

INJUNCTIONS IN DEFAMATION CASES

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INTRODUCTION

Is an injunction a permissible remedy in a defamation case? The traditional answer is that equity will not enjoin a defamation,¹ but an

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1. See RODNEY SMOLLA, *LAW OF DEFAMATION* § 9:85 (2d ed. 1999); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 *IND. L. REV.* 295, 308-11, 324-30 (2001).

increasing number of courts have imposed injunctions in defamation actions.² The issue was presented to the United States Supreme Court in *Tory v. Cochran*,³ but ultimately, was not decided. The plaintiff in the suit, renowned attorney Johnnie Cochran, died a week after oral argument and the Supreme Court resolved the case on narrow grounds without resolving the question presented as to whether injunctions are permissible in defamation cases. The issue is now pending before the California Supreme Court in *Balboa Island Village Inn v. Lemen*.⁴

The issue is sure to recur across the country. Individuals defamed in a blog or on the internet are likely to turn to the courts and seek injunctions. Perhaps damages will be unavailable as the defendant will not have assets or maybe the plaintiff will just want the false, injurious speech to stop. Can a court issue an injunction?

That is the focus of this article. In addressing this question, the first part of the article recounts the facts of *Tory* to provide a context for analyzing the issue. The second part of the article explains why injunctions never should be allowed as a remedy in defamation cases.

I. INJUNCTIONS IN DEFAMATION CASES: THE EXAMPLE OF *TORY V. COCHRAN*

Because the Supreme Court decided *Tory* in a short opinion, on relatively narrow grounds, the full story does not appear in its opinion. It is a colorful story and one that clearly illustrates how a court can come to issue a broad injunction as a remedy in a defamation case.

The lawsuit arose from the events of earlier litigation where Ulysses Tory was represented by Cochran and his law firm.⁵ On February 18,

2. See, e.g., *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975); *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975). *But see*, e.g., *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172 (2d Cir. 2001); *Comty. for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987); *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986); *United States v. Doe*, 455 F.2d 753, 753 n.4 (1st Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967) (rejecting injunctions in defamation actions).

3. 544 U.S. 734 (2005).

4. 17 Cal. Rptr. 3d 352 (Cal. Ct. App. 2004), *review granted*, 102 P.3d 904, No. S127904 (Cal. Dec. 15, 2004). Oral arguments were heard January 29, 2007.

5. There, of course, was no doubt that Johnnie Cochran was a quintessential public figure. He was likely the best known attorney in the world. In recent autobiography, Cochran stated that his success has "provided [him] with the kind of high-profile celebrity and visibility few attorneys have ever enjoyed." JOHNIE COCHRAN, *A LAWYER'S LIFE* 7

1983, Tory and one of his employees, Javier Gutierrez, emerged from Tory's Fish Market and were fired upon by law enforcement officials. Shortly thereafter, Tory decided to retain Cochran in a personal injury and civil rights lawsuit against various government entities involved in the incident.⁶ Tory went to Cochran's law office and was interviewed by an attorney named Earl Evans.⁷ Evans signed a retainer agreement on Cochran's behalf, establishing the attorney-client relationship between Tory and Cochran's law firm.⁸

Over the next two years, Tory became increasingly frustrated with what Tory perceived as Cochran's failure to pursue the litigation on his behalf. Tory felt that he was not being adequately represented. By contrast, Cochran was able to secure a substantial settlement for Gutierrez.⁹ Cochran ultimately withdrew from representing Tory.¹⁰

During the same time period, Evans, who was still working at Cochran's law office and using Cochran's stationery, handled a divorce proceeding for Tory and child custody proceedings for Tory's putative spouse, Ruth Craft.¹¹ Tory and Craft paid Evans for his services under the impression that they were paying Evans as an agent of Cochran's law firm.¹² Tory and Craft were not satisfied with Evans' services and wanted a refund of the monies that they had paid. Tory and Craft testified under oath that Cochran offered to repay them this money.¹³

Several years later, with no refund forthcoming, Tory began peacefully picketing on the sidewalk outside of Cochran's Los Angeles law office and later in front of the Los Angeles Superior Court. He picketed with a group of other people who also were dissatisfied with Cochran,

(2002). Indeed, Cochran's description of himself shows that he is the classic public figure: Court TV hired me to cohost a nightly TV show. Characters in movies made reference to me I appeared as myself in the Robert DeNiro/Eddie Murphy film Showtime. I appeared often as a guest on shows ranging from the very serious Nightline to Larry King's show to sitcoms like The Hughleys. Saturday Night Live and Seinfeld parodied me.

Id. at 7-8. As the Los Angeles Times noted in a 2002 interview, "his face and name are known everywhere there is CNN. He may be the first private citizen in history to have such a huge worldwide recognition factor." Bettijane Levine, *A Cause Celebre*, L.A. TIMES, Sept. 29, 2002, at F1.

6. Reporter's transcript at 6:11-13, 64:2-7, *Tory v. Cochran*, 544 U.S. 734 (2005) (No. 03-1488) [hereinafter Reporter's transcript].

7. *Id.* at 64:5-10, 79:4-11.

8. *Id.* at 64:5-10, 79:16-28, 118:1-8.

9. *Id.* at 36:10-24, 184:20-28, 216:1-5.

10. *Id.* at 174:18-174:3.

11. *Id.* at 6:24-7:2, 63:4-21, 78:12-28.

12. *Id.* at 189:3-7, 253:1-19.

13. *Id.* at 262:14-263:2.

including people Tory understood to be former clients of Cochran and relatives of former clients.¹⁴ Tory testified that he did not pay the other picketers, but that he “might have bought them lunch.”¹⁵ Tory picketed because he believed that he had not been treated fairly by Cochran, that he had not been represented adequately by Cochran, and that he had been deceived by Cochran into thinking that he would be refunded money.¹⁶

Tory and others carried placards bearing various statements expressing opinions about Cochran’s performance as an attorney and about the legal system generally, such as:

- “Johnnie is a crook, a liar, and a Thief. Can a lawyer go to HEAVEN? Luke 11:46”¹⁷
- “What can I do if I don’t receive the Justice the Constitution guarantees ME?”
- “You’ve been a BAD BOY, Johnnie L. Cochran”
- “Atty COCHRAN, We have no Use for Illegal Abuse”
- “I Know How it Feels to Be Terrorized. God Bless USA”
- “Absolute Discrimination”
- “Attorney Cochran, Don’t We Deserve at Least the same Justice as O.J.”
- “Unless You have O.J.’s Millions—You’ll be Screwed if you USE J.L. Cochran, Esq.”¹⁸

As a result of the picketing activity, Cochran sued Tory and Does for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy. The Superior Court for the State of California issued a preliminary injunction, prohibiting Tory from speaking about Cochran, and subsequently tried the suit without a jury. Tory represented himself in the proceedings. Cochran admitted at trial that he did not lose any business as a result of the picketing.¹⁹

Tory consistently asserted his constitutional right to free speech in the

14. *Id.* at 208:22-26, 272:17-20.

15. *Id.* at 208:27-209:23.

16. *Id.* at 213:17-21, 216:6-12; 222:2-16, 274:2-18.

17. The reference is to *Luke* 11:46 in the Bible, which reads: “And he said: ‘Woe to you lawyers also! For you load people with burdens hard to bear, and you yourselves do not touch the burdens with one of your fingers.’”

18. It is striking that these statements are opinion and should not have been the basis for a defamation action at all. This, however, was not presented before the Supreme Court.

19. Reporter’s transcript, *supra* note 6, at 55:20-28.

trial court proceedings. For example, Tory's Answer to Cochran's operative complaint asserted that "the issuance of a preliminary and/or permanent injunction against his picketing activities as proposed in the Complaint would constitute an unconstitutional prior restraint." Moreover, in his objections to the trial court's Statement of Decision, Tory protested that his picketing was "protected under the First Amendment (Freedom of Expression) to the United States Constitution," and further noted that Cochran "is a public figure and therefore, must be held at a higher standard than a private citizen in a matter or issue of libel, slander and invasion of privacy."

The Superior Court found in Cochran's favor.²⁰ The court did not award money damages because such damages were waived by Cochran. But the Court did issue a permanent injunction, which provided:

Unless until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following:

... *In any public forum*, including, but not limited to, the Los Angeles Superior Court and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) *displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm*; (iii) *orally uttering statements about COCHRAN and/or COCHRAN's law firm* . . .²¹

Craft was not named as a defendant in the lawsuit, nor was she given a chance to defend herself at trial, but her speech rights were explicitly restrained in the permanent injunction.²² The injunction was not limited to preventing defamatory statements; it prohibited Tory and Craft from saying *anything* about Cochran in *any* "public forum."²³

Tory and Craft appealed from the permanent injunction.²⁴ On October 29, 2003, the California Court of Appeal issued an unpublished decision

20. Joint Appendix, *Tory v. Cochran*, 544 U.S. 734 (2005), No. 03-1488, 2004 WL 2891867, at *34.

21. *Id.* (emphasis added).

22. *Id.* at *31-32, *34

23. *Id.*

24. *Id.* at *31-32.

affirming the injunction.²⁵ Specifically, the California Court of Appeal rejected the contention that the permanent injunction represented an overbroad prior restraint in violation of the First Amendment and the California Constitution.²⁶ The decision states that permanent injunctions on speech are not prior restraints, and that the overbreadth doctrine does not apply to permanent injunctions.²⁷

Tory and Craft petitioned for review in the California Supreme Court, but this was denied with two Justices dissenting and voting to hear the case.²⁸ The United States Supreme Court granted their petition for certiorari and the question presented was “[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.”²⁹

The case was argued on March 22, 2005.³⁰ On March 29, 2005, Johnnie Cochran died.³¹ The case was not moot, as Justice Breyer explained, because the injunction remained in effect and prevented Tory and Craft from speaking about the law offices of Johnnie Cochran or even about Cochran himself.³² As Justice Breyer stated: “We agree with Tory and Craft that the case is not moot. Despite Johnnie Cochran’s death, the injunction remains in effect. Nothing in its language says to the contrary.”³³

However, the Court found that because of Johnnie Cochran’s death, there was no need to consider the question presented as to whether injunctions are permissible in defamation cases.³⁴ Justice Breyer, writing for the majority, stated: “At the same time, Johnnie Cochran’s death makes it unnecessary, indeed unwarranted, for us to explore petitioners’ basic claims Rather, we need only point out that the injunction, as written, has now lost its underlying rationale.”³⁵ He explained:

Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (*i.e.*, coercing Cochran to pay a ‘tribute’ for desisting in this activity), the grounds for the injunction are much

25. *Id.* at *51-61.

26. *Id.* at *56-57.

27. *Id.* at *57.

28. *Id.* at *62.

29. *Tory v. Cochran*, 544 U.S. 734, 736 (2005) (citations omitted).

30. *Id.* at 734.

31. *Id.* at 736.

32. *Id.*

33. *Id.*

34. *Id.* at 737-38.

35. *Id.*

diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification.³⁶

The issue thus remains open: may courts issue injunctions as a remedy in defamation cases?³⁷

II. INJUNCTIONS IN DEFAMATION CASES ARE INHERENTLY AN UNCONSTITUTIONAL PRIOR RESTRAINT

A. *Injunctions Are Prior Restraints*

The California Supreme Court has held in another context that an injunction is not a prior restraint if it follows a trial and is for unprotected speech.³⁸ In *Tory*, the California Court of Appeal came to the same conclusion and held that a permanent injunction on speech is not a prior restraint.³⁹

This is just wrong. It confuses two distinction questions: is the speech protected by the First Amendment and what remedies are permissible? Even if the speech is unprotected, an injunction is still a prior restraint. The injunction prevents speech before it occurs. The injunction means that a person can only speak by going before the judge and getting permission. That is the very essence of a prior restraint.

The Supreme Court has clearly and unequivocally held that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. The Court has expressly declared that “permanent injunctions . . . that actually forbid speech activities [] are classic examples of prior restraints” because they impose a “true restraint on future speech.”⁴⁰ In *Alexander*, the Supreme Court discussed three prior

36. *Id.* at 738

37. As mentioned in the introduction, the issue is now squarely before the California Supreme Court in *Balboa Island Vill. Inn v. Lemen*, 17 Cal. Rptr. 3d 352 (Cal Ct. App. 2004), *petition for rev. granted*, 22 Cal. Rptr. 3d 517 (Cal. 2005). In this case, a woman who lived across the alley from a restaurant engaged in speech critical of its operations. The restaurant sued and received an injunction against her speaking to its employees or saying nine specific statements. The California Court of Appeal overturned the injunction on free speech grounds and the California Supreme Court granted review. *Balboa Island Vill. Inn*, 17 Cal. Rptr. 3d at 355.

38. *See generally* *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846 (Cal. 1999) (plurality opinion) (upholding injunction on speech in workplace).

39. Joint Appendix, *Tory v. Cochran*, 544 U.S. 734, No. 03-1488, 2004 WL 2891867, at *57.

40. *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine “encompasses injunctive systems which threaten or bar future speech based on some past infraction”).

decisions of the Court holding that permanent injunctions on speech are inconsistent with the First and Fourteenth Amendments to the United States Constitution.⁴¹ These cases clearly hold that a permanent injunction on speech is a prior restraint. The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*.⁴² In *Near*, a newspaper appealed from a permanent injunction issued after a case “came on for trial.”⁴³ The injunction in that case “perpetually” prevented the defendants from publishing again because, in the preceding trial, the lower court determined that the defendant’s newspaper was “‘chiefly devoted to malicious, scandalous and defamatory articles.’”⁴⁴ As the Court in *Alexander* explained, “*Near*, therefore, involved a true restraint on future speech—a permanent injunction.”⁴⁵ The *Near* Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional.⁴⁶

The Court in *Alexander* also discussed *Organization for a Better Austin v. Keefe*, in which a group of picketers and pamphleteers were enjoined from protesting a real estate developer’s business practices.⁴⁷ Although the Court noted that the injunction in *Keefe* was labeled “temporary” by the trial court, it was treated as permanent since its label was “little more than a formality,” it had been in effect for years, it had been issued after an “adversary hearing,” and it “already had [a] marked impact on petitioners’ First Amendment rights.”⁴⁸ The Court struck down the injunction in *Keefe* as “an impermissible restraint on First Amendment rights.”⁴⁹ The Court held that the “claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.”⁵⁰ The Court stressed that “[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.”⁵¹ In *Vance v. Universal Amusement Co.*, the third permanent injunction case cited in *Alexander*, the Court invalidated a Texas statute that authorized courts, upon a showing

41. *Id.* at 550.

42. 283 U.S. 697 (1931).

43. *Id.* at 705-06.

44. *Id.* at 706.

45. *Alexander*, 509 U.S. at 550.

46. *Near*, 283 U.S. at 722-23.

47. 402 U.S. 415 (1971)

48. *Id.* at 417-18, 418 n.1.

49. *Id.* at 418.

50. *Id.* at 419.

51. *Id.*

that the defendant had shown some obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future even if those films had not yet been found to be obscene.⁵² The three-judge District Court panel in *Vance*, whose decision was affirmed by the Supreme Court, held that, as in *Near*, “the state ‘made the mistake of prohibiting future conduct after a finding of undesirable present conduct,’” and that such a “general prohibition would operate as a prior restraint on unnamed motion pictures” in violation of the First Amendment.⁵³

Injunctions are treated as prior restraints because that is exactly what they are: a prohibition of future expression. As the Supreme Court noted, injunctions “carry greater risks of censorship and discriminatory application than do general ordinances.”⁵⁴ Justice Scalia has explained that “an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.”⁵⁵ Injunctions are the “product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman.”⁵⁶ As Justice Scalia cautioned, “the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards.”⁵⁷ Violations of an injunction, even an unconstitutional injunction, are punishable by contempt, while violations of unconstitutional laws never can be punished.⁵⁸

Courts that have held that injunctions are not prior restraints if they follow a trial, or if they are directed to unprotected speech, are confusing the question of whether the injunction is a prior restraint with the issue of whether the injunction should be allowed. Injunctions are inherently prior restraints because they prevent *future* speech. They are not limited to preventing repetition of false statements of fact that are of and concerning the plaintiff and uttered with actual malice—defamatory speech beyond the reach of the First Amendment.⁵⁹ For example, the injunction prevented

52. 445 U.S. 308, 311 (1980).

53. *Id.* at 311-12.

54. *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 764 (1994).

55. *Id.* at 797 (Scalia, J., concurring in part and dissenting in part).

56. *Id.* at 793

57. *Id.*

58. *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967) (upholding collateral bar rule precluding those violating an injunction from later challenging its constitutionality).

59. The Supreme Court seemed to endorse such a view in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973). In *Pittsburgh Press*, the Court upheld a “narrowly drawn” rule prohibiting the “placement in sex-designated columns

any future statement by Tory or Craft about Cochran.⁶⁰ Under the terms of the court's order, Tory and Craft could speak about Cochran and his law firm only if they first go to the Superior Court and receive its permission through a modification of the court order. As in *Near*, *Keefe*, and *Vance*, this unquestionably made the permanent injunction a prior restraint.

B. Injunctions Are Unconstitutional as a Remedy in Defamation Cases

The Supreme Court has declared that prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights."⁶¹ Thus, the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech."⁶² There is a "deep-seated American hostility to prior restraints."⁶³

The Supreme Court has stressed that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."⁶⁴ The Court has often repeated, in many distinct contexts, its antipathy towards "systems" of prior restraints on speech.⁶⁵

of advertisements for nonexempt job opportunities." *Id.* at 391. But crucially, Pittsburgh Press did not involve a court order; it was an order by a Commission. *Id.* at 379. The Supreme Court stressed that the Commission's order preventing sex-based want ads could not be enforced by contempt sanctions because "[t]he Commission is without power to punish summarily for contempt." *Id.* at 390 n.14. That is very different from a court order enjoining speech, such as in this case, where any violations are punishable by contempt.

60. Joint Appendix, *Tory v. Cochran*, 544 U.S. 734 (2005), No. 03-1488, 2004 WL 2891867, at *34.

61. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

62. *Id.* at 589 (Brennan, J., concurring) (emphasis removed).

63. *Id.* (Brennan, J., concurring) (emphasis removed).

64. *Vance*, 445 U.S. at 317 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (emphasis in original).

65. See, e.g., *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (finding temporary injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Neb. Press Ass'n*, 427 U.S. at 556 (applying prior restraint doctrine to reject gag order on participants in a criminal trial); *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (per curiam) (applying prior restraint doctrine to strike down injunction on publication of confidential government documents). In separate opinions stating that "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional," *Pittsburgh Press*, 413 U.S. at 396 (Burger, C.J., dissenting); *Bantam Books*, 372 U.S. at 70-71 (listing cases striking down prior restraints and rejecting as "informal censorship" the local commission's ability to list certain publications as "objectionable" and to threaten prosecution for their sale); *Near*, 283 U.S. at 706, 722-23 (rejecting injunction on future publication of newspaper despite publisher's previous dissemination of defamatory material). See also *Avis Rent A Car Sys. v. Aguilar*, 529 U.S. 1138, 1140-41 (2000) (Thomas, J., dissenting from denial of certiorari) (urging granting of certiorari to "address the troubling First Amendment issues raised" by an injunction imposing "liability to the utterance of words in

“It is because of the personal nature” of the right of free speech that the Court has “rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial.”⁶⁶

The strong presumption against prior restraints is evidenced by the fact that the Supreme Court has never upheld a prior restraint as a permissible remedy in a defamation action. The absence of a single Supreme Court decision approving a prior restraint as a remedy in a defamation case reflects the historical condemnation of injunctions in such actions, the inherent adequacy of money damages, and the inevitable futility of crafting an injunction that is both effective and narrowly tailored.

1. Permanent Injunctions Historically Have Not Been a Permissible Remedy in Defamation Actions

The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation.⁶⁷ The rule was established in eighteenth-century England, well before the American revolution. Its earliest statement is found in *Roach v. Garvan*,⁶⁸ where Lord Chancellor Hardwicke remarked in a case involving a newspaper that printed commentary that was both libelous and a contempt of court:

Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the public or private persons, the only method is to proceed at law.⁶⁹

Three-quarters of a century later, Thomas Howell, barrister and editor of the STATE TRIALS series, tellingly explained the strong consensus that equity had no power to restrain defamation: “I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference or analogy.”⁷⁰ Nineteenth and twentieth-century American

the workplace”); *Madsen*, 512 U.S. at 798 (Scalia, J., concurring in part and dissenting in part) (listing cases and observing that the Court has “repeatedly struck down speech-restricting injunctions”).

66. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion) (citation omitted).

67. See SMOLLA, *supra* note 1, at § 9:85; Michael I. Meyerson, *supra* note 1 at 308-11, 324-30; 43A C.J.S. Injunctions § 255 (2006); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 715-16 (1956).

68. 26 Eng. Rep. 683 (Ch. 1742).

69. *Id.*

70. 20 THOMAS B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 799 (1816).

courts, with remarkable uniformity, adopted the traditional English rule.⁷¹ Free speech concerns were prominent among the reasons given for their position.⁷² In the very first American case on the subject, New York's Chancellor Walworth began his opinion refusing to enjoin the publication of a libelous pamphlet:

It is very evident that this court cannot assume jurisdiction of the case . . . or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.⁷³

In 1882, the Louisiana Supreme Court issued an elaborate opinion refusing to enjoin a newspaper from printing libelous cartoons.⁷⁴ After discussing the constitutional prohibition of prior restraints, the court depicted the traditional common law rule as central to preventing a legal regime in which "with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."⁷⁵

And in 1909, a United States Circuit Court interpreted the Alabama constitution as prohibiting equity from restraining defamation:

The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance.⁷⁶

If history matters in interpreting the First Amendment, it could not be clearer: injunctions were not allowed as a remedy in defamation actions.

2. Damages are a Sufficient Remedy for Plaintiffs in Defamation Cases

Justice Scalia observed that "[p]unishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps

71. Shipley, *supra* note 67, at 716-21. See, e.g., Meyerson, *supra* note 67, at 324-30; Willing v. Mazzocone, 393 A.2d 1155, 1157-58 (Pa. 1978); Howell v. Bee Publ'g Co., 158 N.W. 358, 359 (Neb. 1916); Balliet v. Cassidy, 104 F. 704, 706 (D. Or. 1900); Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 176, 179-80 (1876).

72. Willing, 393 A.2d at 1157-58; Howell, 158 N.W. at 359; Balliet, 104 F. at 704; Life Ass'n of Am., 3 Mo. App. At 179-80.

73. Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

74. State *ex rel.* Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741 (La. 1882).

75. *Id.* at 745

76. Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556 (M.D. Ala. 1909).

Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct.”⁷⁷ Justice Scalia’s observation is based on a wealth of support in the annals of jurisprudence, particularly in the pages of *Near*, where the Supreme Court announced that damages and other methods of punishing past speech—not restraints on future speech—are the appropriate remedies in defamation cases.⁷⁸ In *Near*, the Court drew a line between damages as a permissible remedy for past speech and an impermissible system that proscribes future speech: “Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.”⁷⁹

Courts long have recognized that damages, not injunctions, are the appropriate remedy in a defamation action. In the first days of the Republic, even before the adoption of the First Amendment, the court in *Respublica v. Oswald* explained that although “libelling [sic] is a great crime” it is well-understood that “any attempt to fetter the press” is unacceptable.⁸⁰ Even though the defendant’s “offence [sic] [was] great and persisted in,” the Court did not enjoin the defendant’s future speech.⁸¹

Similarly, well over a century ago, in *Francis v. Flinn*, the Court stressed that damages, not injunctions, are the proper remedy in defamation actions.⁸² In expressing the general rule that equitable relief is not permissible when there are remedies at law, the Court stated that “[i]f the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.”⁸³

In other cases, too, the Supreme Court has recognized that damages, not injunctions, are the appropriate remedy in defamation cases. For example, in *Pennekamp v. Florida*, the Court reversed a judgment of contempt against a newspaper editor responsible for publishing editorials

77. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 794 n.1 (Scalia, J., concurring in part and dissenting in part). See also *Aguilar*, 529 U.S. at 1143 (Thomas, J., dissenting from denial of certiorari) (“money damages” for future use of unprotected language in the workplace is preferable to an injunction on the same words).

78. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 711 (1930).

79. *Id.* at 718-19.

80. 1 U.S. 319, 324-25 (Pa. 1788).

81. *Id.* at 328.

82. 118 U.S. 385 (1886).

83. *Id.* at 389.

that purportedly were contemptuous of judges and the administration of criminal justice in pending cases.⁸⁴ The Supreme Court of Florida, upholding the lower court's citation for contempt, explained that a newspaper may generally criticize a judge, but "may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public."⁸⁵ Nevertheless, the Court concluded that the contempt citation must be reversed to encourage debate on public issues, and also because "when the statements [about a judge] amount to defamation, a judge has such remedy in damages for libel as do other public servants."⁸⁶

Precluding prior restraints does not leave those defamed without remedy, or render the law powerless to deter defamation. The Court has upheld, with crucial limitations, the ability of even public officials and public figures to recover damages in defamation cases. In *N.Y. Times Co. v. Sullivan*, the Court stressed that damage awards, even against major metropolitan newspapers, are a potent weapon for the defamation plaintiff and noted that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."⁸⁷

The issue arises as to what about the judgment proof defendant? Could such an individual continue to say false and injurious things about a plaintiff, and would the courts be powerless to stop this? This is not a frivolous concern. However, the assumption behind the concern is troubling; poor people should have their speech enjoined, while the rich are allowed to speak so long as they pay damages. There is another, even more serious, problem with this concern being a basis for injunctions. The traditional principle of equity is that an injunction will not be issued so long as a damages remedy is adequate. Courts, though, do not find that damages remedies are inadequate simply because the plaintiff cannot afford to pay them.

Finally, there is a particular danger in allowing injunctions as a remedy in defamation cases because of the inadequacy of money damages. Determining the amount of damages in a defamation action is always difficult, as assessing the value of a person's loss of reputation is inherently speculative.

84. 328 U.S. 331 (1946)

85. *Id.* at 343 n.6 (citations omitted).

86. *Id.* at 348-49.

87. 376 U.S. 254, 277 (1964).

3. *Effective Injunctions in Defamation Cases Are Inherently Overbroad and Inevitably Put Courts in the Role of Being Perpetual Censors Determining Whether Speech Can Occur*

Injunctions have not been, and should not be, permitted in defamation cases for another reason: it is impossible to formulate an effective injunction that would not be extremely overbroad and that would not place the court in the role of the censor, continually deciding what speech is allowed and what is prohibited. Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective.

Prior restraints, such as injunctions, are a “most extraordinary remed[y]” to be used “only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.”⁸⁸ There can be no constitutional justification for such an extreme remedy unless it can be properly tailored and would actually serve its purpose. An injunction “issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order.”⁸⁹ Moreover, the Supreme Court has acknowledged that it “must also assess the probable efficacy of [a] prior restraint on publication as a workable method,” and “cannot ignore the reality of the problems of managing” such orders.⁹⁰ As the axiom goes, “a court of equity will not do a useless thing.”⁹¹

In defamation cases, the injunction must either be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous. Most egregiously, like in *Tory*, the injunction can go so far as to prevent any future speech about the plaintiff. An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court’s order.

Moreover, even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation at every point in the future. A statement that was once false may become true later in time. Likewise,

88. *CBS Inc. v. Davis* 510 U.S. 1315, 1317 (1994) (citations omitted).

89. *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968).

90. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 565 (1976).

91. *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall J., concurring).

even if a defendant in a defamation action once acted with the requisite degree of culpability, he or she may have a different mental state later. Defamatory statements about public figures are outside the scope of the First Amendment only when the plaintiff can "prove *both* that the statement was false and that the statement was made with the requisite level of culpability."⁹² Permitting permanent injunctive relief in a defamation case absolves the defamation plaintiff of his or her burden to demonstrate falsity and culpability each time a purportedly defamatory statement is made. Thus, unlike injunctions on particular obscene motion pictures, enjoining defamatory speech will inherently reach too far and be overbroad because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."⁹³

An injunction that reaches more broadly than the exact words already held to be libelous is overbroad for the very reason that it restrains communication before a jury determination of whether it is or is not protected by the First Amendment. Because it delays communication that may be non-defamatory and protected by the First Amendment, it is the essence of a prior restraint.

In addition, an injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. That brand of judicial clearance is what the Court in *Near* called "the essence of censorship."⁹⁴

In *Near*, the Court emphatically rejected the notion that even one who had previously been found liable for printing defamatory matter could be forced to prove to a judge that future statements "are true and are published with good motives and for justifiable ends."⁹⁵ An injunction in any defamation case is precisely that type of censorship, as those enjoined will not be able to say anything about the subject without first getting permission from a judge. Such restrictions inevitably put the court in the classic role of the censor and are intolerable under the First Amendment.

CONCLUSION

It, of course, is difficult to defend any absolute position, even this one

92. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (emphasis in original).

93. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

94. *Near*, 283 U.S. at 713.

95. *Id.* at 713.

that injunctions never should be permitted in defamation cases. But it seems less extreme if it is remembered that never in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case or any other. It is possible to imagine hypothetical situations where the absence of an injunctive remedy is troubling, but the law of the First Amendment should not be based on such as possibilities.

Abandoning *Near*'s disapproval of injunctive relief in defamation actions would mean that every court, in every successful defamation case, could enjoin all future speech by the defendant, or its agents, about the plaintiff in any public forum. The richness of the English language and the myriad ways of expressing any thought means that the only effective way to enjoin defamation would be, as here, to keep the defendant from ever uttering another word about the plaintiff. Such a result runs contrary to the fundamental precepts of the First Amendment, especially where the enjoined speech relates to a public person and a public issue.

At the very least, of course, if there is going to be an injunction it must be narrowly tailored. In *Tory*, Justice Breyer's opinion repeated the fundamental rule that "[a]n 'order' issued in 'the area of First Amendment rights' must be 'precis[e]' and narrowly 'tailored' to achieve the 'pin-pointed objective' of the 'needs of the case.'"⁹⁶

But the Supreme Court and lower courts should go further than this. They should reaffirm the long-standing rule that equity will not enjoin defamation and that such injunctions are prior restraints that inherently violate the First Amendment.

96. *Tory v. Cochran*, 544 U.S. 734, 738 (2005).