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CYBERSPACE INVADES THE FIRST AMENDMENT: Where do we go from here?

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ABSTRACT OF THESIS

CYBERSPACE INVADES THE FIRST AMENDMENT:
Where do we go from here?

Long before our nation was created, European Countries acknowledged the importance of free speech. Despite this, Great Britain later denied this right to the New England Colonies. Over the last two centuries many battles have been fought to make freedom of speech an inalienable right to be shared by all. A good portion of these battles have been fought in courtrooms. Judge and Supreme Court justices have dealt with issues ranging from what is a public figure to what is indecent speech. Many of these issues are not found in the original text of the Constitution. This has forced the judges to devise tests to determine certain standards and to make discretionary choices. Today's public officials are dealing with issues that have never been dealt with before, such as Internet speech and cyberspace libel. The decisions rendered by the courts on these new issues will set a precedent for future generations. What kind of effect of this new territory, known as cyberspace, will have on the First Amendment is yet to be seen.

Dollie Deaton

Jaunary 30, 2001

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CYBERSPACE INVADES THE FIRSTAMENDMENT: WHERE DO WE GO FROM HERE?

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DATE	NAME

Thesis

Dollie F. Deaton

The Graduate School
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Where do we go from here?

THESIS

A thesis submitted in partial fulfillment
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By

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INTRODUCTION

Tired of English tyranny, our founding fathers approved a constitution and ten amendments they hoped would build into the new government some limits so that abuses of power could not happen.[1] The first of these ten amendments was expected to be somewhat of a shield to protect free speech and free press from government intervention.

It took time for the First Amendment to reach its full power. "Despite its well written phrases and promises, the First Amendment did not end the barbaric English practice of punishing seditious libel, which led to severe sanctions for mild criticism of government or its officials." [2] The First Amendment was a single, fragile sentence that did not carry the protective power it now does. It took almost 150 years of challenges and Supreme Court decisions to reach the amount of freedom the public and press now enjoy.

But once again, the power of the First Amendment is being challenged by new technology and a new frontier. This new frontier is known as "Cyberspace." It has no physical boundaries and is available to anyone who either owns a computer or can get to the local library and turn on a computer. Phrases such as the "information highway" and "user friendly" are fast becoming common place.

Inspite of its popularity, the word "Internet" was somewhat foreign to many people even a decade ago. Actually, the term is almost 40 years old. The Internet began in 1957 when the Advanced Research Projects Agency (ARPA) was created within the Defense Department as a response to the Russian launch of the Sputnik Satellite.

In 1969 ARPA created a computer network known as ARPANET which lasted until 1989. In1972 e-mail was created and in the 1980's came the Internet. In the past decade the World Wide Web was launched.

Today the Internet is a global super-network of 15,000 computer networks used by millions of individuals, organizations, corporations and educational entities the world over.[3] As the Internet has developed, it has become a medium not only for entertainment, but also an important source for information and news. [4] Every day more and more people travel use this new technology as a method of communication.

This new type of technology is bringing people together, just as the roads and railways did over a century ago. But this new highway is not made of asphalt and is not surrounded by a landscape made up of trees, grass and sky. Instead of cars, planes or trains, the traveler on the

Information Highway uses computers, telephone lines and modems. The keyboard and mouse are, in a sense, the gas pedal that gets the user to where he/she is going, and the windshield replaces by the computer screen. The traveler on this new super highway is world-wide, not just nation-wide. It costs less to travel this way, and access is unlimited. Messages are sent and received almost instantaneously.

Anyone who has access to the Internet can e-mail, get into chat rooms, post messages or get information about any subject. The user does not have to be a journalist, have morals or sign a creed of integrity or honesty. The information posted does not have to be verified or edited. This information can be sent literally around the world with just a click of one's finger on the mouse. To make things more complicated, the user can almost be assured of total anonymity. Because of this total anonymity, on-line defamation has received significant comment.[5]

Total anonymity is just one of the characteristics of cyberspace libel that makes it much different than the traditional libel the courts have dealt with in the past. Even if the identity of the person who has e-mail or a web site is known, it must be proven that particular person posted the libelous material and not someone else just using that site. These situations bring new challenges to the court system.

The Internet is still relatively new. Until just a few years ago, travelers on the Internet had access but no rules by which to travel. It was not until 1997 that the Supreme Court granted the Internet full First Amendment protection.[6] In *Reno vs. The ACLU,* the Court agreed with a lower court decision that the Internet is as diverse as human thought and concluded that "our cases provide the basis for qualifying the level of First Amendment scrutiny that should be applied to this medium. The Court distinguished the Internet from other media such as broadcasting because "the Internet can hardly be considered a scarce expressive commodity."[7]

This landmark decision can be compared to another landmark decision made by the Supreme Court in 1964 in the case of *New York Times vs. Sullivan*.[8] This was the case that laid the foundations for future libel cases. The court ruled that it public officials must prove that statements considered libelous were made with "actual malice that is, with knowledge that was false or with reckless disregard of whether it was false or not."[9] This case is only 36-years old. Before *Sullivan,* there were no cut in stone rules on libel. Libel rules at the state level were applied to cases. This case set a precedent and provided standards that have been used and will continue to be used in libel cases. Applying these standards to libel that is committed in cyberspace is the challenge the Supreme Court

is now facing. It must protect First Amendment rights that have taken two centuries to achieve.

STATEMENT OF PURPOSE

The purpose of this paper is to provide a historical account of the First Amendment and libel from constitutional times to the cyberspace era. By taking a critical look at the cyberspace libel suits that have been filed over the last four years, it can be proven that the First Amendment is strong, yet flexible enough, to govern this new territory. Areas that will be explored are:

1. History

A historical account of the First Amendment. This will include its fragile but weak beginnings and its inability to curtail government persecution of publishers that dared to criticize the government. It will also include a section on Kentucky's fight for First Amendment rights.

A historical account of the Internet from 1957 to the present.

2. Libel Jurisprudence in America

The landmark decision made in the New York Times vs. Sullivan case set the standard for libel cases that followed. It introduced such terms as "actual malice" and "reckless disregard." The statutes that were set in this case have been used and refined by the courts in our nation for the past 36 years.

3. Libel Jurisprudence

In the past two years there have been a few cyberpace libel suits filed and there will probably be more. As with all laws suits, these cases can be extremely expensive to take to court. Cyberspace is still a very new territory and the rules that govern this frontier are still being decided. A libel suit of this nature can take a very long time. Once the suit is settled, the person found guilty of posting libelous material may not have money or financial holdings to pay damages that might be awarded to a grieved party. There have been law suits dealing with libel and the Internet and the judicial system may see more. Even though these cases occur on a media that is different from traditional media, there is no need for reinterpretation of the laws it took almost two centuries to make.

CHAPTER ONE

Freedom of the press:

The original American dream

In the beginning years of our country, the American dream was not a big house or a fancy car. The first American dream was freedom. The early colonists wanted to be free to worship as they pleased and to speak their minds without worrying about being jailed. Unfortunately for these early colonists, freedom of speech was more of a dream than a reality. As late as 1854 French historian Alexis de Tocqueville said: "I know no country in which there is so little true independence of mind and freedom of discussion as in America…The majority raises very formidable barriers to the liberty of opinion: within these barriers an author may write whatever he pleases, but he will repent it if he ever step beyond them."[10]

To someone such as de Tocqueville it would be hard to imagine that a century later both men and women would be marching in the streets and voicing their opinions on government legislation. The 1960s gave rise to civil rights and anti-war demonstrations. These demonstrators may not have worried as much as maybe their ancestors about being put in jail for seditious libel. The formidable barriers that Tocqueville wrote about had vanished. It took brave men and women and landmark court cases to make these barriers fall. The fear of speaking out against the government is a fear that the colonist brought from England and kept with them even after the United States was an independent country.

Early Trailblazers of the Colonial Press

The first printing press was brought over by colonists within the first 20 years of living in the new world. It was strictly used for religious material. In 1704 *The Boston News-Letter* printed its first issue. It was more careful about what it published, so it was allowed to continue.[11] By 1771 there were 25 newspapers being published in the new world. Since the English colonies had inherited their censorship practice of all publications from Great Britain, the publisher of a newspaper was liable to be arrested and prosecuted if he printed something any of the officials did not like.[12] However, there were some publishers that stepped out and felt the backlash of suppression. James and Benjamin Franklin of Boston were just two of these publishers.

The elder brother, James, began publishing *The New England Courant* in 1721. Within a year he was in thrown in jail because of a blistering news article on the ineffective defense the government had against pirates who were preying on shipping in the area. [13] He spent a month in jail and the 16-

year-old Benjamin became publisher.[14] After getting out of jail, James Franklin continued to criticize the government. Due to his criticism of the government, he was forbidden to publish again unless it be approved by local officials. They also said he needed a license to publish.

Because the formal license laws were invalid in the Colonies, James Franklin went to court. He fought the government's attempt to bring back the practice of licensing. A grand jury agreed with him and refused to indict him on a contempt of court charge for publishing without permission from the government. [15]The authorities gave up the fight against Franklin.

James Franklin, therefore, became a significant figure in the history of a free press in America.[16] By defying the royal government and the General Court, Franklin established the principle that the government can not censor before publication.[17] And the grand jury, by allowing his defiance to succeed, affirmed the concept of an independent press responsible to its readers and not to governmental authority.[18]

Franklin's victory did not apply to other publishers in other colonies. In 1735 New York publisher John Peter Zenger was jailed for nine months. Zenger, publisher of the *New York Weekly Journal*, had criticized Royal Governor William Cosby. In his newspaper, Zenger accused the government of endangering the rights and property of the public by tampering with trial by jury and rigging elections.

Twice, a grand jury refused to indict Zenger for seditious libel and the elected assembly refused to press charges. Finally Cosby's council issued a warrant for his arrest.

Zenger was charged with sedition. During the nine month ordeal, the *New York Weekly Journal* missed only one edition. Zenger's wife and friends kept the publication alive. His supporters could have raised the money necessary to get Zenger out of jail, but Zenger chose to stay there to win sympathy and support from his readers.[19]

When he appeared in court, his lawyers were disbarred. Zenger asked for a court appointed attorney and was given the services of John Chambers. Chambers was known to side with the government and had no real experience with law. Chambers presented a weak defense for his client. At that point, well known Philadelphia attorney Andrew Hamilton announced he would participate in Zenger's defense.

The Attorney General argued that whether or not libel was committed should be left to the judges to decide.[20] The Chief Justice agreed that the law of New York was accurately stated by the 1606 Star Chamber case, de Libellis Famosis, which held that true statements could be libelous.[21] Hamilton argued that law was outdated and that truth was a defense against libel.

At the heart of the defense was the right of the public to criticize the government. Pressing the case further, Hamilton suggested that what is good law in England is not necessarily good in Aerica.[22] He drove his argument for free speech closer to home by insisting that free speech was particularly important in the American colonies where governors, representatives of the Crown, cannot be brought to justice for their misdeeds.[23] The governor's powers allowed total control of the courts and therefore total control. Free speech, Hamilton argued, was American's best method of instilling a sense of duty and seeing that the governing officials acted responsible.[24] The jury agreed and after being in jail for nine months, Zenger was a free man.

The Zenger trial while it significantly contributed to neutralizing seditious libel, by no means guaranteed respect for freedom of the press in colonial New York.[25] In effect, it transferred the location of the principal threat to free speech from the courts to the legislature. For the Assembly, standing upon its privileges and dignity, scared printers and authors into a cautious exercise of their liberties by threatening to try them before its own bar, between 1747 and 1770. [26] Even though Zenger's acquittal was hailed as a victory, the case did not set a binding precedent. It did show the growing sentiment for freedom.[27]

The Bill of Rights

Once America had gained its independence from England, the Articles of Confederation were put in place. It did not take long before they were proven inadequate and politicians met to put together a constitution. The real debate that occurred at this convention was over whether or not to have a "Bill of Rights" spelled out.

Federalist, such as George Washington, did not support the idea like the Anti-Federalists did. Washington believed that the demand for a bill of rights was a mere subterfuge for other objections that could not stand exposure "in open day." [28] The Anti-Federalists felt quite the opposite, even though several of the states had already written a Bill of Rights into their own constitutions. They wanted a stronger version that would accompany the Constitution.

Government under the newly constructed constitution gave more power to the federal government. Because state governments would become weaker, the Anti-Federalists believed that a Bill of Rights should accompany this newly drafted constitution. This was not an issue that was

settled overnight or in a few Congressional meetings. In fact, it became an issue in the first federal election in 1788-89.[29]

Both parties bombarded each other with essays and news articles. Federalists wrote 85 letters urging the ratification of the Constitution. The Federalist, as the letters became known, appeared between 1787 and 1788 in the *Independent Journal*, a semi-weekly New York newspaper. Jay was seriously injured in a street riot shortly after the letters began appearing in the paper and only contributed eight of the 85. Hamilton and Madison wrote the remainder.

Thomas Jefferson gave the Anti-Federalist party's stance of the Bill of Rights issue much needed support. Jefferson, celebrated author of the Declaration of Independence and the keeper of the revolutionary faith that gave birth to America, believed that "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." [30]

Virginia's Richard Henry Lee was another champion of the Anti-Federalist movement. He drafted several amendments that would resemble the 12 amendments that James Madison later introduced to the states in September 1789. These amendments included freedom of the press and a right of assembly and petition. Lee hoped the amendments he had written would be adopted by Congress, but they were not.

In the end it would be James Madison who would get the job done. At first the Federalist Party was not interested, but he persisted. He believed that a bill of rights would give the public more confidence in the government. Madison realized that the introduction of serious rights proposals "will kill the opposition everywhere, and by putting an end to disaffection to the Government itself, enable the administration to venture on measures not otherwise safe." [31]

Madison served on a committee for the 1776 Virginia Constitution. He relied heavily on that document in putting together his proposed amendments.[32] These amendments were prepared in a form that would have them incorporated into the Constitution. At first there was much opposition to the proposed amendments. Only ten of the twelve amendments introduced by Madison were ratified by the states. And finally two years later, Virginia became the last state necessary to complete the ratification process.

The Alien and Sedition Acts

With the ratification of the Bill of Rights in1791 freedom of speech took a big step forward. Just eight years later, the process was somewhat reversed when the Alien and Sedition Acts

were imposed. These laws, supported heavily by President John Adams, pitted Adams' Federalist Party against the Democratic-Republican party. The laws were passed to silence opposition to an expected war with France. Neither country had declared war, but had fought many battles against each other on the water. The Republican Party sided with the French, while the Federalist Party tended to favor the British. The Alien and Sedition Acts were actually three laws that dealt with aliens and one law dealing with seditious libel. The Alien Enemies Act gave the President the right to imprison or deport any person from a country that was considered to be an enemy of the United States.

The Alien Friends Act allowed people from nations considered to be friendly by the United States to be deported if the President thought they were dangerous. The Naturalization Act required an immigrant to live in this country for 14 years before becoming a citizen. The Sedition Act punished anyone who criticized the government.

The Sedition Act brought back the law of seditious libel that had been almost done away with when Zenger was acquitted. The Sedition Act made it a crime, subject to five years' imprisonment and a $5,000 fine, to: write, print or publish, or…knowingly and willingly assist or aid in writing, printing ,uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or the President of the United States, with intent to defame the said government, …or to bring them…into contempt or disrepute: or to excite against them…the hatred of the good people of the United States, or to stir up sedition within the United States.[33]

The Alien Act was directed mainly against the French and Irish immigrants, most of them Republicans.[34] These three laws gave the president the power to deport anyone not born here without a hearing or any real specific reason other than just being a threat to the government. Although these laws were never really enforced, many aliens, in acute apprehension, either fled the country or went into hiding.[35]

The Sedition Act was enforced. Under these laws, 25 arrests and 15 indictments were made and no one was immune. Congressmen Matthew Lyon of Vermont became the first victim. Lyon, an Irishman, had written a letter to the *Vermont Journal* in response to a bitter attack made against him by the Federalist Party. He was charged with sedition. Although he used truth as a defense, he was sentenced to two months in jail and fined almost $1,100. While he was in jail, he was elected to serve a second term by an overwhelming majority. Even after he had served his sentence, he stayed in jail until the fine was paid. The money to pay the fine was raised by

constituents like Anthony Haswell, publisher of the *Vermont Gazette*.

Haswell condemned the trial against Lyon as "persecution" and not prosecution. Haswell's paper launched a bitter attack on the Federalist Party. He received threats about being arrested for treason and having his paper shut down. Haswell deemed these threats of treason as lies and challenged the Federalist Party to prove them. Just before Lyon was to get out of jail, Haswell ran an advertisement for a lottery to help raise money to pay Lyon's fine. He was arrested and indicted on two counts of seditious utterances that were contained in the ad. The first count was false malicious wicked and seditious libel against the United States. The charge was based on the wording of the lottery ad. The second count was on an accompanying paragraph from the *Philadelphia Aurora* that attacked the Adams administration for firing people for their political beliefs.

Haswell told the court that the lottery ad was just an advertisement and that he did not write it. The two people that wrote the advertisement testified in his behalf. On the second count, he used truth as a defense. District Attorney Charles Marsh contended that since Haswell admitted publishing the two items and pleaded their truth, the prosecutor contended, he had confessed his guilt, because the doctrine of "the greater truth the greater the libel" applied under the common law of criminal libel.

After opening arguments, Haswell was granted a postponement. And, unlike Lyon, he was allowed to go free on $2,000 bond. After a lengthy trial, Haswell was fined $200 and assessed court costs and sentenced to two months in the federal prison.[36] He requested that he be allowed to serve his sentence in his home town and four days later, unlike Lyon, his request was granted.

Besides Haswell, four other editors were imprisoned under the Sedition Act. The prosecution that resulted in the longest jail sentence was in Dedham, Massachusetts. A group made up a sign reading "No Stamp Act, No Sedition, No Alien Bills, No Land Tax; Downfall to the Tyrants of America." Authorities arrested two people, and they were indicted on a count of criminal act of free expression. One expressed deep repentance. The other refused and would not name names of his partners in this act. The defendant, a Revolutionary War Army Veteran and common laborer with little formal education, was convicted of having a "rallying point of insurrection and civil war." He was sentenced and stayed in jail for two years.[37]

Kentucky Fights Back

The Alien and Sedition Acts was considered unfair by many. One of the most ardent supporters of this belief was none other than Vice President Thomas Jefferson. He anonymously

drafted a set of resolutions which later was called the Kentucky Resolutions. At that time, the author of these Resolutions was a mystery. In 1821 Joseph Breckinridge, son of John Breckinridge, asked Jefferson about the authorship of these documents and Jefferson reluctantly replied that he was the author.

The heart of the resolutions stated that the Alien and Sedition Acts were unconstitutional and called on all of the states to declare them null and void. Jefferson wanted to give the states the right or power to decide whether or not the Federal government had assumed unauthorized power. He drew a significant distinction between actions involving the abuse of delegated powers and the use of undelegated powers by the federal government. In the first instance, "a change by the people" of those in power "would be the constitutional remedy."[38] But "where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy."[39]

Once these resolutions became public, petitions with thousands of signatures began pouring in to Congress. Week after week newspapers everywhere reported county mass meetings, larger than any in history, which culminated in a series of resolutions that added the Alien and Sedition Acts to the government's policies already under attack.[40] "Despite their most strenuous efforts the Kentucky Federalists were able to secure only a few hundred signers for their own remonstrance, and few of those who signed were considered to be men of any position or respectability."[41]

The largest protest meeting held in the state occurred in Lexington. Some 4,000-6,000 people gathered to hear George Nicholas speak.[42] Nicholas was an attorney and Kentucky's first Attorney General. In early 1799 he published a pamphlet stating that Kentuckians would obey all constitutional laws, but would ignore those that were both unconstitutional and impolitic. Nonetheless, he added, "we contemplate no means of opposition, even to these unconstitutional acts, but an appeal to the real laws of our country."[43]

Nicholas, considered to be the most popular Republican leader in the state at that time, delivered a rousing speech.[44] He questioned the constitutionality of the Alien and Sedition Acts and accused the President and his party of tyranny. Nicholas' speech was followed by a young, up and coming lawyer named Henry Clay. His speech only added to the crowd's furor. Two Federalists who attempted to reply from the wagon-bed platform were rudely hustled away.[45]

Although his presence was not accounted for, another prominent Kentucky politician was

presumed to be in the crowd that day. John Breckinridge, the former Kentucky Attorney General and Fayette County delegate to the State House of Representatives, believed that the Alien and Sedition Acts were unconstitutional. Breckinridge played an important role in getting the Kentucky Resolutions passed. He was convinced that sentiment in Kentucky was so unanimous that any attempt to enforce the Alien and Sedition Laws would be publicly resisted and expelled.[46]

Breckinridge showed up in Virginia not long after the Lexington rally. He had been in poor health and had been advised to visit the Virginia Sweet Springs.[47] From August until November he stayed in Virginia. It is not clear what he did while there, but upon his return to Kentucky he had with him a draft of the Kentucky Resolutions of 1798. They were given to him by Wilson Cary Nicholas, brother of George Nicholas.

The Kentucky Resolutions were introduced in the General Assembly on November 5. Breckinridge had made a couple of changes to the original resolutions. Jefferson's original draft declared that "where powers are assumed, which have not been delegated, a nullification of the act is the rightful remedy;…every State has a natural right in cases not within the compact…to nullify of their own authority, all assumptions of power by others within their limits. The States were invited to concur in declaring these acts void and of no force and to take measures for insuring that neither the acts complained of nor any others, not plainly and intentionally authorized by the Constitution shall be exercised within their respective territories." [48]

The omission of these phrases weakened the stance taken by the Kentucky lawmakers.[49] This may have been deliberately done by Breckinridge in order to make sure the resolutions were accepted. [50] Jefferson had intended to bypass Congress with his claims that it was a mere compact and that the states had the power to declare The Alien and Sedition Acts unconstitutional.[51] Instead, Breckingridge weakened Jefferson's intent by stating that appeals to declare the Alien and Sedition Acts unconstitutional should be directed to Congress.[52]

This set of resolutions was the only topic of that General Assembly. The key debate against ratification came from William Murray, a Federalist lawyer, who tried in vain to stop the tide of dissent against the Federalist Party.[53] Murray had received a copy of the resolutions only a few minutes before entering the House, so he had to content himself with discussing general principles rather than proposing specific amendments which might make the resolutions more to the Federalist point of view.[54]

He argued that if the House approved the resolutions it would be violating the Constitution by assuming unwarranted rights, for the state had no right to censure the Federal

Government. Within the government, he contended, only the judiciary could declare Congressional Acts to be unconstitutional. "Murray admitted that the acts involved might have been impolitic, but he damned the heat and haste with which they had been considered."[55]

Then Breckinridge gave his response. He asserted that the states did have the right to declare null and void any law that was unconstitutional. He contended that Congress and the states were both a part of the compact, and therefore the states had the right to ensure the federal government. He further asserted that:

> "If Congress should still try to enforce them, I hesitate not to declare it as my opinion that it is then the right and duty of the several states to nullify those acts, and to protect their citizens from their operations. Congress should always have enough virtue wisdom, and prudence, however to expurge such laws when requested to do so by a majority of the states."[56]

The Kentucky General Assembly passed the resolutions with little debate. On Nov.13 the Kentucky Senate unanimously passed the resolutions and Gov. James Garrard signed them three days later.[57] Kentucky's public reaction to the ratification followed closely along party lines.[58] A few Federalists protested the passing of the resolutions, mostly Kentucky residents had never been more united in their political sentiments.[59]

Breckinridge and Jefferson's home state of Virginia was next. The Virginia legislature ratified a set of resolutions similar to those passed in Kentucky. However, Virginia and Kentucky stood alone. All other state legislatures either voiced disapproval or stayed silent.

Making a Refuge for the Oppressed

The Alien and Sedition Acts became part of the political platform for the upcoming presidential election of 1800. Even though Kentucky and Virginia received no support from their sister states in adopting the resolutions, the political scene had changed enough between 1798 and 1800 for Jefferson to win the election. As President, Jefferson pardoned those who had been convicted under the Sedition Laws.[60] Over a period of time, Congress also repaid most of the fines.

The Sedition Act expired in 1801 and was not renewed by Congress. Although none of the court cases related to the Sedition Acts ever made it to the Supreme Court, Justice William Brennan, writing in the *New York Times v. Sullivan*, declared The Sedition Act invalid.[61]

The Espionage Act of 1917 and the Sedition Act of 1918

The Alien and Sedition Acts were invoked because of the fear of a war with France.

This same type of fear caused similar laws such as The Espionage Act of 1917. This law was enforced at the onset of World War I.[62] The Espionage Act "made it a crime punishable by a twenty-year jail term or a $10,000 fine to willfully convey false reports or false statements with intent to interfere with the operation or success of the military or naval force of the United States or to promote the success of its enemies…or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, the military or naval forces of the United States or…willfully obstruct the recruiting or enlistment service of the United States." [63]

The First Amendment received another blow the following year when Congress passed an amendment known as the Sedition Act.[64] This amendment made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the Untied States, or the Constitution of the United States, or the uniform of the Army or Navy of the United States, or to promote the cause of its enemies." [65]

Just as with the Alien and Sedition Laws, no one was immune from prosecution. In December 1917, Reverend Samuel Sibert of Carmel, Illinois, was imprisoned because he preached a sermon on all wars.[66] In all 1,532 people were arrested for disloyal statements, 65 for threatening the president, and 10 for sabotage.

"You can't even collect your thoughts without getting arrested for unlawful assemblage," Max Eastman, editor of the *Masses*, told an audience in July 1917. "They give you ninety days for quoting the Declaration of Independence, six months for quoting the Bible, and pretty soon somebody is going to get a life sentence for quoting Woodrow Wilson in the wrong connection." [67]

Eastman and his publication was the first to feel the heavy hand of the government under the Espionage Acts. Just one month after the law was enacted, the entire editorial board was charged with conspiracy to obstruct the draft. This charge was based on four cartoon and four articles that were printed in the August edition. The publication was seized by New York City Postmaster Thomas Patton. He had been ordered to do so by the Postmaster General Albert Burleson. Eastman and his staff took the matter to court.[68]

The case came under the jurisdiction of U.S. District Judge Learned Hand. Judge Hand ruled in favor of Eastman and the *Masses*. In his opinion, he wrote that speech was constitutionally protected unless it incited readers to violate the law. Judge Hand's order was immediately blocked, pending appeal. This appeal was overturned by the Second Circuit U.S. Court of Appeals.[69] The *Masses* was allowed to be mailed.

The First Amendment Establishes New Principles

Judge Hand's decision in favor of freedom of speech was just the beginning of an era that established the principles we now use in our courtrooms. Supreme Court Justices have developed "principle tests" that are used when dealing with freedom of speech cases. These test are clear and present danger[70], bad tendency[71], balancing[72], preferred position[73], and absolutism.[74]

Clear and Present Danger

In 1919 Supreme Court Justice Oliver Wendell Holmes established the test of clear and present danger in the case of *Schenck v. United States*. Charles Schenck, general secretary for the Socialist party, printed and distributed 15,000 pamphlets criticizing the draft. He was convicted under the Espionage Act. Holmes stated that if this had been peace time Schenck's expression of ideas would have had First Amendment protection. However because this was a time of war, anything done to obstruct recruiting constituted clear and present danger.[75] The case established that dissent was not absolutely guaranteed, but rather depended upon circumstances of the case.

The Schenck test was used in two other cases involving the issue of dissent. In 1919, Jacob Frohwerk[76] published articles that encouraged people not to serve in the military forces. The court held that these articles were in violation of the Espionage Act because World War 1 was in progress and encouraging people not to serve created a clear and present danger to the freedom of the United States. The other case involved Eugene Debs.[77] At a Socialist convention, he stood up and stated that the U.S. had no business being in WW1 and applauded people who tried to stop military recruitment. The court held that Debs action, again because of war time, represented clear and present danger and therefore was guilty under the Espionage Act.

In *Abrams v. United States*, Holmes clarified the nature of the clear and present danger test. In his dissenting opinion he wrote: "The government may punish expression "that produces or is intending to produce a clear and imminent danger that it will bring about forthwith certain substantive evils." Holmes emphasized that "the power is greater in time of war than in time of peace because war opens dangers that do not exist in time of peace."[78]

Bad Tendency

The test of "bad tendency" was established in 1925 when Benjamin Gitlow and three other members of the socialist party were indicted on a New York Court for espionage. They had published a radical article in the pamphlet *The Revolutionary Age*. Gitlow's article urged people to use force to overthrow the government. A New York trial court convicted and sentenced them to five to ten years hard labor. The Supreme Court affirmed the lower court decision.

In his opinion Justice Edward Sanford wrote that "such utterances, by their very nature, involves danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen." [79] The Court made a decision on the fact that Gitlow's publication urged people to use force to overthrow the government. If Gitlow had written in a more abstract way, using a fictional government, he could not have been prosecuted.

Justice Sanford also wrote that he presumed the 14th Amendment also guaranteed that state laws could not violate the First Amendment rights of citizens.[80] This was an important step because state judges are elected officials, unlike Supreme Court Justices who are appointed for life. It could be possible for an elected official to have a decision influenced by an opinion group or popular culture, especially if it just happens to be election year. Supreme Court Justices are appointed for life and do not have to worry about being re-elected every so often.

Balancing

The "balancing test" deals with other rights that might come into conflict with the First Amendment. For example if the regulation of a person's behavior results in an abridgment of speech, the court would have to determine which would have the greater protection or priority. This was established in 1951 by Chief Justice Fred Vinson and used in several cases through out the 1950s and 1960s in such cases as *Barenblatt v. United States* (1959), *Konigsberg v. State Bar of California* (1961), and *Robel v.United States* (1976). In Barenblatt, Justice John Harlan noted that when First Amendment rights are asserted to prevent governmental inquiry, "resolution of the issues always involves a balancing by the courts of the competing private and public issues at stake in the particular circumstances involved." [81]

In Konisberg, Justice John Harlan claimed that when constitutional protections conflict with the exercise of valid governmental power, "a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." [82] In *Robel*, Chief Justice Earl Warren acknowledged the "delicate and difficult task" facing the Court when Congress' exercise of its enumerated powers clashes with those individual liberties protected by the Bill of Rights.[83]

Preferred Position

The "preferred position" test is similar to the balancing test except that the First Amendment is presumed to take priority. This test has also been used in many Supreme Court Cases. In the 1943 case of *Murdock v. Pennsylvania,* Justice William Douglas wrote that "freedom

of the press, freedom of speech…are in a preferred position." [84] Three years later, Justice Hugo Black wrote in *Marsh v. State of Alabama* that "in balancing the rights of the people to enjoy freedom of expression, the Court must remain mindful of the fact that the latter occupy a preferred position."[85]

Absolutism

In the 1950s Justices Black and Douglas asserted that the First Amendment denied the government any power to abridge expression. The "absolute test" was designed to enlarge the range of expression that was protected by the Constitution. In his dissenting opinion in *Konigsberg*, Black wrote that "I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field." [86] The absolute test has had few supporters and the view has never received support from a majority of U. S. Supreme Court Justices.[87]

CHAPTER TWO

The Evolution of Libel Laws

But he that flinches from me my good name robs me of that which not enriches him and makes me poor indeed.

Othello Act III

In its simplest form libel is the publishing or broadcasting of defamatory falsehoods.[88] Libel has been a part of our history for generations and much of our early thoughts and ideas about the subject were inherited from our English ancestors. In our country's early beginnings publishers such as James Franklin and John Peter Zenger were charged with seditious libel and jailed for what they printed. These early publishers fought back and established important principles such as using truth as a defense. During the times of the Sedition Act of 1798 and the Espionage Acts of 1917 and 1918 the government dealt a heavy hand to those who dared to criticize public officials. These people had very little if any protection under the First Amendment.

It took almost a century and a half from the time the First Amendment was written to actually develop rules or principles that would protect the public and the press. The United States Supreme Court heard several cases that defined these principles for libel. But the case noted for starting the "libel revolution" *is New York Times v. Sullivan* in 1964.[89] This case developed the principle or rule known as "actual malice."

Actual Malice

The case started in 1960 with an advertisement that ran in the *New York Times*. On March 29, 1960, the *Times* ran a full page ad. The purpose was to collect money for the defense of Dr. Martin Luther King and other people of color who felt they were being treated unfairly because of their race. Dr. King had been indicted by an Alabama grand jury on the charge of committing perjury when he signed his 1956 and 1958 state income tax returns.[90] This was the first charge of this kind in Alabama's judicial history.[91] These charges came just two weeks after Dr. King had endorsed a sit-in that was a response to four black college students not being served at a lunch counter in Greensboro, North Carolina. The students sat at the lunch counter anyway, and the sit-in movement quickly spread through the South. Because of his endorsement, Dr. King feared that state officials were intent on finding some way to put him behind bars.[92] Supporters came to his defense to raise money for legal expenses.

The ad had a headline that read "Heed Their Rising Voices." The headline was borrowed

from a *Times* editorial that ran the previous week.[93] The text contained 10 paragraphs and was signed at the bottom by sixty-four people, including several prominent people, who sponsored the ad.[94] Below that was another list that followed the statement: "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal." The twenty-four people that signed this were mostly black ministers in the South. The ad also contained a coupon for readers to send in contributions for Dr. King's defense.[95]

The advertisement stated that nonviolent demonstrations by thousands of Southern black students seeking "the right to live in human dignity as guaranteed by the U.S. Constitution and Bill of Rights" were being "met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom." [96]

When the ad ran in the paper, people around the country saw it. At that time *The Times* had a circulation of 600,000, of which 394 copies went to readers in Alabama. A few days after the ad ran, Ray Jenkins, city editor of the *Alabama Journal* saw it and wrote a story about it. That story appeared in the April 5, 1960, edition. Jenkins' story pointed out that there was at least one misleading fact in the ad. The ad stated that four black students were expelled because they sang "My Country "Tis of Thee" on the state capitol steps. Actually expulsion resulted from the incident at Woolworth's lunch counter in Greensboro, N.C.[97]

The third paragraph of the ad stated that the student dining hall at Alabama State College was padlocked when the entire student body refused to re-register as an act of protest against the expulsion of the students that sang "My Country Tis of Thee" on the state capitol steps.[98] The ad asserted that the padlock of the dining hall "was an attempt to starve the students into submission. Quite the opposite was true.[99] The dining hall had not been padlocked and spring registration was almost equal to the fall registration.[100]

Grover Cleveland Hall Jr.,[101] editor of The *Montgomery Times*, wrote an editorial that stated the ad contained "crude slanders" about the city.[102] The next day after this editorial was printed, City Commissioner L. B. Sullivan wrote *The Times* and demanded a retraction because he felt he had been libeled. Sullivan was the commissioner who was in charge of the Montgomery Police Department.

The Times replied to Sullivan's letter and asked why he felt that way. The letter pointed out the ad did not criticize anyone by name. Sullivan stated the charges stated against the police department would be also make him look bad because he was a police commissioner. He filed a libel

suit on April 16,1960, in the Montgomery Circuit Court. In addition to *The Times*, four black ministers who had paid for the ad were also named as defendants. He asked for damages of $500,000. John Patterson, governor of Alabama, also filed a lawsuit. In addition to The *Times* and the four black ministers, he also named Dr. King as a defendant. He demanded $1 million in damages.

The mayor of Montgomery, a second commissioner and a former commissioner also filed suits against The *Times*. These lawsuits totaled some $3 million in legal claims against the newspaper.[103]

The Montgomery Circuit Court found in favor of the plaintiff and awarded Sullivan the $500,000 in damages he had asked for. In August 1962, the Alabama Supreme Court upheld the lower court's decision. The case then moved to the United States Supreme Court. In 1964 the decision made by the Alabama Supreme Court was reversed by the Supreme Court.

In writing his opinion, Justice William Brennan said, "the First Amendment represents a profound national commitment to the principle that debate on public issues would be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant attacks on government and public officials."[104] Based on that, the Court decided the ad was covered by the Constitution "as an expression of grievance and protest on one of the major issues of our time."[105]

The Court said that the errors in the ad were made honestly and had little bearing on whether or not the ad received constitutional protection. Justice Brennan wrote, "That erroneous statement is inevitable in free debate and that it must be protected if freedoms of expression are to have the breathing space that they need…to survive has been recognized in cases before." [106] Any other rule, such as one "compelling the critic of official conduct to guarantee the truth of all his factual assertions--and do so on pain of libel judgments virtually unlimited in amount--leads to…"self-censorship" of a kind that would blunt criticism of official conduct. As a result, "would-be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[107]

Although the material in question was a paid advertisement, it the Court saw it as material that addressed a major issue during that time. The First Amendment has long recognized and protected the right of the press to not only cover, but criticize, major issues and acts of the government without fear of punishment. This "breathing space" that is enjoyed by the press is seen as an avenue to foster the growth of free speech and not prohibit it. This safety net or breathing press

simply means that if the press makes an honest mistake it does not have to worry about facing huge libel suits. The justices made it plain that this breathing space did not include careless errors or publishing statements to purposely hurt someone's reputation. If the press is charged with libel, under the New York Times rule, it must be proven that libel was committed with clear and convincing clarity.

Perhaps the most important part of the Court's decision came when the justices agreed that a statement must be made with actual malice before it can regarded as libel when involving public officials. The Court said, "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 is was false or with reckless disregard of whether it was false or not."[108]

The words "actual malice" added a new dimension to the First Amendment. Before this case, if an untrue statement was made about a public official one question was "How much money in damages was the court going to allow?" The rule of actual malice devised by the Court in 1964 became known as the "New York Times rule." What actual malice means is that a publisher (editor) must know that a statement is false before publishing that statement or that the behavior in regard to journalistic standards constituted reckless disregard for the truth. The ad in *Sullivan* is a good example, even if it was a paid advertisement. *The New York Times* did not know that the ad contained false information when it was printed. Therefore, it could not be said the paper acted with disregard for the truth. If it had been known that the statements were false and the ad had been printed to hurt Sullivan's reputation, then it have constituted "reckless disregard."

Giving First Amendment protection to a publisher who printed something that was not true would have seemed impossible to people like James Franklin or John Peter Zenger. These men were jailed for printing the truth. In the *New York Times* case, the Court acknowledged that publishers are human and humans make mistakes.[109] By acknowledging that editors are human and will sometimes make mistakes, this gave the press a "breathing space" and showed a tolerance for errors that are made honestly.[110]

But when mistakes are done purposely to harm a public official or "with reckless disregard for the truth," there is no longer First Amendment protection. This case placed libel squarely in the First Amendment arena and opened up a whole new avenue in First Amendment rights. Not only did this decision consider written works, but also the publishers state of mind. Until

now a publisher's state of mind had not been questioned. Over the next several years Supreme Court Justices ruled on several cases that allowed the Court to further develop principles regarding libel and public figures. Rules were carved out to determine who was a public figure and who was not and how to determine the difference between the two. The next case to challenge the Court in the area of libel occurred just three years after the landmark decision made in *The New York Times* suit. In the case involving Wally Butts,[111] justices applied the New York Times rule and stated that "malice must be demonstrated with convincing clarity." This case and one involving a retired military general [112] set the standards for the definition of public figure.

Public Figure

Butts, the University of Georgia athletic director, was accused of conspiring to fix a 1962 football game between the University of Georgia and the University of Alabama. The article appeared in the *Saturday Evening Post* on March 13, 1963. The article stated its source as being a salesman that attended the game. This salesman accidentally heard a conversation between the two coaches when his phone somehow became hooked into a long distance circuit carrying the conversation between Butts and Paul Bryant.

After the article was published, Butts filed suit against the Curtis Publishing Company that owned the *Saturday Evening Post*. He was awarded $60,000 in general damages and $3 million in punitive damages. The punitive damages were later reduced to $460,000 by the trial judge.[113]

Butts was paid by a private athletic association and not by the state and did not fall into the category of being a public official. The Curtis Publishing Company made a motion for a new trial on the grounds that Butts was not a public official and therefore the *New York Times* rule did not apply. The motion was rejected by the trial judge. He also said that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether or not the article was false or not."[114] The court of Appeals for the Fifth Circuit affirmed the judgment by a 2-1 vote, writing that "what the Post did was done with reckless disregard of whether the article was false or not."[115]

In a 5-4 vote, the United States Supreme Court affirmed the lower court's decision and allowed Butts to keep the $460,000 awarded in punitive damages. In writing the court's opinion, Justice John Marshall Harlan added a new dimension, that of a public figure. Harlan wrote, "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a

showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[116]

Although the outcome was a little different, another case that was decided the same day as Butts' can be compared and contrasted. This case involved Edwin Walker, a retired Army Major General.[117] A news article written by the Associated Press stated that Walker had personally led a demonstration against federal marshals who were attempting to enforce integration at the University of Mississippi. Walker sued for damages and was awarded $800,000. The Court reversed that decision holding the trial court could only find ordinary negligence.

Neither Butts or Walker could be labeled as a public official. Walker was a civilian at the time of the riots. Butts was paid by a private athletic organization and not by the university. He could not meet the public official criteria either. Because of this, the Court created a new category, public figure. The Court ruled that public figures, as well as public officials, must meet the actual malice test.

There were only a few years between *The New York Times* case and *Walker and Butts.* Within this time the Supreme Court made great leaps in providing national rules for libel and what could be protected by the First Amendment. The next important case, considered to be the high water mark, came just four years after Butts and Walker had their day in court. It extended the actual malice test further.

Private Persons and Private Figures

In 1971 the Court extended actual malice to the private persons. In *Rosenblum v. Metromedia, Inc.*, Justice William Brennan wrote a plurality opinion that would place all individuals within the *New York Times* rule, if they were involved in a public event of general interest.[118]

A distributor of nudist magazines, George Rosenbloom, and about 20 news stand operators were arrested and charged with selling obscene material. He was released on bail, but arrested a second time following seizure of obscene materials from his home and a rented barn. The arrests were broadcast over Metromedia's WIP radio station in Philadelphia. The station's newscaster described him as a "smut peddler." Rosenbloom filed a libel suit against WIP and several other media organizations. He also asked for an injunction against the police that would stop them from interfering with his distributions.

When broadcasting the news about the forthcoming trial, WIP newscasters used the words "smut" and "filth" in describing the material that had been distributed by Rosenbloom. The

newscast did not mention him by name. After being acquitted of obscenity charges, he filed a libel suit against WIP in federal court. He stated that he had been defamed because he had been called a "smut peddler" and that was not true because he had been found not guilty. The jury awarded $25,000 in general damages and $750,000 in punitive damages. The district court reduced the punitive damages to $250,000.[119]

The United States Court of Appeals for the Third Circuit reversed the lower court's decision, noting that broadcasts were about matters of public interest and that they involved "hot news" prepared under deadline pressure.[120] The Court of Appeals concluded that "the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented.[121] For that reason, it held that the *New York Times* actual malice standard did apply to the case, and because Rosenbloom had failed to show reckless disregard, it rendered a judgment for Metromedia.[122]

In a plurality opinion the Supreme Court, by a 5-3 voted, upheld the Court of Appeals decision. Justice William Breman's lead opinion, joined by Chief Justice Warren Burger and Justice Harry Blackmun, reasoned that the Constitution "places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation." [123] Freedom of speech and press are not limited to political expression but embrace "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Justice Brennan quoted the concurring opinion of Chief Justice Warren in *Curtis Publishing Company*, which stated that the distinction between the governmental and private sectors are blurred and that individuals who do not hold public office are "nevertheless intimately involved in the resolution of important public questions."[124]

Both Warren and Brennan recognized that some people who do not hold public office or are not celebrities can still have ready access to the media. Because of this easy access, public figures have more power to influence and respond to criticism. A lawyer and a factory worker are two examples of private figures and private individuals. The lawyer would receive more attention in the press if he were criticized for not doing his job, than a factory worker who did not do good work.

In just seven years, 1964 to 1971, the Supreme Court had taken libel from tort law and given it constitutional protection under the First Amendment. A test, called actual malice, was devised and used as the standard in libel cases. New categories within libel, such as public official and private figure, had been created. The Court extended the boundaries further when it ruled that when a private

individual was caught up in a public matter, that individual must meet the same standard of liability as a public figure or official would have to. Libel was definitely on a fast tract of reaching new boundaries.

Then something happened. Libel took off in a whole new direction. Just a couple of years later, a decision was made that reversed many of the gains made by the media since *New York Times v. Sullivan*. States could set their own standards for determining liability against a person that was classified as a private figure. Most states adopted a "minimal level" of fault where the private figure must prove only that the publisher/reporter acted negligently in reporting facts. This is a far cry from the actual malice standard. It is much easier to prove negligence than actual malice. Proving negligence is proving a careless act, but with actual malice the publisher's state of mind must also be considered.

Private Person

The private person was an attorney, Elmer Gertz. He was a practicing attorney, and the author of several books. He was active in writing the Illinois constitution and he was able to get a death sentence commutation for Jack Ruby. Ruby had been convicted of killing Lee Harvy Oswald, the man who allegedly shot President John F. Kennedy.[125]

Gertz was hired by a family whose child had been killed by a police officer. The incident happened in Chicago. An article in *American Opinion* portrayed Gertz as a member of the "Marxist League for Industrial Democracy…" [126] The article also stated that he had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on Chicago police during the 1968 Democratic Convention.[127]

Gertz filed a libel suit against Robert Welch, publisher of the magazine. He claimed the falsehoods printed in the magazine hurt his reputation. Welch countered with a pretrial motion for summary judgment. He asserted that Gertz was a public figure and that the article was about an issue of public importance. For those reasons he argued the actual malice principle applied. He also asserted that Gertz could not show there was actual malice or reckless disregard.

The jury awarded $50,000 to Gertz.[128] The trial judge then reversed the verdict.[129] He ruled that Gertz was not a public figure. The United States Court of Appeals affirmed the trial judge's decision. However, there was doubt expressed regarding the ruling that Gertz was not a public figure. The Court of Appeals also asserted that Gertz had failed to prove that those who wrote

the article knew of the falsity of the accusations.[130] In other words, Gertz failed the actual malice test.

In a 5-4 decision, the Supreme Court reversed the Court of Appeals decision. The majority opinion was written by Justice Lewis Powell and joined by Justices Stewart, Marshall, Blackmun, and Rehnquist. This controversial decision reversed many gains made by the media since The *New York Times v. Sullivan* case and altered the libel laws nationwide. The question, according to Justice Powell, was should a person who is neither a public official or public figure have to meet the actual malice test. This question was in direct conflict with the Rosenbloom decision made just three year earlier that stated "if a private person was thrust in a public matter that person must meet the actual malice standard."

In his opinion, Justice Powell attempted to delineate the "common ground" among the justices on First Amendment matters.[131] First he wrote, there is no such thing as a false idea, finding that the Constitution relies on an idea's acceptability in the public mind, not in the courts, to determine its merit. False facts are in themselves unworthy of constitutional protection, the Court wrote, yet punishing a publication for printing such falsehoods runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and press.[132]

Powell acknowledged that use of the *New York Times* test would defeat the claims of many deserving plaintiffs, including some intentionally subjected to injury,[133] but found this to be a price the Constitution considers worth paying with respect to public officials and public figures. "The First Amendment," he said, "requires us to protect falsehood in order to protect speech that matters." [134]

Different considerations enter into the constitutional equation when the person libeled is a private individual, the Court stated.[135] If the issue is one of public or general interest, use of the New York Times standard is too high, the court decided, for someone who is not a public figure or public official and whose exposure to the increased risk of published falsehood is thus not voluntary. Moreover, a person who is not a public official or figure, the Court suggested, has a lesser ability to command media attention to expose a falsehood.[136]

The *Gertz* decision split the public figure classification into two different categories, an all purpose public figure and a limited purpose figure.[137] The all purpose figure was one whose pervasive fame or notoriety is such that they are deemed public figures for all purposes and in all contexts.[138] The limited purpose public figure was one who either put themselves or became caught

up in a controversy that made them a public figure because they invite attention and comment.[139]

The Court also granted power to the states to set their own standards of liability for a publisher of defamatory untruths against person who is considered to be a private individual. Most of the states have chosen to adopt a negligence standard, a minimal level of fault that means simply that a private figure who is sued for libel must prove that the publisher acted negligently, failing to report and write with the care a reasonable journalist would have.[140] Acting negligently is different from actual malice. Acting negligently is acting carelessly, but not on purpose to damage to someone. With actual malice, there is forethought to do damage or harm to a person's reputation.

The Court ruled that people considered to be public officials or all purpose public figures had to meet the actual malice test before recovering damages from a media defendant, unless the untrue statements were not related to public performance. That was extended further when it ruled that a libel plaintiff had to meet the actual malice standards in order to recover punitive damages. Jurors could no longer presume that damages had occurred just because libelous materials had been printed by the press or broadcast. With this ruling, some evidence of actual harm had to be presented. Prior to this ruling, damages were presumed when publication took place. Large sums of money were awarded to people without any actual proof of damages.

The court also addressed the issue of the private individual and damages that can occur. A private individual does not command the same attention as a public figure, and therefore does not have the ability to attract the press when a libelous statement is made. Punitive damages to private people are awarded on the grounds of actual damages, not presumed damages, to a person's reputation.

Justice Byron White wrote a blistering 35 page dissenting opinion. He was unhappy with the level of fault in Justice Powell's opinion. He sharply criticized what he considered to be the Court's efforts in Gertz to unsurp the responsibility of states to determine the rights of an ordinary citizen to recover damages for false publication injurious to the person's reputation.[141] He wrote, "The Court in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 states. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damages to reputation resulting from the publication."[142]

He speculated that "these sweeping changes will be popular with the press, but this is not

the road to salvation for a court of law."[143] While agreeing that in a democratic society such as ours the citizen has the privilege of criticizing his government, White stated the First Amendment still does not deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation.[144]

Justice Brennan joined White in dissent. Brennan wrote the opinion in the *New York Times* case and the plurality opinion in *Rosenbloom.* In his opinion, he stated that a public issue or pubic event was no less important to a democratic society and to First Amendment issues than a public official or public figure. He added that a private figure could be thrown involuntarily into pubic events is the price of a free society and makes the event no less public.

Justice Blackmun concurred in the judgment, though he sensed "some illogic" in its refusal to extend the actual malice standard to events of public or general interest.[145] Although he stated that had his vote not been necessary to complete the majority he would have voted otherwise, Blackmum stressed that this decision would provide some measure of certainty in the law of libel and, most important, would remove "the specters of presumed and punitive damages" from publishers.[146]

There are several important outcomes from the *Gertz* decision, one being that Justice Blackmum only voted for the decision because it was necessary to complete the majority. This is a weak reason to vote a particular way. He also stated "some illogic" in the refusal of the actual malice test. The controversial decision made in the *Gertz* case overruled the decisions made in *Rosenbloom*.

With this ruling, the private individual (defendant) had to show proof they had been libeled in order to win a judgment. This makes the plaintiff responsible for the burden of proof in libelous situations. Plaintiffs now have to prove not only were the statements made about them were untrue, but also that these statements were published with an element of falsehood. New definitions, all purpose figure and limited purpose figure, were used to restrict the type of individuals that could be considered public figures.

This gave private figures a better opportunity to vindicate themselves when they felt they had been libeled. The states were granted the power to set standards for libel. This allowed lower courts to extend First Amendment protection further than what had previously been granted.

The definition of public figure developed in *Gertz* was applied just two years later when a prominent socialite, Mary Alice Firestone, was determined to be a private figure. *Time, Inc. v. Firestone*[147] reduced even further the categories of those who could be considered public figures.

Firestone was prominent in Palm Beach. She sued *Time* for an article that had stated her husband had divorced her on grounds of extreme cruelty and adultery.[148]

Despite the fact she held press conferences during the divorce proceedings, and thus had access to the press, the Court deemed her to be a private figure whose participation in divorce did not voluntarily thrust her into the public eye or give her special prominence in the resolution of public questions.[149] As in *Gertz,* the Court was badly divided. The 5-3 decision took another step backwards from *Rosenbloom* and narrowed the definition of public figure even more. It also sent a warning to the media that even an innocent mistake could be severely punished.

In his opinion, Justice William Rehnquist stated that Firestone was not a public figure because, "Respondent did not assume any role of prominence in the affairs of society, other than perhaps the Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of issues involved in it. Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre it must have been a public controversy and respondent must be considered a public figure." "But in doing so petitioner seeks to equate "public controversy with all controversies of interest to the public."[150]

Justice Thurgood Marshall argued that Firestone did fit the definition of a public figure. He stated that "Mrs. Firestone brought suit for separate maintenance with reason to know of the likely public interest in the proceedings…The 27-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times. Far from shunning publicity, Mrs. Firestone held several press conferences in the course of the proceedings."[151]

The majority decided that a divorce proceeding did not fit the definition of public controversy that was established in *Gertz*. By having the power to define what a public controversy was also gave the Court the ability to determine whether or not the plaintiff was a public figure or private one. Once that determination is made, the next question is what tests of actual malice apply and how much First Amendment protection does the Constitution allow to this individual and where does the burden of proof lie.

Over the last few decades magazines such as The *National Enquirer* and The *Star* have built up a large audience nationwide. Magazines such as these target the lives of the "Rich and Famous," package it up in newsy articles and are sold in just about every grocery, gas and even

department stores nation wide. Sometimes these magazines write outlandish stories and sometimes the people whom they are written about fight back in court.

Actress Shirley Jones sued the *National Enquirer* when it published an article that said she was too drunk to work on a television series. She also sued an *Enquirer* editor and reporter as individuals. The magazine did not mind going to court in California, even though it was based in Florida. The editor and reporter were another story. They did not think they should be involved at all, let alone have to be in a California court. The Court ruled the case had to be defended in California because Jones resided there and the magazine was sold there. She settled out of court for an undisclosed amount and the magazine had to write a retraction on the article.

Libel and the protection from being libeled has been challenged many times even in the last half century. The Court has set down rules and through a rigorous process of deciding different cases, it has defined and redefined what constitutes libel and what can be done if libel is proven. These cases have also given the media a road map to follow and have shown that there can be severe penalties when they do not follow them. Now there is a new medium on the rise. This medium, the Internet, comes complete with easy access and many questions that the Court will have to deal with.

CHAPTER THREE

The Invasion of the Internet

We live in a most extraordinary age. Events so various and so important that might crowd and distinguish centuries, are, in our times, compressed within the compass of a single life.

Daniel Webster, 1825

Although these words were written almost two centuries ago, they still describe the fast paced life in which most people live. The word "extraordinary" may not even begin to describe the trips to outer space and the inventions that made these trips possible. It is doubtful that Webster imagined someone on Earth talking to someone on the Moon, let alone the whole world watching a man walk on the moon's surface.

Our ways of communication have evolved rapidly. First the telegraph, radio and the telephone enabled people who could afford them an effective and fast way of receiving and sending communications. In the 1940's and 50's television added pictures to the sound and people were able to see and hear news and entertainment on a daily basis. News shows were usually broadcast once or twice a day.

But in the last decade a new form of communication, the Internet, burst onto the scene. It was a fast growing trend that offered easy and instant access. All that was needed to get on-line was a computer. At first getting on-line was a bit more complicated and expensive than today. Over the past 20 years computer companies have worked to make their products as "computer friendly" and affordable as possible. Schools have started teaching children as early as age five the basics of computer programming. Colleges offer a multitude of courses dealing with computers and the Internet. Getting on the Internet is as easy as point and click.

How many people are on-line in America or throughout the world is probably only a good guess. There are many surveys that use all types of parameters trying to answer this question. A March 2000 survey published by Neu Internet Surveys estimated there were 304.36 million world wide, with 136.86 million in Canada and the United States.[152]

Europe was second with 83.25 million users,[153] Asia/Pacific had 68.9 million,[154] South America had 10.74 million,[155] Africa had 2.58 million[156] and the Middle East was last with 1.90 million users.[157]

It's hard to believe that this amazing new super highway of information began with just some thoughts and ideas bouncing around in the heads of such people as J. C. R. Licklider,

Len Kleinrock, and Tim Berners-Lee. Licklider and Kleinrock were graduates of the Massachusetts Institute of Technology. Berners-Lee was educated in England.

In August 1962 Licklider began discussing his "Galactic Network" concept at MIT. He envisioned a globally interconnected set of computers through which everyone could quickly access data and programs from any site.[158] His concept was similar to what our Internet is today.

At the same time, Kleinrock was at MIT doing Ph.D. research. Unlike many of his colleagues, he chose to do his research in a virtually unknown area called data networks. In 1959 he submitted a Ph.D. proposal to study data networks, thus launching technology which eventually led to the Internet.[159] His research was published in McGraw-Hill. The book, "Communication Nets" provided the basic principles for today's Internet technology.[160]

Both MIT researchers joined forces when they became employed by the Federal Government at the Advanced Research Project Agency (ARPANET). In September 1969, the first host computer was connected so that messages could be sent and routed in many different directions. This was just the beginning. Over the next few years, many more computers were added to the ARPANET.

Berners-Lee took the research and new technology a step further. In 1989 he proposed a global hypertext project to be known as the World Wide Web.[161] This global network was designed to allow people to work together by combining their knowledge in a web of hypertext documents.[162] In October 1990, he began working on his project and in just two short months the World Wide Web was made available to some of Berners-Lee's colleagues. The following summer WWW, as it has became known, hit the Internet.

For the next two years Berners-Lee continued to refine his work on the World Wide Web. Today WWW and the Internet are interchangeable. The technology that started with visions and ideas are used by millions. The result is a decentralized, global network—or cyberspace—that links people, institutions, corporations, and governments around the world.[163]

The Need For Rules

The Internet is unique in that it is neither a print nor an electronic medium, but a combination of both. Information can be transmitted or received instantly with the simple click of a mouse. People of all ages can communicate with e-mail, instant messenger or by getting into a chat room. It costs nothing to e-mail someone across the country as compared to several dollars that could be spent talking on the phone. There is also a great deal of freedom with this type of

communication. Written words do not make a sound and the sender can say what they wish or send any kind of picture to another terminal with the clip of a mouse.

In addition to communication, the Internet is also the newest shopping market. Everything from prescription drugs to airline tickets can be bought on-line. It would probably be impossible to find a major or even small corporation that does not have at least one web site. These web sites usually contain a guest book for people to sign and at least one place to leave messages.

The Internet probably offers more freedom for sending or receiving messages than other type of medium. However too much of anything is not good. There must be rules to guide the "driver on this information highway." However, this new frontier is so much different that the traditional media that it is unclear if traditional rules are applicable. The mere fact that there are no physical boundaries to this new frontier is a good example of the differences between the Internet and more traditional modes of communication. Because of the abundance of freedom and the lack of rules in the "cyberspace community," it didn't take long for problems to arise. Some indecent pictures and other types of pornography became commonplace on the Internet. There was a growing concern because of the easy access children had. Outraged parents began to speak out and demand the issue be addressed.

President Clinton's administration rose to the occasion and approved The Communication Decency Act of 1996 (CDA). At the same time other countries were addressing the issue of indecent materials over this new information highway. In September 1996, the Telecommunications Council of the European Union adopted a resolution to prevent sending indecent materials, especially child pornography.

The Communication Decency Act

The CDA was an addition to the Telecommunications Act of 1996. Addressed in this bill was Internet pornography and the easy access children have to it. The law was put into place on February 8, 1996. This section made it a criminal act to knowingly send pornography or indecent material on the Internet to a minor. People found guilty of this crime would be subject to a $250,000 fine and a two-year imprisonment.

Senator James Exon (D-Nebraska) introduced the bill which was passed by both houses of Congress by a vote of 415-16. Exon told members of Congress that people would be arrested if they were giving pornography to children, displaying it on street lights or inviting children into adult bookstores. He argued that exposing children to such things on the Internet was no different

and that strict laws were needed to protect minors from Internet pornography. Exon could compare the Internet to a bookstore because of findings from an earlier case, *Stratton Oakmont Inc. v. Prodigy Services Co*.[164] In this suit part of Prodigy's defense was that the it was similar to a bookstore.

The *Stratton Oakmont* case started in October 1994 when an anonymous user posted an anonymous message on a Prodigy bulletin board. The message among other things called the brokerage firm's president, David Porush, a soon to be proven criminal.[165] These defamatory messages continued for two weeks and Porush eventually heard about them. A libel suit was filed against Prodigy for being a provider of defamatory speech.

New York Supreme Court Justice Stuart Ain ruled in favor of Stratton Oakmont and held that Prodigy was a publisher and not a distributor.[166] Because Prodigy used some type of software to prescreen pornography and racial remarks, Ain ruled that Prodigy was using editorial control and could be sued as a publisher. Prodigy settled out of court.

Because of this libel suit, a "good Samaritan" clause was put into the CDA. It stated that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider and no provider or user can be held liable for any action voluntarily taken in good faith to restrict access to or availability of objectionable content."[167] This clause is also known as Section 230.

The CDA created immediate controversy over freedom of speech and government regulation of the Internet. Groups against the measure included publishers, librarians and civil liberties groups. They argued that the CDA severely restricted First Amendment rights guaranteed by the First Amendment and that it might threaten the actual existence of the Internet. Groups that supported the CDA included many Christian and pro-family organizations. They argued that cyberporn with its easy accessibility was a threat to minors and there was a great need to control it.

Within days after the bill was signed, several lawsuits were filed against it. A complaint filed by the Consumer Internet Empowerment Coalition (CIEC) requested a temporary injunction be granted to stop the enactment of the CDA. A similar suit was filed by the American Civil Liberties Union in the United States District Court for the Eastern District of Pennsylvania and resulted in a temporary restraining order against the CDA. The order granted by Judge Ronald Buckwalter stated that the indecency provision of the CDA was unconstitutionally vague.

At that point a three judge court agreed to meet and review the law. Serving on this

court was Chief Judge Dolores Sloviter, Chief Judge for the Third Court of Appeals, Judge Buckwalter and Judge Stewart Dalzell. Eventually similar suits filed against the CDA became consolidated and were heard as one suit by the three judge court.[168] In June 1996 the three judge court ruled that the CDA would unconstitutionally restrict free speech on the Internet.

The following month another suit was filed in New York to stop the enforcement of the CDA.[169] This verdict was also rendered by a three-judge court. The panel consisted of Judge Jose Cabranes of the 2nd U.S. Circuit Court of Appeals, and two federal district judges, Leonard Sand and Denise Cote. The ruling stated they did not find the CDA language overbroad as a "Ban on constitutionally protected indecent communication between adults but that the CDA would chill protected speech between adults."[170]

The Clinton administration appealed the decisions made in New York and Philadelphia. In July 1996 the Department of Justice filed an appeal against the Philadelphia Court's decision. In December the Supreme Court said it would hear the government's case. Formal proceedings started in March 1997. This case, considered to be a landmark decision, is *Reno v. American Civil Liberties Union.*[171]

Reno v. ACLU

In July 1997, the Supreme Court handed down a ruling that opposed just about every argument made in favor of the CDA. This ruling gave First Amendment protection to Internet speech. The 40 page opinion was written by Chief Justice John Paul Stevens and signed by all nine justices. A separate dissenting opinion was written by Chief Justice William Rehnquist and Justice Sandra Day O'Conner..

The majority opinion said the CDA placed undue barriers on adult communications and that its blanket prohibitions on indecent and patently offensive online content were overbroad.[172] The Court acknowledged that protecting children from indecent material was certainly a legitimate cause, but felt the CDA had gone overboard in trying to do so. The Court said the government simply can't force the adult population to go by only what is appropriate for minors.[173]

Another problem the justices cited was that the language contained in the CDA was vague. The Court found that "the CDA's statutory terms relating to indecent communications and material raised certain First Amendment issues such a chilling effect on free speech was of special concern. Also rejected was the CDA's concept of indecency as it was applied to the Internet. The Court stated, "We are persuaded that the CDA lacks the precision that the First Amendment requires

when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[174]

The Court also rejected the government's opinion that its "significant interest in fostering the Internet's growth provides an independent basis for upholding the CDA's constitutionally."[175] Proponents of the CDA argued that the Internet's growth would be diminished by parent's fears of what their children might see and find on the Internet if they did not have a way to protect them from indecent materials. Justice Stevens noted that "the dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention."[176]

Rejected by the Court was the defense's attempt to use the three prong test for obscenity that was developed in *Miller v. California*.[177] The case involved Marvin Miller who was convicted of distributing advertisements that contained sexually explicit materials. The three prong test redefined community, retained the patently offensive standard and gave specific examples of what was considered to be patently offensive. The government attempted to argue that the CDA's terminology patently offensive and indecency fit one part of the three part test and therefore could not be considered vague.

In his opinion Justice Stevens noted two concerns about the vagueness of the CDA. He noted "The vagueness of the (Communications Decency Act) is a matter of special concern for two reason. First, the (act) is a content based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the Communications Decency Act is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the Communications Decency Act threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions even arguably unlawful words, ideals, and images."[178]

In their dissenting opinion, Justices Rehnquist and Sandra Day O'Conner argued that the CDA could constitutionally apply to some things. They made references to an "adult zone" and creating appropriate and constitutional zoning laws to protect minors from indecent material. Justice Day O'Conner noted that two characteristics of the physical world which made adult zones a workable approach to limiting access to sexually explicit material were geography and identity.[179]

The decision made by the Supreme Court in1997 was widely applauded by the millions of Internet users. In just a few short years after the "birth" of the Internet, this medium received full

First Amendment protection. It's interesting to note that traditional media, such as newspapers, took years and many law suits before it received this honored protection. In declaring the CDA unconstitutional, the Court clearly demonstrated its belief in the marketplace of ideas and this decision squarely put this new media in the midst of it.

Reno v. ACLU was the first attempt made to govern this new "cyberspace frontier." Since then there have been many questions as to what types of other rules or standards that should be used to govern this new territory. Do the old standards, such as the *New York Times* rule, that have been tried and proved apply to this new technology? Or is this frontier so different that a whole new set of rules should be made? Can a part of the Constitution that was written two centuries ago be made to govern a whole new realm that was totally unimaginable even 40 years ago?

No one seems to know for sure what rules apply. However, all Internet users agree there should be some type of rules or laws for travelers on this new information highway. The answers to these types of questions can only come in time and will probably be the result of some type of lawsuit. Currently, there are several cyberspace libel suits filed.

The standards and rulings made by the courts will determine what laws will govern the Internet. Because this technology is new and different, some believe the First Amendment in its current form must change. There are those who contend the First Amendment is flexible enough and changing the rules and laws that have been set down over the last two centuries will only do more harm than good.

The remainder of this chapter will describe four tests that have been used by the courts in deciding First Amendment issues. By applying standards that have been used in the past, the Court is answering the question as to whether the First Amendment can govern this new frontier without changing.

Strict Scrutiny Test

This type of test is used when there are questions about restrictions on the contents of such things as newspapers, pamphlets, and public speeches. It was also used in suits involving telephone communications that were considered to be indecent but not legally obscene.[180] When using the strict scrutiny test, a court must decide whether the regulation in question promotes a compelling state/government interest and whether it constitutes the least restrictive means to further that interest.[181]

This standard was first used in the 1968 free speech case of the *United States v.*

O'Brien.[182] In Boston, David O'Brien and three other men burned their draft cards on the courthouse steps in protest of the Vietnam War. O'Brien was convicted by the U.S District Court in Massachusetts. He argued that burning his draft card was an act of symbolic speech protected by the First Amendment. The U.S. Court of Appeals agreed, but the U.S. Supreme Court reversed. Chief Justice Earl Warren wrote, "This Court has held that when speech and non speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms."[183]

Stating that the government could impose restrictions on free speech if it was proven the government had a compelling interest was not a popular decision. The decision came at a time when there were daily protests against the Vietnam War. The Court said that the "compelling interest" was the draft. At that time, this was the system used to build the armed forces and burning a draft card was considered a definite violation of that interest. Today the draft no longer exists. If someone burned a draft card and was taken to court the case probably would not survive the strict scrutiny test of compelling interest.

Part of O'Brien's defense was that he was trying to gain or influence other people's opinion. The Court ruled that actions such as these must follow the least restrictive method of portraying a person's attitude or actions. O'Brien failed to show this was the least restrictive way of displaying his attitude. Instead of burning his draft card, perhaps he should have marched in a demonstration with thousands of other people that used this method to voice their opinions during that time.

The decision made by the Court may have not been the most popular, but it has been used many times over since then. In 1997 the Court used the strict scrutiny analysis to decide *Reno v. ACLU*. In this case the government failed to prove that without the CDA a sexually hostile environment would exist and that adults or minors would have a problem getting access to obscene materials on the Internet. There was no problem in proving the Court had a compelling interest in protecting minors from obscenity. The problem was in determining what the definition of obscenity and how much or how little of this type material was actually harmful to minors, if the actual age of the Internet user could be proven. Again, the language in the CDA was just too vague to withstand the strict scrutiny test.

The CDA was not proven to be the least restrictive method of controlling indecent material on the Internet. At the same time it was protecting minors, the law was placing a burden

on adult communication. Also, the law could not protect minors from obscene material that was sent from another country. Another problem with on-line materials is that it is very difficult to determine who the sender is, even if that sender is in the United States.

The strict scrutiny analysis is similar to the balancing test that was developed by Chief Justice Fred Vinson in 1951.It could be argued that the Court "balanced" the rights of adults to send adult materials on-line against the rights of minors that might accidentally or otherwise see this material. In this case adult rights had the priority over the rights of minors. Because of the vagueness of the CDA, the Court would have had a difficult time ruling in favor of the rights of minors over the rights of adults. This prioritizing of adult rights over minors did not mean that the Court was not concerned about what minors could view.

This standard also requires a "reconciliation or resolution" of the issues that are being debated. It could be said that the reconciliation was that adults had the right to send adult or otherwise materials on-line and the president encouraged parents to monitor what their children were viewing via a computer screen.

Although the balancing test was not mentioned in reaching this landmark decision, it is easy to see how the concepts that make up this test could have been used. There were competing rights involved, and these rights were weighed heavily against each other to determine which one had priority over the other. Once this was done the Court and the presidential administration made a reconciliation of the issues.

The strict scrutiny analysis was applied. This test is about 30 years old but the court was able to use it to settle First Amendment issues in *Reno v. ACLU.* The decision did not make everyone happy, but in court cases usually only one side feel justice has been done. In this case, the winners were those who favored giving full First Amendment protection to the Internet. By using this tried and true method, the Court proved the First Amendment can be used to control this new territory known as cyberspace when the government can prove it has a compelling interest.

What would happen if there was a suit in which the government could not prove or did not have a compelling interest on the part of the government? In these types cases another standard, such as the "rational basis test", would have to be used.

The Rational Basis Test

The rational basis test states that government restriction of speech is constitutional if it can be proven there is a "rational basis" for the restriction. In other words, this method is exactly

opposite the strict scrutiny test. This standard puts emphasis on "conjectural harm" or what harm "might" be caused by viewing or reading obscene materials. The strict scrutiny test, on the other hand, looks at what actual harm was caused rather than what might have been caused.

Usually this standard is not used to make judgments on the limitations placed on speech. It has been used for speech issues that do not have First Amendment protection. If the Court had chosen to use this method instead of strict scrutiny, the CDA would have been deemed constitutional. The rational basis would have been protecting minors from obscene materials that come via Internet.

Courts have used the rational basis test as early as 1968 in *Ginsberg v. New York*. Sam Ginsburg, the owner of a Long Island diner, sold two "girlie" magazines to a 16-year-old boy. He was charged with selling obscene materials to minors. The Court ruling made it a crime to knowingly sell a minor obscene materials such as nude pictures. In this case, the Court ruled that the rational basis test deemed "only that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.[184]

This standard was used again in *Paris Adult Theatre 1 v. Slaton (1973)*.[185] An adult theater in Georgia was showing two movies that contained adult material. The owners and managers were prosecuted because of the harm that might be caused by viewing this type of material. In turn, the theater owners contended the film was covered by the First Amendment and should be allowed to continue showing this type of film.

The Supreme Court upheld the lower court's ruling that these movies were obscene and were not covered by the First Amendment and that in this instance movie theaters did not have constitutional protection. They also ruled that exposure to this type of material might cause harm to minors. This statement was not made on fact, but merely conjecture. The Court had no concrete proof that actual harm was being caused by exposure to adult movies.

There is a growing concern about what harm is being caused by the material minors view on the Internet. This items range from pornography to how to make bombs. The Court has never denied that harm could result from people seeing or reading these types of materials. In fact, there is proof that certain things found on the Internet, such a how to make a bomb, can be harmful.

The problem with conjectural harm is that no crime has been committed and until harm occurs, no one usually makes any noise. This noise gets people's attention and gets laws passed to stop the harm from occurring again.. Also, authors of many items on the Internet are just as vague as

the CDA language itself. It's hard to prosecute someone that has no face or physical residence that can be tracked down.

The Broadcast Standard

The Internet is quite similar to broadcast in that the signal travels on airwaves or cyberspace making the broadcast standard a very good rule to use in the regulation of this new frontier. The Internet is also similar to broadcasting because it is very accessible to young children and it can be done in the complete privacy of a bedroom, basement or on a mountain top. A person can be listening to the radio and suddenly hear something that offends them. This can happen without any warning at all.

At the same time, a person can be "surfing the net" and a message will suddenly appear without any warning The file can be almost anything from a nice thank you card to a nude picture. The listener/user has no way of knowing what the message is until it is either heard or opened. The difference between the two is that the listener can not turn off the radio before something considered indecent is said. The surfer on the net doesn't have to open a message. "Turning one's head or looking the other way" may be the least restrictive alternative to indecent material."[186] However, files can come with some very unassuming titles. When indecent material is thrust upon someone applying the broadcast standard would work well in dealing with cyberspace issues because of the similarities with the broadcast medium.

This standard evolved from a case that started in 1973 and ended in 1978. *FCC v. Pacifica*, "the seven dirty words" case challenged the government's burden of justification concerning the regulation of indecent expression on the airwaves. Until that case the government had a lower burden of justification. This case gave the courts greater power to punish indecent materials that were broadcast. The case started when a father complained to the Federal Communications Commission about some "indecent words" there were broadcast at 2 p.m. The father was upset because he had his son in the car and the son was subjected to the indecent material.

The FCC ruled that the language in the monologue was indecent, not obscene, but should not have been broadcast at 2 p.m. because of the accessibility of minors to the broadcast media. The U. S. Court of Appeals in Washington D.C. overturned this ruling and the case went on to the Supreme Court. In a 5-4 opinion Justice John Paul Stevens wrote that it was not unconstitutional for the FCC to prohibit language that was considered indecent. The ruling held that the listener's rights take priority over the media's rights if the listener can be subjected to indecent or offensive communication without warning.

The FCC has set a standard that created an adult zone in the broadcasting medium. Television and radio broadcasts that contain adult material or language are supposed to be broadcast later in the evening. Cable television offers parents the option of blocking certain channels that parents do not want their minor children to view. Software companies are working to create software that will serve the same purpose. However, at this time there is no software that will guarantee that all indecent sites can be blocked by parents.[187]

The Denver Area Standard

Denver Area v. FCC, [188]developed in 1996, applies to the cable television medium. If this standard were applied to the Internet, individual service providers would have the right to edit or remove any message or picture that appeared on-line. If this standard were applied to the Internet it would take away the coveted position of distributor and make Internet Service Providers accountable. If the court system used this standard in libel situations, it would make these companies liable for what is on appearing on-line.

The ruling gives the operator of a cable television company the right to regulate certain offensive materials, even if the television channels are leased to third parties.[189] These materials are sexual or excretory activities shown in an offensive manner.[190] In other words, the company has the right to choose what the viewer will or will not be able to watch.

The decision was a 7-2 vote with many concurring and dissenting opinions. That in itself is probably a silent signal of the toughness of these types of cases. The law suit did not focus on a government ban on indecent materials, but rather on expression rights between cable company owners and those who leased channels from them. Although the Court was divided, justices made it clear they were interested in protecting minors from indecent materials.[191]

The justices relied heavily on the *FCC v. Pacifica* ruling because like radio, cable television is accessible to anyone. Also the Court did not require actual proof that exposure to indecent materials would cause harm to minors. It accepted the conjectural harm standard. Justices Clarence Thomas, William Rehniquist and Antonin Scalia did not base their decision on the indecency issue. Instead they decided that the expression rights of the cable companies took priority over the rights of the individuals who leased these channels.[192] The plurality opinion written by Justice Stephen Breyer and joined by Justices John Paul Stevens, Sandra Day O'Conner and David Souter created a hybrid standard.

They refused to apply the strict scrutiny analysis. Instead they upheld Section 10a of the Cable Television Consumer Protection and Competition Act of 1992 that permitted cable television to refuse to carry channels with offensive materials.[193]

The Court did agree there are other less restrictive methods that can be used to curtail the viewing of offensive materials. Least restrictive methods including having parents block certain shows on individual channels. The Court struck down the idea of having all materials that meet the "patently offensive" definition on a single channel and having the customer put in writing this channel was to be blocked by the company. The Court concurred that Section 10a was not narrowly tailored to achieve the government's objective of protection children from materials that meet the patently offensive definition.

Application of this standard to cyberspace gives Internet providers the power to allow any type of web site or to restrict it by putting some type of block on it that would not allow users to access the web site. *Reno v. ACLU* gave Internet users the protection needed to put anything they wish on a web site. However, neither *Denver Area v. FCC* or *Reno v. ACLU* does little to protectminors from being exposed to indecent materials on the Internet. In both cases adult rights were protected over the rights of minors.

Both cases are building blocks from which future cyberspace cases will certainly be decided. Having First Amendment protection and the freedom from being identified already has created problems and the courts are dealing with these problems now. Indecency is certainly a big concern for everyone, as well as the court system. Another problem that is starting to be made known is cyberspace libel. It's a new territory in which the courts will have to make decisions. The question is: "Can these decisions be made using tried and true methods or will new ones have to be made?" "Copyright 2000, Dollie F. Deaton"

CHAPTER FOUR

Libel In Cyberspace

The Internet has much to offer the millions of people who use this new medium daily.[194] Not everyone owns a computer, but companies are constantly offering new and affordable deals on computers that make it possible for just about every family to own one. A few years ago the American Dream was owing a home, having at least one phone and television set and one or even two cars. Computers have become a part of that dream. Computers are also available at schools and the local libraries. Patrons do not pay anything to use them. College students get a free e-mail address as part of being a student.

Messages between these millions of users are sent instantly and senders usually can remain totally anonymous. Most private individuals or public corporations has a web site or a chat room where people can visit and leave messages. Unlike traditional media, these messages stay there on bulletin boards or on-line newsletters and is read by millions.

That may not be a bad idea unless the information is not true and is put there by someone seeking revenge against a company or an individual. Every major news medium, television, newspaper or magazine, has taken advantage of the Internet and created web sites that will allow them to carry the stories that could not be aired or published because of time constraints or the amount of pages in the newspaper. Many articles may not be carefully edited or proofed for content.[195] Many newsletters have nothing to do with traditional media. They may be newsletters from a corporation or a musician or movie star's fan club. Regardless of the origin, it is all too easy for unsupervised work to appear on-line and be read by millions. The appearance of this unsupervised work is a danger that can easily result in libel or defamatory charges.

Currently there have only been a few lawsuits that have tested the waters for libel and some suits have been settled outside of court.[196] There are several reasons for that, one is that law-suits are very expensive and can drag on for a very long time. It may be cheaper in the long run to just accept an apology and a correction for what was posted Money has and always will play an important part in any type of law suit. Most often when a libel suit is filed people want punitive damages. They want to be compensated monetarily for the harm done to their reputation. If the sender can be found, that individual may not have anything to get damages from. The least restrictive method in these types of cases is to merely produce a response to the defamatory article and hope that it will be read by the millions who use the Internet daily. Another problem is that not everyone reads every newsletter or bulletin board on the web.

It would be simply impossible. Therefore, if a defamatory statement is uttered it might be difficult for the person corporation in question to even know that this type of statement was made about the individual or corporation unless someone told that person.[197] Not knowing libelous statements are being made about a person or corporation is certainly a reason for not having a suit. However the reasons for not filing a cyberspace libel suit, there have been a few and are certainly to be more. One of the first occurred in New York in 1991.

Cubby Inc. v. CompuServe Inc

This case was heard in the U. S. District Court for the Southern District of New York. The Court's decision was applauded by Internet Service Providers because it held that they were not responsible for materials that are posted by its subscribers. The case involved a bulletin board service and an Internet Service Provider.

CompuServe is an Internet service provider. For a monthly fee members can access the Internet as well as search engines and other types of databases such as chat rooms and bulletin boards. CompuServe had contracted with another company to manage a site titled "Journalism Forum" under which the company had agreed to "manage, review, create, delete, edit and otherwise control the contents of the Journalism Forum. In accordance with the editorial style and technical standards that had been established by CompuServe."[198]

One of the newsletters found in the Journalism Forum was "Rumorville USA." This bulletin board was managed by Cameron Communications and prepared by Don Fitzpatrick and Associates. Statements that had appeared in Rumorville USA suddenly appeared on a new bulletin board called "Skuttlebutt."

In the suit CompuServe alleged that this information had been "obtained through the back door and that the developer of this new publication had been fired by a previous employer."[199] In the countersuit, "*Cubby* alleged that when it attempted to market a competing database called Skuttlebutt, postings on Rumorville had defamed Cubby by characterizing the effort as a new start-up scam among other things."[200]

In a summary judgment, the Court held that: CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible

for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.[201]

The Court also held that "'First Amendment guarantees have long been recognized as protecting distributors of publications.... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes."[202] Because CompuServe did not have the opportunity to edit the contents of Rumorville before it became public information, the Court held that CompuServe could not be held liable for Rumorville's contents. "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. To hold otherwise would impose an undue burden on the free flow of information."[203]

The ruling made it clear that CompuServe, as the distributor, could not be held for liable because it did not exercise editorial control over Rumorville. The standard applied in the case is the same one that is applied to libraries, bookstores and news vendors. These entities are merely distributors of information. They can not be compared to newspapers and broadcast mediums that write as well as disseminate information and are judged by different standards when it comes to libel charges. If a book containing libelous information is found in a library, the library can not be sued. However, if a newspaper prints libelous materials, the newspaper, publisher, editor and even the reporter may be sued.

The ruling in *Cubby* gives an Internet distributor, such as CompuServe, protection from libelous materials printed in a newsletter such as Rumorville. The ruling described CompuServe as an electronic library containing numerous publications and having numerous members that pay a fee. This is similar to the traditional library with its numerous publications and patrons that use a
library card. In this case, the Court recognized that the Internet, although a new and different medium, could still be governed by rules that have been in use for many years.

As a result of *Cubby*, many on-line service providers may try to protect their position as a distributor and not a publisher, and exercise no editorial control over its on-line materials. As a

distributor, service providers are not likely to be sued for carrying libelous materials. Even if a distributor is sued for libel, the standard for proof is lower than if the company is judged to be a publisher. It is common for companies to provide Internet service to actually have some type of editorial control but provide disclaimers against libel.

The question of who will exercise editing control or will take responsibility for on-line materials may become a sensitive issue between service providers and forum operators. Regardless of who does the editing of such materials as newsletters and bulletin boards, subscribers or Internet users need to be made aware of the nature and extent of editing that is being done. In order to protect the status as a distributor, some providers may opt to have absolutely no editorial control at all. If there is an editorial board, that may mean more expense to the provider and that just means the user will pay more for the service.

Another area that on-line service providers and forum operators are concerned with is copyright infringement. They wish the ruling in *Cubby* would apply to copyright cases as well. Copyright infringement occurs when someone violates the copyright law by copying or using original material that someone else has the rights or patent for. It does not matter if the copyright is done innocently. Copyright infringement suits are found quite often in the music world. Rock singer John Fogerty found himself in the middle of a rather bizarre copyright infringement suit.

In the late 1960's and early 1970's Fogerty was a member of the highly successful rock band Credence Clearwater Revival (CCR). Not only did he sing lead and play lead guitar, he also wrote, produced and arranged all the group's music. CCR's recording contract was with Fantasy Records. After the band broke up Fogerty signed with Warner Brothers Records and began a fairly successful solo career. Just as before he wrote, arranged and produced all of his music.

In the mid 1980's, Saul Zaentz , then president of Fantasy Records and the remaining members of CCR sued Warner Brothers Records and John Fogerty claiming that a recording "The Old Man Down the Road" sounded too much like "Run Through the Jungle," a song written, produced and arranged by Fogerty when he was with CCR. Fogerty won this round and "The Old Man Down the Road" was allowed to be broadcast and performed by Fogerty.

Throughout the past 25 years Fogerty has been plagued with copyright infringement and plagiarism suits brought by Fantasy Records and former band members, Stu Cook and Doug Clifford. Although he never did it, it might have been interesting if Fogerty had counter-sued claiming he could not make a living because he sounded too much like himself. His plight is a good example how easy it is to break the copyright law and explains why Internet Service Providers are hoping that the rules for libel will someday apply to that area also.

Copyright infringement, as libel, is another on-line issue because to the amount of materials that are posted daily. "Providers cannot and do not monitor or review all this information to determine whether the messages infringe copyright, defame any individual or otherwise may violate the law. Conversely, if they were required to do so, the burden would result in no less than bringing their businesses to a halt almost immediately, cutting off the flow of information and communications to millions of people."[204]

If applied to copyright issues, the ruling in *Cubby* would erase the worry about a subscriber uploading a copyrighted piece of material. Internet providers would be protected from being sued and place the copyright infringement squarely on the shoulders of the subscriber that uploaded the material on-line. This has not happened yet. In 1993 Playboy Magazine sued Fiena, a bulletin board, that distributed unauthorized copies of some photos that Playboy held the rights to.[205]

The U.S. District Court for the Middle District of Florida accepted as undisputed that: The defendant "never uploaded any of (Playboy's] photographs onto BBS and that subscribers to BBS uploaded the photographs"; and "as soon as [the defendant] was served with a summons and made aware of this matter, he removed the photographs from BBS and has since that time monitored BBS to prevent additional photographs of [Playboy] from being uploaded."[206]

The court ruled that this was liable even if it was not known to the bulletin board service (BBS) operator that a subscriber had uploaded copyrighted material.[207] The court found that Playboy's rights to publicly distribute and display its property had been violated. To the court, BBS' ignorance in the situation did not matter: "There is irrefutable evidence of direct copyright infringement in this case. It does not matter that defendant Fiena may have been unaware of the copyright infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement.[208] Innocence is only relevant in determining statutory damages.[209]

Just as in libel cases, the courts are handing down stern decisions regarding copyright on the Internet. As in the case with Playboy, the message is clear infringement will not be tolerated by the legal system. Because the findings in *Cubby* have not been applied to this area, it is still a huge area of concern for Internet service providers. If each provider claims to be looking out for copyrighted materials, that could put in question the distributor status they now hold so dearly.

Stratton Oakmont V. Prodigy

The library standard used to decide *Cubby* was challenged again in 1995. This time the results were different and affected legislation in the Communication Decency Act. The ruling in

Stratton Oakmont Inc., v. Prodigy Services Co. is the reason Congress put the "Good Samaritan" clause in the CDA the following year.

In November 1994 Prodigy, an Internet service provider, was sued for $200 million for publishing alleged defamatory statements about Stratton Oakmont Inc., a subscriber to Prodigy, but did learn about the messages a few weeks after they had appeared in on-line. After learning about the messages, Porush immediately filed a suit charging the statements made were libelous..

These statements appeared on a bulletin board, Money Talk. Several other messages of the same nature appeared in Money Talk over the next few weeks. These messages claimed the banking investing firm would soon come to an end and called the president of the firm a soon to be proven criminal. After some research on the part of Prodigy, it was proven that these messages were sent from the count of a former Prodigy employee, David Lusby.

Lusby had quit working for Prodigy several years before and although the messages came from his account, neither side could prove he actually sent them and he was dropped from legal proceedings. Because the account Lusby had was still operational,
Prodigy found itself in the midst of a nasty cyberspace libel suit.

Prodigy contended that, similar to the holdings in *Cubby,* its on-line service was similar to that of a bookstore, library, etc. and therefore was not guilty of libel. On those grounds, the company asked the case be dismissed. Then New York Supreme Court Justice Stuart Ain denied the request and ruled against Prodigy. If the library standard had been applied, that would have made Prodigy merely a distributor and not a publisher. Because Justice Ain had ruled the library standard did not apply here, Stratton Oakmont had a much stronger case against Prodigy. If Justice Ain had applied the library standard, there would not have been grounds for a libel case at all.

Prodigy was declared a publisher and not merely a distributor because the company used software to prescreen things such as obscenities and hate speech. This prescreening software, it was ruled, was similar to editing in the more traditional mediums, such as an editor looking at the materials before it is published in a newspaper. Prodigy had also contracted with a board that monitored and could remove anything considered offensive. Therefore, Judge Ain ruled Prodigy did exercise editorial control over what was appearing on its on-line publications. CompuServe did not have prescreening software for on-line publications or an editorial for material such as Rumorville.

Another issue was the way Prodigy sold its on line services to families. Prodigy marketed itself as a family oriented network that provided prescreening software to filter out inappropriate materials for minors. That claim was reflected in Justice Ain's decision. He wrote: "We 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.[210] The ruling of the court made it quite clear that a company should be held accountable for the way it markets itself.

Prodigy negotiated a settlement outside of court and provided Stratton Oakmont Inc. and Porush with a public apology and appealed Judge Ain's decision. The company asked for its status as a publisher to be reviewed. As part of the deal Stratton Oakmont agreed not to contest Prodigy's appeal.

The appeal was denied. Judge Ain "citing *Paramont Communications v. Gabraltar* (1995) which held that "while we appreciate the desirability of settlement, we do not believe it would be advisable to allow private parties to demand that the Court eradicate precedent which they personally find unacceptable on threat of burdensome litigation should the Court refuse."[211] The court found "the original ruling correct as this is a developing area in the law (in which it appears that the law has thus far not kept pace with the technology) so that there is a real need for some precedent."[212]

The precedent Judge Ain called for in *Stratton Oakmont* was set earlier in *Cubby*. The application of the distributor standard was easily applied. It was not hard to make comparison in these cases to the more traditional medium. This includes the prescreening software that Prodigy had been compared to an editor editing a story for a newspaper and the board that looked at the materials for Prodigy.

The holdings in *Cubby* set the precedent for determining when to apply the distributor standard to cyberspace libel suits. It would have been very contradictory to rule in Prodigy's favor because of the prescreening abilities and the claim of being a family orientated Internet service provider. These case were both heard in New York and did not make it to the United States Supreme Court. Section 230 of the CDA reversed the findings in Stratton.

Although these two cases are similar because of the cyberspace libel charges, they are also very different in that one exercised editorial control over publications and one did not. Determining who is or is not a publisher is a crucial step in a libel suit. Using the two standards set in these two cases will aid courts greatly when making that decision. But because not all Internet users are trained journalists, perhaps lower standards of negligence might be appropriate for those untrained journalists. The bottom line is that libel is libel no matter what area it is committed in, and Internet users should exercise great care when writing on-line publications.

Another issue that is presented by both cases is the amount of control or editing that an on-line service provider should have. Should these companies or editorial boards be "cyber cops" that monitor and prosecute offenders? Or should they merely be bystanders? Because of the rulings in both *Cubby* and *Stratton Oakmont,* service providers and forum operators will certainly want to make it clear who does the editing, if any, and make that editing very consistent with any policies and procedures the service provider has.

Zeran v. American Online

This case addressed the uniqueness of the Internet and the fact that messages are sometimes placed by a third party. These messages are read by millions and, unlike discarded newspapers, these messages stay on-line and are read more than once to refresh the users memory about the content of the messages. This may not be a bad idea unless the messages contain bad or untrue materials. This was the case that involved Kenneth Zeran.

In April 1995, an anonymous user posted a message on an America Online bulletin board advertising t-shirts that had "tasteless and offensive" slogan about the 1995 bombing in Oklahoma City.[213] The message said those interested should contact Ken and gave Zeran's phone number. Needless to say, he received many unpleasant phone calls and even some death threats. Zeran called AOL and the message was removed. A few days after another one was posted and KRXO, an Oklahoma City radio station, broadcast news about the ad posted on AOL. Once again the defamatory message was removed, but not before Zeran received numerous phone calls and death threats.

Zeran was not a member of AOL and did not have access to its online publications. This placed him in the predicament of not being able to post a message defending himself. He filed a suit in federal court claiming the radio station and AOL were negligent and that these defamatory ads had done a great damage to the publishing company he operated out of his home.

In his suit he argued that AOL should be treated as a publisher. AOL stated it was merely a distributor and was protected by Good Samaritan Clause or Section 230 of the Communication Decency Act. This clause prohibits the courts from treating AOL as a publisher. The federal court ruled against Zeran citing the Good Samaritan Clause. In June 1998, the United States Supreme Court denied certiorari.

The question to be solved in this case was whether or not an Internet service provider could be held liable for defamatory messages posted by a third party. The courts said no. By doing so this gave companies such as AOL protection from defamatory statements made by subscribers. The courts recognized that cyberspace has no boundaries and therefore covers a limitless area.

If the courts had ruled for Zeran, it would have opened Pandora's box for everyone including subscribers and service providers. Companies would have had to take responsibility for every message sent, even those sent through Instant Messager. This would be an impossible task to accomplish. The extra cost would have been passed on to the subscribers. The time it took to edit and approve each message, even if it were possible to do such a thing, would greatly affect the time messages are sent and received. People who use the Internet want things sent as soon as possible. They simply do not want to sit and stare at a computer screen and wait for something to appear.

Privacy would have been another issue. Knowing that someone else is reading a private message, such as an Instant Message, could be considered an invasion of privacy because of the content of this messages. These types of problems would certainly have a chilling effect, if not putting some Internet Service providers out of business.

While some people viewed the Zeran decision as protection of free speech, others did not. Granting complete immunity to Internet Service Providers in regards to third party communication also produced questions and some possible problems that may appear on down the road. No one disagrees that the Internet provides users with an opportunity to make views known. At the same time, this new medium also provides an avenue for irresponsible users to do great harm to others by posting defamatory statements. Since Zeran gave Internet Service Providers totally immunity from prosecution in third party communications, the question becomes, "Who's minding the store?"

AOL and others have a clause in their contracts that if third party defamatory materials are reported, the company will do its best to remove them and find out who posted them. AOL's contract also states that AOL will be held harmless as long as the company acts in good faith to remove these statements. The company also encourage users to report any types of materials that appear to be libelous. AOL also gives the opportunity for anyone over the age of 18 to have a special password that will allow uncensored access. Parents can give younger children certain passwords that will screen user and not the Internet service provider. This protects the distributor position for Internet companies.

Clauses, such as the ones found in user contracts, do give Internet service providers a burden to be sensitive to libelous materials. But by not having to worry about prosecution, that may also give companies such as AOL a lazy attitude. As long as they remove libelous statements as soon as they are made aware, Internet Service providers are protected and people who are defamed can post a retraction of their own. However, in Kenneth Zeran's case, he did not belong to AOL, did not have to opportunity to remove or retract the statements and was not covered by AOL's contract.

Since much of the communication that is posted on-line is third party or someone using a BBS, this ruling will also reduce the number of defamation suits regarding the Internet. It may not reduce the amount of libelous materials posted on the Internet, just the chance for the someone to redeem themselves against libelous statements made by a third party. There may be not as many cybespace libel cases simply because many users' pockets are deep enough to retrieve damages.

Bumenthal v. Drudge

This case also involves third party communication. The suit was filed by Sidney Blumenthal, a communication advisor to President Clinton and former journalist, and his wife Jacqueline Jordan Blumenthal, director of the President's Commission on White House Fellowships. The suit was filled against America Online and Matt Drudge, a writer for on-line publications.

Drudge was hired by AOL and compiled a publication known as the "Drudge Report." This report was made available by AOL to its many subscribers. Only a month after being hired by AOL, he produced an edition of the Drudge Report stating that Sidney Blumenthal was a spouse abuser and that this information had been discovered in a background check done by the Federal Bureau of Investigation. He also claimed there were court records to back up his allegations but stated he did not have them. He printed a retraction hours after the article appeared online saying he had been misled by his sources.

The Blumenthals sued Drudge and AOL for alleged libel, slander and invasion of privacy. The law suit had heavy political overtones, many of which eluded to President Clinton and a possible cover-up of information regarding the alleged abuse. Even though Drudge had printed a retraction hours after the story was posted , the Blumenthals still asked for a retraction, an apology, $10 million in compensatory damages and $20 million in punitive damages. They also requested that AOL remove the story at once. AOL claimed protection under Section 230 and the judgment handed down in *Zeran*. The Blumenthals claimed that because of clauses in a contractual agreement between AOL and Drudge both parties should be held liable

A summary judgment in favor of Drudge and AOL was issued by U.S. Court Judge Paul L. Friedman in April. He based his decision on the Good Samaritan Clause found in Section 230 of the CDA and the ruling made in *Zeran*. This ruling extended an earlier decision in the *Zeran* case stated that Internet service providers are immune from distributor liability for defamatory statements made by third parties. The court determined Internet service providers cannot be liable for any efforts taken in good faith to restrict access to obscene, lewd, excessively violent, harassing or other objectionable information provided by third parties. These efforts may include blocking, editing

content and requiring use of credit cards or adult age checks before allowing access to objectionable information."[214]

Granting full immunity to Internet speech also gives Internet service providers the power to decide what type of speech can be posted and where the speech will appear on-line. Let's say an on-line publication posted some "mud slinging material" about one presidential candidate and never allowed any type of "mud slinging material" to be posted about another one. Even though the company or bulletin board service gave libel as a defense, it still could be argued that this is an act of censorship because the company knowingly and willfully removed the material from one candidate and ran similar material on the other candidate. If a situation such as this occurred, the Internet service provider could possibly be declared a publisher because it exercised editorial control similar to what Prodigy did in the *Stratton Oakmont* case.

The fact that Internet companies can remove any type of posted material, even if it is considered obscene, is considered censorship and most people are opposed to that. As long as there is an alternative service the unhappy user can turn to, this should not be a big concern. If you do not like one Internet service, simply switch. Right now there are quite a few companies to choose from.

However, that may not always be the case. Many smaller companies are folding. UK Online is a good example of this. For several years, all faculty, staff and students had the privilege of using a small and cheap Internet service provider. Last year UK Online folded and all users were given incentives to switch to Prodigy. As more and more smaller Internet Service Providers are gobbled up by larger ones, who controls speech on the Internet is becoming a tool in the hands of fewer and fewer. Granting immunity in third party communication has not answered every question or solved every problem. Granting third party immunity may someday create a double standard for newspapers.[215] Newspapers are considered publishers because editors can read, edit and even decide what will be in the newspaper. A newspaper can not claim ignorance either. Today the majority of newspapers have on-line versions also. Suppose a letter to the editor or story contained libelous statements. What would happen if the mistakes were cleared up in the print version but not in the on-line version?

Under *Zeran*, the Internet service provider would not have problems, but could the newspaper successfully argue the same case and claim the same status? So far this situation has not happened, but given the amount of unedited material that appears daily it certainly could.

There are many pros and cons to granting complete immunity to Internet Service Providers in third party communication situations. By and large the decisions handed down by the

courts have been perceived as a positive thing. These decisions are viewed by most users as preserving the market place of ideas by allowing free speech on the information highway.

Internet Service Providers do not take this immunity lightly. They are still concerned with the transmission of smut and the protection of minors. Prodigy still markets itself as a family orientated service, in spite of the *Stratton Oakmont* decision. Companies are still trying to develop software to filter out unsuitable materials, such as child pornography, when it appears on-line. They also encourage each user to be aware of the risks and responsibilities that can occur when libel and other related incidents occur and to report them as soon as possible.

Internet service providers appear to be trying to control things such as defamatory statements, copyright and child pornography. The bottom line is that these companies can not be held liable for third party communication. Knowing a company can not be prosecuted might take away a real diligence for being aware of what kinds of materials that are posted on-line. Even if companies are on the lookout it can be hard to trace down an anonymous user, especially if these messages were sent from a defunct account.

Another issue here is money. Most people that sue for libel seek punitive damages. The majority of on-line users don't have thousands of dollars. Therefore the person being libeled might have the satisfaction of knowing the other party was prosecuted, but would probably get nothing out of the case except a big stack of attorney fees. The Courts have made a little progress in defining rules to govern this new frontier. So far there really have not been that many law suits that have resulted in all kinds of new rules and precedents to follow. But the super highway is still quite new and there are still many questions to answer and for sure these will be answered in a court of law.

CHAPTER FIVE

Where do we go from here?

The Internet has vastly changed the way people all over the world communicate. Just as with any new technology there must be rules to guide users. Some of these rules are in the agreement that the user signs when obtaining a membership from an Internet service provider. Other rules are chiseled out in a court of law. Even though a multitude of suits there have not been filed in conjunction with this new medium, the courts have still laid down some basic principles that are sure to be applied again and again. There are still areas the courts will have to address. The remainder of this chapter touches briefly on these.

Publisher/distributor

With the decisions handed down in *Cubby,* the courts decided Internet Service Providers were not publishers but merely distributors. Section 230 of the CDA and the ruling in Cu*bby* totally insulates Internet companies from prosecution and also limited the amount of government intrusion on Internet speech.

If the Internet company is not the publisher, then just who is? That question is a little easier to answer if the material comes from a bulletin board or on-line newsletter, such as the *Drudge Report* or *Money Talk*. Many times, as in Kenneth Zeran's case, the defamation occurs in a single ad or statement that is posted anonymously. Certainly he received a great deal of damages from the whole incident, but never found out who posted the ad and was never compensated for it. Chances are AOL was the only one who might have had enough money to compensate Zeran. When the Courts gave Internet service providers immunity from prosecution, that nipped many libel suits in the bud.

Online bulletin boards are a source of concern in themselves. In spite of the errors in the Drudge report, it might be better if the on-line materials were similar to his and other known names. Unfortunately, there are many on-line newsletters that are similar to those published by a local neighborhood organization. In these instances, no one checks for facts or errors. Users just whip them out and post these publications on-line for millions around the world to read. Chances are that most of these publications do not contain defamation and certainly not against some celebrity that might make the national news. However, defamation is defamation no matter if the person is a celebrity or a private individual. The amount of damage or hurt someone can feel by defamation should not make a difference if that person is famous or not.

Journalist

There is also concern for "untrained journalists" who write on-line materials. What are their qualifications for writing news materials for different types of Internet services? Chances are most could not really be considered a journalist because they have no real training or understanding of the laws that control the world of journalism. A person who has no real knowledge of the laws that govern publications, but attempts to produce one anyway, is similar to a person who can not read street signs, but drives anyway. It is a dangerous avenue to travel. The decision in *Blumenthal* could have possibly enhanced the situation.

If these companies can not be held responsible for third party communications, it might create a lazy attitude on the part of the Internet service provider as to what is appearing on-line. This attitude might also make it hard to actually determine who posted bad material, if it is possible to figure that out. The ability to post material anonymously is probably not the best quality the Internet has to offer. All most Internet companies have to do is remove the material as soon as it can possibly be done. But what would happen if a user discovered libelous materials posted on-line, requested the materials be removed and the Internet Service Provider refused to do so? This has not happened yet, but if it did it might change the position of the publisher/distributor status.

So far *The Drudge Report* is the most notable case in on-line publications. Matt Drudge never billed himself as a trained journalist so that question was never really addressed in his law suit. He did claim to be correct 80 % of the time. A 20 % error rate is extremely high. No accredited news organization will ever admit to being wrong 20% of the time.

The case suggested that the courts treat Drudge and people like him with a lower standard because they are not trained journalists. If the question arises again, and someday it probably will, the legal system should say, "no way." If you do not fully understand what you are doing, for example writing statements on-line about someone, and be willing to take the consequences of what can happen if it is done wrong, then you simply should not be doing it. And if there is a problem, then it should make no difference whether you are trained or not.

There are many trained journalist who write or contribute to on-line publications. These people get training from an accredited college where they are taught not only how to write properly, but also the laws that govern this medium. Most will end up at newspapers, television stations, etc. and work under the guidance of an editor while their journalism skills are being sharpened. Editors carefully edit materials before they are published. They are well aware of the consequences mistakes

can bring. They pass this knowledge and experience on to their staff. Unlike an on-line publication, it is quite clear as to "where the buck stops" in the traditional media.

The so-called on-line journalist do not have this clear cut line to follow and the amount of unedited material that gets posted daily should be a cause for concern. People who write on-line publications, trained or not, should be considered a journalist and held to the same high standards as the traditional journalists.

Standards/Rules to go by

Because there have not been many cyberspace suits, the courts are still very new in deciding what rules apply to what situation. The ruling in *Cubby* was totally opposite to the ruling in *Stratton Oakmont*. Those decisions hinged on the amount of editorial control each Internet service provider claimed. That is merely just the first step in deciding the rules. The fact that cyberspace is international may be a potential problem. What would happen if someone in another country defamed President Clinton? Whose rules would be used to govern the case? The rules that govern libel in America are far different that in any other country. In England, for example, there are no restrictions placed on libel suits filed by public figures and officials. In an international libel case, jurisdiction would also are a problem, but it might also answer the question of whose rules to apply. The question would be where to hold the case. Even then, the other party might argue it should be governed by the laws in their country because that's where the statements in question were posted.

Both parties would certainly want the case to be heard in their country, unless there is a country, let's say Russia, which might have the plaintiffs winning most all of the libel suits. But if that country is not home to neither party, the plaintiffs might argue that the Internet is truly international, and, therefore, they want to have their case heard in Russia just because they feel they have a better chance of winning. That scenario would also work if there was a country where the defendants in libel suits won all the time. Then the defendant would want the case to be heard in that particular country. This would create many questions for deciding jurisdiction when the cases are international.

Another question besides jurisdiction would be how to categorize a person. There are rules that are used to decide what determines a public figure or a private individual. When a user gets on-line, that person enters a marketplace with millions of people in it. What happens if one user makes libelous statements about something or someone. Does the fact that the user voluntarily "jumped" into the middle of the conversation make him a limited purpose public figure or a private individual. If the user is determined to be a limited purpose public figure because he/she voluntarily

thrust himself/herself in the middle of a controversy, then the actual malice rule must apply. So far, *New York Times* v. *Sullivan* rule has not been applied, but it be easily could be if necessary.

Damages

Damages that are awarded to people in cyberspace lawsuits are identical to the number of cases are few and far in between. Because of the anonymity of most users it is almost impossible to determine the identity of the person who posts a message on the Internet. Even if the person posting the message is found, that person may not financially have anything from which to retrieve damages.

Another consideration is the fact that messages are posted instantly. Retractions and apologies can also be posted just as quickly. Traditional publications, on the other hand, must wait until the next issue is printed. The question becomes, "Are there less damages because the retraction can be printed the same day as the error?" If that becomes the rule, then there will be less damages for the plaintiffs to argue about.

The fact that Internet service providers can not be held liable for the material that appears is sure to cut down on the number of libel cases. With the millions of on-line publications, including on-line newspapers, there will still be times when these issues will have to be settled. If publication from a bulletin board service is involved, the contract between the Internet Service Provider and the bulletin service will be closely scrutinized. The Courts may be able to hold the Internet Service Provider responsible depending on what the contract says about editorial control. If a case like this should arise, it would certainly set a precedent and force the legal system to take a much harder look at cases before relying on the decisions in *Cubby* and *Zeran*. This type of case would be more in line with the decision in *Stratton Oakmont*. Still in its infancy, the Internet is the most rapidly growing new technology. It will continue to change the way communications and news dissemination are done.

Although the Internet is international, that does not mean that another country will apply the same rules that they apply to traditional means of communications. Governments in other countries may choose to redefine libel laws when it comes to cyberspace. This has not happened yet, but even if a single country does this might influence the way other countries, including U.S., thinks. If nothing else it should certainly encourage people to learn something about the rules that other countries have regarding the Internet, if they choose to be a party to on-line conversations with a user that is in another country.

There are still many questions about the Internet that remain to be answered. In the few cases that have been brought before courts. It has been able to use standards and rules that have been

the standards for many years. The courts have had no problems applying First Amendment applications to the few cases that have been brought before them. Still, there are many that wonder if the rules that were carved out over the last 200 years can still apply to a new technology so different from anything else that the world has experienced. So far the courts, at least in the U. S., have answered that question loud and clear. The courts have not had a problem in applying the First Amendment to cyberspace lawsuits. Not a single word had to change in The First Amendment to accommodate this new and ever growing technology. “Copyright 2000, Dollie F. Deaton”

FOOTNOTES

[1] CLARENCE B. CARSON, THE REBIRTH of LIBERTY, (Irvington-on-Hudson, NY: The Foundation for Economic Education, 1976), p. 218.
[2] RICHARD LABUNSKI, THE FIRST AMENDMENT at the CROSSROADS: FREE EXPRESSION AND NEW MEDIA TECHNOLOGY. 2 Communication Law and Policy, (1997) pg. 164.
[3] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (quoting Panavision Int'l L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996)).
[4] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-848 (E.D. Pa. 1996).
[5] *See, e.g.*, Robert M. O'Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 Wash. L. Rev. 623 (1998); Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 Conn. L. Rev. 1137 (1996); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997); R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet, in* 18th Annual Institute on Computer Law, at 691 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 507, 1998); Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 Geo. Wash. L. Rev. 1071 (1997); Sarah Beckett Boehm, Note, *A Brave New World Of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 Rich. J. L. & Tech. 2, (Winter 1998) *available at* (visited Sept. 24, 1999)
[6] Reno vs. ACLU, No. 96-511 (1997)
[7] Ibid.
[8] See Hall, supra note 19, 582
[9] Ibid.
[10] Quoted in Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage, 1971), 11.
[11] NAT HENTOFF, THE FIRST FREEDOM (Delacorte Press/New York, NY 1980), p. 53
[12] Ibid.
[13] See Clyde Augustus Duniway, *The Development of the Freedom of the Press in Massachusetts* (New York, 1906), p. 99-103.
[14] When the General Court ordered James Franklin's arrest for contempt, he was ordered not to publish. He escaped punishment by listing his younger brother, Ben Franklin, as publisher.
[15] Ibid.
[16] NAT HENTOFF, THE FIRST FREEDOM, (Delacorte Press/New York, NY) 1980 p. 63.
[17] Ibid.
[18] Ibid.
[19] JAMES ALEXANDER, A BRIEF NARRATIVE of the CASE and TRIAL OF JOHN PETER ZENGER (The Belknap Press of Harvard University Press) 1972 p 141.
[20] The prosecutor in the Zenger case argued that His Excellency the Governor of New York had wholly the right to decide whether or not libel had been committed. He argued that an appointed official had the right to rule if libel had been committed.
[21] Brief Narrative, pp. 63, 68. Bradley's modern authority for the law of libel, the standard work of that age, was William Hawkins, *A Treatise of the Pleas of the Crown* (London, 1716-1721), which merely restated the principles of the earlier case.
[22] Brief Narrative, pp.66-68.
[23] Ibid.
[24] In its vindication of the legal and moral right (as well as knowledged power) of the jury to acquit whomever they wished in a trial for seditious libel, can be said too have established in North America the principle that the peole could have, consistent with their solemn oaths as juryman, protect from government sanctions the most redical critic of the authorities.
[25] See Levy, *Legacy of Suppression*, pp 78-82.
[26] Ibid., pp 40-42. For an elaboration of this argument, see Leonard W. Levy, "Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York,: William and Mary Quarterly, 17 (1960), 35-50.
[27] JAMES ALEXANDER, A BRIEF NARRATIVE of the CASE and TRIAL OF JOHN PETER ZENGER (The Belknap Press of Harvard University Press) 1972 p 141.

[28] J.STORY, 3 COMMENTARIES on the CONSTITUTION of the UNITED STATES (Carolina Acad. Press ed. 1987) p. 133-34.
[29] HELEN E. VIETH et al, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD from the FIRST FEDERAL CONGRESS (John Hopkins University Press, Baltimore, MD) 1991, p 201.
[30] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), quoted in A. Koch, Jefferson and Madison 41 (1980 reprint).
[31] L. LEVY, "BILL of RIGHTS," in Essays on the Making of the Constitution 285(L levy ed. 1987).
[32] R. Rutland, supra note 11 at 202.
[33] R. Peck, supra note35, at 93.
[34] NAT HENTOFF, THE FIRST FREEDOM, (Delacorte Press/New York, NY) 1980, p. 80.
[35] Ibid.
[36] U. S. v. Haswell, Wharton, State Trials, 686; 1813 quoted by Spargo, Haswell, 73.
[37] NAT HENTOFF, THE FIRST FREEDOM (Delacorte Press/New York, NY) 1980, p. 83.
[38] "Drafts of the Kentucky Resolutions of 1798, ibid., 275-80.
[39] Ibid.
[40] Examples may be found in *Kentucky Gazette*, August 6, 1799 (Woodford), August 20, 1799 (Bourbon), August 28,1799 (Washington): *Frankfort Guardian of Freedom*, August 7, 1799 (Clarke), September 11, 1799 (Mercer): Washington (Kentucky) *Mirror*, September 18, 1799 (Lincoln), Breckinridge drafted the Clarke resolutions, on which most of the others were based.
[41] W. C. Nicholas to John Brickenridge, October10,1798, B. MSS. A copy is also in the Edgehill-Randolph Papers, University of Virginia.
[42] Kentucky Gazzette, August 1, 15, 1798: Washington (Kentucky) Mirror, August 18, 1798.
[43] Observations on a Letter from George Nicholas of Kentucky to his Friend in Virginia, as quoted, ibid. (Jan. 1900), 237-238.
[44] L. H. HARRISON, JOHN BRECKINRIDGE: JEFFERSONIAN REPUBLICIAN (Filson Club Publications, Louisville, Kentucky) p 74.
[45] Clark, *Kentucky*, pp.153-154.
[46] Breckinridge to Monroe, August 12, 1798, James Monroe Papers, New York Public Library. p.74.
[47] Breckinridge to Monroe, August 12, 1798.
[48] Koch and Ammom, "The Kentucky Resolutions," pp, 157-158.
[49] L. H. HARRISON, JOHN BRECKINRIDGE: JEFFERSONIAN REPUBLICIAN (Filson Club Publications, Louisville, Kentucky) p 80.
[50] Ibid.
[51]"Drafts of the Kentucky Resolutions of 1798, ibid., 275-80.
[52] Ibid.
[53] Frankfort Palladium, November 13, 20, 1798l; Warfield, Kentucky Resolutions, p 73-86.
[54] A printed copy is in the Kentucky Broadsides Collection. Library of Congress.
[55] Washington (Kentucky) Mirror, November 30, 1798.
[56] Ibid.
[57] RANDALL, supra note 25, at 534.
[58] Hubbard Taylor to Madison, January 3, 1799, Madison Papers, Library of Congress.
[59] Ibid.
[60] WILLIAM STERNE RANDALL, THOMAS JEFFERSON: A LIFE, 537, (1993)
[61] New York Times v. Sullivan 376, U.S. 254 (1964)
[62] Act of June 15, 1917, 40 Stat. 217
[63] NAT HENTOFF, THE FIRST FREEDOM (Delacorte Press/New York) 1980 p. 110.
[64] Act of May 16, 1918, 40 Stat. See HALL supra note 19, at "Espionage Acts" 260.
[65] NAT HENTOFF, THE FIRST FREEDOM (Delacorte Press/New York) 1980 p. 110.
[66] Id.
[67] Masses Publishing Co. v. Patten, 244 F. Supp. 535 (S.D.N.Y.) (1917) reversed. 246 F. 2d 24 (2d Cir.) (1917)
[68] Ibid.
[69] Ibid.
[70] Schenck v. United States, 249 U. S. 47 (1919).
[71] Gitlow v. New York, 268 U.S. 652 (1925).
[72] Dennis v. United States, 341 U. S. 494 (1951).
[73] Murdock v. Pennsylvania, 319 U. S. 105 (1943).
[74] Konigsberg v. State of California, 386 U. S. 36 (1961).
[75] Schenck, 249 U. S. 47 (1919).
[76] Frohwerk v. Unitedf States, 249 U. S. 204 (1919)

[77] Debs v. United States, 249 U.S. 211 (1919).
[78] Jacob Abrams v. United States, 250 U. S. 616, 40 S. Ct. 17, 63 L.Ed. 1173 (1919).
[79] Gitlow v. New York, 45 S. Ct. 625 (1925).
[80] Barron v. Balitmore, 32 U.S. (1933)
[81] Barenblatt v. United States, 360 U. S. 109 (1959).
[82] Koinsberg v. State Bar of California, 386 U. S. 36 (1961)
[83] Robel v. United States, 389 U. S. 258 (1967).
[84] Murdock v. Pennsylvania, 319 U. S. 105 (1943).
[85] Marsh v. Alabama, 66 S. Ct. 276 (1946).
[86] Konigsberg v. State Bar of California, 81 S.Ct. 997 (1961).
[87] JOSEPH HEMMER, JR, The SUPREME COURT and the FIRST AMENDMENT (Praeger, Westport, Ct) 1986 Ch. 1 p.6.
[88] Any definition of libel must consider the court cases that give it content, therefore, a complete definiton must await a decision of the cases themselves. Although there are circumstances that may be considered exceptions, a statement must be defamatory and false before it can be considered libelous.
[89] MICHAEL F. MAYER, The LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY (Bookcrafters, Chelsa, Mi) 1987 p.1. New York Times v. Sullivan, 376 U.S. 254 (1964).
[90] At his trial during the last week in May, he was acquitted. The state could not produce no evidence for its charge the Dr. King had committed perjury. SEE LEWIS, supra note 17 at 27.
[91] Ibid., at 6.
[92] ANTHONY LEWIS, MAKE NO LAW (Random House, New York, NY) 1991 p.6.
[93] Ibid.
[94] Singers Harry Belafonte and Nat King Cole, actor Sidney Poitier, baseball great Jackie Robinson, and former first lady Eleanor Rosevelt were included.
[95] The ad cost a little over $4,800 and brought in many more times the cost.
[96] New York Times supra note 6, at 256.
[97] During the trial, other errors were noted. The students were expelled not in connection with singing on the state capitol steps but after seeking service at the lunch counter. Dr. King had been arrested four times, and not seven.
[98] New York Times 6, supra note at 257.
[99] LEWIS, supra note 17, at 10-11.
[100] Ibid.
[101] Hall's father was also an editor of the *Montgomery Advertiser* and won the 1926 Pulitzer Prize for editorials attacking the Klu Klux Klan.
[102] LEWIS, supra note 17 at 27.
[103] LEWIS, supra note 17,12-15. Justice Black in his concurring opinion said that Columbia Broadcasting System also had been sued for libel, five suits sought judgments that totaled $1.7 million. See New York Times v. Sullivan, 376 U.S. 254 (1964) (Black, J., concurring)
[104] Ibid. At 270.
[105] Ibid. At 271.
[106] Ibid at 271-272, quoting NAACP v. Button, 371 U.S. 415, 433 (1963).
[107] 376 U.S. at 279.
[108] 376 U.S. at 279-80.
[109] New York Times, supra note 6, at 271-272.
[110] Ibid.
[111] Curtis Publishing Company v. Butts, 388 U.S. 130 (1966)
[112] Associated Press v. Walker. 388 U.S. 75 (1966)
[113] Ibid.
[114] 351 F. 2d at 719, in 388 U.S. at 139.
[115] Ibid.
[116] Ibid. At 155.
[117] Associated Press v. Walker 388 U. S. at 130 (1967).
[118] Rosenblum v. Metromedia, 403 U.S. 29 (1971)
[119] Ibid. at 40.
[120] 415 F. 2d at 896; U.S. at 40.
[121] Ibid.
[122] Ibid.
[123] 403 U. S. at 41.
[124] Ibid. at 42, quoting *Curtis Publishing Company v. Butts*, 388 U.S. at 163-64.
[125] GILLMOR, supra note124, at 207.

[126] Gertz v. Robert Welch, Inc. , 418 U.S. 323, 354 (1974)
[127] Ibid. at 326.
[128] Ibid. at 329.
[129] Ibid.
[130] Ibid. at 332.
[131]Gertz, supra note 7, at 339.

[132] Ibid. at 340.
[133] Ibid. at 342.
[134] Ibid. At 342.
[135] ROBERT S. PECK, THE BILL of RIGHTS and the POLITICS of INTERPERTATION (West Publishing Company, St. Paul, M. N.) 1991 p.234.
[136] Gertz v. Robert Welch, 418 U.S. 323, 354 (1974)
[137] Ibid
[138] Ibid.
[139] Ibid.
[140] ROY MOORE, MASS COMMUNICATION LAW and ETHICS (Lawrence Erlbram Associates, Hillsdale, N. J.) 1999 p. 203.
[141] RICHARD LABUNSKI, LIBEL and the FIRST AMENDMENT, (New Brunswick, N.J.) 1986, p. 156.
[142] 418 U. S. at 370.
[143] Gertz,supra note 7,at 339 (White, J. dissenting)
[144] Ibid. at 387 (White, J dissenting)
[145] Ibid. at354 (Blackmun concurring)
[146] Ibid. at 387 (White, J. dissenting)
[147] Time, Inc., v. Firestone, 424 U. S. 448 (1976).
[148] Ibid. at 452.
[149] Ibid. at 454-55.
[150] Ibid. at450-51.
[151] Ibid. at 485.
[152] Internet facts prepared by Nua Internet and available at<http://www.nua.ie/surveys. E-mail: surveys@nua.com
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] A Brief History of the Internet can be found at http://www.isoc.org/internet-history/
[159] Len Kleirock: The Birth of the Internet can be found at http://www.lk.cs.ucla.edu/
[160] Ibid.
[161] Biography for Tim Berners-Lee can be found at http://www.w3.org/people/Berners-Lee/longer.num
[162] Id.
[163] Reno v. ACLU, 929 F. Supp. 824, 930-38 (E.D. Pa. 1996), prob. Juris. Noted, 117 S. Ct. 554 (1996).
[164] Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Med.L. Rptr. 1794 (N.Y. /sup. 1995)
[165] Ibid
[166] Ibid.
[167] Communications Decency Act of 1996, Pub. L. No. 104-105 (modified at 47 U.S.C. 230© (Supp. 1996).
[168] ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).
[169] Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).
[170] SUSAN DRUCKER, REAL LAW @VIRTUAL SPACE (Hampton Press Inc. Cresskilll, NJ) 2000 p. 134.
[171] Reno v. ACLU, 117 S. Ct. 2329 (1997)
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176]Ibid.
[177] Marvin Miller. California, 413 U.S. 15, 93 S. Ct. 2607,37 L. Ed. 2d 419, (1973)
[178] Reno v. ACLU, 117 S. Ct. 2329 (1997
[179] Ibid.
[180] Sable Communications of California v. FCC, 492 U.S. 115, 109 S. Ct. (1989)

[181] SUSAN DRUCKER, REAL LAW @VIRTUAL SPACE (Hampton Press Inc. Cresskilll, NJ) 2000 p. 139.
[182] 391 U.S. 367, 88 S. Ct. 1673, 20L.Ed.2d 672 (1968)
[183] Ibid.
[184] Ginsburg v. New York, 390 U. S. 629, 88 S. Ct. 1274. 20 L. Ed.2d 195, I med.L.Rptr. 1424 (1968).
[185] Paris Adult Theatre I v. Slaton (1973), 567,-570.
[186] Cohen v. California, 1971 p. 21.
[187] Shea v. Reno, 1996.
[188] Denver Area Educational Television Consortium, Inc.. et al v. Federal Communications Commission et al, 518 U.S. 727, 116 S. Ct., 2374, 135 L. Ed 2d 888 (1996).
[189] Ibid.

[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid .
[194] Internet facts prepared by Nua Internet and available at<http://www.nua.ie/surveys. E-mail: surveys@nua.com.
[195] RICHARD LABUNSKI, THE FIRST AMENDMENT at the CROSSROADS: FREE EXPRESSION AND NEW MEDIA TECHNOLOGY. 2 Communication Law and Policy, (1997) pg. 205.
[196] Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Med.L. Rptr. 1794 (N.Y. /sup. 1995)
[197] In *Stratton Oakmont v. Prodigy*, Vice President Daniel Porush did not even know defamatory statements about him were on the Internet until someone told him.
[198] Cubby v. CompuServe, 766 F. Supp. 135, (S. D. N. Y. 1991).
[199] Ibid.
[200] SUSAN DRUCKER, REAL LAW @VIRTUAL SPACE (Hampton Press Inc. Cresskill, NJ) 2000 p. 315.
[201] Cubby v. CompuServe, 766 F. Supp. 135, (S. D. N. Y. 1991).
[202] Ibid.
[203] Ibid.
[204] Comments of Online Service Providers, at n.2.
[205] 839 F. Supp. 1552 (M.D. Fla. 1993).
[206] Ibid. at 1554.
[207] Ibid.
[208] Ibid at 1559.
[209] Ibid.
[210] Stratton Oakmont Inc. v. Prodigy Serv. Co. WL. 323710 at *1 (N.Y. Sup. Ct. May 24, 1995).
[211] Ibid.
[212] Ibid.
[213] Zeran v. American Online, 958 F Supp. 1124 (E.D. Va. 1997), 1997 U.S. App. KEXIS 31791 (4th Cir Va.) Nov. 12,1997.
[214] Ibid.
[215] See David R. Sheridan, "*Zeran v. AOL* and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet," 61 Alb. L. Rev. 147 (1997).

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1989-1995 **Jessamine Journal** Nicholasville, KY
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Headstart teacher in Powell County

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1988 - Charles Richardson DeSpain Scholarship for outstanding journalism and professional commitment for a college student
1991- 1st place in spot news in Kentucky Weekly Newspaper Competition
1992, 1993, 1994 - 2nd place in lifestyles in Kentucky Weekly Newspaper Competition
1995 - 1st place in a series in Kentucky Weekly Newspaper Competition