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Real Remedies for Virtual Injuries

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REAL REMEDIES FOR VIRTUAL INJURIES*

ANITA BERNSTEIN**

Social networking, which offers enhancements to human lives at a low marginal cost, also contributes to dignitary and other nonpecuniary harms. Statements and images presented in electronic media can give rise to defamation, invasion of privacy, trademark infringement, and false advertising claims. Accurate enough as descriptions of harm, these doctrines do not do an adequate job of repair. An injurious communication preserved by electronic means and distributed through social networking is more likely than its spoken or paper-written counterpart to spread (a phenomenon expressed in the metaphoric adjective “viral”), to reach people whose disesteem the victim cares about, and to retain power to inflict more harm after it has been adjudicated as unlawful. Injuries in the virtual realm call for remedies that recognize how information travels through—and lingers in—electronic media. After summarizing how current remedies for virtual injuries fail to effect repair, this Article proposes a court-annexed alternative dispute resolution scheme.

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INTRODUCTION

Virtual injuries—shorthand here for legally cognizable harms that individuals experience in and around the Internet, a geographically dispersed electronic-technological environment that opened to include ordinary people only at the end of the twentieth century¹—become more amenable to repair with the help of a venerable and low-tech classification.

Tort law has long distinguished libel, which recognizes harms attributed to durable types of communication, from slander, pleaded in court after more ephemeral materials cause harm.² Plaintiffs injured by longer-lasting, reputation-harming materials have an easier route to redress. Whenever a reputation-harming communication takes place “by writing and by contemporary means analogous to writing such as movies,”³ it falls under the heading of libel, a strict liability tort in common law.⁴

1. See Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1607 n.1 (2009) (stating that although ARPANET, a precursor to the Internet, went live in 1969, the year 1994 marks a better starting date).

2. Common law rules compel slander plaintiffs to prove distinct pecuniary damages, unless the oral communication that the defendant made falls on a short list of slurs called “slander per se.” *But cf.* Leslie Yalof Garfield, *The Death of Slander 3* (Aug. 31, 2011) (unpublished manuscript) (on file with the North Carolina Law Review) (“Scholars and commentators, recognizing the illogic in the slander/libel distinction, regularly write that the distinction is archaic and therefore should be abolished.” (citations omitted)). I do not disagree with Professor Garfield’s recommendations for doctrinal reform, *see id.*, and remark only that the durability of a harmful communication matters.

3. DAN B. DOBBS, *THE LAW OF TORTS* 1120 (2001).

4. *Id.*

Because durability as a doctrinal variable in dignitary tort law always made good sense,⁵ this Article embraces and extends it. The line between slander and libel, favoring plaintiffs who can show that the derogatory communication is of the kind more likely to persist, recognizes a temporal element, the half-life present in any injurious falsehood. When a harmful statement has taken a less durable form, it will dissipate faster and will likely do less harm. Evanescence eases the force of a blow.

Social networks—and their consequences that start in the virtual world⁶—make durability of harm stronger by adding credibility and celerity. Joining other writings about these networks, this Article works with the line that divides libel and slander—with its emphasis on durability *vel non*—to broach the problem of repairing civil wrongs that take electronic form. This Article considers publications on the Internet—words, images, or a combination thereof—that fulfill a *prima facie* case for defamation, invasion of privacy, or commercial injury to personality.

Vulnerability to defamation and invasion of privacy is more severe than commercial injury to personality⁷ in at least three respects. First, most people have a reputation, whereas few own trademarks or any other intellectual-personal property that they know of. Second, reputational or emotional harm cuts deeper into the consciousness of a person—it feels worse—than harm to a commercial asset. Third, finding counsel for a defamation or privacy claim is relatively hard, whereas commercial personality claims are prosecuted by relatively expert and accessible lawyers.⁸ Vulnerability brings out the law reformer in me, and so the first two of the causes of action will dominate my attention in this Article.

Social networks are central to the paradigmatic injury that I explore. They occupy a pivotal role in the lives of millions, especially persons living in the United States who were born after the mid-

5. RESTATEMENT (SECOND) OF TORTS § 580B (1977). *But see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that the First Amendment requires fault where a publisher or broadcaster is to be held liable by a private individual).

6. *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (“Online social networking is the practice of using a Web site or other interactive computer service to expand one’s business or social network.”).

7. See David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 270–77 (2010) (detailing the fragility of reputation online).

8. On the difficulty of finding dignitary-tort counsel, see *infra* Part II.B.1. “Trademark lawyer” lends itself easily to electronic searches, and propertied persons have good access to attorneys.

1970s.⁹ The number of viewers and potential viewers in social networks is large.¹⁰ Because these networks leverage trust and vouching, they enhance the credibility of hurtful materials posted.¹¹

News stories have provided reports of several social-network publications that individuals claim defamed them or invaded their privacy. In Chicago, a teen athlete brought an action complaining that four high school peers had set up a Facebook page under his name;¹² this publication, which included pictures of him and his cell phone number, ascribed racist remarks to him that he did not make and claimed untruthfully that he had engaged in certain homosexual and heterosexual acts.¹³ Another fake-page lawsuit reported that two eighth-graders confected a MySpace page in the name of a man they named "M-Hoe," featuring a photograph of their middle school principal and disparaging content about his persona.¹⁴ Parents of a murder victim brought an action for invasion of privacy against several defendants, including Facebook and a New York paramedic, after the paramedic posted on his Facebook page photographs of

9. Ardia, *supra* note 7, at 305 n.303.

10. Facebook claimed 845 million active users as of December 2011. See *Fact Sheet*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaID=22> (last visited May 6, 2012).

11. Terrence Berg, *The Changing Face of Cybercrime*, MICH. B.J., June 2007, at 18, 19, available at <http://www.michbar.org/journal/pdf/pdf4article1163.pdf>. One 2006 hoax, reported as "the Brody Ruckus incident," showcased the popularity of Facebook. See *Ruckus Network*, WIKIPEDIA (Oct. 5, 2010, 7:05 PM), http://en.wikipedia.org/wiki/Ruckus_Network. Co-workers set up a Facebook group in the name of a fictitious individual whom they named Brody Ruckus. This persona announced that "[i]f this group reaches 100,000 [members,] my girlfriend will have a threesome." Justin Appel, *Ruckus Upsets College Music Scene*, ESCHOOL NEWS (Oct. 27, 2006), <http://www.eschoolnews.com/2006/10/27/ruckus-upsets-college-music-scene/> (internal quotation marks omitted). Within three days, more than 100,000 Facebook users had duly joined. *Id.* Brody Ruckus then upped the ante by promising to post photos of the encounter if the group reached 300,000. Within another seven days, 400,000 Facebook users were members. *Id.* Brody Ruckus next promised a video of the threesome if the group became the largest on Facebook. *Id.* At this point, Facebook administrators deleted the Brody Ruckus page on the ground that misrepresentations about participants' identity violated its terms of service. See *id.*; *Statement of Rights and Responsibilities*, FACEBOOK, www.facebook.com/terms.php (last visited May 6, 2012).

12. William Lee, *Facebook Smears Spur Mom To Sue*, CHI. TRIB., Sept. 25, 2009, § 1, at 11.

13. *Id.*

14. On their MySpace profile the teenagers listed M-Hoe's interests: "detention, being a tight ass, riding the fraintain [the principal's wife, a guidance counselor at the school, was named Debra Frain], spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents." *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920–21 (3d Cir. 2011) (internal quotation marks omitted). Their prank reached the federal courts following a contention that their ten-day suspension violated the First Amendment. *Id.* at 920.

their daughter's corpse that he took at the crime scene.¹⁵ Twitter posts by celebrity Kim Kardashian constituted defamation, claimed a physician whose diet product was impugned there.¹⁶ A fashion designer brought an action for libel, invasion of privacy, intentional interference with prospective economic advantage, and breach of contract against another celebrity, Courtney Love, based on content that Love published on Twitter and MySpace.¹⁷

Social networks can also help to disseminate injurious communications that were launched in other media.¹⁸ To the extent that photographs invade their subjects' privacy, for example, the tag suggestions feature that Facebook rolled out in 2011, inviting users to attach names to photographs, makes it likely that more such invasion will occur.¹⁹ But social network augmentation of harms is already in place. Federal court pleadings that drew wide attention in 2007 alleged that AutoAdmit, an Internet discussion board, published commentary injurious to female law students that amounted to "libel, invasion of privacy, negligent and intentional infliction of emotional distress, and copyright violations."²⁰ One trial court remarked that search engines have helped to disperse these words to a wide readership.²¹ Another trial court, handling a different AutoAdmit claim, noted that the defendants had copied their photographs of plaintiffs from Facebook.²² A horrifying pattern of homophobic bullying at an Arkansas school grew worse after the district decided to defend itself against the victim's complaints by setting up a

15. Jordana Ossad, *Parents Sue over Facebook Photos of Dead Daughter*, CNN (Mar. 29, 2011, 22:53 GMT), <http://edition.cnn.com/2011/CRIME/03/29/new.york.facebook.suit/index.html>.

16. Julie Hilden, *Libel by Twitter? The Suit Against Kim Kardashian over the "Cookie Diet,"* FINDLAW (Jan. 4, 2010), <http://writ.news.findlaw.com/hilden/20100104.html>.

17. The plaintiff reportedly collected a settlement of \$430,000. See "*Don't Twibel on Me*": *Tweets as Libel Lawsuits*, JUSTIA.COM (Apr. 1, 2011), <http://onward.justia.com/2011/04/01/dont-twibel-on-me-tweets-as-libel-lawsuits/>.

18. A Duke University student drew attention in 2010 by e-mailing three of her friends a PowerPoint slideshow describing her sexual encounters with thirteen campus athletes. See Irin Carmon, *College Girl's PowerPoint "Fuck List" Goes Viral*, JEZEBEL (Sept. 30, 2010, 3:00 PM), <http://jezebel.com/5652114/college-girls-power-point-fuck-list-goes-viral-gallery>. After the slides "went viral," see *infra* note 123, a popular site reported that photographs of the named individuals came from Facebook. See Carmon, *supra*.

19. Richard Adhikari, *Gagging on Tagging: Facebook Facial Recognition Creeps Out Privacy Partisans*, TECHNEWSWORLD (June 8, 2011, 12:31 PM), <http://www.technewsworld.com/story/72613.html>.

20. *Doe v. Individuals*, 561 F. Supp. 2d 249, 252 (D. Conn. 2008).

21. *Id.*

22. *Ciulli v. Iravani*, 651 F. Supp. 2d 356, 374 (E.D. Pa. 2009).

Facebook page titled “The Whole Story.”²³ Visitors added harassment of the victim so egregious that “within weeks”—but not until more harm occurred—Facebook shut the page down.²⁴

Let us assume, as courts do when reviewing motions to dismiss, that accusations allege truth, and put ourselves in the place of those who believe they have suffered virtual injuries. What would we want by way of redress? Phrased in personal as well as doctrinal terms, this query rests on the premise that dignitary harms call for attention to the individual injured.²⁵ Our hypothetical victim finds counsel, let us suppose, and plans to go to court.

Part I of this Article reviews the causes of action that might be available to label a virtual injury. Labels imply repair: they come with rules addressing what a plaintiff might believe and desire. From the vantage point of our plaintiff, the causes of action available for virtual injuries probably do a better job of describing than remedying. They focus on the dignity of a person, and these references resonate. Many belief systems and ideologies that otherwise clash with one another—religious doctrines, secular humanism, and psychological, philosophical, sociological, and anthropological understandings—unite around dignity as central to human life in a society. Dignity encompasses reputation, the center of defamation. In the United States, dignity also demands a modicum of privacy, a more contingent concept that nevertheless sets boundaries in every culture dividing what ought to be observed and unobserved.²⁶

23. *Wolfe v. Fayetteville*, Ark. Sch. Dist., 600 F. Supp. 2d 1011, 1018 (W.D. Ark. 2009).

24. *Id.*

25. See *Arda*, *supra* note 7, at 286–89 (examining “Reputation as Dignity”); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 455 (1997). Although a vast literature surveys subjective responses to the experience of litigation, see generally, for example, HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999); 44 CT. REV. (SPECIAL ISSUE 1/2) *passim* (2007–2008), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>; Tamara Relis, “It’s Not About the Money!”: A Theory on Misperceptions of Plaintiffs’ Litigation Aims, 68 U. PITT. L. REV. 701, 705–09 (2007) (reviewing empirical findings and noting gaps), the data on plaintiffs’ motives for bringing dignitary-tort claims is sparser. I rely primarily on the seminal report about defamation. See Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 791 (1986) (describing the Iowa Libel Research Project, a national study).

26. See generally ADAM D. MOORE, *PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS* (2010) (noting the universality of privacy among cultures); *Privacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/privacy/> (last visited May 6, 2012) (“Most writers have come to agree that while almost all cultures appear to value privacy, cultures differ in their ways of seeking and obtaining privacy, and probably do differ in the level they value privacy.”). On the taste for privacy among

Judicial responses to the causes of action—rectification of wrongs committed using social-networking tools—fall short, however.²⁷ Part II reviews remedies that courts offer to plaintiffs who succeed in their claims for defamation and invasion of privacy. As is true for civil litigation generally, what courts can give is typically limited to a monetary judgment, even though plaintiffs often espouse some variation on “it’s not about the money.”²⁸

Federal law—both constitutional and statutory—adds to plaintiffs’ difficulties by making the virtual-injury version of these causes of action more difficult for them. Scholars reviewing these infirmities have called for new federal legislation to forestall or repair virtual injuries.²⁹ Although a congressional fix would offer unique contributions—clarity, comprehensiveness, nationwide application, engagement of judges as expositors—it is unlikely to be enacted.³⁰

In recognition of long odds against any federal-level corrective, I present an alternative reparative scheme that a state could install in a pilot program, sited perhaps in one or two of its busier judicial districts. Part III, containing specifics, borrows the equal protection concept of overinclusiveness combined with underinclusiveness.³¹ Remedies for virtual injuries offered now in American courts present victims with too much of what they do not need coupled with too

American survey respondents, see Scott Cleland, *Americans Want Online Privacy—Per New Zogby Poll*, PRECURSOR BLOG (June 8, 2010, 4:28 PM), <http://www.precursorblog.com/content/americans-want-online-privacy-new-zogby-poll>; Susannah Fox, *Trust and Privacy Online: Why Americans Want To Rewrite the Rules*, PEW INTERNET & AM. LIFE PROJECT 2 (2000), available at http://www.pewinternet.org/~media/Files/Reports/2000/PIP_Trust_Privacy_Report.pdf.

27. Ardia, *supra* note 7, at 314–16 (“Judicial Remedies [for virtual wrongs] Are Ineffective.”).

28. Relis, *supra* note 25, at 706.

29. See, e.g., Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility? Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 263 (2007) (proposing an amendment to the Communications Decency Act that would establish notice and takedown for defamatory material on the Internet); Note, *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, 120 HARV. L. REV. 1870, 1884 (2007) (seeking new legislation limiting reach of photo-recognition technology); Melissa A. Troiano, Comment, *The New Journalism: Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1475–78 (2006) (proposing an amendment to the Communications Decency Act that would make bloggers liable in some cases for defamatory comments posted by third parties).

30. A collective action problem impedes passage of reform legislation: beneficiaries are scattered, opponents united. My thanks to Derek Bambauer for elaborating on this point.

31. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347–48 (1949).

little of what would ameliorate the harm they suffered: containment, erasure, rehabilitation, and lowered costs.

The title of Part III, "Toward an Alternative Dispute Resolution," refers simultaneously to a streamlined, court-annexed arbitration option and, more generally, to the need for continual review of the private law doctrines and processes that courts apply. A key theme of the alternative dispute resolution mechanism proposed in Part III is responsiveness to injuries as victims experience them: remedies that are "real," insofar as they address what victims can prove happened and what they desire by way of rectification. The Article concludes by placing the problem of virtual injuries inside a wider contention that judges, legislators, lawyers, and observers of American private law ought to make a habit of reassessment.

I. CAUSES OF ACTION

Claims for virtual injuries will vary; Internet publications that injure can fulfill the elements of one or more causes of action. Interests that the victim holds, the nature of the publication and, for some claims, divergences in governing law will influence what claimants can pursue.³² Durability unites all these injuries: the offending publication will tend to remain available to readers.

A. Defamation

"Harm to reputation or good name," according to a leading treatise, "is the essence of libel and slander."³³ Defamation—the umbrella term uniting libel and slander—contains both common law and constitutional elements. The common law compels the plaintiff to prove defendant's publication to a third person of reputation-lowering material, of and concerning the plaintiff.³⁴ When the publication took place only orally, the plaintiff must show either pecuniary damages or that the communication fits in the short list of "slander per se."³⁵ Constitutional elements of the tort make recovery more difficult: the plaintiff must show fault on the part of the

32. On divergence: In New York, for example, "there is no common-law right of privacy," *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353 (N.Y. 1985), and no common law right to publicity. *See Groden v. Random House, Inc.*, 61 F.3d 1045, 1049 (2d Cir. 1995); *see also Freihofer*, 480 N.E.2d at 353 (noting that to prevail on an appropriation claim, a plaintiff must show that the unauthorized use of his identity must be "for trade or advertising purposes"). California has a right of publicity statute similar to New York's. *See CAL. CIV. CODE* § 3344 (West 1997).

33. DOBBS, *supra* note 3, at 1117.

34. *Id.* at 1120.

35. *Id.*

defendant, falsity of the published statement, and, sometimes, actual damages.³⁶

Of all the virtual-injury liability categories examined in this Article, defamation has generated the biggest secondary literature, perhaps because it has the deepest roots in Anglo-American law.³⁷ Doctrinal scholarship about defamation now routinely includes extensive coverage of this tort in the virtual world; according to one of the blogs that focus on online defamation, “[e]veryday, it seems, there is an online defamation suit being filed of some notoriety.”³⁸ Communities and sectors circulate and retell accounts of this type of defamation.³⁹

One defamation action from the United Kingdom joins our mostly-American discussion to illustrate how this injury takes form in the virtual world.⁴⁰ In spring 2010, Zoe Margolis, an English writer, submitted a solicited essay to *The Independent*, a newspaper.⁴¹ Turning on her computer later, Margolis was shocked to find her prose published under the headline “I was a hooker, but became an agony aunt.” She read the word “hooker” as defamatory. Margolis wrote that calling her a prostitute had “fundamentally damaged” her “reputation and credibility”—not because exchanging sex for money is shameful, she said, but because “my books and my blog focus on creating a clear distinction between the expression of female sexual

36. *Id.* at 1119–20.

37. None of the other causes of action as applied to the virtual realm has its own regularly updated treatise. *See generally* MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET (3d ed. 2010) (surveying causes of action, defenses, and remedies in online defamation cases in various jurisdictions).

38. *Online Bedside Manner*, ONLINEDEFAMATIONLAWSUITS (May 24, 2011), <http://onlinedefamationlawsuits.com/online-bedside-manner>.

39. In my occupational community, the legal academy, the most infamous example of Internet defamation is probably AutoAdmit, *see supra* notes 20–22 and accompanying text, but other complaints abound. For example, in June 2011, one law school brought an action for defamation against bloggers that had impugned it. Complaint at 1–6, Thomas M. Cooley Law Sch. v. Strauss, No. 11780-CZ (Mich. Cir. Ct. July 14, 2011), *available at* http://www.cooley.edu/newsevents/_docs/2011_07_14_Summons_and_Complaint_startpage.pdf. An Indiana University law student filed a handwritten defamation complaint after a blogger called him a scam artist and a fraudster. Complaint at 2–4, Millogo v. Buck, No. 1:10-CV-1187 WTL-TAB (S.D. Ind. Sept. 10, 2010), *available at* <http://www.scribd.com/doc/37977081/Millogo-v-Buck-Complaint>.

40. The two countries vary in their law of defamation, with British doctrine favoring plaintiffs and American doctrine favoring defendants, but they speak the same language, more or less, and about the same fraction of their population is connected to the Internet. COLLINS, *supra* note 37, at 17 (reporting May 2010 estimates of the Internet-connected population as 76.4% in the United Kingdom and 76.3% in the United States).

41. Zoe Margolis, *Counting the Cost of Libel Reform*, GUARDIAN (May 28, 2010), <http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/28/counting-the-cost-of-libel-reform>.

desire for pleasure and the male-centred fantasy of the sex industry.”⁴² *The Independent* ran “I was a hooker” both in print and online.⁴³

Virtual-world iterations of the headline proved hard to undo: it remained unaltered for what one blogger called “an excessive number of hours” after Margolis complained to the paper, and news-aggregator channels helped to spread the publication rapidly.⁴⁴ Airing the grievance on a social network yielded fast advice and support for Margolis, but also spread the message that had affronted her.⁴⁵

B. *Invasion of Privacy*

A famous division crafted by William Prosser,⁴⁶ written into the *Restatement of Torts* and accepted in numerous states,⁴⁷ identifies four types of invasion of privacy: (1) unreasonable intrusion upon the seclusion of the plaintiff; (2) appropriation of the plaintiff’s name or likeness; (3) public disclosure of private facts, or unreasonably giving publicity to the plaintiff’s private life; and (4) publicizing the plaintiff in a false light.⁴⁸ For present purposes, we can exclude the first cause of action: intrusion upon seclusion takes place when individuals physically enter personal spaces, often by devices like telephoto lenses, hidden cameras, and recording devices. Although facilitated by electronic means, intrusion upon seclusion does not take form in publication and thus does not cause virtual injuries as envisioned in this Article.⁴⁹ Appropriation, which overlaps with the right of publicity, belongs in our taxonomy but will be postponed to the next

42. *Id.* (quoting Zoe Margolis) (internal quotation marks omitted).

43. Abby O’Reilly, *Zoe Margolis Wins Libel Damages*, F WORD BLOG, http://www.thefword.org.uk/blog/2010/05/zoe_margolis_wi (last visited May 6, 2012).

44. *Id.*

45. Margolis, *supra* note 41 (describing the author’s use of Twitter).

46. William E. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

47. RESTATEMENT (SECOND) OF TORTS §§ 652A–E (1977). On the wide acceptance of this four-division scheme, see 2 FOWLER W. HARPER, FLEMING JAMES & OSCAR GRAY, *THE LAW OF TORTS* § 9.6 (3d ed. 1996). *But see* Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 291–92 (2002) (arguing that as a cause of action, invasion of privacy has struggled).

48. DOBBS, *supra* note 3, at 1198 (citing RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a (1977)).

49. On the Internet as a medium of surveillance, see generally LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* (2011) (arguing that a dangerous mix of voluntary data creation on social networks, stealth collection of online data by aggregators, and harmful uses of this gathered information injures individuals, sometimes without their knowledge); Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. (forthcoming 2012) (arguing that electronic capture of data can qualify for this claim).

Section, which examines commercial injuries.⁵⁰ That leaves two Prosserian subdivisions pertinent to dignitary harm caused by an online publication, the paradigmatic injury of this Article: public disclosure of private facts and false light.

1. *Restatement (Second) of Torts* Section 652D: “Publicity Given to Private Life”⁵¹

Social networks provide venues to post, locate, and disseminate private facts. Settings on LinkedIn, which sort contacts by degrees of closeness to a participant,⁵² share the tort’s interest in boundaries. A user of a network like Facebook might choose a high-privacy setting to declare that what she posts there are private facts. She might draw a privacy line by blocking designated individuals from her otherwise accessible page. Even when making guarded choices on a social network, however, she necessarily shares information.

Public disclosure of private facts occurs when the defendant publicly discloses a private fact about the plaintiff—but only if the disclosure is not of legitimate public concern, would be offensive to a reasonable person, and reveals facts that are not generally known.⁵³ Constraints on the tort exist because communication and deliberative discourse are constitutional values;⁵⁴ they do not impede prosecution of the paradigmatic claim that this Article considers. Virtual-world images or words that disclose private facts will rarely be of public concern; they expose material about an individual that she tried to keep unrevealed.⁵⁵

An example of online conduct that could support a private-facts claim is “outing,” defined in one lexicon as the exposing as gay, lesbian, or bisexual a person assumed to be, or wishing to be

50. See *infra* note 82 (distinguishing between appropriation and the right of publicity).

51. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

52. On LinkedIn’s degrees of contacts, see *Your Network and Degrees of Connection*, LINKEDIN https://help.linkedin.com/app/answers/detail/a_id/110/ls/741%2C748%2C931%2C1684 (last visited May 6, 2012); see also Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 295–96 (2011) (“The potential readership begins with nobody and ends with everybody. Recluses like author Harper Lee can use Facebook to communicate with one confidante, while exhibitionists like rocker Tommy Lee can use it to broadcast hourly status updates to the world.”).

53. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

54. See *infra* Part II.C.

55. It should be noted that several states either reject the private-facts variant of invasion of privacy or limit its application. See DOBBS, *supra* note 3, at 1208 (discussing rejectionist case law in New York, Indiana, Oregon, and North Carolina).

considered, heterosexual.⁵⁶ Social networks, blogs with lenient moderation policies, chat rooms, and comments spaces on websites offer venues where anyone with an Internet connection can declare that any person has, contrary to appearances, a minority sexual orientation. When the statement about another person's homosexual orientation is true, a defamation claim becomes unavailable,⁵⁷ leaving the private-facts variant of invasion of privacy as a plausible alternative cause of action: exposure of a private citizen's sexual orientation might well be both offensive to a reasonable person and not a matter of public concern.

2. *Restatement (Second) of Torts* Section 652E: "Publicity Placing Person in False Light"⁵⁸

The other privacy claim that fits our dignitary paradigm, false light, has four elements: all can come together in the virtual realm. The defendant must have published information about the plaintiff; the published material must have put the plaintiff in a false light; the false light must be highly offensive to a reasonable person; and the defendant must have known of the falsity or published the material with reckless disregard.⁵⁹

On the surface, false light resembles defamation. Courts and scholars have worked to distinguish the two⁶⁰: the "outing" example demonstrates what false light can add. When an imputation of homosexuality is false, some courts will permit a claim for defamation.⁶¹ Commentators have challenged this acceptance, arguing that this statement should be not defamatory as a matter of law.⁶² Although no such rule has taken hold, plaintiffs falsely labeled

56. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 881 (11th ed. 2003).

57. *N.Y. Times v. Sullivan*, 376 U.S. 274, 279-80 (1964) (holding in part that defamation requires a "falsehood").

58. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

59. *Id.*

60. Smolla, *supra* note 47, at 294 n.14 ("[T]he fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation" (citation omitted)).

61. *Manale v. New Orleans Dep't of Police*, 673 F.2d 122, 125 (5th Cir. 1982) (concluding that calling the plaintiff homosexual, a characterization that the plaintiff said was false, constituted defamation per se under Louisiana law); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 312 (Mo. 1993) (finding that falsely characterizing the plaintiff as homosexual constituted defamation). For a more recent judicial statement that "imputation of homosexuality constitutes defamation per se," see *Yonaty v. Mincolla*, 932 N.Y.S.2d 764, 764 (Sup. Ct. 2011).

62. The California Court of Appeal was the first court to hold that a communication understood by a white plaintiff as associating him and his product with African Americans

as gay nevertheless have a difficult route to recovery for defamation.⁶³ False light provides a second avenue.

Decisional law offers a virtual-injury illustration of the false-light tort. The plaintiff in *Meyerkord v. Zipatoni Co.*⁶⁴ claimed that his erstwhile employer had negligently listed him as the registrant of a domain called *alliwantforxmasisapsp.com*: all I want for Christmas, said this domain name, is a Play Station Portable. Fabricated by Sony, *alliwantforxmasisapsp.com* implied that the public had rallied to plead for more units of a new electronic toy. Greg Meyerkord alleged that being associated with a shoddy promotion caused him “shame, embarrassment, humiliation, harassment, and mental anguish.”⁶⁵ He also noted that these consequences would “continue because the blogs and websites criticizing him remain ‘on the Internet and open for searching/viewing for an indefinite period of time.’”⁶⁶

False light had not yet been accepted in Missouri, and so the appellate court had to explain its endorsement of Meyerkord’s claim. The *Meyerkord* court worried about the defamation overlaps that we have noted: what about false light isn’t redundant? The court noted two nonredundancies. First is the interest protected: for defamation, that interest is reputation, but for invasion of privacy, the interest is “injury to the person’s right to be let alone.”⁶⁷ The second non-redundancy focuses on repair. As the court wrote, “the marketplace of ideas provides a forum” in which reputation can be restored following defamation, whereas “in privacy cases, resort to the marketplace merely accentuates the injury.”⁶⁸

was not defamatory as a matter of law. See *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 261 (Ct. App. 1985). Courts in the early twentieth century would occasionally deem racial misidentification defamatory per se; they have long ceased to do so. See generally Samuel Brenner, “*Negro Blood in His Veins*”: *The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 30 SANTA CLARA L. REV. 333, 333–36 (2010) (observing that the old cases were never overruled). For application of the racial misidentification case law to claims involving outing, see Haven Ward, “*I’m Not Gay, M’Kay?*”: *Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739, 742 (2010) (urging courts to hold that this statement is not defamatory as a matter of law); Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEXUALITY 119, 120 (2003) (surveying race precedents).

63. See Ward, *supra* note 62, at 755–56.

64. 276 S.W.3d 319 (Mo. Ct. App. 2008).

65. *Id.* at 322.

66. *Id.*

67. *Id.*

68. *Id.* at 324–25.

The second rationale in *Meyerkord*, on remedies, pertains closely to all dignitary injury in the virtual world, not just false light. Whenever self-help would “merely accentuate[]” the consequences of wrongful conduct for an individual, private law likely has a job to do.⁶⁹ Its remedies for false light fall short, as *Meyerkord* suggests: though a win for the plaintiff,⁷⁰ the decision offered him only the possibility of obtaining monetary damages. Meyerkord had priced his injury modestly as “in excess of \$25,000.”⁷¹ Sums this low preclude contingent-fee representations for most plaintiffs.⁷² They also fail to redress part of what Meyerkord had complained about: the false light that lingers on “blogs and websites.”⁷³

C. Commercial Injuries

Though not central to the type of injury that concerns this Article, harm to owners of intellectual-personal property warrants attention in a survey of virtual injuries remedied inadequately by current law and procedure. Defamation and most types of invasion of privacy, as we have seen, encompass dignitary harm to individuals: typically these causes of action do not protect the interests of businesses.⁷⁴ Virtual injuries occur also in the realm of commerce, however, hurting the value of a trademark or an interest in personality.

Here, our paradigm is commercial exploitations of identities—in the form of names, photographs, audio recordings, or other electronic data—that appropriate aspects of personality by making reference to individuals without their consent. Individuals so exploited do not suffer harm to their reputation as would suit a defamation claim, nor invasion of privacy of the kind that causes them embarrassment or

69. *Id.* at 325.

70. The law firm that represented Meyerkord boasted that it had made “new Missouri case law.” *Meyerkord & Meyerkord Makes New Missouri Case Law: False Light*, ST. LOUIS PERS. INJURY BLOG (Oct. 17, 2010, 3:40 PM), <http://www.stlouis-personalinjury.com/Blog/2010/October/Meyerkord-Meyerkord-Makes-New-Missouri-Case-Law.aspx> [hereinafter *Meyerkord Website*]; see also *infra* notes 104–22 and accompanying text (indicating that even if the injury were costly enough to profit a lawyer working on contingency, plaintiffs’ lawyers disfavor this fee arrangement for defamation claims).

71. *Meyerkord*, 276 S.W.3d at 322.

72. Greg Meyerkord was represented by a St. Louis firm called Meyerkord & Meyerkord, a name suggesting a nonpecuniary motive for the lawyers who took his long-shot case. *Meyerkord Website*, *supra* note 70.

73. *Meyerkord*, 276 S.W.3d at 322.

74. Entities bring defamation claims, however. See RESTATEMENT (SECOND) OF TORTS § 561 (1977) (providing guidelines for defamation liability to corporate plaintiffs). For a contemporary example in the virtual world, see *supra* note 39 (referencing a defamation action by a law school).

emotional distress, but have experienced a wrong in the form of unauthorized usage. Because “notice and takedown”—a statutory remedy created to combat digital copyright infringement⁷⁵—is not available, the effects of this violation are relatively likely to persist online after the aggrieved individual has protested.

Both statutory and common law provide causes of action for these commercial injuries. An injured person or entity may have a claim rooted in trademark law for misuses of intellectual property that cause confusion. Trademark infringement and related doctrines (including dilution, deceptive trade practices, false advertising, false designation of origin, unfair competition, interference with contractual or business relations, and what has become known as “brandjacking”⁷⁶), all of which can occur online, apply only to uses of intellectual property that advertise or sell goods and services,⁷⁷ eliminating the dignitary-tort part of our paradigm.

Section 43(a)(1)(A) of the Lanham Act⁷⁸ proscribes what courts have called false endorsement, a harm that can occur online. Working with the trademark construct of a “mark” as intellectual property, courts read the statute to set forth a prima facie case: to prevail on a claim of false endorsement, a plaintiff must show that “(1) [the plaintiff’s] mark is legally protectable; (2) [the plaintiff] owns the mark; and (3) the defendant’s use of the mark to identify its goods or services is likely to create confusion concerning the plaintiff’s sponsorship or approval of those goods or services.”⁷⁹ As provided in the statute, the misused item of intellectual property can take the form of a “word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact.”⁸⁰ Courts go further, concluding that other indicia of identity—such as a person’s distinctive voice, amenable to electronic publication—can be protectable as an unregistered mark.⁸¹

75. See *infra* Part II.C.2.

76. See Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851, 854–55 (2010) (discussing the difficulty of remedying “brandjacking,” defined as the “illegal use of trademarked brand names online” (citation omitted)).

77. See 15 U.S.C. § 1127 (2006) (providing a “use in commerce” requirement for trademark claims, and defining “use in commerce” with respect to sale or advertising).


78. *Id.* § 1125(a)(1).

79. *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1014 (3d Cir. 2008).

80. 15 U.S.C. § 1125(a)(1).

81. *Facenda*, 542 F.3d at 1014.

Two closely related causes of action that can cause commercial injury in our virtual realm are appropriation and breach of the right of publicity.⁸² The *Restatement (Second) of Torts* states the tort of appropriation in a sentence: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”⁸³ This appropriation typically is “to advertise the defendant’s business or product, or for some similar commercial purpose;” although the *Restatement* also recognizes liability when defendants use the name or likeness for a personal or nonpecuniary benefit,⁸⁴ case law on appropriation comes from commerce. The *Restatement of Unfair Competition*, proscribing “the appropriation of another’s identity for purposes of trade,”⁸⁵ focuses only on commercial consequences.

Appropriation and breaches of the right of publicity have arisen online. In one example, a television news reporter based in northeastern Ohio brought an appropriation action against a video production company and a site called WildWetT.com for the unauthorized use—and widespread dissemination—of partially unclothed images of herself; the plaintiff informed the court that website searches for her at one point outnumbered those for Paris Hilton.⁸⁶ In another example, the celebrities Bret Michaels and Pamela Anderson won an injunction preventing a site operator from displaying a sex tape in which Michaels and Anderson both claimed a copyright as well as a right of publicity.⁸⁷ As with defamation and invasion of privacy, appropriation-related injuries worsen when social-network behaviors (e.g., publishing tweets with links, clicking the “like” button ) increase public attention to the offending images and websites.

82. One authority parses these terms by describing appropriation as the common law claim that occupies one of the four types of invasion of privacy, with “right of publicity” the broader, generic concept that can be given effect through statutes as well as the common law. *See Publicity*, LEGAL INFO. INST., <http://topics.law.cornell.edu/wex/publicity> (last visited May 6, 2012); *see also* DOBBS, *supra* note 3, at 1198–99 (stating that “the claim is sometimes strangely called a right of publicity” when the interest in question relates to identity as property).

83. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

84. *Id.* § 652C cmt. b.

85. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

86. *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 918 (N.D. Ohio 2004).

87. *Michaels v. Internet Entm’t Grp.*, 5 F. Supp. 2d 823, 823, 829–31 (C.D. Cal. 1998).

II. REMEDIAL CHALLENGES FOR VIRTUAL INJURIES

This Part returns to the dignitary-tort paradigm at the center of this Article: an individual suffers harm through a publication in the virtual world that met doctrinal criteria for defamation or invasion of privacy. Counterparts objecting to defamation or privacy invasion on paper have a tough enough row to hoe; virtual-world conditions make the current remedial scheme even tougher.

A. Current Remedies: An Overview

Start with defamation. Plaintiffs can recover several kinds of pecuniary relief for this tort, including general damages, special damages, punitive damages, and nominal damages.⁸⁸ Special and general damages are both compensatory. The difference between them is that to recover special damages the plaintiff must prove actual pecuniary loss. General damages, by contrast, are awarded based on the presumption that a defamatory falsehood causes injury to reputation.⁸⁹

The Supreme Court made general damages harder to recover in *Gertz v. Robert Welch, Inc.*⁹⁰ *Gertz* also limited recovery for punitive damages,⁹¹ consistent with the academic stance that this remedy threatens freedom of speech.⁹² Nominal damages can go to plaintiffs about whom defendants made defamatory statements that caused them no injury, perhaps because their reputations were solid.⁹³ In the nonpecuniary category, remedies for defamation include injunctions, retractions (which defendants must make voluntarily), rights of reply as provided in state statutes, and declaratory judgments.⁹⁴ Surveying this bounteous-looking landscape, David Anderson has deemed it useless to most plaintiffs, “a general scheme of nonliability that provides a remedy only in exceptional cases.”⁹⁵

Invasion of privacy and commercial harms present a more varied array of injuries to remedy. Two subsets of the privacy tort, false light

88. James H. Hulme & Steven M. Sprenger, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, in REFORMING LIBEL LAW 152, 154 (John Soloski & Randall P. Bezanson eds., 1992).

89. *Id.* at 154–55.

90. *Id.* at 155.

91. *Id.* at 156 (citation omitted).

92. See Note, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 YALE L.J. 610, 613 (1955).

93. Hulme & Sprenger, *supra* note 88, at 156.

94. *Id.* at 157–60.

95. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 510 (1990).

and unreasonable disclosure of private facts, permit recompense for the plaintiff's emotional distress. For appropriation and breach of the right of publicity, state laws vary.

An example drawn from real life: from his Huntsville housing project, Antoine Dodson gave an interview to the northern Alabama NBC affiliate in 2010, describing his response to an attack on his sister in her bedroom.⁹⁶ A music group called The Gregory Brothers spliced and altered Dodson's words along with images of him, adding music and marketing the resulting video, "Bed Intruder Song," on YouTube and iTunes.⁹⁷ The Gregory Brothers gave Dodson 50% credit for writing the song and shared its revenue with him. The video sold more than 91,000 copies.⁹⁸

Discussing what Dodson could recover from a defendant who marketed "Bed Intruder Song" via an unauthorized iPhone application, a student author contrasts the law of Alabama with that of California, home of iTunes.⁹⁹ Dodson could bring his claim in Alabama under the common law of invasion of privacy; in California a statutory right of publicity would apply.¹⁰⁰ Alabama's privacy approach would entitle Dodson to emotional distress damages; it might deny recovery for unjust enrichment.¹⁰¹ More generous to plaintiffs, California law would give him damages of \$750 or his actual loss, whichever was greater, plus profits from the unauthorized use.¹⁰²

B. Harms Unaddressed or Unrepaired

The difficulties that vex virtual-injury plaintiffs who seek redress can be divided into two categories. The first category covers defamation and privacy claims generally. The second category builds on the first by adding harms that stem from virtual injuries in particular.

96. Lorelle A. Babwah, Recent Development, *Climbing in Our Windows & Snatching Our Likenesses Up: Viral Videos and the Scope of the Right of Publicity on the Internet*, 12 N.C. J.L. & TECH. ONLINE 57, 59 (2010), http://www.ncjolt.org/sites/default/files/Babwah_v12OE_57_76.pdf.

97. *Id.*

98. *Id.* at 59–60.

99. *Id.* at 62.

100. *Id.* at 62–63.

101. The case law is ambiguous. *See id.* at 64–65.

102. *Id.* at 64.

1. For All Defamation and Privacy Claimants, Virtual and Non-Virtual Alike

Individuals who cannot pay a lawyer by the hour have trouble reaching the courts to complain about dignitary injury.¹⁰³ A dignitary claim will not compete effectively for time donated pro bono. To get to court, a potential plaintiff will likely be left with whatever value reposes in the claim itself. Consistent with this assessment, researchers in a leading study have noted that about eighty percent of libel plaintiffs engaged their lawyers on contingency.¹⁰⁴

This intake decision is bad business for a fee-minded lawyer because defamation and privacy claims typically fail. One early failure involves settlement negotiations. Differing dramatically from most tort actions,¹⁰⁵ only about fifteen percent of libel actions are settled.¹⁰⁶ Refusal to negotiate or accept a pretrial offer suggests the presence of nonpecuniary priorities.¹⁰⁷ “Irrational plaintiffs” refuse to settle and instead insist on trial.¹⁰⁸ The largest jury award ever granted to an Internet defamation plaintiff—an uncollectable \$11.3 million imposed on a defendant whom the plaintiff knew had been forced out of her Louisiana home by Hurricane Katrina—bespeaks a nonpecuniary motive; the plaintiff had to pay court costs to win.¹⁰⁹

After failing to settle, our paradigmatic defamation plaintiff prevails before a judge and jury, much more often than his counterparts in civil litigation generally.¹¹⁰ One business law scholar with experience representing both plaintiffs and defendants in defamation litigation offers a blunt summary: “Juries are likely to be

103. The fraction of virtual-injury plaintiffs who could pay hourly fees might include physicians slurred on rate-a-doc websites and proprietors of small businesses who complain of unjust attacks, perhaps from competitors.

104. Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985).

105. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting that only 1.8% of federal civil cases were resolved by trial in 2002).

106. Bezanson, *supra* note 104, at 228.

107. For example, a physician might refuse to settle a malpractice action even when the plaintiff has demanded less money than the physician's time preparing for trial would cost, on the ground that settling would lower her reputation. Her worry about having to pay higher malpractice premiums in the future would be partially but not entirely a pecuniary concern affecting settlement.

108. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 1 (2000).

109. See Laura Parker, *Jury Awards \$11.3M over Defamatory Internet Posts*, USA TODAY (Oct. 11, 2006), http://www.usatoday.com/news/nation/2006-10-10-internet-defamation-case_x.htm.

110. Arlen W. Langvardt, *Defamation in the Business Setting: Basics and Practical Perspectives*, BUS. HORIZONS, Sept.–Oct. 1990, at 66, 74.

pro-plaintiff in defamation cases, whether by design or simply by result. Attorneys know this. Judges do too.”¹¹¹ The dynamic changes at the appellate level: “[o]nce appellate courts become involved, however, this remarkable success rate for plaintiffs drops dramatically.”¹¹² Defendants win about three-quarters of the cases that reach appellate courts.¹¹³ The gulf between outcomes at trial and outcomes on appeal suggests difficulty with the application of doctrines on point—not just jury confusion but also reluctance on the part of trial judges to give defendants the summary disposition that appellate judges believe these defendants should receive.

Equally important, what our paradigmatic claimant says she desires lies outside the realm of dollars¹¹⁴: she wants vindication and destruction of what hurt her.¹¹⁵ Low settlement rates suggest that this posture is genuine. In response to the gap between what defamation plaintiffs want and what they get, one scholar drafted a statute he called the Plaintiff’s Option Libel Reform Act, offering claimants an election: they could seek either money damages or a judicial declaration about the truth or falsity of the publication, but not both.¹¹⁶ A congressional bill introduced in 1985 by then-Representative Charles Schumer would have extended this declaratory judgment remedy to public figures.¹¹⁷ A few years later, the Annenberg Program at Northwestern University published a libel reform proposal that also focused on declaratory judgment.¹¹⁸ Two lawyers crafted yet another variation on declaratory judgment, a

111. *Id.*

112. *Id.*

113. *Id.*

114. In a reform proposal aimed at a social network, one lawyer finds it “a little strange for our defamation-law system to compensate reputational damage with money.” Julie Hilden, *Future Conflict over Defamation on Facebook: How It Might Differ from Traditional Defamation Litigation*, FINDLAW (Aug. 24, 2010), http://writ.news.findlaw.com/hilden/20100824.html?DCMP=NWL-pro_top.

115. John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985) (relating survey data: only a fifth of libel plaintiffs filed suit to obtain money, and “[m]ost plaintiffs said that their chief objective was restoring reputation or punishing the media”).

116. Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, in REFORMING LIBEL LAW 68, 68–69 (John Soloski & Randall P. Bezanson eds., 1992). Franklin put fee shifting into his model statute, *see id.* at 71, which could make the declaratory judgment option more attractive to plaintiffs.

117. H.R. 2846, 99th Cong. (1985). For an analysis contrasting the Schumer bill with the Franklin measure, *see* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 847 (1986). Professor Barrett worked on drafting the Schumer bill. *See id.*

118. C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REFORM 1, 2 (1989).

model statute providing for a “vindication action.”¹¹⁹ None of these proposals became law.¹²⁰

Even if dignitary tort claimants would be satisfied with cash damages, most claims for defamation and invasion of privacy have little pecuniary value, and few defendants outside the well-heeled media have enough money to be worth pursuing. As was noted, money and access to the courts go together. “An attorney cannot take a case on a contingency basis if there are no damages or if the defendant has no ability to pay,” explains one litigator, defending his practice of charging cash fees.¹²¹ “Indeed, in many instances an attorney *should not* take a defamation case on a contingency basis since that will then make the case about money instead of being about solutions.”¹²² A misplaced focus on “money instead of . . . solutions” characterizes dignitary-tort liability generally. We turn now to virtual dignitary injury in particular.

2. For Claimants Who Claim Virtual Injuries

Compounding the difficulties of access to, and erratic outcomes in, the courts, two other harms of virtual injuries receive inadequate repair in the current American liability regime. The first may be called explosion and the second durability. Conditions in the virtual world determine the force of a defamatory or privacy-invading publication. Two sets of words and images on two computer monitors might look alike yet be deeply different in their impact; one might languish unseen and unheard while the other has so much force that

119. See Hulme & Sprenger, *supra* note 88, at 173.

120. See John Soloski, *Legislative Efforts To Reform Libel Law*, in REFORMING LIBEL LAW, *supra* note 116, at 352, 364.

121. Aaron Morris, *How To Stop Defamation When You Can't Afford an Attorney*, INTERNET DEFAMATION BLOG (Sept. 6, 2008), <http://internetdefamationblog.com/?tag=small-claims-court>.

122. *Id.* An alternative for defamation that plaintiffs could use for virtual injuries is small claims court, where litigants appear unrepresented by counsel. *Id.* Small claims court offers advantages for those plaintiffs whose injuries are modest enough. Judgments from this forum last a long time and can cloud a credit rating, thereby making an impact on wrongdoers who are or appear to be judgment proof. *Id.* Judgments become nondischargeable in bankruptcy whenever the defendant's conduct is deemed willful and malicious. 11 U.S.C. § 523(a)(6) (2006); *In re Sicroff*, 401 F.3d 1101, 1106 (9th Cir. 2005). The problem of durability persists, however. Because small claims judges have little power to order equitable relief, they cannot cast the offending publication into oblivion. Aaron Morris, *You Can Sue for Defamation in Small Claims Court*, INTERNET DEFAMATION BLOG (May 31, 2010), <http://internetdefamationblog.com/?tag=small-claims-court> (noting that the most small claims judges can do to expunge injurious publications is make their judgments contingent on an act by the defendant: a judge “could, for example, award \$2,500 in damages, reduced to \$1,500 if the defamatory statement is removed from the Internet”).

virtual-vernacular wrote new metaphors to imply potent destruction. “Explosion” is one such metaphor; another is “viral.”¹²³

Virtual content moves and is transformed by links, where one source mentions another. Tens of millions of words, numbers, images, and sound recordings lie within reach of even the feeblest Internet connection. To reach one of these published items, users need its Internet protocol address. They may know it. More often, they will enlist a search engine that sweeps constantly through the virtual world, sifting and ranking the accretion of data at hand.

Search engines use proprietary algorithms to determine the relative rankings of materials retrieved in response to queries typed into search boxes. The sorting criteria of search engines put a premium on high traffic; a much-linked item will come to the fore.¹²⁴ Once-obscure sites can bounce in rankings when they link to high-trafficked destinations like NYTimes.com or BBC.co.uk. The place of social networks in search-engine algorithms is a trade secret, but they are suspected of high influence,¹²⁵ in part because the personal, can’t-be-bought pedigree of individuals’ pages holds trust and credibility.¹²⁶

High rank becomes effect and cause in a cycle of escalation. New readers likely click on what engines put at the top of a search results list. A defamatory or privacy-invading publication online can go viral for having been heavily consumed because search engines give high


123. For a definition of a “viral video,” see Kevin Wallsten, “*Yes We Can*”: *How Online Viewership, Blog Discussion, Campaign Statements, and Mainstream Media Coverage Produced a Viral Video Phenomenon*, 7 J. INFO. TECH. & POL. 163, 163 (2010) (describing viral videos as “online video clips that gain widespread popularity when they are passed from person to person via e-mail, instant messages, and media-sharing Web sites”).

124. Fairly early in the Internet era, a student commentator broached the related problem of inadequate replies to defamation using the conservative blogger Matt Drudge as an example. If Matt Drudge chose to post a false and malicious statement about an obscure private citizen (perhaps this person was a neighbor who had offended him), there would be no match between the much-consumed *Drudge Report* and any reply that the target would post on, say, his own page; Drudge’s words would be widely read and his target’s response would languish unlinked and unconsumed. See Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 494–95 (1998).

125. *Google Algorithm Changes: Social Media SEO Now More Important Than Ever*, KER COMM’NS (Jan. 30, 2011), <http://kercommunications.com/seo/google-algorithm-social-media-seo/>.

126. Richard M. Guo, Note, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH. L.J. 617, 622 (2008) (recalling that Facebook originally restricted its site to college students by requiring users to register with e-mail addresses associated with their college institutions); *How Google’s Panda Update Changed SEO Best Practices Forever*, DAILY SEO BLOG (June 23, 2011), <http://www.seomoz.org/blog/how-googles-panda-update-changed-seo-best-practices-forever-whiteboard-friday> (describing the importance of a “site’s trustworthiness, credibility, quality” in Google rankings).

marks to heavily consumed items. It can also be heavily consumed for having gone viral, after readers click on search-engine offerings for their consumption. Lower ranks reverse the cause-and-effect spiral, and even the most frenzied popularity will eventually ebb. By then a person may have suffered a legally cognizable injury.¹²⁷

Unlike the individuals who brought famed Supreme Court cases on defamation and privacy, our virtual-injury plaintiff likely experienced her injury almost instantly in the middle of her community. Social networks like Facebook encourage users to travel through the preoccupations of acquaintances, friends, “friends,” and persons who aspire to join those categories. “Like” icons, tweets, links, and comments show what these people endorse. A “wall” keeps track of others’ comings and goings; every event, recommendation, topical suggestion, and  bears the imprimatur of somebody known (at least by name) to each user.¹²⁸ Absent social networks, search engines would allow harmful links to rise from obscurity in search results when enough people follow an item, but the spread would be slower and shallower.

In principle, social networkers can limit the potential explosion of injurious material through judicial use of “privacy settings” that restrict access to their pages.¹²⁹ Undoubtedly privacy settings have lessened the quantity of harm that would have occurred without them. And because they may be modified, they accommodate variations in taste for seclusion, suggesting that potential victims can protect themselves through self-help. One gap that a privacy setting cannot close, however, is having been linked to a fellow networker who prefers less privacy.¹³⁰ Moreover, privacy setting menus do not permit users fully to restrict access.¹³¹

127. See generally Josh Blackman, Article, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 369 (2009) (“As a result of a single personal experience, taken out of context, and virally spread throughout the Internet, permanent damage is done to people's lives.”).

128. Furthermore, different types of networks reach out to one another, augmenting the communication. One person's tweet might turn up on a friend's Facebook wall and a friend's friend's newsfeed. Feedback on a site like Yelp also might roam into social networks. Thanks to James Friedman and Sara Milstein for expounding on these connections.

129. See, e.g., Semitsu, *supra* note 52, at 295 (discussing Facebook's ability to vary levels of privacy expectations). Privacy settings are integral to the Facebook business model, though not much used by Facebook's older rival MySpace. Guo, *supra* note 126, at 622–23.

130. Researchers tested the problem of the low-threshold friend by creating a Facebook account for an invented persona in the form of a frog and contacting Facebook users, asking them to accept a friend request. Almost 200 respondents said yes, and 40%

Durability, the second level of extra harm associated with virtual injuries, derives from the truism that anything put into the virtual world tends to linger. One 2005 study estimated 11.5 billion websites in existence.¹³² Some of these sites presumably have disappeared since then; it is likely that more have taken their place.

A website called the Internet Archive's Wayback Machine, "[i]n what was probably the largest copyright infringement ever," according to Jonathan Zittrain, built a database containing "everything online."¹³³ Users can type any date that has passed "and then search the Internet as of that date."¹³⁴ Zittrain applauds the Internet Archive for helping to solve the "Fort Knox" problem of monopolists' withholding information of general interest.¹³⁵ Keeping extra copies of hideable data is indeed valuable. It also makes virtual injuries more durable.

The proprietor of the Wayback Machine "is still one guy"¹³⁶ who does not maintain durability alone. Data mirroring, the practice of copying material onto distant machines to speed dissemination and frustrate removal efforts, spreads durability from the exalted (Wikileaks, for example)¹³⁷ to the mundane: disks containing copyrighted material are routinely, and illegally, mirrored.¹³⁸ At a humbler level, blogs and websites report or re-tweet content from another site, presenting it with attribution in the form of a hyperlink.

of them allowed the frog access to "highly personal information." *HOWTO: Protect Your Privacy on Facebook, Myspace, and LinkedIn*, MINT.COM (Sept. 6, 2007), <http://www.mint.com/blog/how-to/howto-protect-your-privacy-on-facebook-myspace-and-linkedin/>; see also Samantha L. Miller, Note, *The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet*, 97 KY. L.J. 541, 545 (2008) ("A single user with low privacy restrictions 'overcomes/ruins' all the protective and restrictive steps taken by peers." (citation omitted)).

131. Nathan Petrashek, Comment, *The Fourth Amendment and the Brave New World of Social Networking*, 93 MARQ. L. REV. 1495, 1508 (2010) (describing one Facebook policy that "some information cannot be deleted by the user at all").

132. Antonio Gulli & Alessio Signorini, *The Indexable Web Is More Than 11.5 Billion Pages*, <http://www.divms.uiowa.edu/~assignori/papers/the-indexable-web-is-more-than-11.5-billion-pages> (last visited May 6, 2012).

133. Jonathan Zittrain, *The Fourth Quadrant*, 78 FORDHAM L. REV. 2767, 2778 (2010).

134. Lawrence Lessig, *Innovating Copyright*, 20 CARDOZO ARTS & ENT. L.J. 611, 614 (2002).

135. Zittrain, *supra* note 133, at 2778–79.

136. *Id.* at 2778.

137. See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 350 (2011) (describing "mutation and replication" of data as central to electronically networked journalism).

138. Mirror sites that profess compliance with the law typically offer online forms for copyright infringement complaints. See, e.g., *DMCA Disclaimer*, SPEEDYMIRROR, <https://www.speedymirror.com/dmca.php> (last visited May 6, 2012).

An injurious publication long removed by its creator might be indexed by a search engine for display as a cached site, logged in the Wayback Machine for posterity, and reposted on a social network as a stand-alone article with attribution.

Newer, cheaper data storage options and the caching of websites that aggregators like Google maintain to make searches faster have helped build an Internet that preserves much more than it erases. Search engine aggregation technology adds to the durability that burdens defamed individuals. For example, the sentence “Dr. XYZ is a pedophile” could be preceded by nuance (“How shocking to say that . . .”) or even negation (“Nobody could ever believe that . . .”), but after extensive repetition online the surrounding verbiage would disappear in search engines, leaving only “Dr. XYZ” linked to a defamatory noun.¹³⁹

C. Federal-Law Impediments to Recovery

1. Immunity for Service Providers

Although individuals who publish harmful content online can be found liable for dignitary torts and commercial harms, Internet service providers that store and transmit the communication enjoy statutory immunity. Section 230 of the Communications Decency Act states that “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server”¹⁴⁰ will not “be treated as the publisher or speaker of any information”¹⁴¹ if the communication was posted by someone other than that provider.¹⁴² Condemned by most commentators, this immunity remains anchored by a collective action problem: those who benefit from immunity are concentrated while burdened persons are dispersed.

Because service providers cannot be liable for defamation or invasion of privacy, our paradigmatic plaintiff must forgo the chance to gain damages from a reliably solvent defendant and can pursue

139. John W. Dozier, Jr., *What Can Get You Sued?*, DOZIER INTERNET L. (June 21, 2009, 10:46 AM), <http://johndozierjr.typepad.com/dozierinternetlaw/2009/06/defamation-lawyer-what-can-get-you-sued-.html>.

140. See 47 U.S.C. § 230(f)(2) (2006).

141. *Id.* § 230(c)(1).

142. The provider can be liable, however, if it helped to generate unlawful content. See *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1163–64 (9th Cir. 2008) (holding that Communications Decency Act immunity did not protect a website that had asked prospective renters to type in answers to questions that violated fair housing laws).

redress from only the person who posted the communication.¹⁴³ This limitation reduces the amount of money available as tort damages. When injurious communications are published anonymously, victims can bring what has become known as John Doe actions advertent to unnamed defendants.¹⁴⁴ This path can eventually yield names in response to subpoenas on service providers, but it is fraught, as courts impose divergent tests and standards on John Doe plaintiffs.¹⁴⁵

2. No Process for Notice and Takedown

The Digital Millennium Copyright Act (“DMCA”),¹⁴⁶ enacted in 1998, grants a remedy to copyright proprietors that is unavailable to other virtual-injury claimants: notice and takedown.¹⁴⁷ Crafted as a safe harbor for putative infringers, this practice helps holders of copyrights: they can assert a claim of infringement in a work that the provider has made available, and gain swift relief. Service providers that receive notice of infringement and respond by making works inaccessible to the public are rewarded with immunity.

One much-cited study of DMCA notice and takedown analyzed a large data set, including every notice that Google Inc. had received between March 2002 and August 2005.¹⁴⁸ The authors found that at least a third were deficient, either as a matter of substantive law (that is, the material complained of did not actually infringe a copyright) or “significant technical noncompliance that render[ed] the notice unusable according to the statute.”¹⁴⁹ Many notices came from competitors and a large fraction of competitor-sent notices were deficient.¹⁵⁰ The authors concluded that DMCA notice and takedown

143. See Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1375 n.12 (2009) (observing that “John Doe suits [started to flourish] after § 230 of the Communications Decency Act . . . foreclosed access to the most readily identifiable deep pocket defendant”).

144. See *id.* at 1384–89 (describing the device).

145. See Craig Buske, Note, *Who Is John Doe and Why Do We Care?: Why a Uniform Approach To Dealing with John Doe Defamation Cases Is Needed*, 11 MINN. J.L. SCI. & TECH. 429, 439 (2010) (noting that the subpoena process is complicated and unpredictable); Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standards for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1227–38 (2007) (describing a variety of approaches).

146. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

147. See 17 U.S.C. § 512(c)(1)(C) (2006) (listing notice and takedown procedures).

148. Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 641 (2006).

149. *Id.* at 666.

150. *Id.* at 684.

provisions function to suppress material more than prudent copyright policy would commend.¹⁵¹

Oversuppression manifests power. From the standpoint of claimants outside of copyright, being able to demand a prompt takedown of offending material is an enviable boon.¹⁵² For the paradigmatic victim of this Article, the lack of a copyright claim means the lack of an important remedy.

3. First Amendment Barriers to Recovery

Claims for defamation and invasion of privacy (and even intentional infliction of emotional distress) tangle occasionally with the First Amendment, a constraint on government action that judges have long interpreted to favor and shelter defendant speakers at the expense of spoken-about plaintiffs.

Defendant-favoring interpretations of the First Amendment have been especially acute in recent case law involving electronic media.¹⁵³ Two decisions from the 2011 term of the United States Supreme Court illustrate the favored position of First Amendment claims. Relying on commercial-speech doctrine, *Sorrell v. IMS Services, Inc.*¹⁵⁴ invalidated a Vermont statute that prohibited the selling of certain electronically obtained physician-identified information without the physician's consent.¹⁵⁵ To the Court, marketing efforts by pharmaceutical companies in response to mined data about prescriptions constituted speech, and the First Amendment entitles them as customers to buy the content they need to speak effectively.¹⁵⁶ A few days later, in *Brown v. Entertainment Merchants Ass'n*,¹⁵⁷ the Court invalidated a California law that

151. *Id.* at 687–88 (“The surprising number of questionable takedowns we observed, taken in conjunction with the *ex ante* removal of content, the minimal remedies for abuse of the process, and the apparent lack of use of the counternotice procedures, suggest that few are well-served by the current § 512 process, and some or many individuals, as well as public discourse and the Internet’s value as an expressive platform, may be harmed.”).

152. For a detailed articulation of notice-and-takedown envy, see Frederick W. Mostert & Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 TRADEMARK REP. 249, 254 (2011) (proposing a global scheme of expedited dispute resolution, including notice and takedown, for claims of online trademark infringement). The authors praise eBay’s Verified Rights Owner Program, “which allows more than 18,000 companies to take down sellers’ listings that violate their trademarks, often within hours.” *Id.* at 253.

153. Thanks to Derek Bambauer for discussing these cases with me.

154. 131 S. Ct. 2653 (2011).

155. *Id.* at 2656–57.

156. *Id.* at 2676–77.

157. 131 S. Ct. 2729 (2011).

banned the sale and rental of what the statute called “violent video games” to young customers.¹⁵⁸

The First Amendment also impedes efforts to suppress publications before they cause harm and when they threaten more harm in the future. A major constitutional barrier to suppressing injurious publications is the prohibition of prior restraints.¹⁵⁹ One lawyer recounted an exceptional experience prosecuting an Internet defamation claim: on top of a damages award from a jury, he won injunctive relief from the judge.¹⁶⁰ His triumph is rare. “Quite apart from constitutional constraints,” according to the leading torts treatise, “a long tradition has it that equity will not enjoin defamation.”¹⁶¹

III. TOWARD AN ALTERNATIVE DISPUTE RESOLUTION

We return to our paradigm: an individual has objected to a publication made in electronic media, contending that the person or entity that published it caused her dignitary injury. This Part outlines a plan for court-annexed arbitration and remediation of her claim.

A. *Goals: Containment, Erasure, Rehabilitation, and Lowered Costs*

Any publication that satisfies the elements of virtual-injury torts—defamation, invasion of privacy, or violation of an individual’s personality rights—continues to cause harm as long as it remains accessible to the public and the victim maintains awareness of herself. The tortious conduct that it embodies differs from other types of tortious conduct such as negligent driving, deceit, or false imprisonment, where both the defendant’s behavior and the plaintiff’s experience of harm are complete before the dispute reaches the courts. Finite episodes of wrongdoing are amenable to the monetary repair that tort courts provide through “law” as distinct from “equity.”

Virtual injuries, by contrast, call for nonmonetary relief. As pursuits, “containment” and “erasure” might sound zealous or harsh,

158. *Id.* at 2741–42 (invalidating the law on First Amendment grounds).

159. *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

160. Aaron Morris, *Another Victory Against Internet Defamation*, INTERNET DEFAMATION BLOG (Sept. 11, 2009), <http://internetdefamationblog.com/another-victory-against-internet-defamation/>. The author also notes that if the defendant continued her defamatory postings on Craigslist.com, she could be jailed for contempt of court. *Id.*

161. DOBBS, *supra* note 3, at 1193.

a final solution. They are central to rectification, however, when a harmful electronic publication stays alive on the Internet.

Law-fostered containment and erasure of virtual wrongs is familiar from the notice-and-takedown practice that functions to protect digital copyrights. As was noted, the DMCA gives copyright holders the prerogative of informing an Internet service provider that material posted on its site infringes their rights in created works. Congress has elected to treat copyright infringement better than dignitary torts¹⁶²; victims of defamation and invasion of privacy do not have access to the DMCA remedial scheme.¹⁶³ Notice and takedown could be used to contain and erase a wider range of injurious publications. Nothing in the DMCA or any other statute restricts this mechanism to copyright.

Rehabilitation extends the equity-like endeavor of moving beyond money to repair a virtual injury. The failed effort, noted above, to codify a “vindication action” for victims of defamation “who in the past have been unable to satisfy exacting constitutional burdens” recognized that defamatory communications trammel on “the most personal interests recognized by civilized society—honor, reputation, and self-esteem.”¹⁶⁴ Money transfers do not achieve the restoration of these goods.

Containment and erasure go a long way to doing so, and the element of rehabilitation adds concern for the dignity of a victim after he has demonstrated his experience of an unlawful virtual injury. A dispute-resolution mechanism could provide not only for removal of the offending publication but also monitoring to keep the publication contained and erased. This effort would live up to an ideal that “making the victim whole” includes attention to individuals’ capacity for what Aristotle called *eudaimonia*, or flourishing.¹⁶⁵

Containment, erasure, and rehabilitation fare better with lower costs, which in turn commends removing lawyers. Counsel can offer great value for plaintiffs and defendants in dignitary-tort actions but, as a general rule, only when the claims feature high damages, celebrity or notoriety, or pro bono implications. A dispute resolution mechanism that rests on the oft-stated contention that “it’s not about

162. See, e.g., 17 U.S.C. § 512(g)(1) (2006) (providing immunity for erroneous takedowns).

163. See *supra* note 147 and accompanying text.

164. Hulme & Sprenger, *supra* note 88, at 175.

165. See Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1585–90 (1997).

the money,”¹⁶⁶ can conserve expenditures on damages, attorney time, and court formalities. Inside our virtual injury paradigm, lawyers impede remedies and increase transaction costs.¹⁶⁷

Basic policy questions about any type of alternative dispute resolution (“ADR”) ask whether it is mandatory or optional, and if it is optional, who elects the option. Mandatory ADR offers the virtues of speed, informality, streamlined rules, predictability, and relief of court congestion. Optional ADR rests on the premise that these virtues are also vices: speed hustles away prerogatives; informality and streamlined rules forfeit protections; and predictability favors repeat players. “Court congestion” is another way to say “other people’s priorities”: pursuing what one wants for oneself appears a perfectly fine use of time.

Taking due note of arguments that support other paths, this Article endorses an election for plaintiffs. Individuals who believe they have suffered a virtual injury may, in the scheme proposed here, take their complaint either to a judge or to court-annexed arbitration that offers them a speedier resolution and a lower-cost *pro se* environment, at the price of forfeiting access to a jury and open-ended special damages. Like other asymmetric access-to-justice reforms (such as statutory one-way fee shifting), this policy rests on beliefs that present levels of claiming are too low, remedies inadequate, wrongs chronically unrighted, and that injured individuals lack opportunities to protest and expunge violations of the law.¹⁶⁸ Jurisdictions interested in the reform will want litigants to try it. A one-way election is most likely to serve that goal.¹⁶⁹

B. Operations

Should the plaintiff elect ADR rather than adjudication before a judge, a provider, serving as an arbitrator, would examine the

166. See Relis, *supra* note 25, at 721.

167. The experience of the Libel Dispute Resolution Program is on point. Started in 1987 to provide optional alternative dispute resolution for libel claims against the media, the program ceased operations in 1992 with a disappointing record: only five of the 128 libel claims identified by the program and invited to participate said yes, and only one settlement resulted. Researchers at the program deemed the parties’ lawyers a “major obstacle.” Don J. DeBenedictis, *Little Interest in Libel ADR*, 78 A.B.A. J. 16, 22 (1992).

168. On the possibility of too little dignitary-tort liability, see MARK D. WEST, SECRETS, SEX AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES 85 (2006) (noting that although the United States has about fifty times as many lawyers as Japan, twice as many defamation claims per capita are made in Japanese courts).

169. See *supra* note 167 (noting the low participation rate of one past optional ADR initiative).

material in question to determine whether it fulfills the elements of defamation, invasion of privacy, or appropriation in violation of positive law. Plaintiffs would write the basics of their claim on an intake form. DMCA notice and takedown procedure can serve as a model.

Like his copyright infringement counterpart does under the DMCA, our plaintiff would provide his physical or electronic signature;¹⁷⁰ a full copy of material alleged to violate the law, marked to indicate when and where it appeared online;¹⁷¹ “[i]nformation reasonably sufficient” for the ADR provider to contact this complainant, “such as [a USPS] address, telephone number” and electronic mail address;¹⁷² and a statement that all information provided in the complaint is made under penalty of perjury.¹⁷³ Plaintiffs would also label their complaint as defamation, invasion of privacy, appropriation, or false advertising; here the inspiration is the Equal Employment Opportunity Commission intake, where individuals check off all the categories of employment discrimination they believe cover their grievance.¹⁷⁴

To save money and time—and to ease the difficulties of geographic dispersal that formed the law of personal jurisdiction—litigants would not appear before the arbitrator in person. Instead they would offer their contentions in writing.¹⁷⁵ The claimant would present an electronic publication for review by the arbitrator: variations on defamation and invasion of privacy that contain no publication are excluded.¹⁷⁶ She must show that the communication was about her.

Anonymous postings made online can defame or invade privacy while withholding the identity of the source. John Doe actions, where injured persons demand that an intermediary like a service provider

170. 17 U.S.C. § 512(c)(3)(A)(i) (2006).

171. *Id.* § 512(c)(3)(A)(iii).

172. *Id.* § 512(c)(3)(A)(iv).

173. *Id.* § 512(c)(3)(A)(vi).

174. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, INTAKE QUESTIONNAIRE 2 (2009), available at <http://www.eeoc.gov/form/upload/Uniform-Intake-Questionnaire.pdf> (asking, in question four of the form, “[w]hat is the reason (basis) for your claim of employment discrimination” and providing several categories to choose from).

175. Another virtue of appearance in writing is that geographically dispersed entities could handle arbitrations for a pilot program located in a particular state. See *infra* note 183 and accompanying text.

176. Our paradigm eliminates slander and intrusion upon seclusion. See *supra* text accompanying notes 49–50.

de-anonymize identity to them, have become familiar.¹⁷⁷ This device fits with the ADR mechanism offered here and should be available.

The arbitrator would evaluate the nature and impact of the publication using streamlined versions of doctrines that courts now apply. A claimant would present her *prima facie* case much as she would in court, but privileges and affirmative defenses would function less formally, with more discretion available to the arbitrator.¹⁷⁸ Terms of art like public concern, actual malice, levels of fault, and burdens of proof recede, although arbitrators can bring free-speech values to their decisions.¹⁷⁹

Unlikely to please both losers and winners, this ADR process does offer gains for both sides. Plaintiffs get a chance for vindication through an award of nominal damages followed by expungement efforts, described below. For defendants the process offers expertise in virtual injury, which may function to lessen the preference fact-finders now seem to hold for plaintiffs, as well as lower damages.

The arbitrator would prepare a short opinion announcing a decision along with a few sentences of reasoning. Consistent with court-annexed arbitration generally, parties would be encouraged to accept the provider's conclusion: a plaintiff or defendant who rejects the provider's determination and proceeds to court would suffer financial consequences should that the court-generated outcome turn out worse for that party. When both sides accept the provider's conclusion, it would become a court judgment.

Losing defendants would make two payments: nominal damages to the plaintiff and a fee to the court. The latter sum would be applied to support the arbitration program. A losing plaintiff would pay this fee only if the arbitrator deems the claim frivolous. Because parties rather than attorneys would participate, this scheme should be cheaper for both than litigation in court.

When our provider concludes that the publication fulfills the elements of our paradigmatic claim and rules in favor of the plaintiff, the dispute enters its remedy phase. The central feature of this ADR is expungement. A second provider, this one working as a remediator

177. See *supra* notes 143–45 and accompanying text.

178. Here my model is the Uniform Dispute Resolution Program, used to resolve disputes over Internet domain names. See generally Elizabeth C. Woodard, Note, *The UDRP, ADR, and Arbitration: Using Proven Solutions To Regulate Perceived Problems with the UDRP*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1172 (2009) (arguing that ADR should retain its informality, rather than become more court-like).

179. Cf. *id.* at 1199 (describing the prerogative of domain name arbitrators to recognize free speech).

rather than an arbitrator, takes over.¹⁸⁰ Its job is to scour the Internet for material judged unlawful. Commercial providers have been doing this work for years: among them Reputation Defender or Reputation.com is the best known as this Article goes to print. Similar businesses call themselves Reputation Management Consultants, Reputation Changer, Big Blue Robot, Internet Reputation Management, Online Rep Management, Rescue My Reputation, and RemoveYourName. Entities like these manage search engine result pages to minimize unwanted content about their clients.

Commercial scouring as now practiced includes posting of new positive content, sometimes derisively called astroturf,¹⁸¹ which our provider probably should not create or upload.¹⁸² Instead, the remediator would communicate with sites that post the offending material and urge them to take it down, sending them a copy of the court judgment based on an arbitrator's determination. For anonymously posted material, the remediator would use John Doe subpoenas to obtain the identity of the publisher from Internet service providers.

The remediator would monitor the communication for a fixed period, perhaps two years. During this time it would maintain court-annexed electronic alerts, keeping vigilant for any reappearance of the offending material and resuming expungement efforts as needed. Because the court's jurisdiction would continue during the remediation period, remediators would be able to inform judges of any defiance or non-responsiveness that they encounter.

Implementing jurisdictions ought to reach beyond for-profit entities and invite skilled nonprofits to provide both arbitration and

180. By "remediators," I intend those who "correct or make right." See *Remediate*, VOCABULARY.COM, <http://www.vocabulary.com/definition/remediate> (last visited May 6, 2012) (defining the verb "to remediate"). Transitions from arbitrators to remediators would follow protocols to safeguard the challenged material from ready online access, taking care not to make an offending communication easier to find. Beyond this attention to secrecy, I would leave confidentiality-transparency tradeoffs to implementing jurisdictions. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 214 (5th ed. 2007) (noting virtues and drawbacks of both remediators and arbitrators for ADR).

181. Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 426 (2009).

182. Posting new content seems to exceed anything courts have done to repair harmful publications. In recognition of my limited grasp of search engine optimization technologies, however, I would include the astroturfing prospect among the points left to the discretion of the implementing jurisdiction. See *supra* note 180 and *infra* note 183 (noting other policy decisions that this proposal keeps open).

remediation of virtual injuries.¹⁸³ Though expert in wiping unwanted material from the Internet, commercial providers offer no comparative advantage in arbitration, the other half of the task. They also have an economic stake in the problem;¹⁸⁴ by contrast nonprofits can work, consistent with their missions, on both post hoc remedies and legislative prophylaxis. These providers might deliver arbitration to some disputants and post-arbitration expungement to others. Especially if they are staffed by law student interns, they could master both sides of the task quickly and cheaply.

CONCLUSION: WIDER CONTINUING LEGAL EDUCATION

American civil justice integrates technological change into its evolving doctrines, procedures, remedies, and even conceptions of what constitutes an injury. Some participants in this system take pride in being early adopters of innovations. Others wait and see. Virtual injuries give work to both cohorts. Early adopters implement new remedies; the rest of us have an obligation perpetually to reexamine wrongs and rights that accompany injurious publications.

The proposal of this Article, presented for the consideration of “implementing jurisdictions,” also addresses non-implementors. Reassessment is central to legal education, a phenomenon that “starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional career.”¹⁸⁵ Continuing to learn on the job fosters competence for judges as well.¹⁸⁶ In suggesting a particular alternative dispute resolution mechanism, this Article has commented on continuing education for all who help to make new law.

183. By “skilled nonprofits,” I have in mind not only entities like the Electronic Frontier Foundation but also law school clinics, such as the Berkman Center at Harvard, the Stanford Center for Internet and Society, the University of San Francisco Internet and Intellectual Property Justice Clinic, the University of Washington Center for Law and Technology and, closer to my home, the Brooklyn Law Incubator and Policy Clinic. Whether any of these nominees would take on this work, I have no idea; but because this ADR plan offers providers educational gains and a mandate to improve the virtual world, I believe it would appeal to enough qualified nonprofit providers to be effective.

184. Bartow, *supra* note 181, at 419 (“Substantial widespread online personal misery equals success for these companies.”).

185. *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. L. EDUC. & ADMISSIONS TO B. 3.

186. See NAT’L ASS’N OF STATE JUDICIAL EDUCATORS, PRINCIPLES AND STANDARDS OF JUDICIAL BRANCH EDUCATION 4 (rev. ed. 2001) (listing enhancement of judges’ “knowledge and skills” first on an eight-item recitation of goals for judicial education).