Defamation Dilemma: Is the First Amendment Protecting Unprotected Speech?

"As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."  

I. INTRODUCTION

The First Amendment, made applicable to the states through the Fourteenth Amendment, generally prevents the government from proscribing speech, or even expressive conduct, because it disproves of the ideas expressed. From 1791 to the present, however, society has permitted restricting the content of speech in limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." These narrowly limited classes of speech fall outside the First Amendment’s “protective shield” and have a historical foundation in the Supreme Court’s free speech tradition. One such historic and traditional category is defamation.

2. See U.S. Const. amend. I (guaranteeing freedom of speech); id. amend. XIV, § 1 (proscribing state conduct); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (emphasizing First Amendment’s importance in limiting government’s ability to prohibit speech). The Supreme Court further noted that content-based regulations are presumptively invalid. See R.A.V., 505 U.S. at 382; see also United States v. Stevens, 559 U.S. 460, 468 (2010) (stating government has no power to restrict expression because of content).
4. See United States v. Alvarez, 567 U.S. 709, 717-18 (2012) (summarizing history of content-based restrictions on speech); id. at 747 (Alito, J., dissenting) (noting certain false factual statements fall outside of First Amendment’s “protective shield”); see also Stevens, 559 U.S. at 468-69 (calling categories of restricted speech “historic and traditional” and “well-defined”).
5. See Stevens, 559 U.S. at 468 (identifying defamation “historic and traditional” category); see also Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (deciding “libelous utterances” not protected under First Amendment). The Supreme Court reasoned that “libelous utterances” are of slight social value, and any benefit that may be derived from them “is clearly outweighed by the social interest in order and morality.” Beauharnais, 343 U.S. at 256-57.
Though it is well understood that the First Amendment does not protect defamatory language, whether an injunction against future speech following a defamation trial is constitutional remains unclear.6 Recently, in Sindi v. El-Moslimany,7 the First Circuit acknowledged the current circuit split regarding this issue.8 The Sindi court ultimately decided the issues concerning the validity and enforceability of the challenged injunction on narrower grounds, leaving unsettled the question of whether an injunction against future speech following a defamation trial generally violates the First Amendment.9 The Sixth Circuit, as well as state courts in California, Georgia, Kentucky, Minnesota, Nebraska, Ohio, and Tennessee, has adopted a view that an injunction against future speech following a defamation trial may be consistent with the First Amendment.10 On the other hand, the Seventh Circuit, joined by the Pennsylvania and Texas Supreme Courts, has expressed deep skepticism, suggesting this remedy after a defamation trial is per se unconstitutional.11 Although the Supreme Court once granted certiorari to resolve this issue, it disposed of the case on less


7. 896 F.3d 1 (1st Cir. 2018).

8. See *id.* at 30 (addressing split in decision between Sixth Circuit and Seventh Circuit surrounding injunctions’ constitutionality).

9. See *id.* (deferring deciding broader constitutional question). The Sindi court held that the challenged injunction did not survive “the strict scrutiny required to legitimize a prior restraint, principally because of its failure to account for contextual variation.” *Id.* Thus, the court did not reach the question of whether the First Amendment “will ever tolerate an injunction as a remedy for defamation.” *Id.*


11. See McCarthy v. Fuller, 810 F.3d 456, 461 (7th Cir. 2015) (holding permanent injunction overbroad and unconstitutional); Willing v. Mazzone, 393 A.2d 1155, 1157 (Pa. 1978) (determining court order enjoining former client from demonstrating against lawyers unconstitutional prior restraint); Kinney v. Barnes, 443 S.W.3d 87, 89 (Tex. 2014) (holding free-speech clause of Texas’s constitution prohibits permanent injunction against future speech following defamation action).
controversial grounds, leaving the broader constitutional question open.12

More deeply rooted in this split is the issue of prior restraints.13 The Supreme Court has stated that a prior restraint bears a heavy presumption against its constitutional validity.14 In determining the constitutional validity of an injunction, courts must address whether an injunction against future speech already found to be defamatory constitutes a prior restraint, and if so, whether the prior restraint is permissible.15 Though the Court has traditionally viewed injunctions against future speech as “classic examples” of unconstitutional prior restraints, an emerging modern trend finds such injunctions permissible, so long as they are limited to speech specifically adjudicated to be unlawful.16 Moreover, injunctions carry greater risks of censorship and discriminatory application.17 A court’s duty to review the efficacy and consequences of an injunction therefore takes on special importance in the First Amendment context.18

This Note argues that when examining the constitutionality of an injunction against future speech following a defamation trial, a proper analysis contains

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12. See Tory v. Cochran, 544 U.S. 734, 737-38 (2005) (determining party’s death made it unnecessary and unwarranted to explore petitioner’s basic claims). The Supreme Court held that the injunction, as written, lost its underlying rationale following Cochran’s death, and therefore the grounds for the injunction were diminished. See id. at 738. Consequently, the Court determined the injunction amounted to an overly broad prior restraint on speech. Id. The Court specifically noted that injunctive relief “may still be warranted, [and] any appropriate party remains free to ask for such relief.” Id. Thus, the Court ultimately left the question of whether an injunction against future speech generally violates the First Amendment unsettled. See id.

13. Compare Chemerinsky, supra note 6, at 163-65 (arguing injunctions preventing speech before it occurs constitute inherently unconstitutional prior restraint), with Tensmeyer, supra note 6, at 62 (arguing against categorically barring injunctions in defamation cases). Because permanent injunctions are classic examples of prior restraints, and prior restraints have a heavy presumption against constitutional validity, permanent injunctions are therefore presumptively invalid under the First Amendment. See Chemerinsky, supra note 6, at 163-65. In contrast, the “modern rule” allows for injunctions so long as they restrict only speech that has been specifically adjudicated to be unlawful. See Tensmeyer, supra note 6, at 49-50.


15. See Sindi v. El-Moslimany, 896 F.3d 1, 30 (1st Cir. 2018) (holding injunction at issue example of prior restraint). The court reasoned that because the injunction was a judicial order prohibiting certain communications before such communications occurred, the injunction was a “paradigmatic example of a prior restraint.” Id. at 31; see Alexander v. United States, 509 U.S. 544, 550 (1993) (putting forth permanent injunctions forbidding speech activities example of prior restraint). The Court in Alexander defined a prior restraint as a term “used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’” 509 U.S. at 550 (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984)). In holding that the Racketeer Influenced and Corrupt Organizations Act forfeitures based on sales of obscene materials did not violate the First Amendment, the Court reasoned that the forfeiture order imposed no prior restraint on petitioner’s ability to engage in expressive activity. See id. at 551-53.

16. See Tensmeyer, supra note 6, at 44-45 (discussing traditional and modern views of injunctions against future speech).

17. See Sindi, 896 F.3d at 29 (stating judges must scrutinize injunctions restricting speech carefully).

elements taken from both sides of the circuit split.\textsuperscript{19} This Note discusses the historical view of injunctions as a permissible remedy following a defamation trial, as well as the prior restraint doctrine.\textsuperscript{20} Then, it analyzes the differing views among circuits, as well as the constitutional impact of permitting injunctions against future speech.\textsuperscript{21} Finally, this Note concludes that an injunction against future speech following a defamation trial may not constitute a prior restraint, and therefore may be a constitutional remedy under the First Amendment.\textsuperscript{22}

II. HISTORY

A. Origin of the First Amendment and Freedom of Speech

The First Amendment, the first of ten amendments to the United States Constitution that make up the Bill of Rights, was ratified in 1791.\textsuperscript{23} Inspired by Thomas Jefferson and drafted by James Madison, the Framers adopted the Bill of Rights in response to calls from several states for greater constitutional protection of individual liberties.\textsuperscript{24} Initially, much debate surrounded the need for a specific declaration of individual rights in the Constitution.\textsuperscript{25} The Federalists opposed the inclusion of a bill of rights on the grounds that it was unnecessary, while the Anti-Federalists, who were afraid of a strong, centralized government, refused to support the Constitution without a bill of rights.\textsuperscript{26}

Recently freed from the control of the English monarchy, the American people wanted strong guarantees that the new government would not trample on their newly-won freedoms.\textsuperscript{27} In order to ensure this, the Anti-Federalists demanded that a specific enumeration of fundamental rights be written into the Constitution.\textsuperscript{28} After four years of intense debate, the Founding Fathers ultimately conceded to both public sentiment and Jefferson, who argued, “A bill of rights is what the people are entitled to against every government on earth,
general or particular, and what no just government should refuse, or rest on inference.”

Of the ten amendments within the Bill of Rights, the First Amendment is arguably the most important to maintaining democracy. It safeguards five of the most basic human liberties: freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government. These five liberties are considered America’s “first freedoms,” not just because they are listed in the First Amendment, but also because they are fundamental rights that allow for someone to “follow one’s conscience, speak out for justice, and organize for change.”

Protecting these five fundamental rights is essential to achieve the free and open exchange of ideas, a core value of representative governance.

Freedom of speech—the focus of this Note—gives Americans the right to express themselves without the worry of government censorship and intervention. This fundamental right is the most basic component of freedom of expression and essentially separates democracy from totalitarianism. While the First Amendment specifically protects an individual’s right to free speech, it does so through the use of broad, doctrinal “terms of art.” As such, courts

29. See The Bill of Rights: A Brief History, supra note 23 (emphasizing public sentiment’s impact on decision to include Bill of Rights).
31. See U.S. CONST. amend. I (identifying protected rights). The First Amendment states in full: “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.”
34. See The Bill of Rights: A Brief History, supra note 23 (providing First Amendment protects unpopular opinions from government censorship).
35. See Schauer, supra note 30, at 1 (stating freedom of speech “separates democracy from totalitarianism, liberty from restraint, and freedom from bondage”); see also Tsesis, supra note 33, at 1027 (highlighting freedom of speech’s essential functions in context of representative government). A functioning representative government requires freedom of speech because it gives people the opportunity to “express themselves publically [sic] through political debate, compromise agreement, custom, statutory formation, and constitutional amendment and privately through creative endeavors, associations, and day-to-day conversations.” Tsesis, supra note 33, at 1027.
36. See Schauer, supra note 30, at 15 (acknowledging First Amendment’s language contains “theory-soaked” and “doctrinally-encumbered terms of art”); see also Jud Campbell, Natural Rights and the First Amendment, 127 YALE L.J. 246, 251 (2017) (pointing out modern lawyers tend to view constitutional phrases terms of art). These terms of art often produce sparse and inconsistent results. See Campbell, supra, at 251.
continually interpret and dispute the meaning and scope of the right to free speech. Though free speech jurisprudence is still evolving today, the Supreme Court has made one thing clear: This right is not absolute.

B. Defamation as a Limitation to Free Speech

The liberty to speak and write without government interference is a bedrock principle of the Constitution, which is why the Supreme Court has been, and remains, reluctant to restrict or limit this right. From 1791 to the present, however, the Supreme Court has permitted restrictions on the content of speech in a few limited areas. One such category of unprotected speech is defamation.

Defamatory language is language that tends to harm the reputation of another by lowering him or her in the opinion of the community, or by discouraging third persons from associating with that person. The prohibition against defamation is broken down into two separate actions: libel and slander. Libel is a written defamatory statement, while slander is an oral defamatory statement.

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40. See R.A.V., 505 U.S. at 382-83 (listing categories of speech not worthy of constitutional protection). The Supreme Court notes that any benefit derived from these limited areas of unprotected speech is outweighed by society’s interest in order and morality. Id.

41. See Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding libelous utterances not constitutionally protected speech).

42. Restatement (Second) of Torts § 559 (Am. Law Inst. 1977) (defining language rising to level of defamation). Defamation has been defined generally as an attack on the reputation or character of another. See Kevin Martin, Note, Defamation Defined, 43 Chi.-Kent L. Rev. 2, 4 (1966). The most popular definition, however, comes from Prosser’s treatise on the law of torts (Prosser). Id. Prosser states that “[d]efamation is an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him.” Id. (quoting William L. Prosser, Law of Torts 756 (3d ed. 1964)).

43. See Martin, supra note 42, at 2 (explaining defamation’s two distinct actions).

44. See Restatement (Second) of Torts § 568 (Am. Law Inst. 1977) (defining libel and slander). The Restatement states that libel “consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” Id. In addition to publishing defamatory matter by spoken words, the Restatement states that slander can arise through “transitory gestures” or by any form of communication not
As defamation is a state cause of action, and tort law varies widely across states, it is difficult to impose a set of universally accepted elements for a defamation action.\textsuperscript{45} What a plaintiff must prove to succeed in a defamation action depends on the identity of the plaintiff, the identity of the defendant, the nature of the defamatory utterance, and the specific jurisdiction.\textsuperscript{46} The Second Restatement of Torts, however, provides that defamation requires: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”\textsuperscript{47}

The plaintiff’s identity has significant consequences, as different standards apply depending on whether the plaintiff is considered a public figure or a private figure.\textsuperscript{48} Private-figure plaintiffs must establish fault by the defendant, which has been interpreted as requiring negligence.\textsuperscript{49} But if the plaintiff is a public figure, the plaintiff must establish “actual malice” by the defendant in order to recover.\textsuperscript{50} The heightened standard for public figures is based on the fact that public figures generally seek out attention, and because their notoriety often affords them immediate access to redress through the media, the law assumes they need less protection from defamatory speech than the average person.\textsuperscript{51}
C. Injunctions as Permissible Remedies Following Successful Defamation Trials

The two most common remedies following successful civil trials are judgments entitling the plaintiff to collect monetary damages from the defendant and court orders requiring the defendant to refrain from certain wrongful conduct. It has been a longstanding fixture in defamation trials, however, that plaintiffs are not entitled to injunctive relief, solely monetary damages. This precept rests on one of the strongest presumptions in First Amendment jurisprudence: Injunctions against future defamatory speech are unconstitutional prior restraints.

1. The Prior Restraint Doctrine

The prior restraint doctrine deals generally with government restrictions imposed on speech prior to publication. Under the prior restraint doctrine, the government may not restrict a particular expression prior to dissemination, despite the fact that the same expression could be constitutionally punished after dissemination. Thus, the doctrine turns exclusively on the nature and form of governmental regulation, not on the expression’s content or substance. Notably, the Supreme Court has held that a prior restraint on expression is presumed unconstitutional.

defamatory statements). Public figures can often avail themselves of an effective self-help remedy by speaking out against the defamer through media, while private figures do not have this same access to self-help. Id.

52. See Ardia, supra note 6, at 14 (identifying monetary damages and injunctive relief most common remedies).

53. See id. at 18 (discussing longstanding no-injunction rule in Anglo-American law). The no-injunction rule was established in eighteenth-century England, prior to the American Revolution. Chemerinsky, supra note 6, at 167. Nineteenth and twentieth century-American courts uniformly adopted this traditional English rule. See id. at 167-68.

54. See Ardia, supra note 6, at 4 (emphasizing presumption injunctions against libel equate to unconstitutional prior restraints); Chemerinsky, supra note 6, at 165 (arguing injunctions prohibit future expression, and thus prior restraints). Supporters of the traditional approach argue that injunctions following a defamation trial should be treated as unconstitutional prior restraints, therefore categorizing injunctions as prohibitions of future expression. See Chemerinsky, supra note 6, at 165. Moreover, the Court has declared that prior restraints on speech constitute the most serious infringement on First Amendment rights. See id. at 166.

55. See Ardia, supra note 6, at 32 (explaining prior restraint doctrine in general terms).

56. See Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 VA. L. REV. 53, 53 (1984) (noting difference between prior restraints and subsequent punishment). The difference between prior restraints and subsequent punishment is that subsequent punishment is a penalty imposed after the communication has been made. Thomas I. Emerson, The Doctrine of Prior Restraint, 20 L. & CONTEMP. PROBS. 648, 648 (1955). Conversely, the doctrine of prior restraint would prevent that communication from occurring at all. Id.

57. See Emerson, supra note 56, at 648 (highlighting expression’s substance not central to doctrine’s applicability).

58. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (noting heavy presumption against prior restraints). The reasons for this strong support of freedom of the press and opposition to prior restraints can be traced back to the Old English licensing system, which required the approval of the state or church authorities before anything could be published. See Emerson, supra note 56, at 650, 652.
The Court’s first encounter with prior restraints came in Near v. Minnesota ex rel. Olson, in which a five-to-four majority struck down a law authorizing the permanent enjoining of violations by any newspaper or periodical found to have published an “obscene, lewd and lascivious” or “malicious, scandalous and defamatory” issue. The injunction at issue was directed at a newspaper after it had published a series of articles linking local officials to gangsters. The Court, invalidating the statute that authorized such an injunction, held that the statute did not deal with punishments, but instead suppressed the offending newspaper and put the publisher under “effective censorship.” Thus, the Court held that a prior restraint on publication was the “essence of censorship[,]” and as such, the statute infringed on the freedom of the press guaranteed by the First Amendment. In reaching this conclusion, the Court made clear that in certain exceptional circumstances, such as those dealing with national security, the presumption against prior restraints does not stand.

The Court in Near, however, did not expand on the kinds of restrictions to which the term “prior restraint” would apply. As a result, there was no overarching principle to help evaluate future attempts to restrict or regulate speech. In several cases after Near, the Supreme Court struck down injunctions against future speech, deeming them unconstitutional prior restraints. Similar

59. 283 U.S. 697 (1931).
61. See Near, 283 U.S. at 704 (summarizing statements behind reason for injunction); The Doctrine of Prior Restraint, supra note 60 (explaining nature of injunction at issue).
63. See id. at 713, 723 (holding statute’s operation “essence of censorship”). The Court specifically stated that the statute’s operation and effect in substance is that public authorities could bring a newspaper publisher before a judge for publishing defamatory matter, and unless the publisher has enough evidence to demonstrate to the judge that the alleged defamatory matter is true, the newspaper is suppressed and further publishing of the material is punishable. See id. at 713. The Court calls this “the essence of censorship.” Id.
64. See Redish, supra note 56, at 86 (articulating national security exception to prior restraint presumption). The Court, in carving out the national security exception, stated that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” Near, 283 U.S. at 716.
65. See Michael I. Meyerson, Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint, 52 MERCER L. REV. 1087, 1087 (2001) (calling Near decision missed opportunity); The Doctrine of Prior Restraint, supra note 60 (noting ambiguity in applying prior restraints). Because Near did not clearly define prior restraint, the result was ambiguity and misapplication of the doctrine by both scholars and the Court itself. See Meyerson, supra at 1087-89.
66. See Meyerson, supra note 65, at 1092 (deeming failure to precisely define prior restraint primary weakness in Near decision).
67. See id. at 1096-98 (identifying cases striking down injunctions after Near decision). In 1971, in New York Times Co. v. United States, the federal government requested an injunction to prohibit the New York Times from publishing the Pentagon Papers during the Vietnam War. See 403 U.S. 713, 714 (1971) (per curiam). Though each Justice published a separate opinion, the per curiam opinion focused on the issue of prior restraints. Meyerson, supra note 65, at 1097. The Court reiterated the idea that prior restraints are presumed unconstitutional, and the government has a heavy burden of demonstrating the injunction’s justification. See
to Near, none of these cases defined prior restraint, but instead proceeded on the assumption that whatever a prior restraint was, the injunctions at issue belonged in that category, and were thus unconstitutional.68

Finally, in 1993, in Alexander v. United States,69 the Court provided some clarity regarding injunctions against speech as prior restraints.70 The Court finally defined prior restraint as a term used “to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”71 The Court then stated that temporary restraining orders and permanent injunctions are “classic examples of prior restraints” because they are court orders that “actually forbid speech activities.”72 The Court’s opinion in this case lays the foundation for the no-injunction rule in defamation causes of action.73

2. Conflicting Views: The Traditional Approach v. the Modern Rule

Defamation claims are based on reputational harm, and reputational harm is not readily transferable into monetary relief.74 As money cannot restore a diminished reputation nor restore one’s prior emotional state, monetary damages are not necessarily the most adequate or satisfying remedy for this cause of action.75 Not surprisingly, defamation plaintiffs are left frustrated, and thus

_N.Y. Times Co. v. United States_, 403 U.S. at 714. In this decision, the Court did not opine why the government did not meet that burden. See id. In his concurring opinion, however, Justice Brennan wrote, “the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.” _Id._ at 725-26 (Brennan, J., concurring). The next major Supreme Court case dealing with injunctions as prior restraints occurred in 1976 in _Nebraska Press Ass’n v. Stuart_. See generally 427 U.S. 539 (1976). The Court struck down a state trial judge’s order prohibiting publishing “confessions or . . . facts ‘strongly implicative’ of the accused.” _Id._ at 541. In holding the order unconstitutional, the Court stated that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” _Id._ at 559.

68. See Meyerson, _supra_ note 65, at 1098 (emphasizing lack of clarity in defining prior restraint).
70. See _id._ at 550 (providing clear definition of prior restraint and relating definition to injunctions against speech).
71. _Id._ (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984)) (defining prior restraint).
72. _Id._ (deeming permanent injunctions against speech “classic example[[]]” of prior restraint).
73. See Chemerinsky, _supra_ note 6, at 163-66 (arguing injunctions against future speech unconstitutional prior restraints). The traditional no-injunction approach relies primarily on the fact that the Supreme Court in Alexander clearly and unequivocally held that a court order permanently enjoining speech is a prior restraint. See _id._ at 163-64.
74. See Ardia, _supra_ note 6, at 16 (noting difficulty of calculating monetary damages for reputational harm).
75. See _id._ (discussing inadequacy of monetary damages in defamation action). Ardia, in analyzing defamatory speech online, argues that in a situation where a “defendant engages in a continuing course of conduct that requires the plaintiff to bring multiple damage actions, an injunction may also be less burdensome on the parties and the court[,]” and deters further wrongful conduct from the outset. See _id._ at 58. Conversely, Chemerinsky argues that monetary damages do in fact deter defamation and quotes the Supreme Court in _New York Times Co. v. Sullivan_, explaining monetary damages are a potent weapon because “[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.” Chemerinsky, _supra_ note 6, at 170 (alterations in original) (quoting _N.Y. Times Co. v. Sullivan_, 376 U.S. 254, 277 (1964)).
courts have recently begun enjoining certain defamatory statements. A modern rule has since emerged, determining that injunctions can be a permissible remedy under certain circumstances, ultimately creating tension with courts that continue to follow the traditional “equity will not enjoin a libel” approach.

a. The Traditional Approach

The “traditional approach” to whether courts may issue injunctions as a remedy in a defamation case is based on the premise that injunctions against future speech are per se unconstitutional under the prior restraint doctrine. Under the traditional approach, injunctions are treated as prior restraints, and therefore are presumed unconstitutional. This is because injunctions against speech prohibit future expression, and thus carry greater risks of censorship and discriminatory application.

The primary fear among those who support the traditional approach is that injunctions prevent future speech, which may or may not be limited to repeating defamatory language beyond the First Amendment’s scope. In other words, supporters of the traditional approach believe that it is nearly impossible for courts to craft an injunction that would not be overbroad and that would not place the court in the role of the censor. A permissible injunction, if one exists at all, would have to be limited to the exact words the factfinder found defamatory,

76. See Chemerinsky, supra note 6, at 158 (acknowledging increase in number of courts imposing injunctions in defamation actions).

77. See Tensmeyer, supra note 6, at 45 (explaining lack of guidance from Supreme Court led to emergence of competing views); see also Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 746 (Neb. 1997) (highlighting general principles of equity).

78. See Chemerinsky, supra note 6, at 163 (equating permanent injunctions against speech with prior restraints). Injunctions in defamation cases are inherently unconstitutional prior restraints because the purpose of injunctions in these cases is to prevent speech before it occurs. Id. at 163-64.


80. See Chemerinsky, supra note 6, at 165 (emphasizing dangers of injunctions in First Amendment context). In Madsen v. Women’s Health Center, Inc., the Supreme Court noted the risks of censorship and discriminatory application posed by injunctions. See 512 U.S. 753, 764 (1994). As a result of the noted risks posed by injunctions, the Court believed that injunctions require a more stringent application of First Amendment principles. See id. at 765. The question for the Court was therefore “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” Id. Justice Scalia, dissenting in this case, instead felt that the correct standard was strict scrutiny, as an injunction against speech is the greatest threat to First Amendment values. See id. at 792-94 (Scalia, J., dissenting).

81. See Chemerinsky, supra note 6, at 165-66 (warning injunctions against future speech not limited to solely defamatory words). Injunctions against future speech may prohibit defendants from ever republishing statements regardless of the forum or purpose. See Sindi v. El-Moslimany, 896 F.3d 1, 33-35 (1st Cir. 2018). Injunctions against future speech fail to consider contextual variation, and thus can be so wide-ranging that they punish conduct that might be constitutionally protected. See id.

82. See Chemerinsky, supra note 6, at 171 (underscoring difficulty in formulating effective injunction due to danger of overbreadth). An overbroad injunction places the court in the role of a censor because the court would continually have to decide what speech is allowed and what speech is prohibited. Id.
which is ultimately ineffective because the defendant could avoid the injunction altogether by using slightly different words to make the same defamatory point.\(^83\)

An injunction that extends past those exact words previously found to be defamatory thus has the potential to reach statements that may be protected by the First Amendment.\(^84\) This danger of overbreadth is the essence of an unconstitutional prior restraint.\(^85\) Accordingly, the traditional approach views injunctions against future speech following a defamation trial as an inappropriate and unconstitutional remedy.\(^86\)

**b. The Modern Rule**

In contrast to the traditional approach, the “modern rule” permits injunctions against future speech following a defamation trial so long as the injunction is narrowly tailored and limited to restraining speech that has been specifically adjudicated to be unlawful.\(^87\)

The modern rule has been deemed a logical consequence of both the prior restraint doctrine and due process concerns.\(^88\) This theory was introduced by Martin Redish, the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University Pritzker School of Law, who argued that the crucial moment in distinguishing between constitutional and unconstitutional prior restraints occurs when the final judgment is entered.\(^89\) According to Redish, a

\(^{83}\) See id. (highlighting permissive injunctions’ uselessness in defamation actions). A permissive injunction, which could only target the exact words the court deemed defamatory, fails to account for contextual variation, and because of this, such injunctions, even if allowed, truly serve no purpose. See id. The district court in *Oakley, Inc. v. McWilliams* further illustrates this point. 879 F. Supp. 2d 1087, 1091 (C.D. Cal. 2012). In *Oakley*, plaintiffs sought to enjoin defendant from stating that plaintiffs “sent thugs, Blackwater operatives, or military special forces to intimidate him.” Id. The court expressed concern that “this injunction would be worthless if [defendant] could instead simply claim that Plaintiffs had hired the mafia or a street gang to threaten him.” Id. As such, the court found that “a narrowly tailored injunction would therefore fail to achieve its purpose of stopping the defendant’s defamatory statements.” Id.

\(^{84}\) See Chemerinsky, supra note 6, at 171 (asserting permissive injunctions in context of First Amendment can only restrict exact words adjudicated defamatory). It is difficult to know in advance what someone may say, and “the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975). Thus, an injunction that extends beyond what a court has previously deemed defamatory runs the risk of restricting protected speech. See Chemerinsky, supra note 6, at 172.

\(^{85}\) See Chemerinsky, supra note 6, at 172 (explaining danger of injunction restricting protected speech essence of prior restraint).

\(^{86}\) See id. at 173 (concluding Supreme Court should reaffirm long-standing rule equity cannot enjoin defamation). The bottom-line argument for proponents of the traditional approach is that injunctions against future speech are prior restraints that inherently violate the First Amendment, and therefore are not appropriate remedies in defamation suits. See id.

\(^{87}\) See Tensmeyer, supra note 6, at 45 (introducing modern rule). Though each court that has adopted the modern rule states the rule slightly differently, the general rule is that once a judge or jury determines the speech to be defamatory, the false speech may be enjoined. See id. at 53.

\(^{88}\) See id. at 53-54 (offering theoretical justification for modern rule); Redish, supra note 56, at 55 (emphasizing need for full and fair trial for adjudicating constitutional rights).

\(^{89}\) See Tensmeyer, supra note 6, at 54 (attributing theory to Redish, who argued moment of final adjudication most important); see also Martin H. Redish, NW. U. PRITZKER SCH. L., http://www.law.
restraint on expression or speech raises First Amendment concerns not when it is issued prior to publication, but when it is made without a full and fair judicial proceeding determining that it is constitutional. Thus, according to this theory, courts cannot restrict speech until they are sure, by means of a full and fair trial, that the speech is not constitutionally protected. The justification of the modern rule is essentially based on an application of Redish’s theory.

This modern rule first arose in the context of obscenity. In 1957, in _Kingsley Books, Inc. v. Brown_, the Supreme Court upheld a limited injunction against the sale and distribution of written or printed matter found, after a trial, to be obscene. The Court distinguished _Kingsley Books_ from _Near_ on the grounds that _Kingsley Books_ dealt with obscenity, rather than defamation. After _Kingsley Books_, state courts followed its ruling to its logical conclusion and applied it to defamation. Since then, both state and federal courts have utilized the modern rule. As a result, a circuit split currently exists surrounding the question of whether the traditional approach or the modern rule should prevail.

**E. The Circuit Split**

The emergence of the modern rule has created tension between both federal and state courts, and consequently, there is disagreement over whether

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90. See Tensmeyer, supra note 6, at 54 (noting need to distinguish between time of publication and time of final judgment); Redish, supra note 56, at 57 (explaining when prior restraint raises concerns). Redish argues that prior restraints are disfavored because they restrict speech “prior to a full and fair determination of the constitutionally protected nature of the expression by an independent judicial forum.” Redish, supra note 56, at 57. The final adjudication is especially important in the First Amendment context because a primary fear in issuing injunctions against speech is the worry of overextending the injunction to restrict constitutionally protected speech. See Tensmeyer, supra note 6, at 54.

91. See Tensmeyer, supra note 6, at 54 (restricting speech only allowed after full trial); Redish, supra note 56, at 57 (requiring full and fair hearing for adjudicating constitutional rights).

92. See Tensmeyer, supra note 6, at 55 (explaining Redish principle’s application to modern rule).

93. See id. at 51 (stating “first whisperings” of modern rule involved obscenity).


95. See id. at 437, 445 (upholding limited injunctive remedy); Tensmeyer, supra note 6, at 51-52 (providing _Kingsley Books_ background).

96. See Tensmeyer, supra note 6, at 52 (explaining how Court distinguished case from holding in _Near_). The Court in _Kingsley Books_ notes that the appellants’ position in opposing the injunction at issue primarily relied on the holding in _Near_. See _Kingsley Books_, 354 U.S. at 440. In upholding the injunction in _Kingsley Books_, the Court distinguished the case from _Near_ based on the factual differences. See id. at 445. The Court explained that _Near_ involved the courts’ power to enjoin disseminating future issues of a publication because its past issues had been offensive, which was the essence of censorship. _Id._ Unlike _Near_, the injunction at issue in _Kingsley Books_ was solely concerned with obscenity, and restrained matters not already published and not yet found offensive. _Id._ The Court thus upheld the injunction. _See id._

97. See Tensmeyer, supra note 6, at 51-52 (explaining subsequent application of _Kingsley Books_ holding to defamation cases).

98. See supra note 10 (noting courts’ support of modern rule in defamation cases).

99. See supra notes 10-11 and accompanying text (explaining divide between circuits regarding injunctions against future speech).
Injunctions against future speech in defamation cases are an appropriate, constitutional remedy. The Sixth Circuit, joined by state courts in California, Georgia, Kentucky, Minnesota, Nebraska, Ohio, and Tennessee, has adopted the modern rule, holding that an injunction may be a permissible remedy if it is narrowly tailored and limited to particular statements previously found defamatory. The Seventh Circuit, joined by state courts in Pennsylvania and Texas, remains loyal to the traditional approach and has held that such injunctions are unconstitutional prior restraints.

In 2005, in Tory v. Cochran, the Supreme Court granted certiorari to resolve this exact issue. In Cochran, Johnnie Cochran brought a state law defamation action against Ulysses Tory. The state trial court determined Tory engaged in unlawful defamatory activity when he picketed in front of Cochran’s office with signs containing threatening language. Tory indicated to the trial court that he would continue to engage in the defamatory activity in the absence of a court order. As a result, the trial court issued a permanent injunction which prohibited Tory and his agents from picketing and displaying signs or other written or printed material as well as uttering statements about Cochran and Cochran’s law firm in public forums. Tory appealed, and the California Court of Appeal affirmed. Tory then petitioned for a writ of certiorari to the Supreme Court, which the Court granted. After oral argument, Cochran’s counsel informed the Court of Cochran’s recent death.

100. See Sindi v. El-Moslimany, 896 F.3d 1, 30 (1st Cir. 2018) (addressing split in circuit and state decisions); supra notes 10-11 and accompanying text (discussing relevant cases on both sides of split).

101. See supra note 10 (noting federal and state courts adopting modern rule); see also supra Section II.C.2.b (discussing modern rule and permissibility of injunctions against future speech).

102. See supra note 11 (listing federal and state courts opposing injunctions against future speech); see also supra Section II.C.2.a (analyzing traditional approach and unconstitutionality of injunctions against future speech).


104. See id. at 736 (quoting specific issue brought before Court). The specific question raised by Tory in his petition for a writ of certiorari 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.” Id. (quoting Petition for Writ of Certiorari, Cochran, 544 U.S. 734 (No. 03-1488), 2004 WL 933073, at *1).

105. See id. at 735 (detailing parties and giving background facts of case). This case dealt with allegations that Tory, the petitioner, falsely claimed that Attorney Cochran owed him money, picketed Cochran’s office with insulting and obscene signs, and pursued Cochran while threatening and insulting him, all to coerce Cochran into paying Tory to stop participating in the defamatory conduct. Id.

106. See id. at 735-36 (concluding Tory engaged in defamatory activity against Cochran). The state trial court specifically found that Tory, while claiming falsely that Cochran owed him money, had complained to the local bar association; written Cochran threatening letters demanding ten million dollars; picketed Cochran’s office holding up signs containing various insults and obscenities; and, with a group of associates, pursued Cochran while chanting similar threats and insults. Id. at 735. The Court also concluded that Tory engaged in a “continuous pattern of libelous and slanderous activity.” Id.

107. Tory, 544 U.S. at 736 (indicating Tory’s intent to continue committing derogatory activities).

108. See id. (explaining injunction’s terms).


110. See id. (describing procedural history).

111. Id. (pointing to key fact in case). After Cochran’s death was announced, counsel moved to substitute
death made it unnecessary to answer whether the First Amendment forbids issuing a permanent injunction in a defamation case, ultimately expressing no view on the constitutional validity of such an injunction.112 Since 2005, lower courts have been left to decide this issue with little to no guidance from the Supreme Court.113

F. The First Circuit Holding in Sindi v. El-Moslimany

In 2018, the First Circuit weighed in on this debate in *Sindi v. El-Moslimany*.114 This case involved a state law defamation action brought by Dr. Hayat Sindi, a Saudi scientist and visiting scholar at Harvard University, against Samia El-Moslimany (Samia) and Ann El-Moslimany (Ann).115 Among the allegations, Dr. Sindi accused Samia and Ann of publishing a series of web posts in a variety of forums and sending emails to members of the scientific community, claiming Dr. Sindi “fraudulently obtain[ed] her doctorate by paying a colleague to ghostwrite her dissertation, repeatedly [lied] about her age in order to obtain awards meant for younger scientists, and inflat[ed] her resumé by falsely touting her role in Harvard’s Diagnostics for All initiative.”116 The jury returned a general verdict in Dr. Sindi’s favor on all but one of the claims.117 Dr. Sindi then moved for a permanent injunction “seeking to enjoin Samia and Ann

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112. See id. at 737-38 (discussing significance of Cochran’s death). The Court concluded that because 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, the grounds for the injunction no longer existed. Id. at 738. Thus, the Court held that the injunction, as written, amounted to an overbroad prior restraint on speech. Id.

113. See Chemerinsky, supra note 6, at 158 (noting Supreme Court failed to resolve constitutional question surrounding injunctions in Tory). The issue originally presented to the Court in Tory remains unanswered, and the issue is sure to recur across the country, especially in the context of the internet or blogs. See id.

114. 896 F.3d 1, 11 (1st Cir. 2018). Specifically, the First Circuit addressed the issue of whether the court has the power “to impose a prior restraint in the form of a permanent injunction forbidding the publication of words” the court believes “have been used to defame the plaintiff in the past and are likely to be repeated.” Id.

115. See id. (introducing parties and explaining nature of claim). Dr. Sindi also sued Samia and Ann for intentional infliction of emotional distress, tortious interference with contract, and tortious interference with advantageous relations. Id. Samia and Ann removed the case to the federal district court based on diversity. Id. at 11-12.

116. See id. at 11 (discussing Samia and Ann’s derogatory activity). It should be noted that “Dr. Sindi, an appointee of Saudi King Abdullah to his government’s Shura Council and a goodwill ambassador of the United Nations Educational, Scientific and Cultural Organization, concedes that she is at least a limited-purpose public figure.” Id. at 15. This is significant to the court’s analysis because in order for a public figure to succeed on a defamation claim in Massachusetts, he or she must prove actual malice by clear and convincing evidence. See id. at 14.

117. See id. at 12 (explaining result of seven-day trial). The jury found Samia—but not Ann—liable for intentional infliction of emotional distress, and found both Samia and Ann liable for “defamation, tortious interference with contract, and tortious interference with advantageous relations.” Id. The jury awarded damages of $3,500,000. Id.
from uttering or otherwise publishing a multitude of described statements.\footnote{118}{See \textit{Sindi}, 896 F.3d at 12 (discussing both parties' posttrial activity).} The district court granted the permanent injunction, which led to the timely appeal to the First Circuit.\footnote{119}{See \textit{id.} (noting grant of injunction). Specifically, the injunction enjoined Samia and Ann from repeating—orally, in writing, or through electronic communications or directing others to reposts on websites—six particular statements, namely:

1. That Hayat Sindi is an academic and scientific fraud;
2. That Sindi received awards meant for young scholars or other youth by lying about her age;
3. That Sindi was fraudulently awarded her PhD;
4. That Sindi did not conduct the research and writing of her dissertation;
5. That Sindi’s dissertation was “ghost researched” and “ghost written”;
6. That Sindi’s role in the founding of Diagnostics For All was non-existent, and that Sindi did not head the team of six people that won the MIT Entrepreneurship Competition. \textit{Id.} at 27.}

Dr. Sindi argued that the injunction at issue comports with the First Amendment because, as discussed in the modern rule, the particular statements restricted in the injunction were already found to be defamatory, and thus do not constitute protected speech.\footnote{120}{See \textit{Sindi v. El-Moslimany}, 896 F.3d 1, 32 (1st Cir. 2018) (acknowledging Dr. Sindi’s argument). The court noted that this argument has “superficial appeal” because an injunction against speech may pass constitutional muster if the expression has been adjudicated as unprotected speech and if the injunction is narrowly tailored to avoid censoring protected speech. \textit{Id.} Dr. Sindi encouraged the court to follow the holding in \textit{Kingsley Books} by making the argument that, like obscenity, defamation is also unprotected speech. \textit{See id.} at 32-33.} The First Circuit, however, raised many concerns with the injunction, determining that the injunction’s “cardinal vice” was its failure to “make any allowance for contextual variation.”\footnote{121}{See \textit{id.} at 33 (raising concerns about injunction).} More specifically, the injunction enjoined Samia and Ann from repeating certain words, regardless of their purpose in employing them.\footnote{122}{See \textit{id.} (describing meaning of contextual variation).} Thus, the court found that the injunction swept too broadly.\footnote{123}{See \textit{id.} at 33-34 (concluding injunction potentially reaches protected speech). The court elaborated on this conclusion by explaining that the injunction was overbroad because it prohibited Samia and Ann from “engaging in speech about a public figure ‘before an adequate determination that it is unprotected by the First Amendment.’” \textit{Id.} at 34 (quoting \textit{Pittsburg Press Co. v. Pittsburg Comm’n on Human Relations}, 413 U.S. 376, 390 (1973)). The court further demonstrated that there are “a number of future contexts” where repeating the statement “Dr. Sindi is an academic and scientific fraud” might be protected. \textit{Id.} The court offered three examples:

[1] If, say, Samia or Ann learns in the future of fraud actually perpetrated by Dr. Sindi and accurately reports it, the speaker would face contempt sanctions under the injunction even though the right to disseminate truthful information about public figures lies at the core of the First Amendment.

[2] If, say, Samia or Ann were interviewed by a reporter and asked what speech the challenged injunction prevented them from repeating, a reply to the effect that, “I am not allowed to state that Dr. Sindi is an academic and scientific fraud” would subject the speaker to contempt sanctions notwithstanding the truth of the reply.

[3] Perhaps most remarkably, the appellants would face contempt sanctions for disseminating a letter describing their accusations and apologizing for them.} Accordingly, the First Circuit held that the injunction could
not survive strict scrutiny, which the Constitution demands of prior restraints on speech, and vacated the injunction. The result of Sindi seems to indicate that the First Circuit falls largely on the anti-injunction side of the split.125

III. ANALYSIS

A. The Modern Rule: A Constitutional and Effective Remedy

Though the traditional approach attempts to draw a clear line by stating that all injunctions against future speech following a defamation trial are inappropriate and unconstitutional, there appears to be some common ground between both sides of the circuit split.126 Supporters of the traditional approach have acknowledged that a permissible injunction, if one exists at all, would have to be limited to the exact words the factfinder found defamatory.127 The modern rule is also rooted in that idea.128 It recognizes that the First Amendment imposes heightened concerns in this area of law, and in understanding those concerns, allows courts to craft injunctions that only enjoin specific speech found defamatory after a full and fair trial.129

Id. (citations omitted).

124. See Sindi, 896 F.3d at 33-34 (holding injunction fails to pass strict scrutiny).


126. See Chemerinsky, supra note 6, at 172-73 (attempting to defend position injunctions never permissible); see also McCarthy v. Fuller, 810 F.3d 456, 462-63 (7th Cir. 2015) (supporting traditional approach); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 342 (Cal. 2007) (acknowledging injunction possible under modern rule limitations). In McCarthy, the court explained that “[a]n injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression.” 810 F.3d at 462. While the court did not express any views on whether an injunction limited to previous statements determined to be defamatory would be enforceable, it appears to have acknowledged that it may be a possibility. See id. at 462-63. Additionally, in Balboa Island, the court held that “following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory.” 156 P.3d at 349. The modern rule only allows injunctions after the specific statements at issue were found to be defamatory. See id. Though the traditional approach holds an absolute position against injunctions, there seems to be a gray area where injunctions may be allowed, and that is where the modern rule finds its validation. See id. at 351.

127. See McCarthy, 810 F.3d at 461-62 (noting potential permissible injunction may only enjoin previously adjudicated defamatory statements); Chemerinsky, supra note 6, at 171-73 (acknowledging if permissive injunction exists, must only enjoin specific defamatory statements).

128. See Lothschuetz v. Carpenter, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part) (stating injunction permissible if limited to previously adjudicated false and libelous statements); Balboa Island, 156 P.3d at 342 (concluding injunction may prohibit defendant from repeating statements previously found defamatory).

129. See Tensmeyer, supra note 6, at 53-54 (explaining courts cannot restrict speech until clear speech not constitutionally protected); see also Balboa Island, 156 P.3d at 351 (noting courts must tread lightly when issuing order prohibiting speech).
Injunctions crafted under the limitations of the modern rule avoid issues with the prior restraint doctrine, make up for the shortcomings of monetary damages, and act as a greater deterrent against future defamatory conduct. In doing so, these injunctions provide for both a constitutional and effective remedy. Thus, the modern rule should prevail over the traditional approach if the Supreme Court were to address this issue.

1. Reconciling Injunctions and the Prior Restraint Doctrine

The Supreme Court has declared permanent injunctions to be “classic examples of prior restraints.” Lower courts that follow the modern rule have, however, distinguished injunctions following a defamation trial from prior restraints. In making this distinction, the injunctions at issue were not considered prohibited prior restraints, and were thus enforceable.

Prohibiting a person from making a statement before that statement is spoken or published is distinguishable from prohibiting a defendant from repeating a statement or republishing a writing that has already been determined at trial to be defamatory and unlawful. As such, an injunction issued against previously adjudicated defamatory speech is not a prior restraint under the Supreme Court’s definition in *Alexander v. United States*. In *Alexander*, the Court stated that a prior restraint is a “judicial order[] for[bi]ng certain communications” before such communications occur. The specific statements enjoined by a posttrial injunction crafted under the limitations of the modern rule have already occurred, and have already been found unlawful through a fair and full trial.

Thus, enjoining the defendant from repeating or republishing those specific defamatory statements after a trial does not constitute an unconstitutional prior restraint on speech. The modern rule can therefore be reconciled with the prior

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130. See infra Sections III.A.1-2 (discussing modern rule’s constitutionality and effectiveness).
131. See infra Section III.A.1 (analyzing modern rule’s constitutionality and effectiveness).
132. See infra Section III.A.2 (discussing traditional approach’s shortcomings and modern rule’s benefits).
134. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 344-45 (Cal. 2007) (distinguishing between prior restraint on speech and posttrial injunction in defamation suit). The court in *Balboa Island* stated that “preventing a person from speaking or publishing something that, allegedly, would constitute a libel if spoken or published is far different from issuing a posttrial injunction after a statement that already has been uttered has been found to constitute defamation.” *Id.*
135. See *id.* at 347 (listing cases holding posttrial injunction not prohibited prior restraint).
136. See *id.* at 344-45 (highlighting differences between prior restraint on speech and posttrial injunction).
137. See *Alexander*, 509 U.S. at 550 (stating permanent injunction “classic example[]” of prior restraint). *Alexander* puts forth the principle that permanent injunctions are “classic examples of prior restraint[,]” and thus presumed unconstitutional. See *id.* Posttrial injunctions against statements previously found to be defamatory, however, do not necessarily fall under this definition. See *Balboa Island*, 156 P.3d at 344-45.
139. See *Balboa Island*, 156 P.3d at 349 (explaining once court finds speech unprotected by First Amendment, cannot object to its subsequent suppression).
140. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007) (holding certain posttrial
restraint doctrine because it demands that enforceable injunctions be narrowly tailored and limited to specific defamatory speech already adjudicated by the court.141

2. Shortcomings of Monetary Damages and Injunctions as a Deterrent Factor

A common response for a plaintiff who suffers reputational harm is to file a defamation suit.142 The goal of a tort suit is to make the plaintiff whole again, but it is hard to quantify reputational harm brought on by defamation and to convert that harm into monetary awards.143 Further, it is questionable whether monetary damages, acting alone, can rectify this type of harm and accomplish the goal of making the plaintiff whole again following trial.144

Monetary relief can neither restore a diminished reputation, nor make emotional distress resulting from the defamation go away.145 The inadequacy of monetary damages is even more apparent in cases where the defendant is persistent, wealthy, or particularly vengeful.146 While monetary damages in these instances may act as a band-aid, temporarily covering up the pain caused by the prior defamation, the plaintiff remains vulnerable to further libel or slander by the defendant.147 A wealthy or persistent defendant may not view monetary damages as a deterrent, and without a court order, could continue to defame the

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141. See id. (concluding prior restraint doctrine does not prohibit all posttrial injunctions following defamation suit). This assertion rests on the premise that the injunction at issue targets solely the specific statements the court deemed defamatory, and nothing more. See id.

142. See Ardia, supra note 6, at 9 (noting both individuals and organizations commonly file defamation suits in response to reputational harm).

143. See id. at 15-16 (identifying difficulties in calculating monetary damages for reputational harm). “Tort law aspires to provide plaintiffs with a complete remedy for every injury.” Id. at 14.

144. See id. at 15 (stating plaintiffs often request injunction in addition to monetary damages). “[A] remedy that prevents harm altogether is the most complete remedy for a plaintiff.” Id. Research has shown that money is not what the majority of defamation plaintiffs want most. See id. In the 1980s, Professor Randall Bezanson conducted a study that found only 20% of plaintiffs sued to obtain monetary damages for reputational harms. Id.

145. See id. at 16 (describing monetary damages’ inadequacy for average defamation plaintiff).

146. See Tory v. Cochran, 544 U.S. 734, 736 (2005) (noting Tory indicated he would continue to engage in defamatory conduct without court order); Lothschuetz v. Carpenter, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part) (granting injunction due to defendant’s frequent and continuing defamatory statements); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 351 (Cal. 2007) (addressing concerns regarding monetary damages’ effectiveness in situation of continuous defamation). Both Tory and Lothschuetz demonstrate how monetary damages do not necessarily keep the defendant from engaging in future defamatory conduct. See Tory, 544 U.S. at 736; Lothschuetz, 898 F.2d at 1208-09. The court in Balboa Island discusses this issue more thoroughly. See 156 P.3d at 351. In Balboa Island, the defendant, Lemen, argued that the only remedy in a defamation action is damages. See id. The court rejected this argument, stating that if his argument were true, it “would mean that a defendant harmed by a continuing pattern of defamation would be required to bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing the tortuous [sic] behavior.” Id. The court further reasoned that “[t]his could occur if the defendant either was so impecunious as to be ‘judgment proof,’ or so wealthy as to be willing to pay any resulting judgments.” Id. Therefore, the court concluded that monetary damages will not always effectively relieve the plaintiff from “a continuing pattern of defamation.” Id.

147. See Balboa Island, 156 P.3d at 351 (explaining consequences of failure to issue injunction).
plaintiff. As a result, a plaintiff may suffer additional reputational harm and further incur substantial legal costs in essentially re-litigating his or her case.

Injunctions, on the other hand, provide a sense of security to a plaintiff. At a minimum, an injunction establishes a court order preventing a defendant from repeating or publishing the exact statements already found to be defamatory. In a best case scenario, an injunction acts as a deterrent against additional defamatory conduct that may not necessarily be enjoined under the injunction. Though injunctions cannot remedy past reputational harm, they act to some degree as a means to prevent this harm from occurring again. This is the assurance plaintiffs in defamation suits are seeking, and is the most effective remedy to not only make the plaintiff whole again, but also ensure the plaintiff stays whole once the lawsuit ends.

In analyzing the effectiveness of monetary damages as a remedy in a defamation suit, there are serious concerns regarding whether monetary compensation, without more, accomplishes the goal of making the plaintiff whole again. In prohibiting injunctions in a defamation suit, the traditional approach leaves the plaintiff open to further reputational harm and fails to provide the plaintiff with assurance that this unlawful, defamatory conduct will not occur again. The modern rule, in granting narrowly-tailored injunctions,

148. See, e.g., Tory, 544 U.S. at 736 (noting Tory’s persistence to defame Cochran absent court order).
149. See Ardia, supra note 6, at 16 (asserting implications of monetary damages ineffective remedy).
150. See id. at 82 (arguing injunctions have greatest utility in situations where danger of recurrent violation exists). Because numerous defendants have conceded that they would continue to engage in defamatory conduct absent a court order, an injunction can provide the plaintiff with some degree of assurance that certain defamatory conduct will not resume posttrial. See id.
151. See id. (specifying narrow tailoring demands enjoining repetition of specific defamatory statements).
152. See id. at 79 (analyzing injunctions’ effectiveness). “An injunction’s effectiveness is dependent on the behavior of individuals who weigh the benefits of continuing to engage in the proscribed conduct against the likelihood and costs of sanction if they are found to be in violation.” Id.
153. See Ardia, supra note 6, at 78-79 (explaining difficulty for plaintiffs to justify how injunction reduces reputational harm). Traditional equitable principles require an injunction to provide the plaintiff with additional benefits, beyond what monetary damages can provide. Id. at 78. Monetary damages, especially in situations where the defendant is wealthy or particularly persistent, may not be an effective remedy because monetary damages may not protect against future reputational harm. See Chemerinsky, supra note 6, at 170. An injunction that prohibits the defendant from repeating or republishing specific statements already found to be defamatory gives the plaintiff an added benefit, because instead of depending on the defendant viewing monetary damages as a deterrent, the plaintiff now has a court order explicitly preventing similar reputational harm from occurring in the future. See supra note 148 (noting defendant’s persistence absent court order).
154. See Ardia, supra note 6, at 15-16 (highlighting most plaintiffs want correction or retraction rather than monetary compensation). If “a remedy that prevents harm altogether is the most complete remedy for a plaintiff[,]” monetary damages as a sole remedy is not enough, as financial compensation is not always an effective deterrent against future defamation following trial. See id.
155. See supra notes 143-52 and accompanying text (arguing monetary damages ineffective).
156. See Chemerinsky, supra note 6, at 170 (pointing to concerns about “judgment proof defendant”). Without a court order, an individual could continue to say false and injurious things about a plaintiff. See id. “This is not a frivolous concern.” Id. The assumption behind this concern is concerning in itself. See id. In a situation where monetary damages are issued in a defamation suit, poor people theoretically “have their speech enjoined, while the rich are allowed to speak so long as they pay damages.” Id. Vulnerability to future
helps to account for the shortcomings of monetary damages by explicitly prohibiting previously adjudicated defamatory statements from occurring again, thereby acting as a deterrent against future defamation. Therefore, a combination of both monetary damages and an injunction would best serve the plaintiff’s interests, and provide adequate relief for the reputational harm suffered.

B. Did the First Circuit Get It Wrong?

In *Sindi v. El-Moslimany*, the First Circuit ultimately vacated an injunction prohibiting Samia and Ann from repeating or republishing, through various mediums, six specific statements that the court found to be defamatory. It is evident through its analysis that the First Circuit largely supports the traditional approach. If the Supreme Court were to adopt the modern rule, however, the outcome of this case is likely to be very different.

In concluding that the *Sindi* injunction could not survive strict scrutiny, the First Circuit focused primarily on the fact that the injunction at issue forbade Samia and Ann from ever republishing the six statements about Dr. Sindi, regardless of the forum or purpose. By imposing this blanket prohibition on defamatory attacks should not be a basis for issuing injunctions, but nonetheless this is a concern. See *id.*

157. See *Ardia*, supra note 6, at 58 (discussing injunctions’ deterrent effect).

158. See *id.* at 15 (examining “complete” remedies for plaintiffs).

159. See 896 F.3d 1, 35 (1st Cir. 2018) (vacating injunction against defendants). Specifically, the district court ordered that the defendants were enjoined from repeating six statements orally, in writing, or through electronic communications that directed others to the statements. *Id.* at 27. The First Circuit emphasized that the injunction issued by the district court prohibited defendants from repeating or republishing the same six statements “in any medium or for any purpose.” *Id.*

160. See *id.* at 34-35 (drawing parallels between injunction at issue and prior restraints). Specifically, the First Circuit stated that “the challenged injunction forbids the appellants from ever republishing the six statements about Dr. Sindi, regardless of the forum or the purpose.” *Id.* at 35. The court thus concluded that the injunction was “presumptively unconstitutional.” *Id.* This reasoning falls squarely in line with the argument that all permanent injunctions enjoining future speech are prior restraints. See *Chemerinsky*, supra note 6, at 163-66. Injunctions go to the essence of prior restraints because they prevent speech before it occurs, meaning that “a person can only speak by going before the judge and getting permission.” *Id.* at 163. By deeming the injunction “presumptively unconstitutional[,]” the First Circuit must similarly view the challenged injunction as a prior restraint on speech. See *Sindi*, 896 F.3d at 35. This is the main argument of traditional-approach supporters. See supra Section II.C.2.a (articulating traditional approach).

161. See supra Section III.A.1 (reconciling modern rule with prior restraint doctrine). The modern rule does not necessarily view injunctions against specific statements previously adjudicated to be defamatory as prior restraints on speech, and therefore these injunctions may be constitutional and enforceable. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 344-45 (Cal. 2007) (differentiating between prior restraint and posttrial injunction enjoining statements already found defamatory).

162. See *Sindi*, 896 F.3d at 33-34 (stating defamation contextual tort). The court specifically noted: Words that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice. What is more, language that may subject a person to scorn, hatred, ridicule, or contempt in one setting may have a materially different effect in some other setting.
repeating the six statements, the First Circuit determined that the injunction "punishes future conduct that may be constitutionally protected," and thus fails the First Amendment requirement that the injunction be narrowly tailored.\footnote{Id. at 33.}

When faced with similar sets of facts, courts following the modern rule have nevertheless granted injunctive relief prohibiting a defendant from repeating specific statements about a plaintiff that were found to be defamatory, concluding that such an injunction would not violate a defendant’s right to free speech.\footnote{See id. at 34 (holding injunction “wide-ranging and devoid of safeguards” plainly contravening First Amendment). This argument also finds its origins in the traditional approach, which maintains that it is nearly impossible to craft an injunction that is not overbroad. See Chemerinsky, \textit{supra} note 6, at 165-66.} Scholars consider injunctions crafted under this theory constitutional because the defendant has already uttered these specific statements, and a court determined that these statements constitute defamation after a full and fair trial.\footnote{See, e.g., Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990); \textit{id.} at 1209 (Wellford, J., concurring in part and dissenting in part) (granting injunction, but limiting application to statements found false and libelous); \textit{Balboa Island}, 156 P.3d at 349 (concluding properly limited injunction permissible under First Amendment). It should be noted that the injunction in \textit{Balboa Island} was deemed overbroad. See \textit{Balboa Island}, 156 P.3d at 352. This holding was based on the fact that the injunction applied not just to the defendant, but to “her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her.” \textit{id.} More importantly, the court asserted that in order for the injunction to be valid, it “must be limited to prohibiting [defendant] personally from repeating her defamatory statements.” \textit{id.} The challenged injunction in \textit{Sindi} was limited to prohibiting the named defendants, Samia and Ann, from repeating their past defamatory statements. See \textit{Sindi}, 896 F.3d at 27.}

In accounting for concerns regarding contextual variation, if a change in circumstances occurs, a “defendant may move the court to modify or dissolve the injunction.”\footnote{Id. at 353 (proposing way to deal with changing circumstances after injunction issued). The \textit{Balboa Island} court explained that “[i]f it chose to, the trial court could retain jurisdiction to monitor the enforcement of the injunction.” \textit{id.}}

Under the modern rule, the First Circuit was wrong in deciding that the challenged injunction was not narrowly tailored.\footnote{Contra \textit{Sindi} v. El-Moslimany, 896 F.3d 1, 34 (1st Cir. 2018) (concluding injunction overbroad because it punishes future conduct potentially protected under First Amendment).} Narrow tailoring requires that an injunction clearly identify, and be limited to, the specific statements the court or jury has found to be defamatory.\footnote{See \textit{Ardia}, \textit{supra} note 6, at 67 (explaining definition of narrowly-tailored requirement).} Under this definition of narrowly tailored, the \textit{Sindi} injunction would satisfy the requirement as it specifically targeted, and was limited to, a word-for-word recitation of six statements the district court found defamatory.\footnote{See \textit{Sindi}, 896 F.3d at 27 (listing injunction’s terms); \textit{supra} note 119 (providing complete terms of challenged injunction). The injunction clearly identified who was enjoined under the injunction, what specific statements were enjoined, and what specific forums were enjoined. See \textit{Sindi}, 896 F.3d at 27 (enjoining Samia and Ann from republishing specific statements “in any medium or for any purpose”).}

The First Circuit, in response to a dissenting opinion siding with the modern rule, rejected the position that, should the appellants choose to republish any of
the six statements for a non-defamatory purpose, they may move to modify the injunction in light of changed circumstances. In support of this argument, the First Circuit stated that there is no existing precedent that backs up this proposition, and further elaborated that a “deed” requiring a “judicial permission slip to engage in truthful speech is the epitome of censorship.”

Tackling first the court’s argument regarding the lack of clear precedent, the dissent seems correct in highlighting that the absence of precedent is not conclusive as to whether the rule the court adopts is “so plainly right.” The lack of guidance from the Supreme Court surrounding this issue also bolsters the point that any lower court could potentially be wrong in deciding which remedies are appropriate following a defamation suit, and how those remedies should be issued.

Second, while the First Circuit’s concerns regarding judicial censorship are valid, courts have been afforded room to craft similar injunctions based on a defendant’s continuous and frequent pattern of defamatory statements. Such injunctions are necessary to prevent future irreparable harm to a plaintiff’s personal or business reputation.

In , there is no indication in the record that Samia and Ann intended to repeat the statements for a non-defamatory purpose. Additionally, the facts of the case demonstrate that Samia and Ann, over a period of five years, published a series of web posts pertaining to Dr. in a variety of forums and various blogs. They also sent emails about Dr. to members of the scientific community. This was not an isolated incident that negligently rose to the level of defamation, but rather a deliberate, lengthy, and continuous attempt to harm

170. See , 896 F.3d at 34-35 (responding to dissent supporting modern rule). The dissent argued that in the event that circumstances change after the injunction is issued, the defendants would not be forced “to choose between contempt and silence.” Id. at 47 (Barron, J., concurring in part and dissenting in part). The dissent used the court’s proposition in and explained that if the defendants “happen to have a surprising change of heart that leads them to want to, say, apologize to by renouncing—by means of repeating—their prior statements, they would need only to call upon the District Court’s unquestioned responsibility to modify the injunction.” See id.

171. See id. at 34-35 (majority opinion) (demonstrating court’s concerns regarding judicial censorship).

172. See id. at 43 (Barron, J., concurring in part and dissenting in part) (criticizing majority’s argument regarding absence of clear precedent).

173. See v. , 896 F.3d 1, 43 (1st Cir. 2018) (Barron, J., concurring in part and dissenting in part) (stating absence of precedent not conclusive). Until the Supreme Court rules on whether injunctions against future speech following a defamation trial are appropriate and constitutional, lower courts are left to decide this issue with little to no guidance. See , supra note 6, at 45 (noting absent guidance from Supreme Court, several views emerged).

174. See , 898 F.2d 1200, 1208-09 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part) (declaring injunction necessary due to frequent and continuous defamatory statements).

175. See id. (noting injunction’s purpose to prevent future reputational harm).

176. See , 896 F.3d at 47 (Barron, J., concurring in part and dissenting in part) (asserting defendants never indicated desire to repeat statements in non-defamatory context).

177. Id. at 11 (majority opinion) (giving facts of case).

178. Id. (explaining defendants’ defamatory conduct).
Dr. Sindi’s reputation. These facts validate concerns regarding Samia and Ann’s persistence and the likelihood that this unlawful expression reoccurs in a defamatory manner. The challenged injunction was therefore fairly imposed under the modern rule as a means of ensuring that proven unprotected and unlawful speech would not be repeated.

IV. CONCLUSION

Protecting freedom of speech while also providing a plaintiff in a defamation suit with an adequate remedy is a difficult balance to strike. The First Amendment imposes heightened concerns in this area of law, and there is no doubt that courts are reluctant to restrict the right to freely exchange ideas. An injunction crafted under the modern rule’s limitations, however, avoids these constitutional implications and effectively helps make a plaintiff whole again following trial.

The circuit split essentially turns on whether the injunction at issue is considered a prior restraint on speech. The traditional approach views an injunction against future speech following a defamation trial as an unconstitutional prior restraint. The modern rule, on the other hand, views the specific statements previously found defamatory to have already occurred, thereby distinguishing the injunction from a prior restraint. The outcome of this analysis decides whether or not the injunction at issue is presumed unconstitutional, and further, whether the defamation plaintiff is awarded an adequate remedy.

Based on the differing views amongst the circuits, courts need guidance on how to proceed. Because injunctions crafted under the modern rule’s limitations avoid issues with the prior restraint doctrine, make up for the shortcomings of monetary damages, and act as a greater deterrent against future defamatory conduct, the modern rule should prevail over the traditional approach if the Supreme Court were to fully address this issue.

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179. See Sindi v. El-Moslimany, 896 F.3d 1, 36 (1st Cir. 2018) (affirming district court judgment with respect to defamation claims). Dr. Sindi was considered a public figure for purposes of this defamation suit. Id. at 15. A public figure may recover for defamation only if she proves actual malice. Id. at 14. As actual malice requires that “the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth[,]” the Sindi court concluded that “in light of the history of acrimony” between the women and the defendants’ “ill will” towards Dr. Sindi, the jury was entitled to find that the defamatory statements were made with actual malice. See id. at 18-19; Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (providing requirement for actual malice).

180. See Lothschuetz v. Carpenter, 898 F.2d 1200, 1209 (6th Cir. 1990) (Wellford, J., concurring in part and dissenting in part) (focusing on nature of defendant’s defamatory conduct).

181. See id. (allowing injunction because of defendant’s frequent and continuous defamatory statements).