

## NOTES

# SIX-FIGURE BOOK DEALS, CELEBRITY FAME, AND A SPREAD IN *PLAYBOY*<sup>1</sup>: FREE SPEECH AND PRIVACY CONCERNS IN THE BLOGOSPHERE

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### I. INTRODUCTION

In one of the most famous free speech cases, Justice Brandeis remarked, “men feared witches and burnt women.”<sup>2</sup> This kind of fanatical terror is taking hold in the world of Internet blogging, where there are no clear rules for what one can or cannot say online.<sup>3</sup> Lawsuits are springing up attempting to censor unpopular blogs.<sup>4</sup> When it comes to truthful statements made online that implicate others, the invasion of privacy tort is used as a weapon.<sup>5</sup> In cases involving online sexual diaries that reveal intimate facts about the author’s own life, as well as intimate facts about others, free speech rights are weighed against privacy concerns.<sup>6</sup> Since 2004 there have been 159 civil and criminal court actions involving bloggers, some resulting in verdicts against bloggers; there are also many legal actions that never make it to trial.<sup>7</sup> The fear that an aspect of a blogger’s work could potentially cause liability is stifling much of the content in the blogosphere.<sup>8</sup>

Jessica Cutler was a Washington, D.C. blogger and former congressional staff assistant who described the sexual details of the politically powerful men she had relationships with on her blog, *The Washingtonienne*.<sup>9</sup> Cutler identified her lovers by their initials, mentioned

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<sup>1</sup> April Witt, *Blog Interrupted*, WASH. POST, Aug. 15, 2004, at W12.

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<sup>2</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>3</sup> *Judge Favors Burlington School in Free Speech Case*, THE BRISTOL PRESS, Jan. 18, 2009, <http://www.bristolpress.com/articles/2009/01/19/news/doc4793e08f7ba69877821918.tx> (student was disciplined for calling her school administrators “douchebags” on her personal blog).

<sup>4</sup> Huma Yusuf, *Lawsuits Against Bloggers Seen Rising*, ABC NEWS, July 20, 2008, <http://abcnews.go.com/Technology/story?id=5406538&page=1>.

<sup>5</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 120 (Yale University Press 2007).

<sup>6</sup> *Id.* at 132–36.

<sup>7</sup> Yusuf, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> Richard Leiby, *The Hill’s Sex Diarist Reveals All (Well, Some)*, WASH. POST, May 23, 2004, at D03.

the areas they lived in, and their job descriptions: one was a Chief of Staff Bush appointee, one a partner at a Washington, D.C. law firm, and one counsel to Senator DeWine, who was also Jessica's co-worker.<sup>10</sup> In May of 2004, after two weeks of writing her blog, Cutler's identity was revealed when her blog was anonymously linked to the popular Washington, D.C. blog, *Wonkette*.<sup>11</sup> She was promptly fired from her job in Senator DeWine's Office for "unacceptable use of Senate computers."<sup>12</sup> Cutler then wrote a novel based on her experiences, *The Washingtonienne: A Novel*.<sup>13</sup> In June 2005, Robert Steinbuch, her former co-worker, and the alleged male lover Cutler referred to as "RS," filed a lawsuit against her in federal district court in Washington, D.C. for invasion of privacy for public revelation of private facts.<sup>14</sup> Steinbuch also filed a twenty million dollar lawsuit against Cutler in Arkansas, where he now lives, alleging the same cause of action.<sup>15</sup> However, the cases have yet to be argued on the merits due to Cutler's filing for bankruptcy in 2007.<sup>16</sup>

Some legal scholars think Cutler crossed the line when she detailed her lovers, and that holding her liable will induce all bloggers to better edit their postings beforehand.<sup>17</sup> Yet, I argue in this Note that holding her liable would not be in full consideration of her free speech rights and would create a chilling effect on blogging. This Note will examine the balance between free speech rights against privacy concerns, and argues that the socially progressive nature of blogs warrants their newsworthiness and trumps the privacy claim in most cases. Part II discusses the technical nature of blogs, the power of their immediacy, and vast capability of dissemination. Part III will discuss the different lawsuits against bloggers, with Cutler's blog being an exemplary case highlighting the difficulties in defining what constitutes newsworthy material. Part IV will discuss the public disclosure tort and argue that bloggers should not be liable when they use reasonable care and omit details that would make one identifiable. Part V examines the newsworthiness defense and argues that Cutler's blog is of public interest because it sheds light on the recurring D.C. trend of higher ranked politicians becoming sexually involved with their staff assistants, underscoring the changing views on gender roles.

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<sup>10</sup> *Id.*

<sup>11</sup> Jeffrey Rosen, *Your Blog or Mine?*, N.Y. TIMES, Dec. 19, 2004, <http://www.nytimes.com/2004/12/19/magazine/19PHENOM.html>.

<sup>12</sup> Leiby, *supra* note 9.

<sup>13</sup> JESSICA CUTLER, *THE WASHINGTONIENNE* (Hyperion 2005).

<sup>14</sup> *Steinbuch v. Cutler*, 463 F. Supp. 2d 1 (D.D.C. 2005) (the case has been stayed due to Cutler's filing of Chapter 7 bankruptcy in the United States Bankruptcy Court in the Northern District of New York).

<sup>15</sup> *Steinbuch v. Cutler*, 518 F.3d 580 (8th Cir. 2008) (the case has been stayed due to Cutler's filing of Chapter 7 bankruptcy in the United States Bankruptcy Court in the Northern District of New York).

<sup>16</sup> Matt Apuzzo, *Sex Blogger Files for Bankruptcy*, ASSOCIATED PRESS, June 1, 2007, <http://www.capitolhillblue.com/node/2622>.

<sup>17</sup> SOLOVE, *supra* note 5, at 124.

## II. BLOGS AS A UNIQUE MEDIUM

### A. A DEMOCRATIC FORM OF COMMUNICATION

Blogging is a truly democratic, grassroots form of communication.<sup>18</sup> The process is more open and accessible than most other forms of media because anyone with access to a computer and a connection to the Internet can start a blog.<sup>19</sup> The blog is a vehicle for the individual to publicly voice his or her opinions, comments and thoughts on life.<sup>20</sup> There are more opportunities for women, young people, the politically unpopular, members of minority groups, and those lacking renowned expertise in a specific subject area to have their voices heard.<sup>21</sup> Although there are many different voices in the blogosphere, many blogs are written by ultra-conservative men with narrow perspectives.<sup>22</sup> To increase blogger participation by more underrepresented members of society it is important that blogs are not easily censored.

#### 1. *What is a Blog?*

Blog, short for weblog, is a type of website where entries are made and displayed in reverse chronological order.<sup>23</sup> They are running online commentaries on just about any topic or subject; usually they are about one's life or about the issues of the day.<sup>24</sup> The term blogosphere is used to describe the world of blogging.<sup>25</sup> In the blogosphere, readers of blogs can post comments to the blog and engage in virtual discussions. Blogs are ongoing, and if one does not like a post, they can comment on it and counter what was said.<sup>26</sup> The general mechanism behind a blog is to add postings frequently, which creates a compilation of entries that can be referred back to over time.<sup>27</sup> Even if a blogger does not write anything of importance in the initial stages of his or her blog, what develops can turn into a body of work that is uniquely informative.

There is infinite variety when it comes to blogs. There are sex blogs, dating blogs, political blogs, technology blogs, and music blogs, but seventy to eighty percent of blogs are personal journals.<sup>28</sup> The number of blogs in existence changes daily.<sup>29</sup> While still in the process of entering mainstream consciousness, blogs seem to have numerical credibility

<sup>18</sup> See NOW.org, *Increasing Feminist Voices in the Blogosphere*, <http://www.now.org/web/blogging.html> (last visited Dec. 18, 2009) [hereinafter *Increasing Feminist Voices in the Blogosphere*].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Hannibal Travis, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Of Blogs, EBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1520 (2007).

<sup>22</sup> *Increasing Feminist Voices in the Blogosphere*, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> SOLOVE, *supra* note 5, at 1.

<sup>25</sup> *Increasing Feminist Voices in the Blogosphere*, *supra* note 18.

<sup>26</sup> SOLOVE, *supra* note 5, at 19.

<sup>27</sup> Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 888 (2008).

<sup>28</sup> Rosen, *supra* note 11.

<sup>29</sup> See Adam Thierer, *Need Help...How Many Blogs Are There Out There?*, TECH. LIBERATION FRONT, May 6, 2008 <http://techliberation.com/2008/05/06/need-help-how-many-blogs-are-there-out-there/>.

because they are maturing as an influential and important part of the web.<sup>30</sup> Currently, over 112 million blogs are being tracked in the English language blogosphere alone.<sup>31</sup> There are over 175,000 new blogs being created every day.<sup>32</sup> Bloggers tend to update their blogs regularly, with about 1.6 million posts per day, or over eighteen updates a second.<sup>33</sup> Although blog creation and readership is rapidly increasing, one study found that sixty-two percent of online Americans did not know what a blog was.<sup>34</sup> The study also found that blog creators are likely to be men (fifty-seven percent), relatively well off financially (forty-two percent living in households earning over \$50,000 per year), and well educated (thirty-nine percent having college or graduate degrees).<sup>35</sup> The study also found some growth in blogging among women, minorities and those between the ages of thirty and forty-nine.<sup>36</sup> Censoring bloggers would only hinder this growth and endanger the virility of many unconventional and alternative sites.

## 2. *The Power of Blogs*

It is impossible to contain the spread of information, but that should not be something to be feared for the rapid dissemination of data can prove beneficial. Blogs are “superconnectors,” capable of spreading information widely and instantaneously.<sup>37</sup> A popular blogger can decide to link to another, less popular blog, which is what occurred in Cutler’s case, and in almost an instant the content on the less popular blog is widely disseminated.<sup>38</sup> Although there are some spitefully created blogs, such as, RevengeWorld.com, BitterWaitress.com, and DontDateHimGirl.com, their vengeful intent should not be reason enough to shut them down.<sup>39</sup> There are reputable and noble blogs out there as well. For example, Hurricane Katrina victims posted personal information about lost family members on various blogs to try and locate loved ones.<sup>40</sup> In one tragic case, a blogger caught his killer. The victim blogged that his sister’s ex-boyfriend was over at their house and that he would not leave, and later that night the former boyfriend stabbed the blogger and his sister.<sup>41</sup> In this way, blogs are becoming more of a “participatory media”;<sup>42</sup> and through the myriad types of blogs that people are creating, cyberspace is being greatly enriched. While establishing their unique role in our cultural conversation, blogs are

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<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Lee Rainie, *The State of Blogging*, PEW INTERNET & AMERICAN LIFE PROJECT (2005), <http://www.pewinternet.org/Reports/2005/The-State-of-Blogging.aspx>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> SOLOVE, *supra* note 5, at 63.

<sup>38</sup> *Id.*

<sup>39</sup> *See* Revenge World, <http://www.RevengeWorld.com> (last visited on Dec. 30, 2009); Bitter Waitress, <http://www.BitterWaitress.com> (last visited on Mar. 21, 2009); Don’t Date Him Girl, <http://www.DontDateHimGirl.com> (last visited on Dec. 30, 2009).

<sup>40</sup> SOLOVE, *supra* note 5, at 23.

<sup>41</sup> *Id.*

<sup>42</sup> Paul Horwitz, *The Blogosphere and the Law: ‘Or of the [Blog]’*, 11 NEXUS J. OP. 45, 54 (2006).

also being viewed as unsettling by the conventional news media because they threaten their dominant status.<sup>43</sup>

## B. BLOGS HAVE UNSETTLED THE CONVENTIONAL NEWS MEDIA

Blogging has been described as a “phenomenon” that has quickly emerged as a compelling force in American politics.<sup>44</sup> This would explain why bloggers have received media credentials to the Democratic National Convention and Capitol Hill press conferences, not to mention to entertainment events as well.<sup>45</sup> Some believe blogging is disrupting the normal mechanisms of media outlets. Journalists have accused bloggers of lowering standards as bloggers usually do not rely on fact-checking, often only have a single source, and can rely wholly on anonymous sources.<sup>46</sup> Ironically though, the blogosphere as a whole has better error-correction machinery than the conventional media does.<sup>47</sup> It was a group of bloggers’ “dogged persistence in pursuing a story that the conventional media had tired of that forced Trent Lott to resign as Senate majority leader.”<sup>48</sup> This depth of investigation is made possible by the millions of readers who post comments that augment the information already found on blogs. Essentially, the blogosphere acts as a “collective enterprise, not twelve million separate enterprises, but one enterprise with twelve million reporters.”<sup>49</sup> The Supreme Court has upheld a reporter’s right to gather news and report on various topics.<sup>50</sup> Perhaps it will not be long before they uphold a blogger’s right to do the same. Blogs function like the news in many respects: they inform people about political, social, cultural, and economic issues that allow people to stay better informed. Recently, in California, bloggers were protected by a reporter privilege, as a blog site was not forced to reveal its sources pertaining to confidential information found on the site.<sup>51</sup> Blogs have been categorized as printed publications, as their online “pages” of text are opened and closed at a reader’s pace and their recurring posts make them similar to periodicals.<sup>52</sup> All of these similarities show a trend toward treating blogs as a media outlet, emphasizing the importance of blogs and their laudable contributions to public debate.

<sup>43</sup> *Id.* at 46.

<sup>44</sup> Sunny Woan, *The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism*, 44 CAL. W. L. REV. 477, 478 (2008).

<sup>45</sup> SOLOVE, *supra* note 5, at 24.

<sup>46</sup> Richard A. Posner, *Bad News*, N.Y. TIMES, Jul. 31, 2005, at <http://www.nytimes.com/2005/07/31/books/review/31POSNER.html> [hereinafter Posner, *Bad News*].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (writing that in 2002 Senator Lott (R, Miss.) praised Strom Thurmond, a supporter of racial segregation; mainstream media failed to notice the comment and Lott only resigned as Majority Leader when bloggers brought the story to public consciousness).

<sup>49</sup> *Id.*

<sup>50</sup> *Paul v. Davis*, 424 U.S. 693, 713 (1976) (holding that there is no constitutional protection for defendant against disclosure of facts from his criminal record that he was arrested for shoplifting).

<sup>51</sup> See *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d. 72, 103 (Cal. Ct. App. 2006) (holding bloggers did not have to reveal the source of their information of trade secrets posted on their blog under California’s Reporter Shield Law).

<sup>52</sup> *Id.* at 103–04.

## C. BLOGS SHOULD NOT BE EASILY CENSORED

It is apparent that as boundaries between public and private are being transformed through blogs, more extreme views are able to be heard. Some feel blogs exacerbate social tensions because it gives a powerful electronic platform to people with radical views.<sup>53</sup> Seventh Circuit Court Judge Richard Posner feels there is not much harm in blogs:

They enable unorthodox views to get hearing. They get 12 million people to write rather than just stare passively at a screen. In an age of specialization and professionalism, they give amateurs a platform. They allow people to blow off steam who might otherwise adopt more dangerous forms of self-expression. They even enable the authorities to keep tabs on potential troublemakers; intelligence and law enforcement agencies devote substantial resources to monitoring blogs and Internet chat rooms.<sup>54</sup>

The Internet has become a precondition for individual liberty and democratic deliberation. It is clear blogs allow for alternative views from what some term as a, “conventional media bias.”<sup>55</sup> Critics argue that the conventional media usually slants the presentation of issues or avoids dealing with tough issues altogether, for instance, minority groups are either demonized and stereotyped, or not reported on at all.<sup>56</sup> One of the principle values of the First Amendment is the ability to discover truth in the “marketplace of ideas.”<sup>57</sup> All of the varied kinds of blogs found in the blogosphere, even the extreme blogs, will profusely add to public debate on all kinds of issues.

Some scholars believe the impact the blogosphere has on the “marketplace of ideas” warrants the proposition that the blogosphere should be left to regulate itself.<sup>58</sup> Due to our culture’s changing perception of what information should remain closed and private, and what information should be open to public purview, it is even more important to ensure that all sides of issues are represented.<sup>59</sup> The United States (U.S.) government has had a relatively small part in regulating the Internet.<sup>60</sup> The Communications Decency Act of 1996 states that it is the policy of the U.S. to, “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>61</sup> In recent decades there has been heightened scrutiny surrounding the concentration and consolidation of media ownership and control.<sup>62</sup> The threat to the “marketplace of ideas” is much greater when the media is in possession of a few. The courts have warned

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<sup>53</sup> Posner, *Bad News*, *supra* note 46.

<sup>54</sup> *Id.*

<sup>55</sup> Travis, *supra* note 21, at 1574–75.

<sup>56</sup> *Id.*

<sup>57</sup> See Kathleen M. Sullivan, *Free Speech and UnFree Markets*, 42 UCLA L. REV. 949, 950 (1995).

<sup>58</sup> Woan, *supra* note 44, at 479.

<sup>59</sup> CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 78 (Westview Press 2000).

<sup>60</sup> Woan, *supra* note 44, at 492.

<sup>61</sup> Communications Decency Act of 1996, 47 U.S.C. § 230 (2009).

<sup>62</sup> Travis, *supra* note 21, at 1573.

that this could lead to an “unfettered power” to disseminate only these few owners’ “own views on public issues,” which would lead to a distortion of public debate.<sup>63</sup> Congress enacted section 230 of the Communications Decency Act to provide immunity for computer service providers when they fail to take down defamatory messages or screen posts on their websites.<sup>64</sup> This statute ensures that the “free market” on ideas is not constrained, at least not on the Internet. However, section 230 does not immunize bloggers for what they themselves say, at most it may immunize them from comments to their posts written by others.<sup>65</sup> The invasion of privacy torts are the real threats to bloggers, as more and more bloggers are getting into trouble over what they write.

It is a widely held ideology that participation in cyberspace should be free and largely anonymous. However, Internet users are beginning to be prosecuted for misrepresenting themselves online.<sup>66</sup> Last year a Missouri woman was the first person to be found guilty of cyberbullying when she misrepresented herself on the social networking site MySpace.<sup>67</sup> No doubt that case has signaled a wave of concern over online etiquette. Blogs are even becoming a legitimate concern for employers, with some companies sanctioning the usage of blogs. Last May, IBM (International Business Machines) published internal guidelines that encouraged employees to engage in online discussions using blogs when providing information to clients, gaining feedback on products, and reaching new business. Yet, just as easily employees have also used blogs to disclose proprietary information and to defame employers, co-workers or customers.<sup>68</sup> These kinds of uses of blogs have been cleverly coined “cybersmear[s].”<sup>69</sup> However, the more pressing matters in the blogosphere surround the lawsuits that have been brought against bloggers who are accused of invading another’s privacy through their blog posts.

### III. LAWSUITS AGAINST BLOGS THAT REVEAL PRIVATE FACTS

#### A. *STEINBUCH V. CUTLER*

One of the lovers Cutler mentions in her blog, Robert Steinbuch, filed two lawsuits against her in federal court, one in Washington, D.C. and one in Arkansas. Steinbuch has attempted to sue not just Cutler, but the blog *Wonkette*, for re-posting Cutler’s blog, Hyperion Publishing and Disney Publishing for distributing Cutler’s semi-autobiographical book, and Home Box Office (HBO) for purchasing the option to develop a television show

<sup>63</sup> *Id.*

<sup>64</sup> *Zeran v. America Online, Inc.*, 129 F.3d. 327, 334 (4th Cir. 1997).

<sup>65</sup> SOLOVE, *supra* note 5, at 153.

<sup>66</sup> Brian Stelter, *Guilty Verdict in Cyberbullying Case Provokes Many Questions Over Online Identity*, N.Y. TIMES, Nov. 27, 2008, at A0.

<sup>67</sup> *Id.* (quoting Professor Sameer Hinduja: “[i]t will be interesting to see if issues of safety and security will eventually trump the hallmark ideology of free, largely anonymous or pseudonymous participation in cyberspace.”).

<sup>68</sup> William H. Floyd III & James T. Hedgepath, *The Electronic Workplace: Blogs, Cybersmears and Similar Challenges*, 17 S. CAROLINA LAWYER 36, 38 (2008).

<sup>69</sup> *Id.*

based off of Cutler's life.<sup>70</sup> All have been dismissed as defendants except for Cutler and Hyperion.<sup>71</sup> Both cases have been stayed due to Cutler's filing for bankruptcy, and these cases have yet to be argued on the merits.<sup>72</sup>

### 1. *What was said about Steinbuch?*

Cutler began her blog on May 5, 2004, and continued to post on May 6, 7, 10-14, 17 and 18, 2004, until she deleted her blog on May 18, 2004.<sup>73</sup> Cutler and Steinbuch had their first date on May 6, 2004, although Cutler had briefly been introduced to him in February 2004 when she was hired as a Staff Assistant for Senator DeWine, the same senator Steinbuch worked for.<sup>74</sup> It was Cutler's supervisor who approached Cutler during work hours on Steinbuch's behalf to proposition Cutler for a date with Steinbuch.<sup>75</sup> They went out for cocktails that evening, Steinbuch stayed sober while Cutler became intoxicated, and later they went back to Cutler's apartment and had their first sexual encounter.<sup>76</sup> Steinbuch had known Cutler for no more than several hours.<sup>77</sup> Cutler proceeded to post details of her first sexual encounter with Steinbuch, and continued to post further details about her subsequent sexual encounters with him. The intimate details Cutler mentioned in her blog that relate to Steinbuch include: the number of times he ejaculated, his difficulty in maintaining an erection while wearing a particular condom, spanking and hair pulling during sexual activity, intimate personal conversations during sexual activity, the physical description of Steinbuch's naked body, and the sexual positions assumed during sexual activity.<sup>78</sup> Cutler's blog did not solely focus on Steinbuch, as Cutler was also blogging<sup>79</sup> about the five other men she was carrying on sexual relationships with.

### 2. *Cutler's Argument*

In Cutler's Motion to Dismiss, she not only argues that she has First Amendment protection, but that there are dispositive issues on jurisdiction, waiver and statute of limitations.<sup>80</sup> I will only be dealing with her First

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<sup>70</sup> *Steinbuch*, 463 F. Supp. 2d at 4 (dismissing Anna Marie Cox, creator of *Wonkette*); *Steinbuch*, 518 F.3d at 583 (affirming the dismissal of Disney Publishing, HBO and Time Warner, and granting discovery on the issue of whether personal jurisdiction exists over Hyperion Publishing); *Steinbuch v. Hachette Book Group*, 2009 WL 963588 (E.D. Ark. Apr. 8, 2009) (granting 12(b)(6) dismissal to Hachette book distributor of Jessica Cutler's Hyperion-published novel).

<sup>71</sup> *Id.*

<sup>72</sup> *Steinbuch*, 518 F.3d at 583.

<sup>73</sup> Mem. Of Points & Authorities In Supp. Of Def.'s Mot. To Dismiss the Compl. at 6, *Steinbuch*, 463 F. Supp. 2d 1 (D.D.C. July 26, 2005) (No. 05-0970), available at <http://www.citmedialaw.org/threats/steinbuch-v-cutler> [hereinafter *Steinbuch Def's Mem. Supp.*].

<sup>74</sup> *Id.* at 2, 7.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Mem. In Opp. To Def.'s Mot. To Dismiss at 10, *Steinbuch*, 463 F. Supp. 2d 1 (D.D.C.Sep. 15, 2005) (No. 05-0970), available at <http://www.citmedialaw.org/threats/steinbuch-v-cutler> [hereinafter *Steinbuch Mem. Opp. Def.*].

<sup>79</sup> Compl. at 13, *Steinbuch*, 463 F. Supp. 2d 1, (D.D.C.May 18, 2005) (No. 05-0970), available at <http://www.citmedialaw.org/threats/steinbuch-v-cutler> [hereinafter *Steinbuch Compl.*].

<sup>80</sup> Def's Mot. To Dismiss the Compl., *Steinbuch*, 463 F. Supp 2d 1 (D.D.C.Sep. 15, 2005) (No. 05-0970), available at <http://www.citmedialaw.org/threats/steinbuch-v-cutler> [hereinafter *Steinbuch Def's Mot. Dismiss*].



Amendment argument. Cutler claims her own personal sexual experiences with Steinbuch, and the other men she blogged about, relate to the newsworthy topic of political sex scandals in Washington, D.C.<sup>81</sup> Read in its entirety, Cutler's blog makes a shocking and disturbing portrayal of casual and even reckless sexual encounters between young, entry-level Capitol Hill staffers, and senior staffers (like Steinbuch), executive branch officials, and other politically powerful men.<sup>82</sup> Cutler argues the interrelationship between youth, beauty, sex, money, and power in Washington, D.C. has long been a matter of legitimate, and sometimes pressing, public interest.<sup>83</sup>

### 3. *Steinbuch's Argument*

Steinbuch argues Cutler's blog is not newsworthy.<sup>84</sup> He insists that even if a matter is of legitimate public concern, there may be details about a person involved in that matter which are too private to be considered of public concern.<sup>85</sup> Yet, U.S. District Judge, Paul Friedman, wondered whether, "it was smart to file a lawsuit and lay out all of [Steinbuch's] private, intimate details," if they are indeed private details.<sup>86</sup> Steinbuch claims that no bureaucrat or employee in Washington, D.C., "indeed no person anywhere in the Country," would have the right to privacy if Cutler's blog is found to be of legitimate public interest.<sup>87</sup> Steinbuch is also alleging the facts from Cutler's blog are not even true, and that she portrayed him in a false-light.<sup>88</sup> This paper will leave those two contradictory claims aside. Steinbuch's main claim is for public disclosure of private facts, and therefore I will take Cutler's blog as truthful. It is clear though that the arguments of both Steinbuch and Cutler turn on the interpretation of newsworthiness, and as such this paper will argue for an expansive interpretation that would include Cutler's blog.

## B. *JOHNSON V. MAX*

Former Miss Vermont beauty queen, Katy Johnson, obtained an injunction from a Florida state court in 2003, enjoining blogger Tucker Max from, "[d]isclosing any stories, facts or information, notwithstanding its truth, about any intimate or sexual act engaged in by [Johnson]."<sup>89</sup> Johnson is suing over a nine page narrative entitled, "The Miss Vermont

<sup>81</sup> Steinbuch Def.'s Mem. Supp., *supra* note 73, at 9.

<sup>82</sup> *Id.* at 27.

<sup>83</sup> *Id.*

<sup>84</sup> Steinbuch Mem. Opp. Def., *supra* note 78, at 25.

<sup>85</sup> *Id.* at 31 (*citing* Nobles v. Cartwright, 659 N.E.2d 1064, 1077 (Ind. Ct. App. 1995)).

<sup>86</sup> ChemStudioWeb.Com, *Online Sex Diary: Blogger Got Sued!*, June, 5, 2007, <http://www.chemstudioweb.com/online-sex-diary-blogger-got-sued/>.

<sup>87</sup> Steinbuch Mem. Opp. Def., *supra* note 78, at 26.

<sup>88</sup> *Id.* at 9, 26.

<sup>89</sup> ACLU of Florida, Inc.'s Mot. for Leave to Appear as *Amicus Curiae* in Supp. of Def.'s Emergency Mot. to Dissolve Temporary Injunction at 3, *Johnson v. Max*, No. 9:03-CV-80515, at 3 (S.D. Fla. June 17, 2003) available at [http://www.citmedialaw.org/threats/johnson-v-tucker\\_max](http://www.citmedialaw.org/threats/johnson-v-tucker_max) [hereinafter Johnson ACLU Mot.].

Story,” written by Max, which details private facts about his alleged intimate relationship with Johnson.<sup>90</sup> Max writes:

[S]he desperately intensified her attack on my loins, slipping a hand down my pants, and bringing one of my hands up to her now-exposed left breast. I desperately tried to formulate a plan about where we could fuck . . . . Our clothes were off, in the back of a Ford Explorer, where there is not much room to spare, in less than 30 seconds. About a second after that she mounted me.<sup>91</sup>

However, just a few weeks after filing her lawsuit, Johnson filed a notice to dismiss; her attorney claimed victory stating that, “she has exposed a Web site [sic] which clearly degrades women.”<sup>92</sup> She gave no specific reason why she dropped the lawsuit, but most likely it was due to the extensive media coverage she received. Max has stated that he felt compelled to write about the specific details of his relationship with Johnson because of the “giant hypocrisy” he encountered when he met Johnson.<sup>93</sup> Johnson operated a children’s website that gave character education advice for young girls and sold related books and merchandise, and she promoted platforms such as, Say Nay Today and the Sobriety Society.<sup>94</sup> Max also claimed victory stating: “I am proud that I was able, in a small way, to serve my country by defending, and ultimately defeating, an egregious attack on the 1<sup>st</sup> Amendment.”<sup>95</sup> The differing interpretations of victory highlight the tension between the need for privacy and the need for free expression rights.

This case exemplifies the two competing values at work in invasion of privacy cases, the desire to be free from unwanted intrusion and the desire to freely express oneself. Johnson claims a victory in exposing a blog that prides itself in exposing the private details of others. Yet, Max claims a victory under the First Amendment in being able to continue to blog about his racy encounter with the former Miss Vermont. The ACLU argued for the release of the injunction, claiming the Internet is, “the closest thing ever invented to a true free marketplace of ideas.”<sup>96</sup> They argued that tortious speech was insufficient to justify the prior restraint put on Max.<sup>97</sup> Historically, the invasion of privacy claims have almost never amounted to the justification needed for prior restraints.<sup>98</sup> The injunction that was issued prohibited Max from writing Johnson’s name, and also from writing, “Miss Vermont.”<sup>99</sup> It would have been useful to see how the courts would have

<sup>90</sup> Tucker Max, *The (Almost Banned) Miss Vermont Story*, TuckerMax.Com, Jan. 2003, [http://www.tuckermax.com/archives/entries/date/the\\_almost\\_banned\\_miss\\_vermont\\_story.phtml#705](http://www.tuckermax.com/archives/entries/date/the_almost_banned_miss_vermont_story.phtml#705).

<sup>91</sup> *Id.*

<sup>92</sup> *Former Beauty Queen Drops Lawsuit Against Pick-up Artist*, ASSOCIATED PRESS, Jul. 22, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11548> [hereinafter *Former Beauty Queen*].

<sup>93</sup> Max, *supra* note 90.

<sup>94</sup> Adam Liptak, *Internet Battle Raises Questions About the First Amendment*, N.Y. TIMES, June 2, 2003, <http://www.nytimes.com/2003/06/02/national/02INTE.html>. See Clinton Fein, *Someone Talked!*, Annoy.Com, June 6, 2003, <http://www.annoy.com/features/doc.html?DocumentID=100495> (describing Johnson’s website as containing a “type of saccharine fluff that would make most people nauseous”).

<sup>95</sup> *Former Beauty Queen*, *supra* note 92.

<sup>96</sup> Johnson ACLU Mem., *supra* note 89, at 2.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> Liptak, *supra* note 94.

<sup>99</sup> *Former Beauty Queen*, *supra* note 92.

solved the issue of prior restraints on blogs. The court may have allowed Max to refer to “Miss Vermont,” but not to Johnson’s name, or it may have revoked the injunction entirely if it found that Johnson was a public figure because of her website and beauty pageant titles. Max went further than Cutler in his blogging, Max used Johnson’s real name, posted actual pictures of her, and gave plenty of very specific identifying details.<sup>100</sup> This case still leaves open the question of how cryptic a blogger has to be in order to write about someone else, especially when an injunction, not just a lawsuit, could be issued.

### C. CONCLUSION

Bloggers are in a precarious legal position, and Cutler’s and Max’s cases only highlight the ambivalence bloggers are facing regarding what content they can write. The cases do not yield resolutions, only more questions. Bloggers have a powerful medium at their disposal, yet it is unclear exactly what they can do with that medium. In the above cases, Cutler wrote about her life and the men in it, Max wrote about a particular relationship he had with one particular woman, and both bloggers characterize themselves as authors. These cases have different outcomes: Cutler is still involved in litigation, while Max’s lawsuit was dropped. Though it is likely that Max would have been found liable, it would have been beneficial for other bloggers to see what arguments he would have used in his defense, and if they would have sufficed.

## IV. THE LAW OF PRIVACY IN THE BLOGOSPHERE

The idea of tort liability to remedy the invasion of one’s privacy was first conceived by Samuel Warren and Louis Brandeis in their 1890 article entitled, ‘The Right of Privacy’.<sup>101</sup> One of their main concerns was that the press of the 1890s was overstepping its prerogatives by publishing essentially private and intimate details of people’s lives.<sup>102</sup> They observed that the problem of the increased commercial exploitation of the private life would be vastly heightened by the impact of new technologies, and that privacy torts were the proper remedy.<sup>103</sup> Again, like in the 1890s, we are faced with new technologies, the Internet, and more potential invasions of privacy. The public disclosure tort in particular has been used since the 1890s, across jurisdictions, by individuals who seek to suppress unfavorable or damaging information about themselves or their immediate family.<sup>104</sup>

<sup>100</sup> Max, *supra* note 90.

<sup>101</sup> Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890) (noting that the common law privacy torts were devised in the United States and not inherited from England).

<sup>102</sup> SOLOVE, *supra* note 5, at 109.

<sup>103</sup> *Id.*

<sup>104</sup> See *Forsher v. Bugliosi*, 26 Cal. 3d 792 (1980) (failing to prove disclosure of private facts where facts were related to news media surrounding Manson Family killings), *Harris v. Easton Publishing Co.*, 335 Pa. Super. 141 (1984) (holding recipients of welfare benefits have right to reasonable expectation of privacy regarding amount of benefits), *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (personal details in book about historical Great Migration were found to be only slightly offensive);

In the early part of the twentieth century adultery with another man's wife constituted a literal invasion of privacy, as the wife was defined as being the property of her husband.<sup>105</sup> This was established in the 1904 Supreme Court case, *Tinker v. Colwell*, where adultery was held to be a "civil injury" and that the public disclosure tort could be used to protect a husband's reputation against allegations of his wife's infidelity.<sup>106</sup> In the middle of the twentieth century the public disclosure tort began to be used by plaintiffs to uphold their professional reputations, as they tried to censor media defendants from publishing unpleasant, yet truthful facts.<sup>107</sup> Though liability is usually not found with the media defendant, the Court has moved from treating reputation as somewhat of a property interest to treating it as a privacy interest.

Deciding public disclosure lawsuits has become a balancing act for courts, with privacy interests in reputation pitted against the media's free speech rights. In *Time v. Hill*, the Court held that *Life* magazine could publish an article that mentioned the details of a family that was trapped for days by a convicted felon.<sup>108</sup> The Court in *Hill* acknowledged the family's privacy concerns in not wanting to be eternally stigmatized and forced to relive the traumatic event through ongoing press coverage.<sup>109</sup> Yet, the Court ultimately decided there was public interest in the story because a play was opening that was loosely based off of the event.<sup>110</sup> The Court grappled with the contention, wondering if the public interest aspect was "not so overpowering as virtually to swallow the tort."<sup>111</sup> The Court held that the risk of exposure is an "essential incident of life in a society which places a primary value on freedom of speech and press," and that being able to have a free discussion on various topics helps to "enable members of society to cope with the exigencies of their period."<sup>112</sup> The Court has since acknowledged that there is a "sphere of collision" between claims of privacy and those of the free press.<sup>113</sup> That collision has not subsided, and the contours of privacy rights are still uncertain. It seems the public disclosure tort changed from being a tool to protect reputation to a tool used to attempt media censorship.

#### A. THE PUBLIC DISCLOSURE OF PRIVATE FACTS TORT

There are four distinct kinds of invasions of privacy, but this paper is mainly concerned with the public disclosure tort. Common law describes the public disclosure tort as, "unreasonable publicity given to another's

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*Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003) (widely disseminated list of employee social security numbers did not amount to public disclosure).

<sup>105</sup> *Tinker v. Colwell*, 193 U.S. 473, 481 (1904).

<sup>106</sup> *Id.* at 482.

<sup>107</sup> *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (holding daredevil's bizarre antics were not public disclosures of private facts), *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (publishing rape victim's name is protected under First Amendment when name is matter of public record).

<sup>108</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

<sup>109</sup> *Id.* at 384, n.7.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 388.

<sup>113</sup> *Cox Broadcasting Corp.*, 420 U.S. at 491.

private life.”<sup>114</sup> Liability is found if, “the matter publicized is of the kind that, (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public.”<sup>115</sup> The disclosure of the facts must have been done in a way that the matter would be regarded as substantially certain to become one of public knowledge, there is no liability if the plaintiff leaves open to the public eye some fact or characteristic.<sup>116</sup> The offensiveness of the intrusion will be adjudged by the standard of an ordinary reasonable man, and the protection that is given to a plaintiff’s privacy must be relative to the customs of the time and place, to the plaintiff’s occupation, and to the habits of his neighbors and fellow citizens.<sup>117</sup>

Lawsuits targeting blogs must satisfy the elements of the public disclosure tort. The “public disclosure” element will likely be satisfied for a blogger, unless they had a password in use. Even if only a few people read the blog, without a password, it is capable of being accessed by the public. The “private facts” element will most likely be easy to determine, especially when it comes to online sexual diaries. In Steinbuch’s case, he must both prove that Cutler’s disclosure was public and that the facts were private, in addition to proving that the publication was highly offensive and of no legitimate concern to the public. Most believe Cutler’s actions were, “perfunctory at best,” in attempting to disguise Steinbuch.<sup>118</sup> She claims, however, she initially wrote her blog for the observation of only three friends, two of whom who lived a great distance from Washington, D.C.<sup>119</sup> She did not include a password to her blog because she did not think it was, “going to come up on the radar.”<sup>120</sup> In May of 2004, two weeks after Cutler began blogging, an anonymous tip was sent to the popular Washington, D.C. website, *Wonkette*, and Cutler’s blog was re-published on that site for thousands of viewers to see.<sup>121</sup> This paper will assume that, with the combination of Cutler’s failure to use a password and her specific statements regarding Steinbuch, a judge could likely find her liable for public disclosure of private facts. Considering the reasonable person standard, most jurisdictions will likely look at *how* identifiable someone was when determining offensiveness. A blog post has a higher potential of being considered offensive if there is a substantial amount of personal and private identifying markers that serve to reveal, actually or constructively, another’s identity. Although it is still unclear exactly how courts will reason, I argue that they should consider a blogger’s reasonable attempt to mask the plaintiff’s identity and not find offensiveness where the plaintiff is

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<sup>114</sup> Restatement (Second) of Torts § 652A(2)(c) (1977).

<sup>115</sup> *Id.* at § 652(D).

<sup>116</sup> *Id.* at § 652(D) cmt. b.

<sup>117</sup> *Id.* at § 652(D) cmt. c.

<sup>118</sup> Jennifer M. Liebman, *Defamed By a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL’Y 343, 353 (2006).

<sup>119</sup> Witt, *supra* note 1, at W12.

<sup>120</sup> *Id.* (quoting from an interview with Jessica Cutler).

<sup>121</sup> *Id.* (Wonkette creator, Ana Marie Cox, wrote an e-mail stating that she, “[had] no reason to believe that Jessica was the tipster”).

not substantially identifiable.<sup>122</sup> Before getting to Cutler's newsworthiness defense, I will now consider the implications of the "highly offensive" element and discuss just *how* identifiable Steinbuch was.

### 1. *There Should be No Blanket Liability for Bloggers*

If a blogger writes private facts about someone, and that person is later identified, there should be no blanket rule that finds liability for the blogger if he or she used reasonable care. The privacy torts can be misused to attack speakers who are critical of certain people or topics<sup>123</sup> which is why bloggers should be exculpated when they reasonably attempt to mask identities. A blanket rule of holding bloggers liable simply because someone's identity was revealed is unfair. Most bloggers rarely reach a national audience, but the few that unexpectedly do should not be held responsible when people happen to correctly guess who they wrote about, as long as the blogger reasonably tried to hide the plaintiff's identity. Judge Posner believes that it is not necessarily a bad thing when someone is exposed for hiding discreditable facts about themselves because it allows for a more "accurate picture."<sup>124</sup> Judge Posner argues that people often want to hide harmful facts about themselves for their own gain, a practice he compares to a merchant concealing a defect in a product.<sup>125</sup> Therefore, holding bloggers liable only when they fail to use reasonable care inhibits spiteful lawsuits from springing up when someone's true nature happens to be exposed.<sup>126</sup>

Lawsuits will continue to be brought against bloggers as our society becomes more open. To impose tort liability on bloggers because they reveal secrets, even though they reasonably attempted to protect them seems to go against the progressive direction society is heading. The Internet is no longer a novelty, it is something generations are now growing up with and more and more people are content with making personal information public.<sup>127</sup> If a blogger used non-obvious pseudonyms to describe private details about another, and a third party was able to identify the person who was blogged about through additional facts not obtained in the blog, then the blogger should not be liable for offensiveness. Recent reports show that twenty-five percent of bloggers post very personal details on their blogs, sixty-six percent frequently write about other people they know without permission, and twenty-one percent even explicitly identify other people on their blog.<sup>128</sup> If Cutler had just used initials, and left out the other identifying details, she would not be responsible for the many sleuths

<sup>122</sup> It is also unclear if Cutler would be liable if she had used a password for her blog, but if instead, one of her three friends had sent the e-mail to *Wonkette*. Would merely creating a blog count as publicity? Not likely.

<sup>123</sup> SOLOVE, *supra* note 5, at 120.

<sup>124</sup> RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 232 (Harvard University Press 1998) (1981) [hereinafter POSNER, *ECONOMICS*].

<sup>125</sup> *Id.* at 233.

<sup>126</sup> *Id.*

<sup>127</sup> See Danielle Citron, *Zuckerberg's Law of Data Sharing*, ConcurringOpinions.Com, Dec. 8, 2008, [http://www.concurringopinions.com/archives/2008/12/zuckerbergs\\_law\\_1.html](http://www.concurringopinions.com/archives/2008/12/zuckerbergs_law_1.html) (quoting Facebook Founder, Mark Zuckerberg: "next year, people will share twice as much information as they share this year, and that next year, they will be sharing twice as much as they did the year before.").

<sup>128</sup> SOLOVE, *supra* note 5, at 59.

who searched the Internet and tried to come up with potential candidates of who her male lovers were based on those initials.<sup>129</sup> However, it was the plethora of personal details Cutler included about Steinbuch that did make him readily identifiable, even without the help of the Internet. Offensiveness should not turn on if the plaintiff's identity was revealed to a substantial portion of the public, but rather *how* identifiable the plaintiff was to the public.

## 2. *Cutler's Blog Satisfies the "Highly Offensive" Element*

It is reasonable for a blogger to take precautions so that the identity of the person of target criticisms is not revealed; offensiveness should be found when those precautions are not reasonably taken. Cutler wrote about Steinbuch in such a way that made Steinbuch *very* identifiable. Steinbuch's complaint alleges that he was clearly recognized by a substantial segment of the community as the "RS" sexual partner Cutler described, because:

Cutler used [p]laintiff's initials, "R.S." and his first name to refer to him. Cutler also identified [p]laintiff in her public blog through his religion, Jewish; his job, Committee Counsel to the Senate Committee on the Judiciary; his place of residence, Bethesda; the fact that he has a twin; his general appearance ['RS looks like George Clooney without his glasses on']; and details of Cutler's intimate relationship with [p]laintiff that Cutler had previously disclosed to colleagues and co-workers.<sup>130</sup>

Cutler had enough foresight to use initials, but not enough to use reasonable care and only mention the initials without going into specificities. For all of the six men she was having relationships with, she used initials, stated the general Washington, D.C. neighborhood they lived in, and their occupations: "[J]F=Married man who pays me for sex. Chief of Staff at one of the gov agencies, appointed by Bush....MD=Dude from the Senate office I interned in Jan. thru Feb. Hired me as an intern."<sup>131</sup> Cutler also slipped and once mentioned Steinbuch's first name, "Rob."<sup>132</sup> There are enough facts in regards to Steinbuch that make him identifiable even though Washington, D.C. has over 500,000 residents; Bethesda, Maryland has about only 50,000 residents.<sup>133</sup> More significantly, there is likely only a miniscule segment of Washington, D.C.'s and Bethesda's populations who work as Counsel on the Senate Judiciary Committee. The committee is comprised of nineteen Senators and has seven sub-committees.<sup>134</sup> It is also likely that Steinbuch may be the only member of the Committee that has a twin and is also Jewish. These details honed in on

<sup>129</sup> Rosen, *supra* note 11, (describing one website that posted pictures of thirteen chiefs of staffs at federal agencies under the headline, "Would You Sell Sex to This Man?").

<sup>130</sup> Steinbuch Compl., *supra* note 79, at ¶ 12.

<sup>131</sup> *Id.* at ¶ 13.

<sup>132</sup> *Id.*

<sup>133</sup> See U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/11/1150000.html> (for population of Washington D.C.); CityData.Com, <http://www.city-data.com/city/Bethesda-Maryland.html> (for population of Bethesda, Maryland).

<sup>134</sup> See United State Senate Judiciary Committee on the Judiciary, "About the Committee," <http://judiciary.senate.gov/about/faq.cfm> (last visited Mar. 22, 2009).

Steinbuch's identity and made him easily identifiable to the public, constituting Cutler's remarks as highly offensive.

### 3. *Anonymous Bloggers as "Highly Offensive"*

In the case of the anonymous blogger, most courts have set a stringent standard that must be met in the pleadings stage in order to obtain the identity of an anonymous blogger.<sup>135</sup> In one recent case, anonymous posters on the popular law school admissions forum, AutoAdmit.com (AutoAdmit), posted degrading and disturbing sexually explicit comments about two female students at Yale Law School.<sup>136</sup> These students, plaintiffs Doe I and Doe II, sued the anonymous posters over statements like "[Doe II] deserves to be raped," and, "I would like to hate-fuck [Doe I] but since people say she has herpes that might be a bad idea."<sup>137</sup> These posters mentioned the plaintiffs by name, and revealed disturbing and harassing information, such as "anyone who goes to the gym in the afternoon has seen her tramping [sic] around in spandex booty shorts and a strappy tank top."<sup>138</sup> It is clear these anonymous posters intentionally and recklessly meant to identify the plaintiffs because they mention their names and the law school they attend. In addition, the posters have no authorial privilege because the comments are third party revelations. The posts do not even try to mask the identities of these plaintiffs. For a case such as this, the bloggers should be liable for acting in such a highly offensive manner because they explicitly posted plaintiffs' names, pictures, and the law school they attended.<sup>139</sup>

### 4. *Easily Finding Bloggers Liable Encourages Disreputable Conduct*

Blogs have a way of encouraging people to be responsible for their own reputations. If Cutler had disguised Steinbuch's identity sufficiently, she should not have been charged with offensiveness for her other statements. What is left out of the criticism of Cutler's blog is that these men met Cutler in extremely public places and knew her for only a few hours before engaging in a sexual relationship with her.<sup>140</sup> Steinbuch had Cutler's boss ask Cutler out on a date for him.<sup>141</sup> In Cutler's semi-autobiographical novel, she comments that one of her lovers (not Steinbuch) pulled up next to her and offered to give her a ride as she was walking home, and that another met Cutler at a bar and immediately took her to his office to have sex.<sup>142</sup> The other employees in the Senate office

<sup>135</sup> See e.g., *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (holding that a defamation plaintiff must satisfy a "summary judgment" standard before obtaining the identity of an anonymous defendant).

<sup>136</sup> See CitizensMediaLaw.Org, AutoAdmit Story, June 8, 2007, <http://www.citmedialaw.org/threats/autoadmit> (last visited on Mar. 19, 2009).

<sup>137</sup> Pls.' Compl. ¶¶ 23–24, *Doe v. Doe*, No. 3:07 CV 909 (D. Conn. 2008), available at <http://www.citmedialaw.org/threats/autoadmit> [hereinafter *Doe Pls., Compl.*].

<sup>138</sup> *Id.* at ¶ 36.

<sup>139</sup> See *Doe v. Doe*, No. 3:07 CV 909 (D. Conn. 2008), available at <http://www.citmedialaw.org/threats/autoadmit> (court denied one of the anonymous poster's motion to quash subpoena seeking the identity behind the username "AK47").

<sup>140</sup> Steinbuch Def.'s Mem. Supp., *supra* note 73, at 7.

<sup>141</sup> *Id.* at 6.

<sup>142</sup> CUTLER, *supra* note 13, at 63–64. "[A] shiny black Mercedes-Benz pulled over. . . [and he] told me he was good friends with a few congressman and that he could help me get a job. . . I wondered if this



where both Steinbuch and Cutler worked were aware of their sexual relationship; Cutler had even divulged Steinbuch's sexual preferences to her co-workers.<sup>143</sup> Perhaps some consideration should be given to the fact that Steinbuch continued to see Cutler after she had exposed him to her co-workers.<sup>144</sup> Steinbuch argues that Cutler did not give him accurate "factors by which he could assess [her]."<sup>145</sup> He says, "it is one thing to be manipulated and used by a lover, it is another thing to be cruelly exposed to the world."<sup>146</sup> Perhaps it is these men who are at fault for exposing themselves and having an intimate relationship with someone they did not know well. When bloggers *do* act with reasonable care and sufficiently mask identities, they should not be charged with offensiveness simply because what they reveal is how careless and disreputable another person is.

It is not logical to expect people to keep secrets or to expect them to uphold the reputation of other people they do not know well.<sup>147</sup> It may be hard to function in society, especially in small communities, without a good reputation. Shakespeare said reputation is an "immortal part" of the self, a marker of respectability and worth.<sup>148</sup> The public disclosure tort has a way of scolding those who tarnish reputations. However, courts have held that there is nothing wrong with trying to sully another's reputation through truths.<sup>149</sup> In the 1970s, environmentalist Ralph Nader criticized General Motors for its pollution emissions and General Motors retaliated by asking Nader's friends to betray him and divulge his secrets.<sup>150</sup> A court held that this was not improper.<sup>151</sup> It seems, however, unfair for plaintiffs to use the public disclosure tort to combat breaches of confidences. In this way, the tort is used to "control others' perceptions and beliefs," and allows people to hide their true moral character even when it is "at variance with the individual's professed moral standards."<sup>152</sup> Cutler's case brings this issue to light: though she was careless about protecting Steinbuch's identity, bloggers who do use reasonable care and also happen to reveal intimate and unflattering details of others should not be held to be offensive.

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was how he spent his Saturdays, picking up girls in his car and promising to help them." *Id.* "As I climbed into Fred's Volvo SUV, I noticed something in the backseat. A car seat. For a baby." *Id.* at 31.

<sup>143</sup> Steinbuch Def.'s Mem. Supp., *supra* note 73, at 8 (Cutler claims that the "rumor" of their spanking sexual encounter had spread within their office and had "spread to other offices," that Steinbuch expressed no objection, and even told Cutler he was "not mad about the gossip at all" and that he was "actually joking around the office about it.").

<sup>144</sup> Steinbuch Def.'s Mem. Supp., *supra* note 73, at 7 ("Steinbuch did not bother to ask Cutler whether she was sleeping with other men, or, for that matter, to find out much else of significance about her before becoming sexually intimate with her himself.").

<sup>145</sup> Steinbuch Mem. Opp. Def., *supra* note 78, at 24.

<sup>146</sup> Steinbuch Compl., *supra* note 79, at ¶ 33.

<sup>147</sup> See *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that law does not protect a wrongdoer's misplaced belief that a person he voluntarily confides in will not later reveal the wrongful activity).

<sup>148</sup> William Shakespeare, *Othello*, in *THE RIVERSIDE SHAKESPEARE* 1266 (Herschel Baker et al. eds., 1997) (1622) ("Cassio: I have lost the immortal part [reputation] of myself, and what remains is bestial.").

<sup>149</sup> SOLOVE, *supra* note 5, at 174.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> POSNER, *ECONOMICS*, *supra* note 124, at 233.

## B. A BLOGGER'S AUTHORIAL PRIVILEGE

The public disclosure tort is often rendered impotent when the issue is found to be one of newsworthiness, especially when there is an authorial privilege in the intimate disclosures. An author's right to divulge autobiographical details comes under the protection of the First Amendment, and thus strengthens the newsworthiness defense when an author's written work is at issue. In a society where individuals have limited time and resources with which to microscopically observe the operations of our government, we rely almost whole-heartedly on the press and other forms of media to educate us about the facts of those operations.<sup>153</sup> In *Hill*, the Court stated, "a broadly defined freedom of the press assures the maintenance of our political system and an open society."<sup>154</sup> Without the information provided by the press, most of us would be unable to vote intelligently or register opinions on the administration of our government.<sup>155</sup> That is precisely why the Supreme Court has recognized the defense of newsworthiness; that when a subject matter is of legitimate public concern, there can be no invasion of privacy.<sup>156</sup> Newsworthiness is generally determined by weighing the following factors: (a) the social value of the facts published; (b) the depth of the article's intrusion into ostensibly private affairs; and (c) the extent to which the individual voluntarily acceded to a position of public notoriety.<sup>157</sup> Whether the subject matter is of legitimate public concern is to be determined according to community mores.<sup>158</sup> Decisions of lower courts disagree as to whether newsworthiness should be treated as a question of fact for the jury or a mixed question of fact and law.<sup>159</sup> The newsworthiness defense, however, will fail when publications cease to give out information to which the public is entitled and instead engage in "morbid and sensational prying into private lives for [their] own sake."<sup>160</sup> When looking at these prongs, Cutler's blog does convey newsworthiness because she, as an author, chose to pry into her own life.

1. *An Authorial Privilege is Likely to be found in Written Depictions of Sex Rather than Visual Depictions of Sex*

Newsworthiness is likely to be found when sexual activities are written about because courts find greater social value and a lesser degree of intrusion in written depictions of sex as opposed to visual depictions. In 1996, celebrity Pamela Anderson sued *Penthouse* magazine in federal district court in California for publishing photographs showing Anderson and her then husband, rocker Tommy Lee, in various states of undress, and

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<sup>153</sup> *Cox Broadcasting Corp.*, 420 U.S. at 491.

<sup>154</sup> *Time*, 385 U.S. at 389.

<sup>155</sup> *Cox Broadcasting Corp.*, 420 U.S. at 492.

<sup>156</sup> *Id.*

<sup>157</sup> *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 1048 (Cal. Ct. App. 1984).

<sup>158</sup> *Id.* at 1048.

<sup>159</sup> Joseph Elrod, Note, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 728 (1995).

<sup>160</sup> *Sipple*, 154 Cal. App. 3d. at 1049.

depicting sexual touching between the pair.<sup>161</sup> Anderson and Lee sued over the sexually explicit pictures and lost, because there is no liability when a defendant simply gives further publicity to matters already published.<sup>162</sup> A year later, a sex tape involving Anderson and rocker Bret Michaels also went public and they sued the publisher in federal court in California as well.<sup>163</sup> In *Michaels*, the court held that the visual and aural details of Anderson's sexual activities were found to constitute private facts, even for celebrities.<sup>164</sup> The court in *Michaels* focused on the first two prongs of the newsworthiness defense, finding it "difficult if not impossible to articulate a social value that will be advanced by dissemination of the Tape," and that a "video recording of two individuals engaged in such relations represents the deepest possible intrusion."<sup>165</sup> Courts will usually assume the third prong for celebrities and non-celebrities alike because it is usually obvious if they were trying to cultivate fame or not.<sup>166</sup> Here, an injunction was issued in *Michaels* because the court reasoned that visual depictions of intimate activities not only constitute a severe intrusion, but are also devoid of any social value.

The newsworthiness defense weighs in favor of the defendant when written depictions of sex are involved, because the literary work is not expunged of its social value when its broader themes compensate for its explicit sexual material. It is the social value and public interest in the broader themes of written work that give the author the right to write about his or her life. For example, Author Susana Kaysen had an affair with a married man, and then wrote about it. Her book, *The Camera My Mother Gave Me*, was written during the years she was carrying on the relationship and some of the book's passages detail facts about her intimate life.<sup>167</sup> Kaysen was sued by her ex-lover, Bonome, for public disclosure of private facts because even though Kaysen altered Bonome's name, background, and occupation, local family and friends were still able to identify Bonome as the "boyfriend" described in the book.<sup>168</sup> Kaysen described her "boyfriend" as "whining and pleading" for sex, and wrote that he aggressively tried to initiate sex with her: "I felt he was trying to rape me."<sup>169</sup> A superior court in Massachusetts held that the statements concerning the "boyfriend" were relevant to the broader themes of the book, and that the intimate details were included to develop and explore those themes, namely Kaysen's ongoing vaginal pain that she could not find treatment for.<sup>170</sup> An additional interest the court found was Kaysen's right to disclose her own intimate affairs, as she was not a disinterested third party, but rather she was authoring her own personal story.<sup>171</sup> Authors

<sup>161</sup> Lee v. Penthouse, Ltd., 1997 WL 33384309, \*1 (C.D. Cal. Mar. 19, 1997).

<sup>162</sup> *Id.* at 18 (citing *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d. at 1040, 1047 (Cal. Ct. App. 1984)).

<sup>163</sup> *Michaels v. Internet Ent., Group Inc.*, 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

<sup>164</sup> *Id.* at 840.

<sup>165</sup> *Id.* at 841.

<sup>166</sup> *Id.* at 842.

<sup>167</sup> *Bonome v. Kaysen*, 2004 WL 1194731, \*1 (Mass. Super. Ct. Mar. 3, 2004).

<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \*6.

<sup>171</sup> *Id.*

like Kaysen that write in code to reveal intimate details about their lives have more First Amendment protection because the newsworthiness defense is usually found to be in their favor.

Disclosing intimate details is usually found to be in proportion to the public interest that the author's work conveys when the social value outweighs the depth of intrusion. Although Kaysen's free speech rights were in direct conflict with Bonome's privacy rights, the fact that Kaysen did not use Bonome's name in the book subordinated the depth of intrusion prong.<sup>172</sup> The court held that the disclosure had the "necessary nexus (both logical and proportional) to the issue of legitimate concern."<sup>173</sup> Kaysen's disclosure did not make it substantially certain that Bonome's identity would become public knowledge.<sup>174</sup> The court in Kaysen's case was able to make a determination by balancing how identifiable Bonome was against the importance of the themes in Kaysen's book. However, some courts have used inferences when determining the newsworthiness prongs. For example, Actress Chase Masterson, née Christianne Carafano, sued a website that had published her home address, among other intimate details.<sup>175</sup> The court allowed these intimate details to remain on the website because of Carafano's celebrity status coupled with the fact that the "social value of [p]laintiff's address can be *inferred* from the myriad tours and maps offered of 'Star's Homes' throughout Los Angeles County."<sup>176</sup> Carafano herself had never been featured in an issue of "Star's Homes," but there was still social value in her address because many like to inform themselves of celebrity addresses. Though it is likely many segments of our society enjoy watching sex tapes of celebrities, there was no social value in the visual depictions of Lee having sex, despite the public interest.<sup>177</sup> The *Carafano* court seems to be saying that in regards to written intimate details, an inference of their social value can be made if those details are sought after by the public. This would not be the case for visual works because, as in *Michaels*, their degree of intrusion outweighs any inference of social value. Essentially, a written depiction describing explicit sex acts is much more likely to have a broader, more socially relevant theme, and an inference can be made by courts that there is public interest. The visual imagery of those same explicit sex acts would be given no socially relevant inference. This renders the social value prong malleable and more inclusive of online diary writings that describe sexual practices, the inference being that the writing is socially valuable since the public is seeking it out.

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<sup>172</sup> *Id.* at \*7.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Carafano v. Metrosplash, Inc.*, 207 F. Supp. 2d 1055, 1061 (C.D. Cal. 2002) (the website had originally stated Carafano's address, her telephone number, e-mail address and the fact that she lived alone with her son, but Carafano abandoned her claim with respect to these facts).

<sup>176</sup> *Id.* at 1069 (emphasis added).

<sup>177</sup> Harriet Ryan, *In the Celeb Sex-Tape Trade, There's More Flirting Than Hookups*, L.A. TIMES, Sep. 15, 2008, at E1, available at <http://articles.latimes.com/2008/sep/15/entertainment/et-sextapes15> (describing that the distribution of celebrity sex tapes is on the rise after the Pamela Anderson-Tommy Lee tape had several million dollars in sales).

## 2. *Authorial Privilege Applies to Cutler's Online Sexually-Themed Diary*

However malleable a prong, the newsworthiness defense has been thwarted when it comes to visual depictions of sex, as the image of sex acts in the *Michaels* tape were considered completely valueless, but the writings of sex acts in *Kaysen* were given an inference of social value.<sup>178</sup> Visual depictions of sex may not contribute anything more than just the imagery of people having sex, but what more is contributed by writings that are just explicitly sexual? Cutler's blog, however, is exemplary of the finer division that can be made between written depictions of sex, and written depictions of sex that have a broader theme. If Cutler had secretly videotaped her encounters with Steinbuch, without his consent, those tapes would undoubtedly qualify as an invasion of privacy. Not only would they have been made without consent, but the tapes would also have none of the literary nuances and witty remarks Cutler makes about Washington, D.C. in her blog. Cutler's blog does not just focus on Steinbuch's sexual proclivities, for if it did only this, it would make it more difficult to extend to it an inference of social value. However, Cutler chronicles her behavior in such a way that it is informative of human activity; though carnal, her blog serves as a scathing exposé of Washington, D.C.

Cutler's authorial choice to write in such a sardonic way only emphasizes the crude sexual nature of Capitol Hill, where men are said to commonly refer to entry level staff assistants, like Cutler, as "Staff Ass."<sup>179</sup> Indeed many women who have worked in Washington, D.C. have acknowledged this chauvinistic atmosphere.<sup>180</sup> Some argue the Monica Lewinsky scandal fused the personal and political permanently when Lewinsky's personal e-mails to her friends were considered relevant to the Starr Report.<sup>181</sup> Even outside of Washington, D.C., sexual liaisons in the workplace are a current topic no matter how "deplorable" the "popular appeal" is.<sup>182</sup> A noteworthy Boston realtor lost his privacy action after the court found that his status as a prominent businessman made the issue of whether or not he fathered his secretary's child a matter of legitimate public concern.<sup>183</sup> For similar reasons, the fact that he had refused to give child support was found to be of "general modern public interest," and it was within the reporter's rights to write the story.<sup>184</sup> Authorial privilege then

<sup>178</sup> *Id.*

<sup>179</sup> Steinbuch Def.'s Mem. Supp., *supra* note 73, at 26.

<sup>180</sup> *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court: Before the S. Comm. on the Judiciary*, 102nd Cong. (1991), reprinted in *THE COMPLETE TRANSCRIPTS OF THE CLARENCE THOMAS – ANITA HILL HEARINGS OCTOBER 11,12,13, 1991*, at 22–23 (Anita Miller ed., Academy Chicago 1994) (1991) [hereinafter *Anita Hill Testimony*] (quoting from Ms. Hill's testimony: "After approximately three months of working there, [Clarence Thomas] asked me to go out socially with him.... I believed then, as now, that having a social relationship with a person who was supervising my work would be ill advised.... My working relationship became even more strained when Judge Thomas began to use work situations to discuss sex.... On several occasions Thomas told me graphically of his own sexual prowess.").

<sup>181</sup> Julie Hilden, *Are Accounts of Consensual Sex a Violation of Privacy Rights? The Lawsuit Against the Blogger "Washingtonienne,"* FindLaw.com, June 21, 2005, [http://writ.news.findlaw.com/scripts/printer\\_friendly.pl?page=/hidden/20050621.html](http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/hidden/20050621.html) (last visited Mar. 19, 2009).

<sup>182</sup> *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 893 (Mass. Ct. App. 1999).

<sup>183</sup> *Id.* at 894.

<sup>184</sup> *Id.*

seems to give wider reign on written topics, even with regards to the topic of sex.

However, some oppose the public disclosure tort precisely because it makes a judgment on what is a legitimate topic and what an author has the right to write about.<sup>185</sup> UCLA Law Professor Eugene Volokh, argues that we all have varying and different ideas of what kinds of speech should be protected.<sup>186</sup> Volokh argues that having judges decide which things “right-thinking members of society” should recognize and which they should forget seems at odds with the purpose of the First Amendment.<sup>187</sup> Volokh suggests that speech that is on “daily life” topics is just as important and worthy of First Amendment protection as political speech.<sup>188</sup> Speech on “daily life” issues can deeply affect the way we view the world, deal with others, and even the way we vote.<sup>189</sup> I am not arguing for complete disposal of the public disclosure tort, but for more leeway in what counts as a legitimate topic. Cutler’s routine sexual activities qualify as a type of “daily life” speech, as they were included in her diary alongside other topics, such as work and the social scene of Washington, D.C. Historically, gossip about sex was a public event, as gossip was used as a form of social control.<sup>190</sup> Here, Cutler is attempting to subvert social control by writing about the sex lives of bureaucrats running our nation’s capital. Some argue, however, that because it is more difficult for people to keep information about themselves private, the right of privacy should be given more importance than the right to free speech.<sup>191</sup> A scheme of a “hierarchy of rights,” ranking a right higher that is more important to the individual, would rank privacy above free speech.<sup>192</sup> This is a bad idea for two reasons. The advances in technology and the Internet’s growing dissemination capabilities should not force us to censor blogs just because they have the power to reveal private details about others that could be found online. In addition, privacy and speech should never be categorically ranked, for they are to be balanced in regards to each issue. In Cutler’s case, I believe her authorial privilege outweighs Steinbuch’s privacy claims.

As we saw in *Carafano* and *Kaysen*, how courts decide what speech is socially valuable to write about is becoming a malleable standard. I argue not for the dissolution of the privacy tort per se, but for the expansion of the social value prong to include speech like Cutler’s. Cutler even argues

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<sup>185</sup> Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1095 (2000) (“[T]he notion that otherwise protected speech should be restrictable when it doesn’t relate to matters of public concern strikes me as so potentially broad and so vague that it deserves to be abandoned, even if it would yield the right results in a narrow subset of the cases in which it would be applied.”).

<sup>186</sup> *Id.* at 1113.

<sup>187</sup> *Id.* at 1091.

<sup>188</sup> *Id.* at 1092–93.

<sup>189</sup> *Id.* at 1093 (claiming that finding out that a neighbor once presumed to be law-abiding, actually has a criminal record, may indirectly influence one toward greater liberalism, conservatism, or something else by the unmasking of such a secret).

<sup>190</sup> Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 329 (1983).

<sup>191</sup> Stephanie Taylor, Note, *Small Hope Floats?: How the Lower Courts have Sunk the Right of Privacy*, 108 W. VA. L. REV. 459, 468 (2005).

<sup>192</sup> Elrod, *supra* note 159.

her blog is important because it shows the effect her personal experiences in Washington, D.C. had on her self-esteem.<sup>193</sup> Her blog also shows that Washington, D.C. is a place with many hypersexual men who target young entry level assistants like Cutler. She writes:

Details about what it's really like on Capitol Hill . . . . To get these jobs, the applicant needs a college degree, and needs to be an attractive girl. Most of my living expenses are thankfully subsidized by a few generous older gentlemen. I'm sure I am not the only one who makes money on the side this way: how can anybody live on \$25K/year?? If you investigated every Staff Ass on the Hill, I am sure you would find out some freaky shit. No way can anybody live on such a low salary. I am convinced that the Congressional offices are full of dealers and hos.<sup>194</sup>

Thus, the sexual details of her blog are in proportion to the broader theme of the interplay between political power and sex. Even if Cutler did not originally write her blog with any particular theme in mind, the theme is nonetheless evident. Though a morbid and sensational prying into private lives will negate the newsworthiness defense, it seems reasonable members of the public are interested in the sexual proclivities of the people who run our government, take for examples the Anita Hill Hearings, the *Flynt Report*, and the Chandra Levy murder.<sup>195</sup> The social value prong should be expanded to allow the inference that Cutler's insights into Washington, D.C. lifestyles matter to the public and that her comments on Steinbuch are in proportion to the overall thematic point her blog makes.

### 3. *Unconventional Blogs Deserve First Amendment Protection Too*

Making an example out of Cutler would force many bloggers, most probably female, to think twice about expressing themselves, thus distorting the "marketplace of ideas." If Cutler is held liable, bloggers will not only be apprehensive to use initials, but most likely apprehensive to write about anything. There is undoubtedly a cathartic release that comes from writing, especially if it is an author writing about personal relationships. That outlet would be quelled if Steinbuch wins. Some believe Steinbuch should be entitled to damages,<sup>196</sup> but most bloggers are amateurs who do not have a lot of money to pay damages.<sup>197</sup> There should be no liability if the blogger was not reckless in identifying details. Even though cases like *Kaysen* make it alright for authors to write intimate details about others as long as they are not reckless, there still is a ubiquitous

<sup>193</sup> Steinbuch Def's Mem. Supp., *supra* note 73, at 30.

<sup>194</sup> Calicocat.com, *Jessica Cutler's Blog, Washingtonienne, Analyzed*, May 22, 2004, <http://www.calicocat.com/2004/05/jessica-cutlers-blog-washingtonienne.html> (last visited Mar. 25, 2009).

<sup>195</sup> See Anita Hill Testimony, *supra* note 179. See also CALVERT, *supra* note 59, at 78 (describing that in 1998, Larry Flynt advertised in the *Washington Post* that he was seeking any information about the affairs of politicians, and then in 1999 issued *The Flynt Report*, which detailed his findings on many adulterous, right-wing, politicians. This was not considered to be a violation of the invasion of privacy); CalicoCat.Com, *supra* note 193 (explaining that Chandra Levy, the murdered intern for U.S. Representative Gary Condit, was living in an expensive apartment and that it was strongly rumored she was having an affair with Condit, perhaps in exchange for monetary support).

<sup>196</sup> SOLOVE, *supra* note 5, at 124.

<sup>197</sup> *Id.* at 122.

apprehension felt by authors choosing to write about others.<sup>198</sup> One way to overcome this chilling effect is to expand the definition of social value to include alternative lifestyles and points of view that can greatly add to the “marketplace of ideas.”

## V. SOCIALLY PROGRESSIVE BLOGS WARRANT NEWSWORTHINESS

A blog’s ability to widely disseminate unpopular or alternative views and delve into subject matters at great depths makes blogs extremely socially progressive, and extremely newsworthy. Currently, newsworthiness is dually defined in case law, with some judges referring to it as a descriptive predicate, relying on the fact that there is widespread public interest, and others referring to it as a value predicate, relying on the fact that the publication is somehow meritorious.<sup>199</sup> Cutler’s blog satisfies both definitions. There is obvious widespread interest satisfying the descriptive predicate definition, and the sexual imbalance between powerless female interns and powerful male politicians in Washington, D.C. is a matter of serious political concern, satisfying the value predicate definition.<sup>200</sup> Since there is no such thing as a false idea under the First Amendment, “[h]owever pernicious an opinion may seem,”<sup>201</sup> bloggers have the right to blog about unconventional topics without fear of reprisal. To ensure the public disclosure tort is applied to bloggers in a constitutional fashion, they need to be given some latitude as to what is viewed as worthy of discussion:

[By] providing people with a way to learn about social groups to which they do not belong, gossip increases intimacy and a sense of community among disparate individuals and groups . . . . [G]ossip is a basic form of information exchange that teaches about other lifestyles and attitudes, and through which community values are changed or reinforced . . . . Perceived in this way, gossip contributes directly to the [F]irst [A]mendment ‘marketplace of ideas,’ and the comparative weight assigned to an interest in its limitation merits careful consideration.<sup>202</sup>

Though some may call it lurid gossip, Cutler’s blog about her lifestyle in Washington, D.C. likely informed many people that the social milieu of our nation’s capital is not at all admirable. I am not arguing for an

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<sup>198</sup> *Rocker Stipe, Diner from Hell*, N.Y. POST, Feb. 12, 2009, at 14, available at [http://www.nypost.com/p/pagesix/rocker\\_stipe\\_\\_diner\\_from\\_hell\\_YLfCTyO0dvXhioyPQFqGSL](http://www.nypost.com/p/pagesix/rocker_stipe__diner_from_hell_YLfCTyO0dvXhioyPQFqGSL) (author and former New York City waitress Sara Barron, writes in code in her yet-to-be released memoir, *People Are Unappealing*. Barron uses non-obvious nicknames to refer to celebrities she waited on and she thoroughly refuses to even hint at the identities of the celebrities, fearing liability) *see also* CHELSEA HANDLER, ARE YOU THERE, VODKA? IT’S ME. CHELSEA, Simon Spotlight Entertainment (2008) (the first page of the author’s memoir about her funny romantic escapades, she makes it clear all names and references have been altered for privacy’s sake).

<sup>199</sup> 5 Witkin Sum. Cal. Law Torts § 665(c)(2)(a) (2008).

<sup>200</sup> Dahlia Lithwick, *Private I’s? Should the Law Protect Us From Kiss-and-Tell Bloggers?*, SLATE, July 29, 2006, <http://slate.com/id/214674>.

<sup>201</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>202</sup> Zimmerman, *supra* note 190, at 334.



annihilation of the newsworthiness defense, although some scholars believe the defense is too vague a concept to protect First Amendment rights and that its broad discretion provides for inconsistent results.<sup>203</sup> Rather, I believe the social value prong should be expanded to include unconventional blogs, like Cutler's, as worthy because they are uniquely informative of larger social issues.

A. CUTLER'S BLOG IS UNIQUELY INFORMATIVE OF THE SEXUAL  
IMBALANCES THAT EXIST AMONG WASHINGTON, D.C.  
POLITICIANS AND ENTRY LEVEL ASSISTANTS

Though some of Cutler's statements may have revealed Steinbuch's identity and his sexual proclivities, the blog in its entirety serves a legitimate public interest. One journalist comments that if free speech is analogized to the "marketplace of ideas," then isn't it "proof that Washington powerbrokers still think of young female interns as the dessert cart an important idea?"<sup>204</sup> Cutler blogged that working on Capitol Hill was "a lot like high school, [with] hordes of hormonally charged people trapped together all day, flirting in the halls and cafeteria."<sup>205</sup> Capitol Hill has been commonly, and comically, referred to as "the last plantation," emphasizing the lack of politicians there that follow the laws they set forth.<sup>206</sup> Cutler's blog exposed the back-stage behavior of powerful politicians, she writes, "[t]he boss who pimped me out to [Steinbuch] just stopped by," "and "EVERYBODY knows. Even our LD [Legislative Director] (*who is sleeping with somebody in our office, too, BTW*)."<sup>207</sup> Cutler also mentions her "sugar daddy [a Georgetown Lawyer]," who gave her monetary gifts.<sup>208</sup> Some of the details are graphic, but Cutler reveals many of the "pawing patriarchy's dirty secrets."<sup>209</sup> She highlights the common Washington, D.C. practice of higher ranked government officials engaging in sexual relationships with employees ranked below them, an issue of great political concern.

It is Cutler's grave violation of Capitol Hill norms that gave her so many enemies, but her flouting of those norms also allowed outsiders a unique look into the sordid practices going on there. Norms are the central mechanism through which a society exercises social control and regulates conduct.<sup>210</sup> To be effective norms must regularly be followed, and cannot be ignored.<sup>211</sup> Steinbuch's lawsuit chides Cutler for cavalierly ignoring established norms, but what Cutler has to say in her blog comprises a fairly accurate portrayal of the social environment of Washington, D.C. It is hard at first to see the social value in Cutler's descriptions of Steinbuch: "he has

<sup>203</sup> Elrod, *supra* note 159, at 733.

<sup>204</sup> Lithwick, *supra* note 200.

<sup>205</sup> Witt, *supra* note 1.

<sup>206</sup> Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31, 31 (1998).

<sup>207</sup> Steinbuch Compl., *supra* note 79, at ¶ 13 (emphasis added).

<sup>208</sup> *Id.*

<sup>209</sup> Witt, *supra* note 1.

<sup>210</sup> SOLOVE, *supra* note 5, at 6.

<sup>211</sup> *Id.*

a great ass,” “number of ejaculations: 2,” “he likes spanking (both giving and receiving).”<sup>212</sup> However, the details about Steinbuch are relevant not only because he worked in the same Senate office as Cutler, as a higher-ranked employee, but also because he worked directly under elected officials, the Senate Judiciary Committee. It is not the case that the sexual activities of all bureaucrats in Washington, D.C. would be newsworthy and thus not afforded privacy. They would be newsworthy, however, when those sexual activities are fostered by, and likely only exist because of, disparities in the workplace. Steinbuch was in close proximity to great political power and governance, and he sought out Cutler, an intern at the bottom of the political food chain. Indeed, many of the men Cutler wrote about made the first romantic overture toward her. This is much akin to the Lewinsky scandal, but there the lowly intern was victimized as part of an investigation, she did not willingly tell her story.<sup>213</sup> Here, Cutler thwarted the possibility of somehow being victimized by choosing to write about her experiences. The morality of her choice to do so is not reason to find her liable.

Cutler’s ethical standards are not up for debate when it comes to determining the newsworthiness of her blog. Cutler was not ashamed that she was carrying on sexual relationships with half a dozen men. Such was the social environment of Washington, D.C., as Cutler writes, “it was a revolving door of men, with me pushing one out after another.”<sup>214</sup> The residents of Washington, D.C. are probably more likely to see scandals, especially sex scandals, as part of political, even daily life.<sup>215</sup> A court in Washington, D.C. will take into account the community mores, which would be much more resigned to the topic of Cutler’s blog than perhaps a community in another jurisdiction. Despite the presence of a few prominent female politicians, our nation’s capital is still very much a man’s world, one journalist stating that, “[t]he sight of young beauties doing thankless errands for decrepit codgers is still common.”<sup>216</sup> Regardless of whether one believes Cutler’s lifestyle is morally reprehensible, the solution is not to censor her blog or blogs like it. The public has an interest in her, and the media still keeps updating us about her.<sup>217</sup> She “turned the tables on the kind of Washington men who have always expected their pretty young playthings to be powerless and silent,” and she “grabbed for the power that seemed most readily available to her: sexual power.”<sup>218</sup> Although sexual power is not very powerful in the long run, Cutler’s blog highlights the fact that young women, to whom other forms of power are inaccessible, are willing to barter their sexuality in Washington, D.C. In this way, the exchange of sex for power has a political dimension. There is public interest and curiosity as to the driving forces that would make someone

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<sup>212</sup> Steinbuch Compl., *supra* note 79, at ¶ 13.

<sup>213</sup> Hilden, *supra* note 181.

<sup>214</sup> Witt, *supra* note 1.

<sup>215</sup> Hilden, *supra* note 181.

<sup>216</sup> *Id.*

<sup>217</sup> Kelly Will, *Blogger Jessica Cutler’s Next Project*, PAGE SIX MAGAZINE, Jan. 11, 2009, <http://www.nypost.com/pagesixmag/issues/20090111/Six+City> (writing that Jessica Cutler was married in December 2008 to New York Lawyer, Charles Rubio).

<sup>218</sup> Witt, *supra* note 1.

choose to barter sex for power and money, whether they be materialistic, avaricious, or about getting something for what feels like nothing.

#### B. COURTS SHOULD NOT REGULATE MATTERS OF TASTE AND STYLE

The fact that Cutler was willing to engage in sexual activities for monetary rewards overshadows her artistic choice to write about it in the first place. Whether she intended to or not, her blog holds up a mirror to our society and examines our insatiable need for wealth and power.<sup>219</sup> Courts, like the government, should not be in the business of regulating matters of “of taste and style” in speech.<sup>220</sup> It is not Cutler’s promiscuity I support, it is her fearless and often pithy style, which enthalls the reader as Cutler narrates her travails in a male-dominated society. The lifestyle she led, her many sexual encounters, and the way in which she augmented her income, have garnered so much public interest that HBO will be basing a television show on Cutler’s blog.<sup>221</sup> Many feel Cutler is emblematic of her generation. The writer and executive producer of the upcoming HBO production, Vanessa Taylor, states: “[t]here have been a lot of morally ambiguous male characters finding acceptance on TV, but we haven’t seen that with female characters.” Cutler should not be reprimanded with a lawsuit and subjected to judicial scrutiny because of her sexual moral relativism, and she should not be prohibited from sharing her experiences with the world.

Cutler’s expressive and individualistic style should be debated, not censored, as her moral ambiguity is essentially a by-product of our changing society. Changing cultural conceptions of what is private, have changed journalistic and legal conceptions of what constitutes news.<sup>222</sup> Consider the popularity of reality television, and its extensive and invasive intrusion into the private lives of others.<sup>223</sup> Times are changing, and many consider Cutler and her blog a “sign” of that change.<sup>224</sup> For some, Cutler signals the death knell of deeply held American values, such as conformity, and makes way for newer values: personal satisfaction, individual choice, and cultural pluralism.<sup>225</sup> Yet, these newer values do not seem deplorable, as greater pluralism has led to more rights for women, minorities, and homosexuals. It would not be fair to say Cutler’s individualism must be punished because it deviates from traditional social ideas.

The style and themes of Cutler’s blog may not be conventional, but that is not dispositive of the status of the blog’s value. Consider the two most famous books on the drug Prozac, Peter Kramer wrote *Listening to Prozac* from a psychological perspective, while Elizabeth Wurtzel wrote *Prozac*

<sup>219</sup> Allen Salkin, *You Try to Live on 500K in this Town*, N.Y. TIMES, Feb. 6, 2009, § ST, at 1.

<sup>220</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>221</sup> Josef Adalian, *D.C. Skein gets HBO Vote*, VARIETY, Mar. 14, 2006, at 1.

<sup>222</sup> CALVERT, *supra* note 59, at 78.

<sup>223</sup> *Id.* at 86 (explaining that the “celebrity” rationale for exhibitionism has led to many people watching, and even trying out, for shows like MTV’s *The Real World* and CBS’ *Survivor* and *Big Brother*).

<sup>224</sup> Witt, *supra* note 1.

<sup>225</sup> *Id.*

*Nation* from her perspective as a patient.<sup>226</sup> Kramer's book detailed the scientific and social reasons why America may be depending on the drug too much; Wurtzel wrote a memoir detailing her adolescence spent "stoned, drunk and miserable," replete with graphic sexual details, admitting her mouth once becoming chapped from "too-frequent ministrations of oral sex."<sup>227</sup> The explicit personal details Wurtzel wrote about better connected with an audience and garnered more public interest in the subject, and a movie was later made.<sup>228</sup> Some feel Cutler's blog has no connection with public discourse.<sup>229</sup> I disagree. Almost every Washington, D.C. workplace, including Senate offices, has a written policy prohibiting or discouraging sexual contact between colleagues, especially those of unequal power.<sup>230</sup> As the author of her blog, Cutler chose to write about Steinbuch, a co-worker ranked above her, and chose to write about a Chief of Staff who engaged her in solicitation. It may be in poor taste to reveal intimate sexual details about others, but there is undoubtedly no tactful way to expose the underbelly of Washington, D.C. Some criticize her promiscuity, others praise her individuality, but what is important is that her blog has added to the public debate on the questionable atmosphere of Washington, D.C. and on our society's current ambivalence toward changing gender roles.

### C. BLOGS CAN EXPAND THE DEBATE ON CHANGING GENDER ROLES

Cutler has been pegged as an uber-individualist,<sup>231</sup> as she told her own story in her own way, not withstanding traditional gender roles, as one journalist wrote:

Cutler's blog, interestingly, isn't just "kiss and tell." Along the way, it reveals the double standard that still applies to, and confuses, so many women. Even as Cutler mulled whether she and Steinbuch might marry (he's Jewish; she's isn't), she also worried that their "nasty sex" wasn't appropriate for a married couple . . . . If the question of what it means to be a wife, and what it means to be a whore, are political as well as personal . . . then this blog definitely (if often inadvertently) had something political to say.<sup>232</sup>

However, others feel blogs like Cutler's only add to a current "cultural zeitgeist" that is producing a "generation of shameless skanks."<sup>233</sup> In recent years the gender gap has narrowed and women's sexual attitudes and behaviors have come to resemble men's, as more young women engage in casual sex and portray ambitious and aggressive characteristics.<sup>234</sup> Feminist Naomi Wolf, has commented on the irony in contemporary sex practices.

<sup>226</sup> Ken Tucker, *Rambunctious With Tears*, N.Y. TIMES, Sep. 25, 1994, § 7, at 11.

<sup>227</sup> *Id.*

<sup>228</sup> Kate Arthur, 'Prozac Nation': A Prescription For Trouble, N.Y. TIMES, Feb. 27, 2005, § 2, at 2.

<sup>229</sup> SOLOVE, *supra* note 5, at 131.

<sup>230</sup> Witt, *supra* note 1.

<sup>231</sup> *Id.*

<sup>232</sup> Hilden, *supra* note 181.

<sup>233</sup> Michelle Malkin, *A Generation of Skanks*, TownHall.com, Nov. 15, 2002, <http://townhall.com/Common/PrintPage.aspx?g=2c09b20a-b0f0-4eec-8aa0-dedd04243c48&t=c>.

<sup>234</sup> See MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 230 (2000).

She notes that our increasingly liberal culture will continually distort reality by letting women know “what [is] expected” of them sexually, namely that if they are promiscuous they must still take on a semblance of propriety.<sup>235</sup> In Cutler’s case, she is being punished for not wearing her mask of propriety when blogging. Wolf points out that because of this irony, our culture does not “make women” very well.<sup>236</sup> Cutler straddles this irony, freely blogging about her promiscuities, but all the while daydreaming of being, “a Jewish housewife with a fat rock on [her] finger.”<sup>237</sup> Cutler’s blog is important precisely because of the indecisiveness and insincerity it exposes.

Blogs like Cutler’s are important because they act as sign posts of where our culture is heading, especially in terms of gender roles. Rigid gender roles appear to be loosening, and one sex is no longer regarded as inherently better suited to certain roles than the other.<sup>238</sup> Some argue that the social differences that defined gender roles for so long are being eradicated, in exchange for differences based on talents and abilities instead. This probably “both thrills and terrifies men.”<sup>239</sup> In the AutoAdmit case, the anonymous posters were mostly males. Perhaps their statements were fueled by fear, perhaps the capable and intelligent females that attended Yale Law School posed a threat to them. Traditionally, male sexuality embodies the role of aggressor and female sexuality the role of victim.<sup>240</sup> It seems the anonymous posters on the AutoAdmit site were trying to imbue a sense of those traditional roles back into society, as they aggressively victimized the female law students through cyberspace. Although the anonymous posters should be held liable for revealing the full names of the students they wrote about, their comments and posts do indicate a common discomfort among males with women who do not submit to traditional gender roles of domestication and chastity. In this demonstrative fashion, even extreme and disturbing blogs have use in the “marketplace of ideas.”

Media disdain for females who do not conform to traditional gender roles is also apparent in the different ways female and male bloggers are reviewed. One can argue that if Cutler were male, she would not have been crucified for writing her blog, for Tucker Max’s blog has even more vulgar sexual details, and he is consistently, and slyly, praised for his efforts.<sup>241</sup> Both Cutler and Max were sued by lovers that they blogged about, with disturbingly different outcomes. While, Cutler was attacked for being shamelessly promiscuous, Max was simply referred to as a “cad.”<sup>242</sup> As a

<sup>235</sup> NAOMI WOLF, *PROMISCUITIES: THE SECRET STRUGGLE FOR WOMANHOOD* 130, 31 (1997).

<sup>236</sup> *Id.* at 134.

<sup>237</sup> Witt, *supra* note 1 (quoting from Cutler’s blog: “I really just want to be a Jewish housewife with a fat rock on my finger”).

<sup>238</sup> ROSALIND BARNETT & CARYL RIVERS, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* 6 (2004).

<sup>239</sup> KIMMEL, *supra* note 234.

<sup>240</sup> Catharine MacKinnon, *Reflections on Sex Equality Under the Law*, 100 *YALE L.J.* 1281, 1302 (1991) [hereinafter MacKinnon, *Reflections*].

<sup>241</sup> Liptak, *supra* note 94 (Max is referred to as a “cad,” surely that is a better label, than the multitude of vulgar names Cutler is called).

<sup>242</sup> *Id.*

victim of Cutler's blog, Steinbuch was never ridiculed, but Max's victim, Johnson, the Vermont Beauty Queen, was so caustically scrutinized she dropped the lawsuit. Media coverage was somewhat favorable for Steinbuch, but Johnson was called many demeaning names in the press; for example, the pop culture website UrbanDictionary.com features a distasteful entry for Johnson, an admirable entry for Max, and no entry for Steinbuch.<sup>243</sup> One blogger is adorned, Max, the other is harshly criticized, Cutler, the only difference being gender. In addition, the AutoAdmit site rarely features vulgar comments about males. Women may have the same legal rights as men, but there are still social inequalities that the Cutler, Max, and AutoAdmit cases all point out.<sup>244</sup> These cases show there is uneasiness in society about how females should act, and how they actually do act. There is resentment at bloggers like Cutler for boldly portraying females in an uninhibited way. The media's double standard of criticism for audacious and assertive female bloggers and their male counterparts demonstrate the necessity for allowing female bloggers to write about any topic so that the "marketplace of ideas" is a true reflection of our current society.

If female bloggers see blogging as a risky endeavor, gender roles will remain distorted and alternative viewpoints will not be voiced. Feminist legal scholar Catharine MacKinnon notes that the law has a way of "intruding on and structuring relations between the sexes, institutionalizing male dominance."<sup>245</sup> Female bloggers who write about gender nonconforming subjects face criticisms male bloggers do not. The more the speech of the dominant is protected, the more dominant they become.<sup>246</sup> Blogging circumvents this inequality, by providing an accessible platform for all members of society, for it is not just females who are subjugated by political sex scandals. While such scandals have a gendered dimension to them, most involving female interns and assistants such as Monica Lewinsky and Chandra Levy, there have been recent reports of improper relationships between male Representatives and adolescent male congressional pages.<sup>247</sup> Powerful male politicians seem almost predisposed to capitalizing off of their subordinates, whether their subordinates are female or male. The silencing of these scandals occurs less through explicit state policy, and more through official and unofficial privileging of powerful groups and viewpoints.<sup>248</sup> That is what the invasion of privacy torts have the power to do, to silence blogs like Cutler's. The marketplace

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<sup>243</sup> Urban Dictionary, Home Page, <http://urbandictionary.com> (last visited Mar. 21, 2009) ("Katy Johnson," defined as: "silly harlot who fucks you then sues you..."; "Tucker Max," defined as: "Tucker Max can think whatever he wants, and do whatever he wants, because he is indeed Jesus.").

<sup>244</sup> LAURA A. LISWOOD, *WOMEN WORLD LEADERS: FIFTEEN GREAT POLITICIANS TELL THEIR STORIES* 131 (1995).

<sup>245</sup> MacKinnon, *Reflection*, *supra* note 240, at 1326.

<sup>246</sup> CATHARINE MACKINNON, *ONLY WORDS* 72-73 (1993) [hereinafter MACKINNON, *ONLY WORDS*].

<sup>247</sup> Mary Ann Akers, *Another Sexually Charged House Page Scandal*, WASH. POST THE SLEUTH BLOG, Dec. 6, 2007, 18:20 EST, [http://voices.washingtonpost.com/sleuth2007/12/another\\_sexually\\_charged\\_house.html](http://voices.washingtonpost.com/sleuth2007/12/another_sexually_charged_house.html) (explaining that two members of Congress have resigned from the House Page Board because the teenage pages are "so wild and unsupervised," this comes a year after the "Mark Foley incident," where Congressman Foley was caught "sending sexually tawdry instant messages to male House pages").

<sup>248</sup> MacKinnon, *Reflections*, *supra* note 240, at 77.

rewards the powerful, and those views become established as truth.<sup>249</sup> Cutler's blog defiantly resists this distortion by revealing that more and more females in society are not concerned with fulfilling traditional gender roles. Her blog, whether inadvertently or not, conveys this message. That is why all bloggers, especially females, need latitude in what topics they choose to write about, otherwise the market on "truth" will be distorted and monopolized.

## VI. CONCLUSION

The First Amendment values behind blogging become more and more pertinent as we move into a technological and interconnected society. A newsworthiness extension to blogs is valuable and should trump privacy claims, even where a blogger unintentionally reveals identities. This extension is not so much a relinquishment of privacy, but rather an assurance of truth and a guard against ignorance. The details of Cutler's blog are newsworthy because her blog shows the interplay of power and sex between young staff assistants and senior officials in our nation's capital. Because the "marketplace of ideas" serves a truth-seeking function, we must ensure all voices are heard. Not only does Cutler's blog reveal that the seat of our nation's government contains some deplorable government workers, it also shows the double standard women have to face in being expected to live up to traditional gender roles. Unconventional blogs, like Cutler's, may reveal private details, but they also subvert norms and offer alternative views on society. Such purposes clearly constitute legitimate public interests.

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<sup>249</sup> *Id.* at 78, 102.

