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Trump Suits: Melania Sues the Internet

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I) Trump Suits: Melania Sues the Internet

I. FACTUAL BACKGROUND:

Melania Trump, wife of the 2016 Republican nominee Donald Trump, has suggested that both The Daily Mail and Webster Tarpley could face legal action for making alleged defamatory statements against her. The Daily Mail is a British newspaper that also runs an online website for its news stories in the United States. The newspaper has been operating for one-hundred thirty years, and has been primarily viewed as a conservative paper.¹ Webster Tarpley, creator of Tarpley.net, is a philosopher of history hoping to provide strategies to solve current global crises happening today.² These two online sources, independent of one another, have alleged that Melania Trump was an escort in the 1990s prior to meeting Donald Trump. On August 2nd, 2016, Webster Tarpley posted a blog titled “Where is Melania Trump” that included statements about her alleged escort work. Charles J. Harder, Melania Trump’s attorney, states that the two news sources have been placed on notice regarding her potential defamation claims. In Melania Trump’s filing, her attorneys assert that the accusations of providing escort work is inaccurate. Trump’s attorney notes that the images used in the articles were from appropriate and legal modeling work in the 1990s. Webster Tarpley asserts that Melania Trump’s claim is without merit and that she is a public figure actively engaged in a presidential campaign, thus protecting his blog post.

Melania Trump’s suit against The Daily Mail is based on an August 20th, 2016 article that notes Melania Trump was an escort at a gentleman’s club in Milan prior to moving to New York

¹ The Daily Mail has an extensive history since its induction. A full history is available at www.dailymail.com.

² Webster Tarpley has a blog site where his full biography is accessible. www.Tarpley.net.

in the 1990s. Both The Daily Mail and Webster Tarpley retracted their articles and only Tarpley has apologized. Melania Trump has continued to claim defamation against both The Daily Mail and Webster Tarpley. Mr. Harder states that “all such statements are one-hundred percent false, highly damaging to her reputation, and personally hurtful. She understands that news media have certain leeway in a presidential campaign, but outright lying about her in this way exceeds all bounds of appropriate news reporting and human decency.”³ There has been much controversy behind Melania and Donald Trump in the 2016 election cycle and it appears that the publication of these stories could have influence on the minds of American voters.

II. DEFAMATION: WHAT IS IT AND WHERE DID IT ALL BEGIN?

Throughout American history, the issue of defamation has consistently been noted with making adverse statements in a public setting. Although the legal definition of defamation has not changed, the way in which alleged victims are able to bring a claim has. “It is always a question for the court to determine, as a matter of law, whether a published statement is within the protected class of speech.” U.S.C.A. Const.Amend. 1; Const. Art. 2, § 22. Defamation has, throughout the history of the United States, been considered a civil liability.⁴ A rising issue with defamation has been the constant technological advancements that alter how individuals communicate. From the early 1800s in which people expressed their opinions through sources such as leaflets, to now, where the ability to injure one’s reputation is as easy as a click of a button. Although the legal definition remains the same, the legality of defamation has altered significantly. Today, courts are split on what constitutes online defamation and what is protected as freedom of speech under the First Amendment of the United States Constitution.

³ Ember Sydney, Lawyer for Melania Trump Threatens Defamation Suit Against News Outlets, N.Y. Times, Aug. 22, 2016.

⁴ The tort of defamation has been a civil liability since its induction.

Defamation has long been acknowledged to result from “the making of a false statement which tends to ‘expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’” Dillon v. City of N.Y., 261 A.D.2d 34 (1999). To prove defamation:

“‘[a] plaintiff bringing a defamation action ... must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.’” Id.

Within the defamation framework, there are two types of defamation. First, libel occurs when writing is read by persons who are not the author nor the one defamed. Barber v. Daly, 586 N.Y.S.2d 398 (1992). Second, slander occurs when a statement is published and heard by a third party. Id. “Cause of action for libel or slander requires publication of defamatory matter.” Id.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court held that particular defamatory statements were shielded by First Amendment principles. In Sullivan, respondent alleged that statements made in a New York Times advertisement were libelous in nature. Id. The United States Supreme Court noted that “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Id. The Court held the position that freely open discussions about public figures are protected under First Amendment principles. Id. If the intention of the defamatory claim is not malicious in nature, then the First Amendment should afford it protection from suit. Id. An important ruling from Sullivan is that public officials can only bring a defamatory suit against an

individual or entity if the statements were made with actual malice. Id. “The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Id.

Since the United State Supreme Court’s ruling in Sullivan, subsequent cases have built on its ruling in that tort law balances defamatory statements with First Amendment protection interests. The result is that defamation is tortious, contingent on statements made, who the statements are intended to target, and whether a public figure was targeted, thus protected by First Amendment principles. Private individuals have more protection under the First Amendment in that they do not have to prove that actual malice occurred to deem a defamatory statement to be tortious in nature. Id. “Because constitutional guaranty is involved, trial court in libel action involving media defendant and public official or public figure plaintiff must first determine whether there is sufficient evidence from which one could conclude that statements were uttered with actual malice.” Nev. Rev. Stat. Ann. § 41.332 (West). Whether the evidence provided proves a finding of actual malice is a question of law. Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657 (1989). To prove actual malice, an essential element of defamation for public figures, there must be adequate evidence showing that the defendant made the statements under the presumption that they are false, or the statements were made with serious doubt as to its truth. George v. Fabri, 345 S.C. 440 (2001).

A. DEFAMATION: PUBLIC FIGURES AND THE INTERNET

As defamation’s role in society has been brought into the internet age, the ability to post injurious statements about public figures has become simpler. The determination of what defines

a public figure is more complicated than determining whether a person is a public official. The United States Supreme Court has defined public figures as:

“Evidence of a defamation plaintiff’s all-purpose public figure status, so that under the First Amendment the plaintiff is required to prove the defamatory statements were made with actual malice, might include statistical surveys that concern the plaintiff’s name recognition, previous coverage of the plaintiff in the press, whether others in fact alter or reevaluate their conduct or ideas in light of the plaintiff’s actions, and whether the plaintiff has successfully been able to shun the attention that the public has given him.” Wayment v. Clear Channel Broad., Inc., 116 P.3d 271 (2005).

Many popular figures in American society have continued to bring defamatory claims against news outlets. Some have been successful, while others have flopped. “Celebrity defamatory cases have come a long way since 1981, when Carol Burnett was awarded \$1.6 million in the first libel judgment against the National Enquirer.”⁵ The jury in Burnett’s case noted that the National Enquirer did not do its due diligence to check their sources, thus the statements printed in the newspaper were in fact false and defamatory in nature. Id. An individual’s ability to quickly navigate through internet sources and formulate an opinion has caused hardship on courts. Id. Regardless of truthfulness to the defamatory claim, a public figure’s reputation can be damaged. Mila Kunis, a well-known actress, allegedly stole a chicken twenty-five years ago from a friend. Kunis has not denied the allegations but stated that the issue arose as a child and should not have any bearing on her acting career.⁶

United States Chief of Staff General William C. Westmoreland brought a libel suit against CBS, Inc. regarding a documentary they aired. Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985). The documentary mentions that Westmoreland manipulated intelligence about the

⁵ Robert Lindsey, Carol Burnett given \$1.6 million in suit against National Enquirer, N.Y. Times, Mar. 27, 1981.

⁶ David Moye, “Mila Kunis Stole my chicken”: Alleged childhood friend, Huffington Post, Apr. 23, 2015.

strength of opponents in the Vietnam war in order to show signs of progression in the war. Id. Conflicting reports began to surface from intelligence officers with knowledge of Westmoreland's reports regarding their validity. Id. Westmoreland claimed that in proving a defamation claim for public figures, a showing that the alleged statements were made with actual malice must be proven. Id. The suit was ultimately dismissed, inferring Westmoreland's inability to show that CBS acted with actual malice.

The court in Sullivan states that "the right of free public discussion of the stewardship of public officials was...a fundamental principle of the American form of government and decided that Alabama law, which allowed for libel for "criticizing the way public officials perform or fail to perform their duties," would "threaten the very existence of an American press." Sullivan, 376 U.S. at 294.

After Sullivan, the context of defamation and public figures requires a breach of a duty of care – actual knowledge that the statement is false or a careless disregard of its truthfulness. The duty of care for public figures varies on the individual's role in society. A general purpose public figure is:

"[A] person whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making." 99 Am. Jur. Proof of Facts 3d 393 § 1 (Originally published in 2008).

Following the court's ruling in Sullivan, subsequent cases have discussed the actual malice standard in the public figure context. For public figures to recover in a defamation action, the plaintiff has to make a reasonable showing that the materials were selected with a malicious intent. Fox Entertainment Group, Inc. v. Abdel-Hafiz, 240 S.W.3d 524 (Tex. App. Fort Worth 2007). A defendant in a defamation case has the power to argue their particular reasoning for

their statements, which is able to negate actual malice. The actual malice standard is subjective, simply requiring a mere showing that the defendant had knowledge of the falsity of any published claims.

The issue arises as to whether or not Melania Trump could be defined as a public figure. Although unlikely, courts could fail to recognize Melania Trump as a public figure. Although the Trump brand is well known, many individuals, arguably do not associate the name to Melania Trump. If a successful argument could be raised that Melania Trump is not a public figure, the argument shifts to whether the subject matter of Tarpley and The Daily Mail's articles is a matter of interest to the general public. The focus of the articles is on the alleged prostitution of Melania Trump in the 1990s. Melania Trump does not have an immediate connection to the Trump Organization and she was not a face of the Trump family until 2005.

Melania Trump is arguably a general purpose figure as defined. She is connected to a largely well-known company, the Trump Organization. The Trump brand sells merchandise on a global scale, and Melania is largely connected to the company. On internet sites such as Facebook, Melania Trump has over eight-hundred thousand followers.⁷ The Trump brand has continuously grown on a global scale, and with Donald Trump as the 2016 Republican nominee, the name itself has continuously become more recognized. As a general purpose public figure, an individual is bound to be criticized by individuals online.

III. FREEDOM OF SPEECH AND THE INTERNET AGE

At issue for Melania Trump is determining whether she has a valid defamation claim against The Daily Mail and Webster Tarpley, and to determine whether the online speech in question is protected under the First Amendment. Through the rise of the internet age, defamation case law

⁷ As of October 13th, 2016, Melania Trump's public figure page has 800,186 followers.

has continuously tried providing a clearer understanding of what constitutes protected free speech on the internet. The issue with the internet and the First Amendment becomes whether the intention to protect free expression continues with the newest forms of media. Throughout the history of our country, there has been a constant shift from one form of communication to another. “The reality of today’s world is that social media, whether it be Twitter, Facebook, Pinterest, Google+, or any other site, is the way people communicate.” New York v. Harris, 2012 NY Misc. LEXIS 1871 *3, note 3 (Crim. Ct. City of NY, NY County, 2012). The digital age has not afforded less protection to individuals under the First Amendment, and it is evident that First Amendment protections granted under the Bill of Rights must protect the newest forms of communication. “The Supreme Court has established that whether speech is made offline or online, it is entitled to the same level of constitutional protection.” Reno v. ACLU, 521 U.S. 844 (1997). The way that individuals choose to express themselves through various online sources has caused complications for lawmakers as to what constitutes free speech protection.

The ability for individuals to express themselves without posting their personal opinion online has become a complex problem for courts. Social sharing, a quick way for an individual to express their specific view using someone else’s speech, has become a focal point for the courts. Social sharing allows an online user to “share” another individual’s speech, whether a video or blog, on their site to express their own belief regarding that specific issue. With the rising popularity in social sharing, lawmakers have found difficulty in determining whether “sharing” personal opinions without making the statement itself is protected speech under the First Amendment. “When the framers of the First Amendment prohibited Congress from making any law ‘abridging freedom of speech,’ they were not thinking about computers, computer programs, or the internet, and they could not envision the First Amendment issues that the cyber revolution

would bring into play.” Universal Studios, Inc. v. Corley, 273 F.3d 429, 434 (2nd Cir. 2001).⁸

The court in Corley did apply First Amendment principles, thus rejecting Corley’s argument that computer coding is protected free speech under the Constitution. Id. The issue of computer coding and free speech continues to be discussed in courts today.

The internet has become the primary system of communication in an ever expanding world. The accessibility the internet affords society gives us the ability to cipher through speech, and post on our personal sites what we want to express to our viewers. Whether it is Facebook, Twitter, or your own personal website, the accessibility to online resources allows individuals to “share” what they find with a click of a button. These “share” buttons have great influence in many aspects of our lives, and have the ability to exponentially reach larger audiences as internet accessibility continues to grow on a global scale. Martin v. Daily News, L.P., 990 N.Y.S.2d 473 (N.Y. Sup. Ct. 2014). The ability to create a false video or blog, and the easy accessibility by online users to obtain such information, creates much unrest on the reputations of many. Id. Courts have noted that the growing reliance by society on online publications, whether through social media or an individual’s website, simply “sharing” that information confidently constitutes speech. Id. “With the rise of social media, the relationship between the First Amendment and the internet is increasingly at issue.”⁹ Robert Sprague, an Ohio congressman, argues:

“Online social networking is becoming more ingrained into the personal lives of individuals, as well as being adopted as a communications tool by businesses. As the use of online social networks matures, so should their associated legal issues. Employers will need to maintain

⁸ The internet has provided the Constitutional framers with what had been longed for, unrestricted access to freely express their views. The ramifications of sharing another individual’s speech was not considered in the framer’s idea of the First Amendment.

⁹ Pedram Tabibi, How Deleting A Facebook Post may Violate Free Speech (and lead to a lawsuit), LIBN.com (Aug. 31, 2012).

vigilance as the online social network landscape evolves and the legal system adjusts to its presence in the workplace.¹⁰”

A. FREEDOM OF SPEECH: BUT WHAT IS PROTECTED?

The framers of the Bill of Rights envisioned a society where open debate and free expression would be free-flowing. The First Amendment adopted in 1791 states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Amend 1, U.S.Const. The ability as a nation to freely express ourselves is one of the greatest powers that we are afforded as citizens. Although free speech is one of the strongest expressions afforded us, there are restrictions on what First Amendment free speech is protected.

As technological advances allow us to cost-effectively communicate online, what constitutes nonverbal free speech is constantly an issue for the courts. First Amendment issues pertaining to free speech and social media will continuously worsen as internet companies continue to enhance the speed and modes at which individuals are able to communicate. “When an internet-based First Amendment claim is brought, the court must first determine whether the communication at issue constitutes speech. If it does, the court must conclude whether the speech is protected or unprotected by the First Amendment. Second, the court must decide whether the law restricting speech is content based or content neutral.” Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).¹¹ If an individual intends to convey a message and that message is

¹⁰ Robert Sprague, Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship, 50 U. Louisville L. Rev. 1, 34 (2011).

¹¹ One of the most fundamental questions regarding protected free speech is whether that specific law is content-neutral or content-based.

understood by its listeners, a First Amendment analysis will determine whether or not protection should be afforded to that speech. Spence v. State of Wash., 418 U.S. 405 (1974).

Free speech protections should be afforded to online users in an ever-growing internet age. Article 19 of The International Covenant on Civil and Political Rights (ICCPR) allows expressive speech regardless of the platform used.¹² “The text and drafting history of the ICCPR also demonstrate that the negotiating states intended the term ‘media’ to encompass not just the particular channels of communication available at the time (e.g., newspapers and increasingly radio and television) but also technology that had yet to be invented.” Id. at 407. The United Nations Human Rights Council recently passed legislation backing freedom of speech to extend to internet entities. The Human Rights Council affirmed that:

“The same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19 of the Declaration of Human Rights and the International Covenant on Civil and Political Rights.”¹³

In Reno, the Supreme Court noted that “statutory provisions enacted to protect minors from “indecent” and “patently offensive” communications on the Internet abridged the freedom of speech protected by the First Amendment.” Reno, 521 U.S. at 844. Communications online are to be afforded the highest protection from governmental restrictions. Id. Social media sites often have their own policies influencing what is restricted from being posted on their sites. For example, “Google disallows sexually explicit images and videos from search results by using its

¹² See Molly Land, Toward an International Law of the Internet, 54 Harv. Int'l L.J. 393, 399-401 (2013).

¹³ See Human Rights Council Res. 21/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 21st Sess., Oct. 11, 2012, U.N. Doc. A/HRC/RES/21/16 (Oct. 11, 2012).

“safesearch” technology.”¹⁴ However, there are still instances in which prohibited materials appear on these sites. Id. With continuing technological enhancements, one’s ability to freely post what they desire regardless of restrictions, will continue to persist. Freedom of speech is violated, under Reno, when an individual’s right to freely express themselves is abridged on personally owned sites.

In June 2014, the Sixth Circuit Court of Appeals rendered a significant decision regarding defamation and the internet. Sarah Jones was a cheerleader for the Cincinnati Bengals, and an online site posted images of her claiming to have slept with players on the team. Jones v. Dirty World Entm’t Recording LLC, 755 F.3d 398 (6th Cir. 2014). Following the allegedly defaming posts on the site, Jones sued Dirty World alleging defamation, particularly libel. Id. The court concluded that § 230, a section of the Communications Decency Act (CDA), moves away from the well-known intention that apportions liability to publishers. Id. The Court of Appeals states that Congress believes speech on the internet should be treated different considering an individual’s reliance on it. Id. “An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.”” Id. The Court of Appeals for the Sixth Circuit concluded that Dirty World did not contribute to posts simply because they select them for publication to their site. Id.

Complications arising with information content providers occur in the context of blog and aggregation sites. These sites allow individuals to post ‘threads’ that allow other registered users to freely discuss the topic. Through sites such as Reddit, speakers are able to cut out the

¹⁴ See SafeSearch: Turn on or off, Google, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=2986286&rd=1> (last visited Oct. 21, 2013).

mainstream media to speak right to an audience that they would not normally be able to reach. The Delaware Supreme Court decided a defamation suit involving a blogger, thus giving lawmakers a sense of what protections are afforded to bloggers under the First Amendment. Doe v. Cahill, 884 A.2d 451 (2005). As the trend towards stronger free speech protection for internet users continues to grow, bloggers will be able to have more power in posting what they choose. The Supreme Court in Cahill notes that “blogs are generally not as reliable as the Wall Street Journal Online and that they are a “vehicle for the expression of opinions” and “not a source of facts or data upon which a reasonable person would rely.”” Id.

In Batzel, the court held that “a moderator of a listserv and webmaster who posted an allegedly defamatory e-mail authored by a third party was entitled to CDA immunity as a user of an interactive computer service.” Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003). The holding in Batzel evidences the growing trend in providing near complete immunity for posting internet messages. Id. Lawmakers will likely find the Batzel analysis influential since the bulletin boards used are technologically analogous to blogs. Batzel is similar to Tarpley’s site in that both web sites are normally controlled by, at the very most, a few people. Tarpley and Batzel both control what is on the site, both must employ collaborative computer services to function, and both serve as sources of news to their viewers. Blogs sites will continue to be equivocal based on the notion they can be factual in nature and opinionated as well. Without definitive knowledge that blog sites are posting consistent factual information, the decision in Cahill will continue to hold precedent. Many social media accounts pass along information that comes through the internet, which would typically grant CDA 230 immunity. Publishers looking for immunity must prove that the alleged defamatory statements posted online must come from a separate third source, as evidenced in Batzel. In Tarpley’s case, however, it does not seem evident that

protection under CDA 230 would be applicable. Dissimilar to Batzel, Tarpley did not take an alleged defamatory statement from a third party source and post it on his webpage. The claims raised by Tarpley were his personal thoughts and initially arose on his webpage, evidencing that CDA 230 immunity would most likely not apply in his case.

When a statement is published on a social site such as Facebook, the capability to determine the publisher is easier because of the publisher's profile. With various account profile settings available on social sites, it is difficult to determine the available audience to the published statements. Complications for courts arise when the defamatory statements are made on blog sites, like Reddit, because of the anonymity of the profile and the inability to target its publisher.

Matt Drudge, creator of a gossip webpage entitled *Drudge Report*, posted an article about plaintiffs Sidney and Jacqueline Blumenthal. Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998). The plaintiffs allege that the statements posted on *Drudge Report* were defamatory in nature. Id. America Online (AOL) contracted with Drudge to make the *Drudge Report* available to all AOL customers. Id. Drudge retracted the article in question and AOL notified all of the subscribers that the article was retracted. Id. AOL recognizes that CDA 230(c)(1) would not grant immunity if they had any involvement in the gathering of information or editing of information on Drudge's site. Id. The D.C. court found Drudge liable, but AOL was granted immunity. Id. The court agrees with AOL that "the story was written by Drudge without any substantive or editorial involvement by AOL." Id. CDA 230 disallows courts to hear claims against computer service providers that do not play a role in the alleged defamatory statements. Id. If courts entertained these claims against computer service providers, then the amount of lawsuits pending in the courts would grow exponentially. It would be near impossible to impose

a duty on computer service providers, such as AOL, to conduct a review of all published materials to determine its validity.

Complications worsen regarding a blog user's ability to post comments readers can leave on blogs or other social media sites. Typically, blog sites do not demand individuals to use their factual names or to require identifying information such as their personal name or location. If individuals do provide such personal information, problems arise when individuals provide false information, making it difficult to track them.

B. THE FIRST AMENDMENT: WHAT CONSTITUTES POLITICAL SPEECH?

“Core political speech consists of conduct and words that are intended to directly rally public support for a particular issue, position, or candidate. The United States Supreme Court suggested in Meyer that core political speech involves any interactive communication concerning political change.”¹⁵ Meyer v. Grant, 486 U.S. 414 (1988). Speech concerning public affairs is at the very core of what the First Amendment framers aimed to protect. “Because political speech is deserving of the utmost constitutional protection and “[t]he First Amendment protects employees from termination of their employment in retaliation for the exercise of speech on matters of public concern,” McVey v. Stacy, 157 F.3d 271 (4th Cir. 1998), the content of the speech itself must be scrutinized in order to determine if the speech is political or touches upon a matter of public concern. Id. During political campaigns, the First Amendment provides extensive protection to individuals who seek to freely express their political views. “The First Amendment affords the broadest protection to discuss public issues and debate on the qualifications of candidates, reflecting a profound national commitment to the principle that debate on public

¹⁵ Debates on societal issues and candidate qualifications all constitute protected free speech.

issues should be uninhibited, robust, and wide-open.” N.Y. Times Co., 376 U.S. at 270. Social media has continuously influenced how we perceive political candidates during election cycles. In 2012, President and Democratic nominee Barack Obama used social media to debate then-current issues. Online social networks provide a simple and cost-effective approach to reach a specific audience in hopes to sway the vote in a specific direction.

The Supreme Court of Oklahoma held in Thompson that the publications were constitutionally protected political speech, which precluded claims for defamation. Gaylord Entm’t Co. v. Thompson, 958 P.2d 128 (1998). Two lawyers sued media companies for defamation relating to articles discussing interest group’s determination to change state tort laws. Id. The court in Thompson defines political speech as any form of speech that discusses governance and its actors. Id. The court explains that:

Without accurate media coverage and discussion of issues that are of governmental interest, it is doubtful that the general public would be able to make informed decisions and participate intelligently in their governance, nor would representatives of government be able to perform their assigned tasks effectively, and thus, the protections of such activity is essential for an effective democracy. Id.

Election cycles are one of the most opinionated discussions conducted in the United States. With social media continuing to play a larger role every election cycle, lawmakers are continuously trying to govern what constitutes protected political speech. The court in McKimm states “The knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” McKimm v. Ohio Elections Comm., 89 Ohio St. 3d 139 (2000). Protected political speech will continue seeing complications in the form of blog sites like Reddit because of one’s inability to be able to prove whether a blog post is intended to be fact or opinion. Courts have begun hearing cases regarding a blogs role in defamation contexts. The court in Thompson notes that “if there is a rational connection between

the communication or utterance complained of as defamatory and the author's quest for political change, the communication should be viewed as protected political speech and a means of securing a change in the government's conduct of its business." Thompson, 958 P.2d at 128.

Arguably, any Trump suit would likely fall to a motion to dismiss based on the notion that political speech is highly protected, especially during political campaigns. The Trump family has notoriously threatened suit with the possible intention to intimidate individuals from entering suit against them. Based on case law in New York, it seems inevitable that a summary judgment motion would come quickly.

IV. DEFENSES TO DEFAMATION CLAIMS

When an individual is sued for defamation, like any other suit, it does not necessarily mean they will prevail. Defamatory statements can touch a large audience with the click of a button, and it is essential that a remedy exist for those who undergo online defamation. Defamation is an intentional tort, and the plaintiff has the burden of proving that the defendant acted with the intent to harm their reputation. A defamation-defendant has several different defenses that can be raised to rebut any defamatory presumption, whether it be libel or slander. As a legal shift in defamation caselaw goes into the internet realm, the traditional defenses to defamation remain intact. With the ability for instant fact checking of many stories that are published online and "shared," defamation defenses are more likely to be quickly stricken or proven. There are several defenses a defamation-defendant can raise, but two common defenses are: (1) truth and (2) statement of opinion.

A. DEFENSES TO DEFAMATION: TRUTH

"The determination of whether a publication is an actionable statement of fact or a constitutionally protected statement of opinion, like the determination whether a statement is

false and defamatory, is a question of law.” Vice v. Kasprzak, 318 S.W.3d 1 (Tex. App. 2009). The defense of truth was promoted by Alexander Hamilton in Croswell. People v. Croswell, 1804 WL 874 (N.Y. Sup. Ct. 1804). “The right of giving the truth in evidence, in cases of libel, is all-important to the liberties of the people.”¹⁶ One of the biggest issues facing courts on defamation regards truthful statements made online. As the complexity of what constitutes online defamation grows, what defense a defendant can use to combat such claim becomes complex as well. “Truth provides a complete defense to defamation claims.” Dillon, 704 N.Y.S.2d at 1. The burden in proving that the alleged defamatory statements are false shifts to plaintiff. G.D. v. Kenny, 205 N.J. 275 (2011). Complications on behalf of the plaintiff arise, because traditionally, the plaintiff does not want society knowing the statements are true. In a defamation suit, instances occur in which the defense of truth is raised when defamatory statements are not completely accurate. Id. Courts have looked to the “substantial truth” test in order to determine whether a statement at issue is in fact false. Vice, 318 S.W.3d at 18. “The “Substantial truth” test, as applied in defamation actions to determine falsity of a factual statement, is the same whether the burden rests on the plaintiff to prove falsity or on the defendant to prove an affirmative defense of substantial truth.” Id. The court in Vice notes that “we consider whether it is more damaging to the plaintiff’s reputation in the mind of the average person than a truthful statement would have been.” Id. One of the most crucial aspects in the defense of truth is the determination of whether the statements are factual or opinionated in nature. Id. The Texas Supreme Court in Vice references Milkovich in determining whether a defamatory statement is

¹⁶ Historical Society of the New York Courts, “Truth as a Defense in a Libel Action,” <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-02/history-new-york-legal-eras-people-croswell.html>.

factual or opinionated. *Id.* In Milkovich, the following principles were used in determining whether a statement is factual or opinionated:

(1) the statement must be provable as false, at least “where public-official or public-figure plaintiffs [are] involved”; (2) constitutional protection is afforded to “statements that cannot ‘reasonably be interpreted as stating actual facts’ ” in order to assure “that public debate will not suffer for lack of ‘imaginative expression’ or ... ‘rhetorical hyperbole.’ ”; (3) “where a statement of ‘opinion’ on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth”; or if the statement involves a private figure on a matter of public concern, the “plaintiff must show that the false connotations were made with some level of fault”; and (4) the statements must be given “enhanced appellate review” to assure that these determinations are made in a manner that does not “constitute a forbidden intrusion” into free speech. *Id.*

The principles used in determining whether defamatory statements are factual or opinionated has been helpful for the courts. Truth, being a common defense to defamation, requires complex analysis in determining its proper usage. The Texas Supreme Court in Vice provides a proper analytical framework for courts to use when the defense of truth is raised in defamation cases.

B. DEFENSES TO DEFAMATION: STATEMENT OF OPINION

As the majority of individuals continue to use expressive speech online, an internet user’s ability to state personal opinions continues as well. Social sharing has become a significant way in which one’s personal opinion reaches a larger audience. Statements of opinion made by individuals online are protected under the First Amendment. Scholz v. Delp, 473 Mass. 242 (2016). “Whether a statement is an actionable factual assertion or a protected opinion is a question of law if the statement unambiguously constitutes either fact or opinion, and a question of fact if the statement reasonably can be understood both ways.” *Id.* With the accessibility to online fact checking, internet users have the capability of determining whether a statement is factual or opinionated. In Scholz, wife’s statements in a newspaper discussing husband’s suicide

being influenced by a breakup of his rock band were held to be statements of opinion, thus not defamatory in nature. Id. The court concluded that there was no concrete proof that the husband did in fact commit suicide for the specified reasons, and concluded that the statement was an opinion. Id. The Scholz court looks at several factors in determining whether a statement is factual or opinionated:

In a defamation action, factors to be considered in determining whether a statement is one of fact or opinion include the specific language used; whether the statement is verifiable; the general context of the statement; and the broader context in which the statement appeared, as well as any cautionary terms used by the person publishing the statement. Id.

The court's analytical framework in determining a factual or opinionated statement will help to deter complications in subsequent cases. Easy accessibility to online sources, coupled with one's ability to post "speech" with the click of a button, courts are troubled with determining what is fact or opinion in the defamation context. Courts must look at the statement in its entirety, not simply a sentence, in determining whether the statement is a fact or an opinion. Social media sites such as Facebook and Twitter have become some of the largest players in providing news online. Not all communications are truthful in nature, and the capability for an online user to "share" opinionated articles will continue to create complex issues for the courts.

V. SLAPP DEFENSE: ONE BIG BLUFF?

One of the most powerful rights afforded Americans is freedom of speech. The United States Supreme Court has recognized one's ability to petition the government as the foundation of our country. "California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation (SLAPP) that "masquerade as ordinary lawsuits," but are intended to deter ordinary people "from exercising their political or legal rights or to punish them for doing so." Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013). SLAPP suits are used to silence critics by compelling them to spend money on lawsuits

that are unwarranted. Many states have enacted anti-SLAPP statutes intending to protect free speech that provide quick hearings of any claims brought against them. California has adopted an anti-SLAPP statute allowing defendants of a suit to file a special motion to strike. Id. Prevailing on an anti-SLAPP motion shifts the burden to the defendant to show that the plaintiff's claim arises in continuance of the defendant's First Amendment right of free speech. Id. In Makaeff, a factor in determining whether a SLAPP defense would be successful fell on the California Court of Appeals' determination of Trump University's public figure status. Whether Trump University was a public figure was crucial because it played a role in whether plaintiff needed to establish actual malice. "Under California's anti-SLAPP statute, such acts must be "in connection with a public issue," and include: any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. Cal.Civ.Proc.Code § 425.16(e)(3).

Webster Tarpley's lawyers are asking a Maryland Judge to throw Trump's defamation claim under an anti-SLAPP provision.¹⁷ Tarpley's attorneys acknowledge the wealth associated to the Trump family. Therefore, they believe an anti-SLAPP argument would aid in cost mitigation against fraudulent claims aimed at abridging First Amendment free speech. As in Makaeff, the burden of proof for a defamation claim will fall on the Maryland court's determination of Trump's public figure status. Arguably, Melania Trump is a public figure, therefore she would have the burden to establish the heightened standard of proof for defamation laid out in Sullivan. Id. With the heightened burden of proof that Trump would likely have to overcome, Tarpley's anti-SLAPP defense would likely prevail in Maryland courts.

¹⁷ Zoe Tillman, In Melania Trump Suit, Journalist Invokes Maryland's Anti-SLAPP Law, Law.com, Oct. 18, 2016.

VI. CONCLUSION

The ability to communicate instantly with individuals online is domineering in society today. When someone has the ability to post a blog or a video on the internet, millions of people are able to “share” the materials instantaneously. With the upcoming 2016 presidential election upon us, political informants for both parties are constantly attacking the other party’s candidate. Both Webster Tarpley and The Daily Mail’s articles both premise the notion that Melania Trump was involved in prostitution in the 1990s. With the ever growing internet influence on our lives, news sources have jumped on the story and made it top news. Influence in a political election has consistently been present throughout American politics, but in this specific instance, it is difficult to determine if it went past First Amendment protections.

Melania Trump’s suit against both The Daily Mail and Webster Tarpley comes at a time when courts are divided regarding defamation and the internet. The complexity to what constitutes free speech online is a relatively new legal arena that lawmakers are just beginning to tackle. The Trump family is known to use legal action as a bargaining chip with entities they disagree with. In the instant case, the court’s ruling of whether the statements made by both Webster Tarpley and The Daily Mail are protected will help lawmakers have a more comprehensive understanding of what constitutes online defamation.

Melania Trump has persisted that regardless of apologies, defamation claims will go forward against both Webster Tarpley and The Daily Mail. There is an uphill battle in proving that both parties acted in a way that is neither protected by First Amendment principles as well as the actual malice standard, which is fundamental in defamation suits. With the growing

capability to be able to “share” news on various social sites, proving a claim of defamation will become difficult for alleged victims. The First Amendment protects one’s right to be able to express their opinion, particularly individuals who are consistently in the media spotlight. With the inability to hide from constant fact checking of public figures, common defamation defenses of truth and statement of opinion will be more complex. The tools that technological advances has afforded us, the ability to edit clips and images has allowed individuals to place others in a more positive or negative light. Memes, an image containing edited captions, has become a focal point in social media communication. With Melania Trump inevitably in the crossfire with both parties, a pending lawsuit could create lawmakers with either a headache or a finite solution to defamation and the internet.

II) Trump Suits: Trumping the Tax Code

I. FATUAL BACKGROUND

Donald Trump, the 2016 Republican presidential nominee, has come under fire for several controversial topics throughout the presidential cycle. One of the most common actions taken by any presidential nominee is releasing their past tax returns. Donald Trump has been persistent on the notion that he is under a routine business audit and will release his tax returns following the audit. Donald Trump has touted himself as being a billionaire with his wealth coming from the Trump Organization in which he runs. With Trump’s notoriously high ego, skepticism around his actual wealth began swirling when he withheld his prior tax returns. On October 1st, 2016, the New York Times released, without Donald Trump’s consent, 1995 tax records showing a loss of nine-hundred sixteen million dollars. Donald Trump’s tax returns, first reported by the New York Times, were obtained through an online leak. WikiLeaks has noted

that they intended to release Donald Trump's tax returns, but the source of such leak remains unknown. The tax return leak shows that Mr. Trump did not pay federal income tax and as he claims "that makes me smart."¹⁸

The Trump family is notorious for threatening suit whenever the opportunity is afforded. The New York Times article suggests that Donald Trump could have evaded paying taxes for nearly twenty years because of losses relating to his real estate investments.¹⁹ Online leaks has become a standard theme in the 2016 presidential election. Both Hillary Clinton and Donald Trump have come under target to leaks, which have negatively impacted their campaigns. Donald Trump requests the New York Times provide information regarding who leaked his tax returns. Although Donald Trump has threatened suit against the New York Times for leaking his tax returns, the Times would be able to raise a persuasive First Amendment defense against any claims.

II. LEAKING PRIVATE DOCUMENTS: EFFECTIVE JOURNALISM?

On October 22nd, 2010, the largest leak of classified documents was published online showing army reports detailing five years of the Iraq war.²⁰ WikiLeaks is an online media company in the business of publishing classified documents at both the corporate and government level. The goal of WikiLeaks is to provide people access to confidential documents that increase awareness throughout the world of government and corporate actions.²¹ The reporter's privilege, which is recognized in ten circuits, grants protection to a reporter from

¹⁸ Steve Eder, Does Donald Trump Pay Taxes? Here is What We Know, N.Y. Times, Sept. 27, 2016.

¹⁹ Matthew Ingram, Why the New York Times Could Face a Legal Battle Over Its Trump Tax Story, Fortune.com, Oct 3rd, 2016.

²⁰ Baghdad War Diary, WikiLeaks, <http://wikileaks.org/irq/> (Feb. 24, 2014).

²¹ See About, WikiLeaks, <http://wikileaks.org/About.html>.

having to testify about confidential information that they leak. Of the ten circuits that implement the reporter's privilege, there is a large circuit split defining a journalist whom can claim protection under the privilege. In the Ninth Circuit, a journalist is defined as an individual who intends to publicize information and whether intent was clear at the beginning of the newsgathering process. Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993). The court argues that the reporter's privilege is intended to protect fact-finding reporting, a fundamental principle under the First Amendment. Id. An important factor considered when implementing the reporter's privilege is whether the type of journalism at issue is exploratory in nature. Exploratory journalism has fundamentally been protected under the First Amendment at the inception of its adoption. Disallowing protection for investigative journalism would harm the interest of those who rely on these individuals to provide them with proper information. The internet has become a juggernaut for media outlets, and information that is leaked to the public habitually appears primarily on the internet. With companies like WikiLeaks branding themselves as a media organization, lawmakers have argued that these companies are not engaged in investigative reporting.²² Investigative reporting typically requires extensive research, but those who simply leak information, should not be able to invoke the reporter's privilege.

The implementation of the reporter's privilege is intended to permit open communication into public conversation. With leaked information becoming a norm in the internet age, the debate as to the legality of the reporter's privilege comes into question. One issue is whether WikiLeaks and similar online organizations could assert the reporter's privilege and shield themselves from government questioning. One of the strongest constitutional protections is one's

²² Jonathan Peters, Wikileaks Would Not Qualify To Claim Federal Reporter's Privilege in Any Form, 63 Fed. Comm. L.J. 667 (2011).

ability to freely express themselves in an open forum. Restricting a journalist's ability to provide information that is believed to be vital to the public, would be an abridgement on the First Amendment.

III. LEAKING PRIVATE DOCUMENTS: IS IT PROTECTED?

The growing internet age has created issues with whether leaking confidential information is protected under the First Amendment. The intent of the First Amendment is to protect everyone's right to free expression, regardless of the medium in which the expression is construed.²³ Leaked information clarifies the necessity for First Amendment ideologies that significantly outline and constrain the categories of confidential materials whose conveyance public officials can prosecute. Balancing the public's interest with First Amendment principles highlights the continued efforts lawmakers need to make in the growing internet age. Because of the usual anonymity of leaked information, the ability in determining its source is typically without prevail. Lawmakers have argued that privacy concerns result from shielding those who leak information to the public via online websites. Shield laws provides absolute journalism protection, regardless of the way in which the materials were obtained. Providing shield laws to individuals that have resources to leak information would greatly impact the privacy expectations of individuals on a global scale. Individual privacy expectations could be breached on the presumption that hacked information, information intended to be kept confidential, could be exposed without identifying it as a criminal act. Several jurisdictions hold that regardless of the legality in how the information is disclosed, shield laws still provide absolute protection to individuals. Beach v. Shanley, 465 N.E.2d 304, 306 (N.Y. 1984). States that implement shield laws have been judicially interpreted as obliging reporters to testify regarding criminality of

²³ Leo Morris, We are all the Press, Opening Arguments blog, Nov. 17, 2005

known sources. The difficulty in a state's interpretation of testifying to only identified sources greatly strengthens protections to those leaking confidential materials, based on the difficulty in proving who in fact leaks the information. Evidently, with one's belief that criminality is intended for those leaking information, typically leaked information consists of government documents. Balancing individual interest with First Amendment principles in protecting those who leak information will continue to create a headache for courts. Governments globally prosecute individuals who leak private government documents to the fullest extent. Edward Snowden, a former CIA Intelligence employee, released thousands of worldwide government documents that were classified. In 2013, the United States Department of Justice imposed criminal charges on Snowden for theft of government property. With the controversial actions taken on part of the United States Government, Snowden has gained critics on both side of the spectrum. While the United States Government argues that our national security has been placed at risk, others hold the notion that too much government secrecy has caused distrust between the government and its citizens. Legal analysts have stated that "to gain the trust of the American people, the intelligence community must be understood as being governed by hard, intelligible jurisdictional constraints. And in the post-9/11, post-WikiLeaks and post-Snowden era, it will be harder than ever to persuade Americans that such hard constraints exist."²⁴ With worldwide knowledge of Snowden's actions, it is difficult to envision enforceability of absolute protectionism to individuals who leak government documents to the press.

In Bartnicki, the seminal issue was "where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has

²⁴ Jane Chong, Why Americans Don't Trust the Intelligence Community, Lawfare (Mar. 3, 2015).

obtained in unlawfully, may the government punish the ensuing publication of that information based on the defect in chain?" Bartnicki v. Vopper, 532 U.S. 514 (2001). The issue risen in Bartnicki has become a notable problem throughout the 2016 presidential election. Newspapers, as in Donald Trump's case with the New York Times, often receive such leaked information through various sources, not through their own resources. An issue becomes whether states could prosecute media outlets for publishing such sources that are a matter of public concern. The court noted that there is a constitutional privilege in publishing information obtained unlawfully by a third party. Id. The inability to prosecute the publication of truthful information infrequently can satisfy constitutional standards. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

Based on the United States Supreme Court ruling in Bartnicki, it does not seem plausible that Donald Trump would prevail in suit against the New York Times. Although individuals, like Donald Trump, are angered by leaked information, bringing suit against media outlets who report on leaked information will likely not prevail. Media outlets see a public interest in information that is obtained by third parties, regardless of how those third parties obtain their information. The ruling in Bartnicki shines a light on court's trend in protecting effective journalism in favoring public interest.

IV. Conclusion

One of the most complex issue facing online leaks is the inability to prove its source. WikiLeaks continuously takes credit for leaking information that is believed to be beneficial to individuals, but they do not release the source. Courts continue to be split on protectionism and journalism. The First Amendment is one of the greatest rights afforded to United States Citizens, but laws like shield laws provide a different context. Shield laws create difficulty in determining what journalism is protected under the First Amendment and what journalistic speech is not.

Sites like WikiLeaks do not conduct investigative research into issues, they release information that has already been founded. The internet continues to be a growing realm that continuously creates complex issues for the courts. Journalism is continuing to grow on the internet and people are becoming heavily invested in online news. Shield laws are a stepping stone with protectionism and online journalism, but much needed reform will provide individuals with a concrete understanding of what online journalism is protected under the First Amendment.