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Tucker Lecture, Law and Media Symposium

Erwin Chemerinsky

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Tucker Lecture, Law and Media Symposium

Erwin Chemerinsky*

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I. Introduction

Media law has developed remarkably unrelated to the growth of various media. Think about defamation law for a moment. Most of American law concerning libel and slander is based on English defamation law. In fact, 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. The development of major national newspapers, radio, and television did not alter defamation law very much. There was a major shift in defamation law following *New York Times v. Sullivan*¹ in 1964 as the Supreme Court imposed First Amendment limits on defamation. But these changes were not the result of the development of media.

Another major tort that exists with regard to the media is public disclosure of private facts, invasion of privacy claims. This is a newer tort. It can be traced back to the key article by Warren and Brandeis in the *Harvard Law Review* in 1890 on the right to privacy.² But even this tort seems relatively unaffected by the development of various media. Even now, the cases about public disclosure of private facts do not seem to pay much attention to whether

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1. See *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that states, under the First and Fourteenth Amendments, cannot award damages to a public official for defamatory falsehoods concerning his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard to whether it was true or false).

2. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890) (arguing there existed a right to privacy which had not yet been named).

it is occurring in newspapers, radio, television, or the Internet. Here, too, the tort has developed and been refined unaffected by how the media has grown and changed.

I think what has happened is that intellectual frameworks and legal constructs developed and have simply been applied to the new media. The assumption has been that at least with regard to the law, the new media are changes in degree, not in kind. It is true of the First Amendment as well. Generally, the First Amendment principles concerning speech and press do not pay much attention to the medium that is involved. I do not want to overstate this. In the area of whether or not the government can require a right to reply there has been some attention to the medium. The Supreme Court drew a distinction between the broadcast and the print media as to whether the government can impose a right to reply.³ In the area of indecency regulation, the Court has paid a good deal of attention to the medium.⁴ But other than these exceptions, I think it is fair to say that the law is not changed depending on the medium that is involved. It is not surprising then that as the Internet has developed over the last fifteen years, courts have tried to take existing categories, existing principles and apply them to this new medium.⁵

I believe that this is a mistake. The Internet is inherently different from all other media that preceded it. In some cases, there is a need to have radical changes in the law because of the development of the Internet. To put it in terms of the terminology used a moment ago, I want to argue that the Internet is in kind different from other media, not just a difference in degree. I structure my argument around two points. First, the Internet is in fact different from all other media. And then second, I want to try to trace some of the implications of this difference. If you accept the premise, what does it mean with regards to the law and how it has to develop?

3. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969) (holding that "Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials"), *with* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974) (holding that the First Amendment bars a state from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials).

4. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874-75 (1997) (concluding that indecency regulation is not allowed as to the Internet); FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (concluding that indecency regulation is allowed as to broadcast media).

5. *See, e.g.*, *ACLU*, 521 U.S. at 869 (concluding that indecency regulation is not allowed as to the Internet because "the Internet is not as 'invasive' as radio or television . . . Users seldom encounter content 'by accident'").

II. *The Internet is Different*

The Internet really is different from all of the media that preceded it: The pamphlets at the time of the founding, the local newspapers that existed then, the national newspapers that began to develop, magazines, radio, television. What is it that makes the Internet different?

The first is the democratization of ownership. At least for national media, until now, it had always taken a substantial amount of capital in order to be able to have access. For the print media, in order to have a newspaper required a substantial amount of resources. For broadcast media, a license was required, which inevitably required substantial time, equipment, and a good deal of capital. The Internet changes that. All the Internet requires is that somebody be able to afford a computer, which is now just a few hundred dollars, and a little bit of software. And even that is not really required because there are publicly available computers in libraries and other places. As long as a person has some minimal degree of technological ability, there is the ability to reach a mass audience. It is true that at the time of the framing, people could put out pamphlets without needing much capital,⁶ but to reach people with regard to pamphlets it was necessary to go places. To reach a lot of people, it would be necessary to go to many different places and have money to print a large number of pamphlets. The Internet of course gives the ability to reach a large audience with relatively little in the way of resources.

This is even more dramatic when it comes to visual media. It used to be that in order to have a television program, it would take a great deal in the way of resources. Very few traditionally had access to the broadcast media. YouTube,⁷ and generally the web, has changed that. Anybody who has a digital camera can make his or her own movie and put it up on the web for many to see.

The democratization of access to the media is inherently different than anything that has preceded it. What does it mean? Everyone is the press. There was a debate in the 1970s and 1980s as to whether or not the institutional press should have special privileges under the First Amendment. Potter Stewart wrote a very famous article in which he argued that there needed to be

6. See Homer L. Calkin, *Pamphlets and Public Opinion During the American Revolution*, PA. MAG. HIST. & BIOGRAPHY, Jan. 1940, at 22 ("From the sixteenth to the eighteenth century the pamphlet was the chief instrument to carry one's ideas to the public [B]ecause it was small and cheap and would reach a large audience").

7. YouTube, LLC, Home Page, <http://www.youtube.com> (last visited Sept. 18, 2009) (on file with the Washington and Lee Law Review).

special protections for the institutional press.⁸ He emphasized that the ability of people to receive information very much depends on the press and therefore, the press needs to have special rights of access.⁹ Others, such as Chief Justice Warren Burger, disagreed with this.¹⁰ There are some Supreme Court cases where the majority and dissent argued over whether there is some special protection for the institutional press.¹¹

But everyone is potentially the press now. Anybody who has a blog, anybody who has a website, can claim to be a reporter. If special protections were given to the institutional press, how would lines ever be drawn in light of the democratization of access to the media? Also, the democratization of access to the media means there is a much greater ability of a much larger number of people to inflict harm on others. I do not deny that defamatory speech can inflict harm without having access to a large audience. In a small town, slanderous statements can do irreparable damage to a person's reputation. However, what the Internet gives is the ability of a much larger number of people to do harm with a much larger audience to a much greater number of people. If somebody wants to put a false statement about someone on a blog or the web, it can immediately be read by millions or tens of millions of people. Countering it becomes much more difficult. It used to be that only a relatively few had the ability to reach millions or tens of millions. Now, almost anybody does.

This is not true only with regard to defamatory speech: Consider public disclosure of private facts—the ability to release personal information about an individual that is not newsworthy. Information that would be offensive to the reasonable person is now in the hands of so many. As was so with regard to defamation, it used to be that relatively few could spread personal information to millions of others. Now, so many others can. At least with regard to defamation there is a counterpoint—the ability to reply to an audience of millions is also greater. It used to be that if I was defamed by, say, the *Los Angeles Times*, the only real opportunity I would have to counter this would be if the *Los Angeles Times* would publish a retraction. Now I can publish my

8. See Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.").

9. See *id.* at 636 ("The public's interest in knowing about its government is protected by the guarantee of a Free Press . . .").

10. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 797–801 (1978) (Burger, C.J., concurring) (arguing that the "history of the [Press] Clause does not suggest that the authors contemplated a 'special—' or 'institutional' privilege").

11. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) (concluding that reporters do not have a First Amendment right to keep the identity of sources secret from a grand jury).

own retraction. It does not mean that it would reach the same readership as the *Los Angeles Times*. It does not mean that it will counter the negative effects on my reputation. There is no assurance retractions would ever do that. But there is at least the recognition that the democratization gives greater ability to reply to attacks on one's reputation. Of course, when it comes to privacy, replies and retractions do not do any good. If somebody reveals very personal information about me, there is nothing by way of a reply or retraction that would do any good. The toothpaste is literally out of the tube once the information appears.

A second way in which the Internet is inherently different from other media is that it is a portal for all other media. At my house, we get our telephone, television cable, and internet all through one provider. In fact, you can now receive all of the media just through the Internet. Many people do all of their reading of newspapers just through the Internet. It is possible to access radio stations and listen to them online.¹² Many television programs are available online.¹³ You can get your telephone service just through the Internet.¹⁴

No other media has been a portal to other media in this way. This, too, has dramatic implications. The medium-by-medium approach to the First Amendment developed by the Supreme Court, at least in the area of indecent speech, does not make any sense any longer. The medium-by-medium approach started in *FCC v. Pacifica Foundation*¹⁵ in 1976, which involved the George Carlin monologue on the Seven Dirty Words.¹⁶ A radio station that broadcast it was punished by the FCC.¹⁷ The Supreme Court said that the broadcast media is uniquely intrusive into the home and accessible to children

12. See, e.g., NPR: National Public Radio, <http://www.npr.org/> (last visited Sept. 18, 2009) (offering a twenty-four-hour coverage of live news events) (on file with the Washington and Lee Law Review).

13. See, e.g., ABC, <http://abc.go.com/watch> (last visited Sept. 18, 2009) (offering the ability to watch full episodes of ABC's popular television programs) (on file with the Washington and Lee Law Review).

14. See, e.g., Magic Jack, <http://www.magicjack.com> (last visited Sept. 18, 2009) (providing telephone service through a computer's internet connection) (on file with the Washington and Lee Law Review).

15. See *FCC v. Pacifica Found.*, 438 U.S. 726, 750–51 (1978) (reversing court of appeals decision and finding in favor of FCC decision that radio broadcast was prohibited by 18 U.S.C. § 1464).

16. See *Pacifica Found.*, 438 U.S. at 729–30 ("A satiric humorist named George Carlin recorded a 12-minute long monologue entitled 'Filthy Words' He proceeded to list those words and repeat them over and over. . . .").

17. See *id.* at 732 (noting that the Commission found the language used by Carlin to be "indecent and prohibited by 18 U.S.C. § 1464").

so that the government may punish profane and indecent language there.¹⁸ But then in *Sable Communications, Inc. v. FCC*,¹⁹ the Court said that telephones are different, that the government does not have the ability to punish indecent speech over telephones.²⁰ Subsequently, the Court also said cable television, too, is different from over-the-air television and radio because people choose to subscribe to cable and bring it into their homes.²¹ Then the Court said that the Internet is different and prevented government regulation of indecent speech.²²

Over time, each medium has developed its special rules under the First Amendment. But this medium-by-medium separation does not make sense when people are getting all of the media through one provider—as is currently possible through the Internet. Another way, of course, in which the Internet is the portal for other media is the ability to link on so many other media, to access so much information just through this one medium of the Internet.

There is another implication that is enormously important, but less directly related to tort law or the First Amendment: The extent to which the Internet as a portal to other media undermines the economics of these other media. For example, newspapers are available online, without people having to subscribe, the economic base of newspapers is undermined. No longer do people have to subscribe to the newspapers to get access to the content. No longer do people have to buy at the newsstand in order to get a copy. In terms of advertising, advertisers do not get the same access to the audience when people are reading the newspaper online as when the ad is physically in the newspaper for people to see. Newspapers are struggling terribly with how they can recoup some of the money—advertising for their websites, finding other ways for charging subscribers to use them.²³

18. *See id.* at 748–49 (“First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . Second, broadcasting is uniquely accessible to children, even those too young to read.”).

19. *See Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115, 126–31 (1989) (holding unconstitutional a ban on interstate transmission of indecent commercial telephone messages).

20. *See id.* at 128 (“The private commercial telephone communications at issue here are substantially different from the public radio broadcast. . . . Placing a telephone call is not the same as turning on the radio and being taken by surprise by an indecent message.”).

21. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 735 (1996) (noting, for example, that under the federal regulation subscribers to cable programming have the ability to request access to sexually explicit material).

22. *See Reno v. ACLU*, 521 U.S. 844, 869 (1997) (“[T]he internet is not as ‘invasive’ as radio or television. . . . Users seldom encounter content ‘by accident.’”).

23. *See Peter Johnson, Web Revolution Leaving Newspaper Gather in a Lurch*, USA TODAY, Mar. 12, 2007, at 4D (“Most newspapers are ramping up their websites to stay relevant. But because online advertising lags in comparison to print, many newspapers can’t adequately staff their websites with reporters who gather news.”).

As an example, in Los Angeles, the *Los Angeles Times* has gone through a series of cutbacks.²⁴ In fact, they have gone from about twelve hundred news staff to now about seven hundred news staff as a result of these economics.²⁵ Think about what a newspaper loses when it goes from twelve hundred to seven hundred—and the cuts certainly are not done yet. The people that staff bureaus throughout the world are no longer there. The reporters to do investigative reporting are no longer there. And this is a place where the Internet has not substituted for newspapers. The Internet does not have, as I note most other websites on the net do not have, bureaus throughout the world to gather information. The Internet has not proven very successful in terms of aggressive investigative journalism that requires sustained effort over an extended period of time. There are certainly those on the Internet who are able to get the tidbit that would not otherwise be reported, but there is not the sustained investigative reporting. The Internet is great at presenting information from other media, but not yet effective at doing the kinds of things that newspapers have traditionally done. Undermining the economics of newspapers will have a devastating effect just in terms of what newspapers have always done—bearing witness, informing people in ways that the Internet will never be able to do.

A third way in which the Internet is in kind different, is the way in which it provides access to information. We have access to more different sources at the stroke of a key than people have ever had before. Think of all the information that is available from your home computer that probably would not have been at a local library, not even a university library before. People can be exposed to a vast spectrum of opinions and views through the Internet. Earlier in dealing with the broadcast media, the Supreme Court made a major assumption with regard to the scarcity of the broadcast media. In *Red Lion Broadcasting v. FCC*²⁶ the issue was whether the fairness doctrine was constitutional.²⁷ More specifically, the issue was whether the FCC could impose a requirement that broadcasters allow a right to reply.²⁸ The Supreme

24. See Martin Zimmerman, *L.A. Times to Layoff 300, Consolidate Sections*, L.A. TIMES, Jan. 31, 2009, at C1 (stating the *L.A. Times* announced its future plans to lay off 300 people).

25. See *id.* ("The layoffs announced Friday at The Times are the fourth round of staff cutbacks at the paper in the last 12 months and represent an 11% reduction in its current newsroom staff of around 650. At its peak in 2001, The Times newsroom had 1,200 employees.").

26. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–401 (1969) (upholding the FCC "fairness doctrine" and stating the doctrine's personal attack and political editorial rules do not violate the First Amendment).

27. See *id.* at 386 ("The broadcasters challenge the fairness doctrine . . . on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press.").

28. See *id.* (noting that the broadcasters argue that the FCC cannot inhibit their First

Court unanimously ruled against the media, rejected their First Amendment argument and concluded that the inherent scarcity of the broadcast media justified allowing the fairness doctrine and the right to reply.²⁹ The Court was focusing on the fact that with regard to television there were three—now four—national networks, relatively two local stations, a finite number of radio stations.³⁰ A few years later, in *Miami Herald Publishing Co. v. Tornillo*,³¹ the Court considered whether a state could impose such a right to reply law on newspapers and the Court said that would violate the First Amendment. I was skeptical of the distinction that the Court drew because newspapers were as scarce, maybe even more scarce than when it came to the broadcast media. One effect over the course of the twentieth century was the collapse of so many newspapers, including many in major metropolitan areas. When I grew up in Chicago, there were four daily newspapers. Today, there are two.³² There used to be half a dozen papers in Los Angeles; now there is one major newspaper.³³ If scarcity was the rationale, then it would seem that the *Red Lion* approach would apply just as much to the print media as to the broadcast media.³⁴ But now there is no basis for talking about scarcity. Certainly, the development of cable television and the hundreds of channels that are available there—you can see Gilligan's Island almost any time of day or night—shows that this assumption of *Red Lion* is no longer valid. The Internet means that there is no scarcity with regard to access to information at all.

Amendment right to "use their allotted frequencies" as they wish and to exclude "whomever they choose").

29. *See id.* at 399, 400–01 ("[T]he resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. . . . [W]e hold the regulations and ruling at issue here are both authorized by statute and constitutional.").

30. *See id.* at 400 ("Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible.").

31. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (holding that the First Amendment bars a state from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials).

32. CHI. SUN TIMES, www.suntimes.com (last visited Sept. 19, 2009) (on file with the Washington and Lee Law Review); CHI. TRIB., www.chicagotribune.com (last visited Sept. 19, 2009) (on file with the Washington and Lee Law Review).

33. L.A. TIMES, <http://www.latimes.com> (last visited Sept. 19, 2009) (on file with the Washington and Lee Law Review).

34. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396–401 (1969) (stating the inherent scarcity of broadcast media justified allowing the fairness doctrine and the right to reply).

A fourth way in which the Internet is in kind different is in its being a global media. Never before has there been a media that so inherently crosses national borders. It is the nature of broadcast frequencies that most cover a finite area. In fact, newspapers could be physically kept out of places. But access to the Internet is difficult to restrict. Once somebody has access to the Internet, they can then see all the material that is there. This too has important implications. Think of it in terms of regulating indecent speech. This is one place where the Supreme Court has recognized that the Internet is different.³⁵ When Congress tried to regulate indecent speech over the Internet, it was pointed out to the Supreme Court that about forty percent of what was regarded as indecent over the Internet was coming from foreign countries.³⁶ So even if Congress, through a law like the Communications Decency Act,³⁷ could prohibit the knowing transmission of indecent material over the Internet in the United States, people could still access indecent material by going to these foreign sites. What would be the point of restricting access within the United States if people could get access to the exact same kind of material by going to foreign sites? There would be no way for American law to be able to restrict it.

There is also an implication of globalization that transcends our media law and our First Amendment law: It is much harder for a totalitarian government to restrict access to information within its own borders. It has always been the case that one of the things that totalitarian governments try to do is to control the press, to limit the messages, to limit the information people could receive. But if people in those countries can gain access to the Internet they can have full knowledge of all the information that their government wants to deny them.

III. Implications

If the Internet really is different than any other medium that preceded it, what does it mean for the law? Here I just want to sketch some of the places where I think the law needs to change with regard to the Internet. Let me go through five different areas where I think the law is going to have to change.

One difference is with regard to defamation law. As mentioned above, there is a much greater ability of a much larger number of people to inflict much more harm with regard to false statements than was ever true before. I

35. See *Reno v. ACLU*, 521 U.S. 844, 869 (1997) ("[T]he internet is not as 'invasive' as radio or television. . . . Users seldom encounter content 'by accident.'").

36. See *id.* at 854 (finding that some sexually explicit communications over the Internet originate in foreign countries).

37. Communications Decency Act, 47 U.S.C. § 223 (2000).

think there is also another subtle negative effect of the Internet with regard to defamation—concern for credibility of sources has been undermined by the Internet. I see this especially when I teach college classes. I, for the last twenty years, have taught at least one college class per year and my students have to write a term paper. I discovered that my students will treat a random website the same as *Time Magazine*, the same as a student Note in a law review, the same as the most esteemed law professor, the same as an opinion by the United States Supreme Court. There is very little differentiation of credibility. That really matters when we are talking about the effects of defamatory speech. If an idle rumor on a blog is given as much credibility as an article in the *New York Times*, the harm to reputation is much greater.

The issue that is coming up with increasing frequency with regard to defamation is whether courts can impose injunctions to stop defamatory speech. If there is a website that is saying something defamatory about somebody, can a court take down that website by injunctive relief? Traditionally, the law was that equity would not enjoin defamation.³⁸ The traditional answer was that if someone was defamed, they would have to turn to a damage suit for a remedy.³⁹ But over the course of the last decade, and I think with increasing frequency over the last decade, there have been a number of lawsuits that have involved whether there can be an injunction, and many of these lawsuits involved speech over the Internet. Now I should disclose here that I was involved as a lawyer in two of these lawsuits.⁴⁰ I will tell you about them and I will tell you that the position that I took as an advocate is different from that which I would argue as a scholar I think the Court should take.

The first of these cases was *Tory v. Cochran*.⁴¹ Ulysses Tory used to be a client of Johnnie Cochran. Actually, he never met Johnnie Cochran, he was a client of the law offices of Johnnie Cochran. He felt that he was treated badly by the office of Johnnie Cochran, thought that they owed some money back, and when he did not get it, he decided to picket Johnnie Cochran's law offices.⁴² In fact, he got some homeless people to come and picket with him by

38. See, e.g., *Kuhn v. Warner Bros. Pictures*, 29 F. Supp. 800, 801 (S.D.N.Y. 1939) ("The decisions in our State and Federal courts have firmly established the legal principle that no injunction may issue to prevent or stop the publication of a libel.").

39. See, e.g., *Willis v. O'Connell*, 231 F. 1004, 1010 (S.D. Ala. 1916) (explaining that plaintiffs seeking to vindicate their good names have remedies in civil damages and criminal prosecution, but not in equity).

40. *Tory v. Cochran*, 544 U.S. 734 (2005); *Balboa Island Village Inn v. Lemen*, 156 P.3d 339 (Cal. 2007) (presenting cases in which the author argued against such injunctions).

41. See *Tory*, 544 U.S. at 738–39 (2005) (vacating the California Court of Appeals' judgment which had allowed a broad injunction against Tory to stand).

42. *Id.* at 735.

promising to give them lunch.⁴³ Johnnie Cochran sued Ulysses Tory and his wife Ruth Craft for an injunction to stop the defamatory speech.⁴⁴ Understandably, Cochran did not seek money damages.⁴⁵ Ulysses Tory was judgment-proof, there were no assets to be had. Cochran just wanted an injunction. Now I question whether the speech was even defamatory. He said things like, "Unless You have O.J.'s Millions-You'll be Screwed if You USE J.L. Cochran, Esq."⁴⁶ Signs were raised that said, "There is no justice in America."⁴⁷ These are not really false factual statements. Johnnie Cochran had a prominent Los Angeles lawyer to represent him in his defamation suit. Ulysses Tory, who has a tenth grade education, represented himself. You can guess who prevailed at trial. The trial judge said to Johnnie Cochran's lawyer, "Draft an injunction," and the lawyer did what any zealous attorney would do: He wrote a really broad injunction.⁴⁸ The injunction says that Ulysses Tory and his wife Ruth Craft cannot say anything about Johnnie Cochran or the law offices of Johnnie Cochran in any public forum.⁴⁹ The way public forum is defined under California law is quite broad; it applies, for example, to any statement over the media.⁵⁰ The California Court of Appeals upheld the injunction and the California Supreme Court denied review.⁵¹

At oral argument in the Supreme Court, the first question that I got was from Justice Souter who gave me the ultimate softball question. He said, "Counsel, aren't you even covered by this injunction?"⁵² And of course, since

43. See *Cochran v. Tory*, No. B159437, 2003 WL 22451378, at *1 (Cal. Ct. App. Oct. 29, 2003) ("[Tory] admitted the 'possibility' that some of the picketers joined him only because they wanted a free lunch.").

44. *Tory*, 544 U.S. at 735.

45. See Complaint at 20–21, *Cochran v. Tory*, No. BC239405, 2002 WL 33966354 (Cal. App. Dep't Super. Ct. Apr. 24, 2002) (requesting a "temporary restraining order, a preliminary injunction, and a permanent injunction").

46. *Cochran*, No. B159437, 2003 WL 22451378, at *1

47. See *id.* (providing the text of several of the signs held by picketers).

48. See *id.* at *2 (providing that Tory may not go near or harass Cochran, and severely restricting Tory's ability to speak freely about Cochran).

49. *Id.* at *2.

50. See *Carreras v. City of Anaheim*, 768 F.2d 1039, 1045 (9th Cir. 1985) ("[F]or the purposes of the California Liberty of Speech Clause, the 'public forum' doctrine is not limited to traditional public forums such as streets, sidewalks, and parks . . ."), *abrogated in part by* *L.A. Alliance for Survival v. City of L.A.*, 993 P.2d 334 (Cal. 2000); *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 869 (Cal. Ct. App. 2005) ("The term 'public forum' includes forms of public communication other than those occurring in a physical setting. Thus the electronic communication media may constitute public forums.").

51. *Tory v. Cochran*, 544 U.S. 734, 736 (2005).

52. See Transcript of Oral Argument at 4, *Tory v. Cochran*, 544 U.S. 734 (2005) (No. 03-1488) ("How about you? You're in trouble too, aren't you?").

it speaks not only to Ulysses Tory and Ruth Craft, but their agents, I could answer, "Yes, because as Ruth Craft and Ulysses Tory's lawyer, if I go out to the Supreme Court steps and pass out copies of my brief I would be violating the terms of the injunction."⁵³ One week after oral argument, Johnnie Cochran passed away,⁵⁴ so the Supreme Court, 7-2, decided the case very narrowly. They simply said, that especially since Johnnie Cochran had died, this injunction was far too broad.⁵⁵

When this case was decided, I got a call from a lawyer in California about another case: *Balboa Island Village Inn v. Lemen*.⁵⁶ Anne Lemen did not like a restaurant that was operating across the street from her apartment in the beautiful area of Balboa, California. So she circulated leaflets, walked around with signs saying that undesirable activity was going on at the restaurant.⁵⁷ The restaurant sued her, and what they wanted was not damages but an injunction to stop the false statements.⁵⁸ The California Supreme Court ruled 5-2 that there can be an injunction in defamation cases, but only of specific speech that has been proven factually false.⁵⁹ I think that is the right standard with regard to the Internet.

I do not see any reason to continue the traditional rule that there can never be an injunction in defamation cases. I do not believe that damages will necessarily be an adequate remedy. There certainly can be an instance where the defendant has no assets and can continue to engage in the speech as long as they are willing to take the risk of a damage judgment against them. I think, though, that an injunction has to be narrowly tailored. It has to be limited to specific speech that is proven to be false. The California Supreme Court was correct in remanding the case to see what were the appropriate findings that the

53. *See id.* at 4 ("Yes, I am, Your Honor. This injunction is so broad that if I talk about Johnnie Cochran or this case on the sidewalk in front of this Court or pass out copies of the brief or speak to any reporter, I am violating the terms of the injunction . . .").

54. *See Tory*, 544 U.S. at 736 (stating that Cochran's counsel informed the court of Cochran's death after oral argument, that Tory agreed to substitution of Cochran's widow as respondent, and that the case was not moot despite the death).

55. *See id.* at 737-38 ("[T]he grounds for the injunction are much diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.").

56. *See Balboa Island Village Inn v. Lemen*, 156 P.3d 339, 353 (Cal. 2007) (holding that an "injunction prohibiting repeating of speech trial court found defamatory was not invalid prior restraint, but . . . was overbroad").

57. *Id.* at 341-42.

58. *Id.* at 342.

59. *See id.* at 353 (explaining that only "properly limited injunction[s] prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory" could stand).

speech was false and whether the injunction was limited to false speech. The Supreme Court is going to have to deal with the issue of when there can be injunctions in defamation cases. The best solution is that there can be an injunction with regard to the Internet and defamatory speech but only as to speech that is specifically proven false and only as to that speech.

A second area where I think we need to rethink the law as a result of the Internet is the tort of public disclosure of private facts. The reality, as I said, is there is much greater ability to reveal more personal information about individuals than ever before because of the Internet. Far greater opportunities exist for lawsuits for invasion of privacy, for public disclosure of private facts, and the First Amendment inevitably will then arise. The tort creates liability for true speech.⁶⁰ Defamation, by definition, is liability for false speech.⁶¹ Public disclosure of private facts is liability for true speech.⁶² That inherently raises tensions with the First Amendment.⁶³

What is less obvious, one aspect of the tort of public disclosure of private facts is that the speech has to lack newsworthiness.⁶⁴ How is a court to decide what is newsworthy, especially when it comes to the medium of the Internet? One way to decide what is newsworthy is what people are actually interested in. But that seems to be an elusive inquiry because the very fact that people are reading it would then make it newsworthy. The fact that it is on the website and it can be shown that the website is widely accessed would demonstrate that the speech is newsworthy and that would, therefore, defeat the tort. The only other way of defining what is newsworthy would be a standard of what enlightened people should be interested in. This would not focus on the salacious things that people actually want to know, but on what the enlightened public in their best interests should want to know. I am very troubled under the First Amendment with courts making judgments about what people should or should not know.

I think that the Internet is going to force the Court to rethink the tort of public disclosure of private facts. The Court is going to have to greatly narrow

60. See RESTATEMENT (SECOND) OF TORTS § 652D (1976) (explaining that the section "provides for tort liability involving a judgment for damages for publicity given to true statements of fact").

61. See *id.* § 581A cmt. a (explaining that defamation must consist of a statement that is "both defamatory and false").

62. *Id.* § 652D.

63. *Contra id.* (explaining the Restatement drafters' belief that, despite initial impressions of conflict, this type of liability is consistent with the First Amendment).

64. See *id.* § 652D cmt. d (explaining that if the speech is a "matter of legitimate public concern," liability will not attach).

the tort. My proposal would be: There should only be the possibility of liability for public disclosure of private facts when the disclosure does more than reveal private information; it must be that the speech actually causes a reasonable threat to a person's safety. Now, I realize that this approach will sacrifice a great deal of protection of privacy, but I do not know a way of doing it otherwise without compromising core First Amendment principles. On the other hand, I do not believe there is a First Amendment right to make somebody reasonably fear for his own safety.⁶⁵ So, if there is an internet website that lists doctors who provided abortions and other healthcare providers involved with regard to reproductive health with their names and faces and it could reasonably cause them to fear for their safety, then I think there is a basis for liability for public disclosure of private facts.⁶⁶ I think absent this element, tort liability raises grave concerns with regard to the First Amendment.

A third area where I think we are going to need to change the law as a result of the Internet is with regard to indecency regulation. I have already alluded to why this is so. The Court's medium-by-medium approach to indecency just does not make sense any longer. Why should we have one set of rules for radio and television,⁶⁷ and another for cable,⁶⁸ and another for the Internet,⁶⁹ when people are getting all of these sources through one provider and all of these sources through one medium—the Internet. I think here the conclusion has to be that there cannot be government regulation of indecent speech; that here the conclusion of *FCC v. Pacifica Foundation*⁷⁰ needs to be reconsidered. The Supreme Court had the opportunity to do that this year in *FCC v. Fox Television Stations*.⁷¹ The case involves a few instances where

65. See, e.g., *Virginia v. Black*, 538 U.S. 343, 366–67 (2003) (explaining that Virginia could not ban all cross burnings consistent with the First Amendment, but could prevent those burnings that were meant to cause fear or intimidation).

66. Cf. *Doe v. Mills*, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) (finding a cause of action in public disclosure of private facts where abortion-patient plaintiffs had their names displayed by protesters outside of the health clinic where they were about to undergo abortions).

67. See 18 U.S.C. § 1464 (2006) ("Broadcasting obscene language."); *FCC v. Pacifica Found.*, 438 U.S. 726, 747–48 (1978) (applying the indecency prohibition to radio and broadcast television).

68. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 768 (1996) (applying the indecency prohibition to cable television).

69. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 197 (2003) (applying the indecency prohibition to the Internet).

70. See *Pacifica Found.*, 438 U.S. at 748–51 (1978) (finding a broadcast of a George Carlin monologue indecent and stating that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection").

71. See *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (considering the FCC's "fleeting expletives" rule and upholding it on administrative law grounds without

there are fleeting expletives over television through broadcast media. One involved Bono accepting an award where he used the so-called F-word as an adjective before the word "brilliant."⁷² Another was where Cher was speaking to her critics and used the F-word.⁷³ Another was Nicole Richie who used the S- and the F-word in a single sentence.⁷⁴ Another involved a character on *NYPD Blue* using an expletive as a synonym for the word that means untrue or a lie.⁷⁵ The FCC took the position that any use of the so-called F-word is inherently sexual.⁷⁶ Now, that does not seem right. I do not think that Cher in saying to her critics, quote "Go Fuck 'em!" was really saying she wanted to have sexual relations with them. The Second Circuit struck this down, but on administrative law grounds.⁷⁷ The Second Circuit said that the decision of the FCC to punish a fleeting expletive was arbitrary and capricious; that the FCC didn't give a reasoned explanation for its decision.⁷⁸ But at the end of its majority opinion, the Second Circuit said that it would also raise First Amendment concerns.⁷⁹ The United States Supreme Court, in a 5-4 decision, reversed the Second Circuit.⁸⁰ The Court, in an opinion by Justice Scalia, said that the action was permissible on administrative law grounds.⁸¹ The Court remanded the case in consideration of the First Amendment issue.⁸² Justice Thomas, in a concurring opinion, urged the Court to reconsider the medium approach to indecency.⁸³ The Court should follow his lead.

addressing the merits of the rule).

72. *Id.* at 1807.

73. *Id.* at 1808.

74. *Id.*

75. *See Fox TV Stations, Inc., v. FCC*, 489 F.3d 444, 452 (2nd Cir. 2007), *rev'd*, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009) (providing various expletives used in multiple episodes by a character on the show).

76. *See FCC*, 129 S. Ct. at 1809-10 (developing the FCC's position that the word is used to describe a literal sexual act).

77. *Fox TV Stations*, 489 F.3d at 467.

78. *See id.* at 462 (explaining that the FCC had failed to provide a "reasoned analysis justifying its departure from the agency's established practice").

79. *See id.* at 462-66 (noting the court's concerns about the level of First Amendment protection afforded in these circumstances).

80. *FCC*, 129 S. Ct. at 1819 (2009).

81. *See id.* ("[W]e find the Commission's orders neither arbitrary nor capricious.").

82. *See id.* ("This Court . . . is one of final review We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion . . . the case is remanded for further proceedings consistent with this opinion.").

83. *See id.* at 1822 (Thomas, J., concurring) ("I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.").

Now, I think the one place where the government still will be able to regulate is to protect individuals from being used in the production of indecent material. Thus, child pornography laws are not threatened by this. The Supreme Court has recognized that the government has a compelling interest in protecting children from being used in the making of pornography.⁸⁴ These laws can continue to stand because the government constitutionally can punish private possession of child pornography, regardless of where in the world it originated.

A fourth area that needs to be rethought is the law with regard to the fairness doctrines. *Red Lion Broadcasting, Co. v. FCC*,⁸⁵ decided in 1969, has never been reconsidered by the Supreme Court. The FCC changed the fairness doctrine but *Red Lion Broadcasting* still remains the law. Under current law, there still constitutionally could be a fairness doctrine or a right to reply law with regard to the broadcast media.⁸⁶ I remember arguing that *Miami Herald* was wrong and the Court should have allowed a right to reply with regard to the press as much as the broadcast media, that a person who is attacked should be able to answer, that there is as much scarcity with regard to the print media as the broadcast media. I now believe that my position was wrong. But I believe that the existence of the Internet, the ability of people to reply on their own blogs, their own websites, the blogs and websites of others, make it unnecessary to have a fairness doctrine and unnecessary to have right to reply laws. In fact, because of the Internet and the ability to expose so many different viewpoints, the fairness doctrine is now an anachronism.

A fifth and final implication of what I have discussed is that it makes it much harder for either the First Amendment or statutes to give any special protection to the institutional press. Here, too, the Internet has forced me to rethink my position and I think it is going to force the courts to rethink theirs. As mentioned above, there has been a long debate over whether the institutional press should get special privileges. They often do. There are reporter shield laws in almost every state that give special protections to the institutional press that the non-institutional press does not receive.⁸⁷ There is a

84. See, e.g., *New York v. Ferber*, 458 U.S. 747, 774 (1982) (finding that child pornography is not entitled to First Amendment protection).

85. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (finding a congressionally imposed requirement that broadcasters provide free air time to criticized parties in order that they might respond appropriately under the First Amendment).

86. See *id.* (finding that the doctrine of fairness justified the congressionally granted right to reply).

87. See, e.g., CAL. CONST. art. I, § 2 (providing constitutional protection for journalists working in print, radio, and television news from contempt for failing to disclose information to courts or administrative bodies).

proposal in Congress to create a federal reporter shield law.⁸⁸ I am very sympathetic to the idea of reporter shield laws. I think the Supreme Court was right in *Branzburg v. Hayes*⁸⁹ when it said that without some protection for the gathering of information, there cannot be a free flow of information.⁹⁰ I think *Branzburg v. Hayes* was wrong in denying protection to the press with regard to a reporter shield.

But I do not know how to define who is a reporter any longer when anybody can say they were gathering information for purposes of their blog, for purposes of their website. Everybody is realistically a reporter in the world of the Internet. Likewise, I think we face problems in terms of who gets press passes, who gets access to various government functions. How can we say it is only the formal institutional media when so many people are informing others by using the Internet, websites, the newest medium? So I think the laws that do provide special protections to the institutional press need to be reconsidered and be expanded to include the Internet and the media and once you do that for the web, I do not know how there can ever be special protections for the formal institutional press.

IV. Conclusion

What I have argued for is not new in American history. This is not the first time that a change in technology required a change in the law. I think you see that with regard to the Fourth Amendment. Originally, the Supreme Court said that the Fourth Amendment requires a physical trespass.⁹¹ So when the first electronic eavesdropping, wiretapping case came before the United States Supreme Court in *Olmstead v. United States*,⁹² the Supreme Court said wiretapping, electronic eavesdropping, does not implicate the Fourth Amendment so long as police did not actually enter the premises.⁹³ The

88. See S. 448, 111th Cong. (2009); H.R. 985, 111th Cong. (2009) (reintroducing federal reporter shield legislation after previous bills had died at the end of the 110th Congress).

89. See *Branzburg v. Hayes*, 408 U.S. 665, 708–09 (1972) (determining that forcing a news reporter to testify before a grand jury did not violate his First Amendment rights to freedom of press; his agreement to keep his sources confidential did not give rise to any constitutional privilege against testimony).

90. See *id.* at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

91. See, e.g., *Hester v. United States*, 265 U.S. 57, 58–59 (1924) (finding that evidence must stem from a physical trespass by police officers to be considered inadmissible).

92. See *Olmstead v. United States*, 277 U.S. 438, 466–68 (1928) (considering whether wiretapping violates the Fourth Amendment).

93. See *id.* at 464 (finding that "the amendment does not forbid what was done . . . there

Supreme Court said so long as the police are doing the wiretap without going on to the person's property, no Fourth Amendment concern at all.⁹⁴ That was the law for almost forty years until finally the Supreme Court, in *Katz v. United States*,⁹⁵ realized that the change in technology required an alteration of the legal framework. The Supreme Court articulated a totally different approach to the Fourth Amendment. The Court said that the standard for the Fourth Amendment is the reasonable expectation of privacy.⁹⁶ There are obviously problems with regard to that but it was an approach that could be used for all the different technologies the government might use with regard to the Fourth Amendment.

What I am arguing for is that we have the same change when it comes to the First Amendment, the same change with regard to the media. So far the Supreme Court has taken existing principles and conceptual frameworks and simply applied them to the Internet. The Internet requires reconsideration of First Amendment law in the same way that wiretapping did for the Fourth Amendment. It requires that major aspects of the First Amendment be reconsidered.

was no entry of the houses or offices of the defendants").

94. *See id.* at 467–68 (assuming that an invasion of a house by mere wires does not count as a trespass and does not implicate the Fourth Amendment, so the courts are powerless to exclude such evidence without an act of Congress).

95. *See Katz v. United States*, 389 U.S. 347, 358–59 (1967) (finding a wiretapping to have violated the Fourth Amendment).

96. *See id.* at 353 (concluding that the old trespass doctrine will no longer be controlling and instead, an expectation of privacy analysis will determine whether police action is a "search and seizure" under the Fourth Amendment).