

Speech Unjoined

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It has long been a fixture of Anglo-American law that libel plaintiffs are not entitled to injunctive relief; their remedies are strictly monetary. Indeed, it has been repeated as a truism: “equity will not enjoin a libel.” It is a view that rests on one of the strongest presumptions in First Amendment jurisprudence, that injunctions against libel and other kinds of speech are presumptively unconstitutional as prior restraints. But it may not be true, at least not anymore.

While the Supreme Court has never upheld an injunction as a permissible remedy in a defamation action, recent decisions by the highest courts in California and Kentucky have held that an injunction may be a permissible remedy in a libel case, as have several federal appellate courts. And in cases involving defamatory speech published on interactive computer services, courts have grappled with whether to order the providers of those services to remove defamatory content, with one court recently enjoining the continued publication of a post submitted by a third-party.

This Article examines why courts historically have been reluctant to order injunctive relief in defamation cases, noting that this reluctance has deep roots in American and English Law. It also contrasts the issuance of injunctive relief in copyright cases, where courts grant such relief as a matter of course, even when the injunction is indistinguishable from other forms of impermissible prior restraints.

The Article then explores the challenges and dangers of enjoining defamatory speech on the Internet, asking whether injunctions can be an effective remedy where speech and liability are disaggregated. It concludes by suggesting that a limited form of injunctive relief would be constitutional and normatively appropriate, if it were limited solely to false statements on matters of private concern that have been found – after full adjudication – to be defamatory. It then describes how such a remedy might be structured so that it would be both effective in the digital realm and compatible with core free speech principles.