic Market Place, 7 J. L. & Econ. 1 (1964); Ronald H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. Papers & Proceedings 384 (1974); Coase, Advertising and Free Speech, 6 J. Leg. Stud. 1 (1977). This paper refers to the commercial speech doctrine only in the broadest sense, representing the idea that the First Amendment does not prohibit the government from regulating the communication of information and ideas in connection with the sale of goods and services. See Nowak and Rotunda, supra note , 16.31.

[22] See Posner, supra note , at 39-40. The more product-specific the advertisement is, the more the regulated seller can recoup his investments. Id.

[23] Id. This argument rests on the externalities of the information market. Generally speaking, information is a common good, in that producers of information benefit themselves as well as all those who hear the information at no cost. Television newscasts or scientific publications (assuming no intellectual property right) are the typical example. With commercial speech, however, the market of information is not as eternal. Producers of product-specific commercial speech will only produce information geared towards the sale of their particular product. Thus, the

regulation of commercial speech will not produce losses incurred by society as a whole; only those sellers and buyers of the specific product will bear the costs. See Id. at 16-19; Daniel A. Farber, Commentary, Free Speech Without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554 (1991). The argument is more persuasive the more product-specific the commercial speech.

[24] Posner even suggests that commercial speech also incurs a low E in the Dennis formula due to the small chance of legal error. See Posner, supra note , at 39-40. This may be true when the commercial speech is false, misleading, or illegal, as Posner himself argues: A false representation regarding the price, quality, or quantity of a good or service offered for sale can usually be unmasked in a legal proceeding without a great ependiture of time and money or a great risk of error. Id. at 39-40. A court, however, may struggle with the broader issue of whether the speech is commercial in the first place. See Nowak & Rotunda, supra note , 16.29 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)). This implies larger costs of legal error. Nevertheless, as discussed above, supra note , in close calls the equation leans toward granting First Amendment protection.

[25] See Posner, supra note , at 40.

[26] The case may be made, however, for the time-value discount for cigarette advertising. That is, the harms associated with cigarette smoking generally manifest themselves several decades after the actual advertisement.

[27] See, e.g., Valetine v. Chrestensen, 316 U.S. 52, 54 ([T]he Constitution imposes no ... restraint on government as respects purely commercial advertising.); Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971), aff'd without op. sub nom. Capital Broadcasting Co. V. Acting Attorney General Kleindienst, 405 U.S. 1000 (1972) ([A]dvertising is less vigorously protected than other forms of speech.).

[28] See Posner, supra note , at 41-43.

[29] The damage to a person's reputation should not be trivialized in First Amendment terms. As Richard Posner recognized:

> Of course, destroying one person's reputation utterly would do much less harm than seriously damaging the nation's security or prosperity; but ... it is rare that serious damage to the nation can be reliably predicted from a speech or writing, and the damage is usually in the remote future and may therefore be modest in prevent-value terms.

Posner, supra note , at 41-42.

[30] If the statements in question are true or are presented as the author's opinion, they are not

defamatory. See generally W. Page Keeton, et al., Prosser and Keeton on the Law of Torts 111 (5th ed. 1984).

[31] See generally 2 Fowler V. Harper, et al., Fleming James, Jr., & Oscar S. Gray, The Law of Torts 5.0, at 2-10 (2d ed. 1986) (stating that all states apply a strict liability legal regime against authors of defamatory statements).

[32] See Posner, supra note , at 42.

[33] See Nowak & Rotunda, supra note , 16.34.

[34] See Keeton, supra note , 113, at 810-813 (stating that the common law of libel protects the reputation of the defamed person so that anyone involved in the primary dissipation of the defamatory information may be libel). As explained below, infra note and accompanying text, the word publisher, is a legal term of art denoting any reproduction of a defamatory statement.

[35] See, Posner, supra note , at 42-43.

[36] See Guido Calabresi, The Cost of Accidents 68-75 (1970). This internalization of costs has pervaded much of tort theory. See, e.g., Robert L. Rabin, Perspectives on Tort Law 166-228 (3d. ed. 1990).

[37] See, e.g., Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 (1959).

[38] See supra note . As explained by Posner,

> The analogy to the tort immunity of charitable enterprises is close and rests on similar considerations. News about public figures is apt to be underproduced, both because others can copy the news without liability and because the private demand is weaker than the social demand. . . . The alternative would be to grant more etensive property rights in news, in order to cut down on free riding in the news market.

Posner, supra note , at 42 (citations omitted).

[39] The counter-argument is that authors of defamatory information, like most other tort-feasors, are often judgment proof. If liability is strictly limited to this class of defendants, the compensatory and deterrent purposes of the law are defeated. Therefore, the argument runs, liability must be shared by a broader class of tort-feasors including publishers. As Posner recognized, [a]n objection to [the economic approach to defamation law] is that it forces the victims of defamation to subsidize the production of ideas. Posner, supra note .

[40] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

[41] See supra note. Posner provides a vivid example of the argument:

> If a reporter gets a scoop, his newspaper will capture in higher sales revenues only a part of the value that the public attaches to the news, because the item will be carried in all competing newspapers with only a slight time lag. Therefore if the reporter and the newspaper that employs him are faced with the prospect of large damages, they may be reluctant to publish the item even though the total social benefits ..., as measured by the willingness of all newspaper readers to pay to read the item, may exceed those damages. One way of encouraging the newspaper to publish the item is to reduce the costs of publication; and this is done by making it unnecessary for the newspaper to conduct as thorough an investigation of the truth of the item as it would have to do if it were strictly liable or liable for negligence in publishing a false defamation.

Posner, Economic Analysis of the Law, supra note , 27.2, at 669-670.

[42] See Time, Inc. v. Hill, 385 U.S. 374 (1967) (holding that private individuals are held to the New York Times standard only if the individuals were involved in a matter of public interest); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that the New York Times rule does not apply to private citizens who are not public officials and are not public enough with respect to a particular controversy).

[43] Posner, supra note , at 43. The events leading to New York Times itself vividly illustrates Posner's argument. As explained by Professor Oscar Gray,

> [i]t became evident [in the 1960s] that one or more southern courts might permit local jurors to levy crippling damage awards ... on the pretext of the most trivial inaccuracies in civil rights coverage. The publication of any material deemed unsympathetic to local sentiment would be subject to the threat of financial retaliation that could be ruinous unless the federal judiciary intervened.

Harper et al., supra note , 5.0, at 5.

[44] 418 U.S. at 347 (footnote omitted).

[45] As argued above, any person (other than the author) facing liability for defamatory information leads to the externalization of costs and the underproduction of valuable information. See supra notes - and accompanying text.

[46] See 2 Harper et al., supra note , 5.0 at 13; Restatement (Second) of Torts 580B, cmt. g (1977). For a list of states adopting the negligence standard, see Turf Lawnmower Repair v. Bergen Record, 655 A.2d 417, 423-424 (N.J. 1995) (listing 38 states, the District of Columbia, and three other U.S. jurisdictions).

[47] Instead, the Court couched its vocabulary in terms of media, and non-media defendants. Gertz, for example, announced that the New York Times rule was aimed in part to the need to avoid self-censorship by the news media. 418 U.S. at 341. Many scholars have questioned whether New York Times applies to non-media (i.e. private defendants who are not publishers or broadcasters) defendants. See, e.g., Harper et al., supra , at 15.

[48] Keeton, supra note , 113, at 797 (citation omitted).

[49] Id. 113, at 810.

[50] In New York Times itself, the Court reversed a judgment against four individual clergymen whose names appeared as sponsors of the advertisement in question. 376 U.S. 256, 292. See also Harper et al., supra note , at 15.

[51] 361 U.S. 147 (1959).

[52] Id. at 153.

[53] Id. at 153-54.

54] See, e.g., Lerman v. Chuckleberry Publishing, Co., 521 F. Supp. 228, 235 (S.D.N.Y. 1981); accord Macaluso v. Mondadori Publishing, Inc., 527 F. Supp. 1017, 1019 (E.D.N.Y. 1981).

[55] Keeton, supra note 30, 113, at 810-11 (footnotes omitted).

[56] See supra notes 35-39 and accompanying text.

[57] See supra note 48.

[58] See MI ST600.2911 (1995). The statute provides in part:

> If the libel has been published in a newspaper, magazine, or other periodical publication or by a radio or television broadcast, the servants and agents of the publisher or proprietor of the periodical or radio or television station or network, and the news agents and other persons who have been connected with the libel only be selling or distributing the publication containing the libel and who have not acted maliciously in selling or publishing the libel, shall not be required to contribute and shall not be taken into account in determining the amount that any joint tort feasor is required to contribute under the provisions of this section.

Id.600.2911(4).

[59] See TN ST 29-24-105 (1995). The statute provides:

> The right of action heretofore existing against a commercial printer or commercial printing establishment engaged in the business of printing for others to recover sums of money as damages for the publication of a libel is hereby abolished where the copy for the libelous matter was furnished by the customer to the commercial printer or commercial printing establishment and no part of the libelous matter was written, edited or otherwise authored by the commercial printer or commercial printing establishment or their agents, servants or employees.

Id. 29-24-105(b).

[60] WI ST 895.05 (1995). The statute provides:

> Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only retraction shall constitute correction; otherwise the publication of a libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as the libeled person's statement, shall constitute a correction within the meaning of this section.

Id. 895.05(2).

[61] 776 F.Supp. 135, 137 (S.D.N.Y. 1991)

[62] Id. at 137-138.

[63] Id. at 137.

[64] 23 Media L. Rep. 1794 (Sup. Ct. N.Y. 1995).

[65] Id. at 1795-96.

> Seemingly, however, Prodigy's marketing campaign painted quite a different picture. In one newspaper advertisement, Prodigy claimed[w]e make no apology for pursuing a value

> system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.

Id. at 1795.

[66] Cubby, 776 F.Supp. at 137-140.

[67] 23 Media L. Rep. at 1796.

[68] Id.

[69] Id. at 1797-1798. The Court also noted the automated program installed by Prodigy that would instantaneously filter obscene or offensive material. Nevertheless, the Court did not examine the degree of filtering eecuted by the program nor did it address its effectiveness in exercising editorial control.

[70] See generally, Edward V. DiLello, Functional Equivalency and Its application to Freedom of Speech on Computer Bulletin Boards, 26 Colum.J.Law & Soc.Probs. 199, 210-211 (1993).

[71] Id. at 213.

[72] 23 Media L. Rep. at 1796.

[73] Some commentators have argued that the real holding in Stratton Oakmont lies on equitable principles of estoppel rather than a strict application of defamation law. See, e.g., Matthew C. Siderits, Comment, Defamation in Cyberspace: Reconciling Cubby, Inc. v. Compuserve, Inc. and Stratton Oakmont v. Prodigy Services Co., 79 Marq. L. Rev. 1065, 1080-81 (1996). That is, the court may have been persuaded by the public's detrimental reliance on Prodigy's advertising as an editorially controlled electronic network. See supra note .

[74] See supra note .

[75] See, e.g., supra note . Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. at 371-75 and FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), with Miami Herald Publishing Co. V. Tornillo, 418 U.S. 241, 247-58.

[76] See generally, Red Lion Broadcasting, 395 U.S. at 396-400.

[77] See Posner, supra note , at 39. See also Posner, An Economic Analysis of the Law, supra note

27.4, at 672-74.

[78] See Posner, supra note , at 39-40.

[79] See, e.g., Joan Brightman et al., Mystery Guests, Am. Demographics, Aug. 1, 1995, at 2,4 (stating that the majority of internet users have at least a college education and above-average annual incomes); Internet Facts (visited Dec. 1, 1996) <http://www.the-resource.com/resource/interfac.htm> (stating that 37% of internet users have only a bachelors degree, while 27% have graduate degrees).

[80] As Posner argued above, supra note , this analysis is drawn from the general characteristics of the print media as compared to television or radio broadcasting. Posner would probably be hard pressed not to draw the same analogy to the internet.

[81] 776 F.Supp. at 137.

[82] 23 Media L. Rep. at 1795.

[83] See Anne W. Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace, 104 Yale L.J. 1639 (1995).

[84] Id. at 1647.

[85] In fact, this factor was one major reason why the Supreme Court was more inclined to apply the New York Times constitutional privilege against public figures, who may more readily correct defamatory information by virtue an easier access to the media. See Gertz, 418 U.S. at 337-40.

[86] See Online and Internet Facts (visited Dec. 1, 1996) <http://www.isa.net/intfacts/onlineserv.html>.

[87] See, e.g., id. (arguing that the most recent figures show America Online with 6.2 million subscribers, Compuserve with 5.2 million subscribers, and Prodigy with 1.1 million subscribers). Of course, this is only a rough estimate of incoming information. Not only to internet service providers carry their own private newsgroups (i.e. accessible only by the provider's subscribers), but they also carry the public usenet newsgroups which are generally accessible to anyone on the internet.

[88] Cf. Prodigy, 23 Media L. Rep. at 1797 (distinguishing Prodigy as a publisher because of its automatic screening capabilities). It is difficult to conceive how the Prodigy court was persuaded that any automatic screening mechanism could effectively filter defamatory information such as the Money Talk statements in question. See, e.g., DiLello, supra note , at 213 (arguing that courts

should espouse a functional equivalency approach rather than looking at tenuous technological differences).

[89] 361 U.S. at 154.

[90] 776 F.Supp. at 140 (quoting Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984)), cert. Denied, 471 U.S. 1054.

[91] See supra notes - and accompanying text.

[92] Branscomb, supra note , at 1651-52 (citations omitted).

[93] This question was considered in Noah Levine, Note, Establishing Legal Accountability for Anonymous Communication in Cyberspace, 96 Colum. L. Rev. 1526 (1996).