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Defamation by Docudrama: Protecting Reputations from Derogatory Speculation

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Defamation law aims to protect reputations against speech of low constitutional value. When a speaker willfully misrepresents false derogatory statements as fact,[1] defamation law holds her liable to anyone whose reputation her speech has harmed because the First Amendment does not protect such false and malicious speech. But when a speaker willfully misrepresents derogatory speculation[2] as fact, defamation law does not recognize any resulting reputational harm. Although in the latter case the plaintiff might fail to demonstrate that the discreditable statements are false, the plaintiff might nevertheless be able to establish that the speaker deliberately misrepresented the level of her certainty. And the uncertainty that accompanies speculation creates a significant probability that the statement is actually false. Nevertheless, courts afford full constitutional protection to such highly suspect and malicious speech.

Derogatory speculation presents a significant threat to reputational interests particularly because it appears often in docudramas,[3] an increasingly popular[4] form of storytelling.

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[1] This Comment uses "fact" to denote "something that has been objectively verified." *The American Heritage Dictionary* 484 (Houghton Mifflin Co., 2d college ed 1985).

[2] "Speculation" here refers to statements based on evidence insufficient to qualify as facts.

[3] "The docudrama is a dramatization of an historical event or [the] lives of real people . . . [that] utilize[s] simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes." *Davis v Costa-Gavras*, 654 F Supp 653, 658 (S D NY 1987).

[4] One writer has noted:

> The three traditional networks rely increasingly on . . . high-profile, true events . . . to anchor their movie lineups. . . . "Murders, rapes, kidnaps and batterings are the rule of thumb for the traditional networks in movies and mini-series," says the former ABC president Fred Pierce, now a producer, "and the source materials are now easier to come by. Access to real-life situations has become quicker because of the explosion of magazine shows and local newscasts and videocams and satellite feeds. The stories are more available."

Jeff Silverman, *Murder, Mayhem Stalk TV: True tabloid tales! Television in frenzy over sordid real-life sagas*, NY Times 2-1, 2-28 (Nov 22, 1992).

Docudramas weave fact with fiction to create a captivating story: they often change artistically unsatisfactory facts and fabricate unavailable facts.[5] When docudrama producers believe that the subject of their speculation will be unable to prove their statements false, the producers often substantially exaggerate their certainty of disreputable claims because the current law of defamation fails to remedy the harm that such speculation inflicts upon an individual's reputation.[6]

Part I of this Comment explains that while the current law of defamation privileges speculation on minor issues for the compelling reason that such statements cannot harm reputations, the law tends to protect derogatory speculation only because the subject of the speculation usually cannot establish that the speculative statements are false. Part II argues that although defamation plaintiffs often cannot prove a speculative claim false, derogatory speculation on significant issues that appears as fact often is false and can harm reputations. Part III proposes that the law hold speakers liable for defamation when they willfully present significant derogatory speculation as fact.

I. CURRENT DEFAMATION LAW

The law of defamation attempts to balance the constitutional right to free speech against the common law interest in personal reputation.[7] It strikes a poor balance, though, in the realm of speculation, where it often denies recovery to plaintiffs because they cannot prove that the derogatory statement is false.

A. The Inadequate Remedy against Derogatory Speculation

The Supreme Court reversed the common law presumption for protecting reputational interests over the freedom to engage in de-

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[5] Unlike a documentary, which "maintains strict fidelity to fact," a docudrama "is a creative interpretation of reality." *Davis*, 654 F Supp at 658.

[6] Jim Manos, a docudrama producer, extols the virtues of buying the rights to a story: "[The rights and the insights into the story gained through them] give an opportunity to *begin* telling the story. If you're careful and legally within your bounds, you can then write *what you want to write*." Jim Manos, quoted in Silverman, NY Times at 2-29 (cited in note 4) (emphasis added). What Mr. Manos implies is correct: under current law, where there are holes in the story, a docudrama producer may fill them with any plausible version of the facts.

[7] W. Page Keeton, ed, *Prosser and Keeton on the Law of Torts* § 113 at 804 (West Publishing Co., 5th ed 1984).

famatory speech.[8] In *New York Times Co. v Sullivan*,[9] the Court decided that in order to recover for reputational harm, a public figure[10] defamation plaintiff must demonstrate, by a preponderance of evidence, that the allegedly defamatory statement was false, and, by clear and convincing proof, that the defendant acted with "actual malice"—she either knew that the statement was false or recklessly disregarded the truth.[11] Although private defamation plaintiffs enjoy a more lenient proof of fault standard,[12] they too must prove falsity in order to prevail.[13]

The current allocation to plaintiffs of the burden of proving falsity makes it particularly difficult for a plaintiff to recover against a speaker who has harmed her reputation by presenting discreditable speculation as fact. Consider, for example, a case in which the plaintiff establishes that the defendant presented a certain statement as fact although the defendant had no way of knowing the truth. The plaintiff has thus demonstrated that the defendant must have been speculating. If the defendant has alleged plausible fact scenarios, however, the plaintiff often cannot prove that the scenarios are false.[14] Thus, even where a speaker could not

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[8] *Prosser and Keeton* explains that "[t]he established common law attempted to accommodate these competing values by the general notion that the defendant published at his peril unless he could prove that the statement was either true or that it was made on a privileged occasion." Id (citation omitted).

[9] 376 US 254 (1964).

[10] In *New York Times*, the Court articulated the standard for defamation of a public official. Id at 279-80. In 1967, the Supreme Court extended the *New York Times* standard to "public figures." *Curtis Publishing Co. v Butts*, 388 US 130, 155 (1967).

[11] 376 US at 279-80. The *New York Times* standard also requires the plaintiff to prove, by a preponderance of evidence, that the statement was of and concerning the plaintiff and that the statement's content defamed the plaintiff's reputation. Id. See also *Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657 (1989); R. Bruce Rich and Livia D. Brilliant, *Defamation-In-Fiction: The Limited Viability of Alternative Causes of Action*, 52 Brooklyn L Rev 1, 5 (1986).

[12] States may set their own standards for defamation of private individuals so long as the standards do not impose liability without fault or without requiring a showing of substantial danger to the individual's reputation. *Gertz v Robert Welch, Inc.*, 418 US 323, 347-48 (1974).

[13] *Philadelphia Newspapers, Inc. v Hepps*, 475 US 767, 776-77 (1986).

[14] Often, when the speaker cannot know the truth, the plaintiff cannot establish the truth. Consider, for example, the following situations in which a speaker might speculate because she cannot discover the truth: (1) The speaker cannot know the truth when she speculates about a "private" fact accessible only to a few people, none of whom has conveyed it to the plaintiff. Even if the plaintiff is one of those privy to the truth, she might have only her word with which to establish the truth to the factfinder. The factfinder is especially likely to be skeptical when different parties privy to the truth give conflicting testimony. (2) The speaker cannot know the truth when no reliable record or witness exists. In such cases, the plaintiff is not only unable to prove that the defendant's version of the facts is false, but she is also unable to know the truth herself.

have known the truth, courts will often protect her discreditable speculations.

Street v National Broadcasting Co.[15] illustrates how current defamation law protects such derogatory speculative statements. In *Street*, a defamation suit, the Sixth Circuit observed that where the speaker cannot know the truth, the plaintiff cannot prove falsity and consequently cannot prevail.[16] The court thus recognized that defamation law does not necessarily hold a speaker liable for the act of deliberately presenting discreditable speculation as fact.[17]

In *Street*, Victoria Price Street sued NBC for defaming her in a docudrama. NBC's docudrama, *Judge Horton and the Scottsboro Boys* ("*Scottsboro Boys*"), depicted a 1931 Alabama trial in which Street alleged that Haywood Patterson raped her.[18] In the rape trial, the jury had found Patterson guilty and sentenced him to death, but the presiding judge, James E. Horton, had found the evidence insufficient and reversed the verdict.[19] The NBC docudrama presented Judge Horton's view of the trial and the events at issue:[20] it portrayed Victoria Street as "a perjurer, a woman of bad character, a woman who falsely accused the Scottsboro boys of rape knowing that the result would likely be the electric chair."[21]

At trial, Victoria Street demonstrated that NBC presented derogatory speculations about her as fact. First, the *Street* court refused to find that NBC either reported or knew the truth about the alleged rapes. The court rejected NBC's defense of truth, which NBC had rested on its claim that *Scottsboro Boys* neutrally reported a judicial proceeding. The court decided that the docudrama did not report Patterson's trial fairly.[22] Moreover, the court observed that even an accurate report would not have sufficed for NBC to claim to know the truth because "[j]udicial proceedings resolve disputes, but they do not establish the truth for all time."[23] Second, the Sixth Circuit found that NBC did not pre-

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[15] 645 F2d 1227 (6th Cir 1981).

[16] Id at 1236-37. This Comment, however, recognizes that a plaintiff sometimes may know the truth and be able to satisfy the falsity requirement.

[17] The plaintiff would prevail only if she can prove that the speculation is false. Id.

[18] Id at 1229-30. Street also implicated eight other African-Americans.

[19] Judge Horton's unreported opinion was reprinted by the Sixth Circuit in *Street*. See 645 F2d at 1237.

[20] Id at 1233.

[21] Id at 1232.

[22] Id.

[23] 645 F2d at 1233.

sent the derogatory speculations about Victoria Street as its or Judge Horton's opinion of her: "The characterization [was] expressed as concrete fact."[24] Thus the court determined that NBC had not shown that it had any way of knowing the truth of the derogatory claims that it presented as facts.

Nonetheless, NBC prevailed because Victoria Street could not prove that the disreputable claims made in the docudrama were false. In so holding, the court noted that the law of defamation makes it virtually impossible for a plaintiff to prevail against a defendant who had no way of knowing the truth but speculated what it might be: "[w]hen the truth is unknowable,[25] falsity, and hence defamation, cannot be proven."[26]

As *Street* exemplifies, the current doctrine suggests that a speaker is liable for a defamatory speculation only if she proposes a version of the truth so implausible that the plaintiff can prove her statement false.[27] But as for the vast array of plausible defamatory speculations that a plaintiff cannot prove false, the current doctrine does not recognize any resulting defamatory harm.

B. The Privilege for Minor Speculation

In *Masson v New Yorker Magazine, Inc.*,[28] the Supreme Court suggested that the First Amendment protects a speaker who creatively reconstructs lost conversations only when the speaker has notified his audience that "the quotations should not be inter-

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[24] Id.

[25] The truth is unknowable when "the truth is uncertain and . . . undiscoverable through further investigation." Id at 1237.

[26] Id at 1250 (Peck dissenting) (citation omitted). The dissent agreed with the majority that when the truth is unknowable to the defendant, the plaintiff will not be able to prove her statement false. This is often the case. See note 14.

[27] But see *Koch v Goldway*, 607 F Supp 223 (C D Cal 1984), aff'd, 817 F2d 507 (9th Cir 1987). In *Koch*, the defendant said of his opponent during a political campaign, "There was a well-known Nazi criminal named Ilse Koch during World War II. Like Hitler, Ilse Koch was never found. Is this the same Ilse Koch? Who knows?" 607 F Supp at 224. The truth of that implication was, at best, unknowable to the defendant, yet the plaintiff was able to prove that the implication was false because her age rendered implausible any allegation that she was a Nazi war criminal. Id at 225-26. Moreover, the court noted the unlikelihood that such a criminal would enter politics using her original name. Id at 226. Nevertheless, the court found that the statement was not defamatory because no one could reasonably understand it to describe actual facts about the plaintiff. Id.

As this case demonstrates, defamation plaintiffs seem to be in a "Catch-22" situation: if a defamatory speculation is plausible, a plaintiff often cannot prove it false, and thus the claim is not actionable; yet if the speculative statement is implausible, and thus the plaintiff can prove it false, the court will likewise find that the claim is not actionable because the audience cannot reasonably understand it to describe facts about the plaintiff.

[28] 111 S Ct 2419 (1991).

preted as the actual statements of the [person] to whom they are attributed."[29] Perhaps the reason for this protection is that these speakers are filling in minor, rather than significant, blanks. Courts justifiably privilege speculation about minor, inconsequential issues because such statements do not harm reputations.[30]

A New York district court, for example, concluded that the First Amendment protects simulated dialogue in docudramas[31] when it does not "distort the fundamental story being told."[32] Such simulated dialogue provides specific expression to an exchange that either actually occurred, or completely comports with the known facts and whose occurrence or nonoccurrence has no significant implications. Under this privilege, speakers can speculate freely only about relatively insignificant details which cannot cause reputational harm and thus do not justify a restriction on free speech.[33]

Under this privilege that allows speakers to recreate insignificant data to comport with significant facts, the audience has little, if any, interest in notification. In *Galloway v Federal Communications Commission*,[34] for example, the D.C. Circuit held that the First Amendment protects the FCC policy that reporters may stage[35] "minor or incidental aspect[s] of [a] news report,"[36] although the FCC does not require broadcasters to notify their audiences of the staging. As with dialogue simulation, therefore, the First Amendment privileges reputationally harmless staged newscasts that are faithful to the significant facts.

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[29] Id at 2431.

[30] "[A] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Keeton, ed, *Prosser and Keeton on the Law of Torts* §111 at 774 (cited in note 7). Presumably, no trifling matter could affect reputation in this way.

[31] Docudrama producers simulate dialogue either because they do not know which words were actually spoken or for purely artistic reasons. *Davis*, 654 F Supp at 658.

[32] Id.

[33] A similar situation arises in most works that "recreat[e] conversations from memory, not from recordings . . . ." *Masson*, 111 S Ct at 2431.

[34] 778 F2d 16 (DC Cir 1985).

[35] In a staged newsreport, reporters "set up" an event, but film and present it as if the event occurred independently of the news media.

[36] *Galloway*, 778 F2d at 20. The *Galloway* decision thus permits news broadcasters to stage events for purely technical reasons: reporters may, for example, reshoot film of an interviewer acting out his questions because the camera was focused on the interviewee during the actual interview. Id at 20 n 3. But *Galloway* also allows reporters to stage an event when they do not know exactly how an event occurred, so long as the staging does not affect the basic accuracy of the events reported. Reporters may, for example, upon seeing a broken store window after a riot, ask one of the rioters to throw a brick through the window in order to capture the act on film. Id at 20.

II. The Defamatory Effect of Significant Derogatory Speculation That Appears as Fact

Defamation law attempts to protect individuals from speakers who harm their reputations by alleging significant and negative false facts about them. Defamation law therefore rightly privileges speculation about minor issues, as well as statements presented as subjective opinion.[37] Neither minor speculation nor subjective opinion can significantly harm reputational interests.

However, by protecting speculation about even significant facts, defamation law incompletely protects individuals from reputational harm. A speaker who claims to know something significantly negative about another person can harm that person's reputation; if that speaker is not as certain about the facts as she claims to be, she very likely got them wrong and misrepresented that person. Defamation law should remedy any reputational harm that a speaker causes by derogatorily speculating about significant matters.

A. Derogatory Speculation on Significant Issues: The Threat to Reputation

Because even negative statements about minor issues cannot defame,[38] defamation law justifiably privileges speculation on insignificant details. When speculative statements remain faithful to the significant facts, the public interest in free speech far outweighs the minimal, if any, damage to reputation. The Supreme Court has endorsed this balance of interests: "The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth."[39]

Negative statements about significant issues, however, can defame. NBC's docudrama, *Scottsboro Boys*, for example, did not limit its "creativity" to minor matters: it speculated whether Victoria Street was raped, whether she recalled the rape and the rapist(s), and whether she reported her recollections honestly at trial.[40] Although NBC did not know the answers to these impor-

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[37] According to the Ninth Circuit, opinions are "[s]tatements not themselves factual, and which do not suggest that a conclusion is being drawn from facts not disclosed in the statement . . . ." *Koch v Goldway*, 817 F2d at 509. See also *Milkovich v Lorain Journal Co.*, 497 US 1, 17-18 (1990).

[38] See note 30.

[39] *Masson*, 111 S Ct at 2433. This is a statement of the de minimis doctrine as applied to the law of libel.

[40] *Street*, 645 F2d at 1232.

tant questions, it nevertheless "filled in the blanks" with speculations that harmed Victoria Street's reputation.[41] As *Street* demonstrates, speculation about significant issues has the potential to harm reputational interests.

B. Significant Derogatory Speculation That Appears as Fact: The Harm to Reputation

Insofar as plaintiffs often cannot prove speculative statements false, speculation resembles opinion, which defamation law privileges. But defamation law does not privilege opinion because plaintiffs cannot prove it false.[42] Rather, defamation law privileges opinion because derogatory statements of opinion, as opposed to derogatory statements of fact, do not unjustly harm reputations.

When a speaker makes a statement, "X," and presents it as her opinion, she communicates to the audience that "I believe or feel that 'X' is true." Because she qualifies her statement as a description of her own subjective state, without making a claim about the objective state of anyone else's existence, she cannot have misrepresented anyone else:[43] opinion "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[44] Justifiably, the law does not hold that speaker liable for defamation.[45]

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[41] If one defames a woman by asserting that she has been raped, *Youssoupoff v Metro-Goldwyn-Mayer Pictures*, 1934, 50 TLR 581, 51 LQ Rev 281, then it must be the case that one defames her by asserting that she falsely accused someone of rape. The latter act disgraces the woman's character more, if the former does at all. Keeton, ed, *Prosser and Keeton on the Law of Torts* § 111 at 773 (cited in note 7).

[42] It is virtually impossible to contradict what a person says she believes.

[43] Assume C has expressed an opinion about B. If C's stated opinion is unwarranted or insincere, C has committed an injustice against B; the law, however, does not recognize that injustice because C's right to express himself freely outweighs B's interest in being fairly spoken of by C. No reasonable person, A, would lower his esteem for B on the basis of C's opinion where that opinion does not imply any discreditable facts about B. If A lowers his regard for B purely because of his faith in C's opinion, and without evaluating any facts for himself, then A has acted unreasonably and committed an additional injustice against B. But C has only defamed B if he causes reasonable people to lower their regard for B.

[44] *Milkovich*, 497 US at 20, citing *Hustler Magazine, Inc. v Falwell*, 485 US 46, 50 (1988).

[45] Alternatively:

> [I]t can be said that the state of a person's mind is a fact and if a publisher misrepresents his state of mind, he misrepresents a fact even though it is only an opinion. However, it would not seem to be practical or in the interests of free speech to make the kind of inquiries that are necessary to ascertain the precise meaning . . . of . . . opinions . . . in order to ascertain falsity and dishonesty in the expression of the opinion.

Keeton, ed, *Prosser and Keeton on the Law of Torts* § 114 at 814 (cited in note 7).

On the other hand, when a speaker makes a discreditable statement, "X," about the plaintiff and presents it as a fact, she communicates to the audience that "I know for a fact that 'X' is true." The speaker thus claims that "X" has met the generally accepted epistemological level of certainty required for a statement to qualify as a fact. Because this communication purports to describe not the speaker's subjective evaluation, but the objective state of the plaintiff's existence, it might cause reasonable people to alter their beliefs about what facts are objectively true about the plaintiff, and perhaps to lower their regard for her.

Even when a speaker purports to state an opinion, a defamation plaintiff may prevail if the audience can reasonably interpret the speaker to be stating or implying false assertions of fact.[46] As with opinion and all other types of statements, derogatory speculation that appears as fact can harm the subject's reputation by causing reasonable people to lower their regard for the subject. Therefore, derogatory speculation, when it is presented as fact, should not be protected by the First Amendment.

C. Speculation's High Likelihood of Falsity

Defamation plaintiffs, when they can prove that the speaker was speculating, should be able to bypass the falsity requirement because proof that the speaker was speculating strongly tends to prove the falsity of her statements. Speakers often speculate when they have no compelling reason to believe one fact pattern over another. For example, in *Street*, the speaker could equally have believed any one of three possible scenarios: (1) the defendants raped Victoria Street, (2) they did not rape her and she framed them, or (3) someone else raped her but she believes the defendants did. In such cases, there is a high probability that the speaker will make an incorrect guess.

Therefore, when a speaker speculates that "X" is true, "X" is very likely false. If "X" is a significant derogatory claim, it puts the subject's reputation at risk. And if the speaker claims to know "X" for a fact, reasonable people could accept "X" as true. When all of these conditions hold, the speaker has very likely unfairly harmed her subject's reputation. Nevertheless, defamation law effectively privileges significant derogatory speculation that a

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[46] *Milkovich*, 497 US at 18-19. See also Restatement (Second) of Torts § 566, comments a-b at 170-72 (1977).

speaker presents as fact because courts unjustifiably presume that such statements are true.

III. A DEFAMATION DOCTRINE THAT IMPOSES LIABILITY FOR SPECULATION

Under the Constitution, the Supreme Court generally protects speech interests at the expense of reputational interests. Accordingly, the Court presumes that discreditable statements are true, and thus requires that a defamation plaintiff prove that the statements are false. Because speculation is highly likely[47] to communicate false information, however, the Court should not require a defamation plaintiff to prove a statement false when the plaintiff can prove that the defendant was speculating. By encouraging speakers to inform their audience of the level of certainty with which they speak, the Court could better protect reputational interests without limiting speech in any significant sense.

A. The Constitutionality of the Proposed Doctrine

In order to encourage a free exchange of ideas, the Supreme Court presumes that discreditable statements are true.[48] In *Philadelphia Newspapers, Inc. v Hepps*,[49] the Court recognized that because defamation plaintiffs bear the burden of proving falsity, they cannot prevail when neither the plaintiff nor the defendant can prove the derogatory statement true or false.[50] The Court argued that the plaintiff must prove falsity even in those situations because the Constitution requires the Court to tip the balance in favor of protecting speech in cases where the statement is actually true, even though the Court thereby cannot protect reputations in cases where the statement is actually false.[51]

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[47] From the perspective of an individual who knows that statement A is speculative but knows nothing about statement B, A is more likely than B to be false.

[48] The Supreme Court has explained:

> To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

Hepps, 475 US at 776-77.

[49] Id at 767.

[50] Id at 778.

[51] The *Hepps* Court noted:

> Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. . . . Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which de-

In reaching this decision, however, the *Hepps* Court failed to consider the subclass of cases in which the plaintiff cannot prove that the statement is false, but can prove that the defendant was speculating.[52] Because speculation is so often false, the Court should not presume that discreditable speculation is true. The Court could better protect reputations without shifting the burden of proving truth to defendants[53] if it allowed defamation plaintiffs to prove that the discreditable statement was either false *or* speculative.

B. Speakers' Incentive to Disclose Their Certainty

The proposed law would encourage speakers to notify their audiences when they do not know the truth. Speakers who inform their audiences that they are speculating make only one factual assertion: "I guess that 'X' is true." With such a disclaimer, speculation would rightfully gain the same privilege that the First Amendment affords to opinion because, like opinion, its expressly subjective nature limits the reputational harm it can inflict.

A disclaimer ideally suited to a speculative work accompanies Meyer Levin's novel *Compulsion.* The novel presents the private thoughts and emotions of two convicted murderers, Nathan F. Leopold, Jr. and Richard Loeb—information to which Levin had no access. Levin uses a disclaimer to notify his audience that he is speculating: "Though the action is taken from reality, it must be recognized that thoughts and emotions described in the characters come from within the author, as he imagines them to belong to the personages in the case he has chosen."[54]

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fendants could not bear their burden despite the fact that the speech is in fact true.

Id at 776.

[52] The Court referred to the situation in which a plaintiff cannot prove a statement false as where the speech is "unknowably true or false" and where "the fact finding process will be unable to resolve conclusively whether the speech is true or false." *Hepps*, 475 US at 776. This Comment notes that a plaintiff may be unable to prove that a statement is false but nevertheless be able to prove that the defendant did not know whether his own statement was true or false. The plaintiff might be able to demonstrate, for example, that the defendant must have been speculating because the defendant could not have known the truth. See Part I(A).

[53] But defendants would retain the defense of truth: a defendant would escape liability if she could prove, after the fact, that although her speculation harmed the plaintiff's reputation, it did not do so unfairly because the claim happened to be true and thus described the plaintiff accurately. This defense deters the abuse of this doctrine by those plaintiffs who know that the statement was true, yet can prove that the defendant was speculating.

[54] *Leopold v Levin*, 45 Ill 2d 434, 437, 259 NE2d 250 (1970).

Under the proposed doctrine, Levin's disclaimer would immunize his work from any charge of defamation because the disclaimer ensures that the novel, like statements of opinion, cannot "reasonably [be] interpreted" as stating or implying[55] discreditable facts about someone. In fact, Leopold did sue Levin for defamation and lost.[56] As the *Leopold* court noted, "the . . . novel, while 'suggested' by the crime of the plaintiff, [was] evidently fictional and dramatized material[ ] and *[it was] not represented to be otherwise.*"[57] Levin thus used a disclaimer to accurately represent his level of certainty.

By informing the audience that the speaker is not certain of what she has said, a disclaimer precludes any undue reputational harm to the subject: a reasonable audience will discount any unflattering speculations about the subject and thus formulate a fair opinion of her.[58] Furthermore, disclaimers protect and enhance speech. First, although it might be a slight burden to add a disclaimer to a statement, the disclaimer does not censor the substance of the speech, which is still heard in full by the audience. Second, disclaimers raise the general level of a discussion by making communication more accurate: the audience knows not only what a speaker has to say, but also her level of certainty. Thus, the audience will be less likely to act with unwarranted assurance of a statement's truth. Finally, disclaimers focus attention on ignorance, thereby encouraging people more knowledgeable about a subject to bring more information to light, and generally sparking interest and further research in pursuit of the truth.

C. Applying the Proposed Defamation Doctrine

In order to avoid overburdening speakers and thus chilling speech, courts must implement the proposed defamation doctrine cautiously. The limiting principles that guide courts in applying the current doctrine can also help them to apply the proposed doctrine in a manner that protects reputations without infringing upon the right to free speech.

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[55] *Milkovich*, 497 US at 20.

[56] *Leopold*, 45 Ill 2d at 434.

[57] Id at 445 (emphasis added).

[58] Of course, not all audiences are reasonable. At a minimum, however, a disclaimer allows the thoughtful and conscientious to assess speech accurately.

1. *Listeners must understand the speculation as fact.*

In order to find a speaker liable for defamation under current law, a court must find that the statement is false. But when common sense or general knowledge indicates that a statement is false, courts will not hold the speaker liable for defamation because the speaker will not have actually caused a reasonable audience to believe a defamatory statement.[59] Consequently, the subject of the statement will suffer no significant reputational harm that could justify a restriction on free speech. Correspondingly under the new doctrine, courts should not hold a speaker liable for harming reputation through speculation unless the speaker presents the speculation as fact. But when a reasonable audience generally knows that a statement is speculative, the speaker cannot have misled them into taking the derogatory statement as fact. Therefore, the subject of such speculation is not at risk of unfair reputational harm that could justify a restraint of speech.

Consider, for example, the 1991 movie *JFK*. Most of the American public realizes that the events surrounding John F. Kennedy's assassination were never fully discovered and publicized. Therefore, although the movie presents one version of the story authoritatively, the audience knows that it is speculative.[60] As with opinion and clearly false statements, no reasonable person could misinterpret such statements as fact. Therefore, defamation law should privilege obviously speculative speech.

2. *The speaker must be subjectively aware that he is speculating.*

Fault requirements limit defamation law's restrictions on speech by holding speakers not to the objective standard of truth but to the subjective standard of honesty. The Supreme Court has rejected the objective "reasonable person" standard, which holds that a speaker acted with actual malice if a "reasonably prudent man" would have done more investigation before publicizing the

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[59] Defamation requires that a third party have "understood" the communication as discreditable. Keeton, ed, *Prosser and Keeton on the Law of Torts* § 113 at 798 (cited in note 7).

[60] The movie *Malcolm X* similarly involves speculation concerning Malcolm X's murder. Vincent Canby, *"Malcolm X," as Complex as Its Subject*, NY Times B1 (Nov 18, 1992). However, it is likely that fewer people understand *Malcolm X* as speculation because the controversy surrounding Malcolm X's assassination has not received as much publicity as that surrounding Kennedy's assassination. Therefore, unlike with *JFK*, the proposed doctrine would require a disclaimer for *Malcolm X* if its theory of Malcolm X's death, when taken as fact, is discreditable to a plaintiff.

statements.[61] The Court has instead adopted the subjective "actual malice" test, which requires the plaintiff to prove that the defendant made the false derogatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[62] A speaker has acted with "reckless disregard" if she "*in fact* entertained serious doubts as to the truth of [her] publication."[63]

This subjective standard deters only those speakers who know or strongly suspect that they are disseminating false information. The Supreme Court does not seek to protect such speech under the First Amendment because "[t]here is no constitutional value in false statements of fact."[64] The law does not more broadly prohibit all false statements of fact because such a rule would cast too wide a net, "capturing" and thereby deterring speakers who do not intend to speak falsely.[65]

The proposed doctrine mimics the current doctrine's subjective standard: it finds liability for discreditable speculation only if the speaker in fact either knew or seriously suspected that her certainty regarding the truth of her statement did not meet the standard for factual knowledge. Thus, the rule deters only those speakers who were aware that they were misrepresenting their degree of certainty. The proposed law would therefore protect speakers who honestly believe in the truth of their claims even if their statements were actually speculative.[66]

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[61] *St. Amant v Thompson*, 390 US 727, 731 (1968).

[62] *New York Times*, 376 US at 280.

[63] *St. Amant*, 390 US at 731 (emphasis added). Because the Constitution values free speech, the factfinder should presume the speaker's honesty and find fault only when objective circumstantial evidence strongly indicates the speaker's bad faith. In *St. Amant*, the Supreme Court compiled some specific tests that a factfinder can use to draw reliable conclusions regarding a speaker's state of mind.

[64] *Gertz*, 418 US at 340.

[65] According to the Supreme Court, "[c]alculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and 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. . . .'" *Garrison v Louisiana*, 379 US 64, 75 (1964), quoting *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942). But the Supreme Court has also acknowledged that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant*, 390 US at 731. Even harmful statements that are false assertions of fact "contribute to the free interchange of ideas and the ascertainment of truth" when the speaker "honestly believe[s]" her claims. *Garrison*, 379 US at 73.

[66] These are speakers who, by a "reasonable speaker" standard, did not have the certainty that they projected, but subjectively believed they did.

CONCLUSION

Persons who willfully present derogatory speculation as fact know that there is a high probability that they have guessed wrongly. Speakers could avoid this serious risk of defamation at the minimal cost of disclosing their own ignorance. When a defamation plaintiff can demonstrate that a speaker has behaved so irresponsibly, the law should recognize that the statement was more likely than not false, and therefore not require the plaintiff to prove the falsity of the statement. Otherwise, given the private nature of most topics of speculation, plaintiffs will often have little evidence with which to convince a factfinder of the falsity of a claim that derides their character. The law can protect free speech without stacking the deck against reputational interests in this manner.

This Comment suggests that we reconsider why defamation plaintiffs must always prove falsity. The Constitution might require no more than that the plaintiff demonstrate a high probability that the statement is false and that the defendant concealed that probability in bad faith. Accordingly, defamation law could deter speakers from willfully exaggerating the reliability of their derogatory statements at other people's risk and force them to internalize the risk of error by acknowledging their own uncertainty. Audiences that learn the epistemological status of derogatory claims can assess characters more fairly. By restricting the freedom to speak irresponsibly about someone else—a questionable free speech interest—this approach would better protect legitimate reputational interests.