ENJOINING PRODUCT DISPARAGEMENT: DISCARDING THE DEFAMATION ANALOGY

English courts expanded the tort of slander of title,[1] creating the tort of product disparagement, to protect a merchant's interest in the reputation of his goods and services.[2] American courts have drawn upon commercial tort law and the law of defamation to develop further the tort of product disparagement.[3] The substantive and remedial aspects of commercial tort law and defamation, however, differ significantly. Traditional remedies for commercial torts typically include both monetary and injunctive relief,[4] whereas the sole remedy for successful defamation actions, as a matter of well-established equitable principles and constitutional law, is monetary damages.[5] The conjoining of these two bodies of law by American courts has impeded the development of a coherent system of relief for successful disparagement claims.[6] In particular, the injection of the elements of defamation into product disparagement has

1. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 503 (1973). Professor Dobbs cites Dickes v. Fenne, 1 March 93, 1 Rolle Abr. 58, W. Jones 444 (K.B. 1639), as an example of a slander of title or commercial disparagement. In *Dickes*, the defendant made the following remarks to the plaintiff's customers about the quality of his beer: "[H]he would give a peck of malt to his mare, and she should pisse as good beare as [plaintiff] doth Brew." *Id.*

2. *See, e.g.*, General Prods. Co. v. Meredith Corp., 526 F. Supp. 546, 553 (E.D. Va. 1981) (product disparagement is designed to protect "the owner's interest in the vendibility of his products").

3. *See, e.g.*, Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1 (Minn. 1984) (relaxation of modern commercial tort law justifies relaxation of causation requirements in product disparagement actions). Other courts have wrestled with the role of defamation's constitutional restrictions in disparagement actions. *See* Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977); Dairy Stores, Inc. v. Sentinel Publishing Co., 191 N.J. Super. 202, 465 A.2d 953 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985); *see also infra* notes 23-32.

4. *See, e.g.*,, International News Serv. v. Associated Press, 248 U.S. 215 (1918) (court upholds injunction directed at defendant's misappropriation of plaintiff's news gathering efforts); Burger King of Fla., Inc. v. Hoots, 403 F.2d 904 (7th Cir. 1968) (court approves injunction preventing defendant from using Burger King trademark outside a limited geographical area); *see also* DOBBS, *supra* note 1, at 503 (discussing damages in disparagement actions).

5. *See, e.g.*, Leo Winter v. Department of Health & Human Servs., 497 F. Supp. 429 (D.D.C. 1980) (action for defamation dismissed because plaintiff sought injunctive relief); *see also* Kuhn v. Warner Bros. Pictures, Inc., 29 F. Supp. 800 (S.D.N.Y. 1939) (defendant's defamatory movie not enjoinable because plaintiff may collect monetary damages).

6. In System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977), the court suggested that injunctive relief in disparagement actions may be unconstitutional. *See also* Dairy Stores, Inc. v. Sentinel Publishing Co., 191 N.J. Super. 202, 465 A.2d 953 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985) (constitutionality of disparagement injunctions unsettled).

unnecessarily deprived injured merchants of injunctive relief when persons subject their products to false attacks.

This Note focuses on the confusion caused when courts erroneously equate defamation with disparagement. Part I of this Note demonstrates that courts should treat product disparagement as a commercial tort, therefore entitling disparagement victims to injunctive relief similar to victims of other commercial torts. Part II discusses potential constitutional and equitable barriers to injunctive relief in disparagement actions, concluding that courts have improperly denied injunctive relief in these actions. Finally, part III proposes a theory of relief for victims of disparagement, incorporating the availability of injunctive relief. In the past, courts have blurred the substantive aspects of disparagement and defamation, refusing to provide the same remedies for disparagement as they provide for other commercial torts.[7]

I. DISPARAGEMENT VERSUS DEFAMATION

Product disparagement and defamation are fundamentally different torts. Product disparagement is an attack calculated to harm the reputation of a merchant's product. Defamation, on the other hand, is the promulgation of falsehoods harmful to a person's own reputation.

A. Proving Product Disparagement and Defamation

To prevail with a product disparagement claim, the plaintiff must typically prove: (1) that defendant made a disparaging statement—that is, the defendant impugned the quality of the plaintiff's goods or services;[8] (2) the disparaging statement was false;[9] (3) the defendant made the disparaging statement with common-law malice;[10] and (4) the existence of,

7. *See* Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963 (1975) (courts have not yet settled the distinction between defamation and disparagement).

8. *See, e.g.*, Wendy's of South Jersey, Inc. v. Blanchard Management Corp., 406 A.2d 1337, 1338 (1979) ("[T]he tort of product disparagment . . . involves aspersing the quality of one's property. . . ."); Graf, *Disparaging the Product—Are the Remedies Reliable?*, 9 DUQ. L. REV. 163, 166 (1970).

9. *See, e.g.*, Bunch v. Artec Int'l Corp., 559 F. Supp. 961, 971 (S.D.N.Y. 1983) ("[F]alsity is a necessary element of a [disparagement] claim. . . ."). Other countries prohibit truthful disparagement. *See* Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1938).

10. *See* Note, *Disparagement Under the Uniform Deceptive Trade Practices Act*, 51 IOWA L. REV. 1066, 1068-69 (collecting cases that discuss malice); *see also infra* note 17 and accompanying text.

and possibly the precise extent of, a pecuniary injury.[11] The first two elements of a cause of action for product disparagement establish commercially improper conduct.

Defamation actions provide recovery for persons, including corporations, who suffer injuries to personal reputation.[12] The plaintiff must prove the defendant made a defamatory statement. The plaintiff does not have to prove the defamatory statement's falsity; rather, truth is an affirmative defense to a claim of defamation.[13] Furthermore, unlike in a disparagement action, the plaintiff usually need not demonstrate a specific pecuniary loss caused by the defamatory statement. Courts will often presume injury from the nature of the statement.[14]

The first amendment imposes significant limitations on defamation actions. Although defamation was historically without the protection of the freedom of speech, the Supreme Court has increasingly recognized limitations on the suppression of even defamatory speech. In the landmark defamation case, *New York Times Co. v. Sullivan*,[15] the Supreme Court held that "public figures" who sue for defamation must demonstrate "actual malice" on the part of the defendant.[16] The plaintiff satisfies the actual malice requirement upon proof that the defendant made the defamatory statement with actual knowledge or reckless disre-

11. *See, e.g.*, Sbrocco v. Pacific Fruit, Inc., 566 F. Supp. 15 (S.D.N.Y. 1983) (claim that business reputations has been damaged and will be further damaged in future years is insufficient); Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1143 (3d Cir. 1977) (injunction against disparaging statements improper because plaintiff has no reasonable probability of demonstrating special damages). *But see* Ellis v. Waldrop, 627 S.W.2d 791, 797 (Tex. Civ. App. 1982) (holding that proof of loss of a specific sale as a requisite to damages for slander of title is no longer required).

12. *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353-54 (1974) (discussing the law of libel and slander). For a recent survey of the treatment of defamation in state courts, see generally LIBEL DEFENSE RESOURCE CENTER 509—STATE SURVEY 1983 (H. Kaufman ed. 1983).

13. *See, e.g.*, United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 634 (Minn. 1982) (court presumes the falsity of an alleged defamatory statement); Eaton, *supra* note 12, at 1353 n.16.

14. In several cases, injury is presumed and the defamation is actionable per se when the statement imputes a crime, a loathsome disease, unchastity of a woman, or affect the plaintiff's trade or business. *See, e.g.*, Hunt v. Gerlemann, 581 S.W.2d 913 (Mo. Ct. App. 1979).

15. 376 U.S. 254 (1964).

16. *Id.* at 274. The Supreme Court has established three categories of "public figures:" (1) a limited number of persons such as politicians or celebrities, who have voluntarily achieved "general fame or notoriety in the community;" (2) a person who thrusts himself into the public eye—for example, an abortion protester—in a particular situation voluntarily becomes a public figure; and (3) in rare cases, a person might involuntarily become a public figure, for example, someone who wins a lottery. *See* Eaton, *supra* note 12, at 1421-22.

gard of the statement's falsity.[17] In *Gertz v. Welch*,[18] the Court held that in defamation actions brought by "private figures," courts cannot impose liability consistent with the first amendment absent proof of at least negligence.[19]

The remedies for defamation actions are also subject to constitutional limitations. Thus, a court may not enjoin defamatory statements.[20] An injunction against the promulgation of a defamatory statement represents a prior restraint of speech. Except in narrowly defined areas, prior restraints of speech are presumptively deemed unconstitutional.[21] Accordingly, a person threatened by injury from a defamatory statement must wait until the defendant publishes the defamatory statement before seeking relief.[22] Injunctive relief is unavailable.

The constitutional limitations necessarily imposed on defamation actions underscore the importance of distinguishing between disparagement and defamation actions.

B. The Strained Alliance Between Disparagement and Defamation

Courts often fail to distinguish between defamation and disparagement, probably because both torts remedy false statements that produce reputational injuries. Moreover, factual situations that raise issues of disparagement can also raise issues of defamation.[23] Courts that treat dis-

17. 376 U.S. at 274. Common-law malice, *see supra* note 10 and accompanying text, on the other hand, refers to a sense of ill-will, hatred, or statements calculated to injure. Williams v. Trust Co. of Ga., 140 Ga. App. 49, 54, 230 S.E.2d 45, 50 (1976).

In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 fn.30 (1984), the Supreme Court stated that: "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."

18. 418 U.S. 323 (1974).

19. *Id.* at 347. A "private figure" includes any plaintiff who cannot be classified as a "public figure;" *see supra* note 16. The state courts are of course free to interpret their own constitutions to require an "actual malice" requirement in "private figure" defamation actions. *See* Seegmiller v. KSL, Inc., 626 P.2d 968, 973 (Utah 1981) (the states "have divided over the appropriate standard to be adopted").

20. *See* Near v. Minnesota, 283 U.S. 697 (1931) (striking down a statute that allowed injunctions against defamatory statements); Kessler v. General Servs. Admin., 341 F.2d 275 (2d Cir. 1964) ("courts generally will not enjoin torts against the person"); Zarate v. Younglove, 86 F.R.D. 80, 103 (C.D. Cal. 1980) (prior restraint of noncommercial speech is presumptively unconstitutional).

21. *See infra* note 40 and accompanying text.

22. *See, e.g.*, Kuhn v. Warner Bros. Pictures, Inc., 29 F. Supp. 800 (N.Y. 1939) (defamed plaintiff has adequate remedies at law).

23. *See, e.g.*, National Ref. Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 773 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927) (Lewis, J., dissenting) (statement that a maltster used filthy and disgust-

paragement and defamation as inseparable are likely to define disparagement by reference to defamation law.

The alliance between defamation and disparagement has led some courts to impose an "actual malice" element of proof on "public figures" who bring product disparagement claims.[24] In *Dairy Stores, Inc. v. Sentinel Publishing Co.*,[25] for example, a newspaper published a derogatory article based on the test results of the plaintiff's new product. The court emphasized that the claim was based on the publication of allegedly inaccurate test results and therefore was properly characterized as an action based upon a false statement.[26] The court refused to decide for purposes of the case whether the action was for defamation or disparagement, holding that in either case the plaintiff must prove that the defendant acted with "actual malice."[27]

C. *Disparagement's Relationship to Commercial Torts*

Product disparagement is better characterized as a commercial tort than a hybrid of defamation law. The substantive and policy-based similarities between disparagement and other commercial torts contrast with the superficial factual similarities between disparagement and defamation. Commercial torts and disparagement, unlike defamation, require the plaintiff to prove a commercially improper act.[28] Section 43(a) of the Lanham Act,[29] for example, provides a federal remedy for someone injured by a merchant's misrepresentations of the quality or performance

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ing water for the malting of grains is actionable for defamation); Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981) (magazine's criticism of electric car not only disparaged the car, but also defamed the car's producer); Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1259 (Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) (disparaging comments invariably reflect on a corporation's reputation); Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 877, 24 Ill. Dec. 573, —, 385 N.E.2d 714, 720 (1978) (a statement may simultaneously attack both the quality and integrity of a product, in which case both causes of action [*i.e.*, disparagement and defamation] may lie). *See also* Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 971 (1975) (a strongly disparaging statement is almost invariably actionable for defamation as well.)

24. *See* Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981); Dairy Stores, Inc. v. Sentinel Publishing Co., 191 N.J. Super. 202, 465 A.2d 953 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985).

25. 191 N.J. Super. 202, 465 A.2d 953 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985).

26. *Id.* at 216, 465 A.2d at 960.

27. *Id.* at 210 n.2, 465 A.2d at 957.

28. *See supra* notes 8-22 and accompanying text.

29. 15 U.S.C. §§ 1051-1127 (1982).

of his goods.[30] Like a disparagement claim, a successful section 43(a) claim requires proof of both a false statement and a subsequent injury.

A significant difference between disparagement and other commercial torts is remedial. Injunctive relief is freely available to successful commercial tort claimants;[31] however, disparagement victims must often settle for compensatory relief.[32] Many courts have deprived product disparagement victims of injunctive relief, again because of the strained alliance between disparagement and defamation.

II. THE BARRIERS TO INJUNCTIVE RELIEF

Courts and commentators have pointed out that disparagement threatens a commercial property interest and therefore should be enjoinable.[33] In *Black & Yates v. Mahogany Association, Inc.*,[34] the United States Court of Appeals for the Third Circuit enjoined the distribution of a circular that disparged the quality of the plaintiff's mahogany. The court found that the disparagment was unfair competition, a proper subject for injunctive relief.[35] A majority of courts, however, still refuse to enjoin disparaging statements.[36] These courts reason that enjoining product disparagement violates the first amendment and that the traditional powers of equity restrict the availability of injunctive relief. Neither of these rationales justify the denial of injunctive relief in product disparagement cases.

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30. Section 43(a) reads: Any person who shall . . . use in connection with goods or services, or any container or containers for goods, a false designation or origin, or any false description or representation . . . shall be liable to a civil action by any person . . . likely to be damaged by the use of any such false description or representation.
15 U.S.C. § 1125(a)(1982).

Although the Lanham Act is a trademark act, misrepresentations about one's own product are actionable under § 43(a). *See* Exquisite Form Indus., Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403 (S.D.N.Y. 1974) (any misrepresentation regarding the product is actionable under § 43(a) of the Lanham Act).

31. *See, e.g.*, Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 250 U.S. 28 (1918); Molex, Inc. v. Nolen, 759 F.2d 474 (5th Cir. 1985).

32. *See, e.g.*, Greenberg v. DeSalvo, 254 La. 1019, 229 So. 2d 83 (1969), *cert. denied sub. nom.* Greenberg v. Dunker, 397 U.S. 1075 (1970).

33. *See, e.g.*, Black & Yates v. Mahogany Ass'n, 129 F.2d 227, 235 (3dCir. 1942), *cert. denied*, 317 U.S. 672 (1942) (expressly stating that disparagement is enjoinable); Innovative Concepts in Entertainment, Inc. v. Entertainment Enters. Ltd., 576 F. Supp. 457, 459 (E.D.N.Y. 1983) (enjoining defendant from circulating an allegedly disparaging "comparison" between two games).

34. 129 F.2d 227 (3d Cir. 1942), *cert. denied*, 317 U.S. 672 (1942).

35. *Id.* at 235.

36. *See* Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 849 (E.D.N.Y. 1971) (collecting cases).

A. The Constitutional Barrier to Injunctive Relief

The potential constitutional barriers to injunctive relief for disparagement fall into two categories. First, a defendant will likely assert that the first amendment's freedom of speech clause forbids injunctions in disparagement actions.[37] Second, the common factual nucleus that supports both a disparagement claim and a defamation claim arguably compels the application of defamation's remedial restrictions to disparagement actions.[38]

An injunction against a disparaging statement constitutes a prior restraint of speech.[39] Except in limited circumstances, prior restraints are presumptively unconstitutional.[40] The doctrine of prior restraints, however, does not apply to commercial speech.[41] Commercial speech is speech that merely proposes a commercial transaction or, alternatively, speech related solely to the economic interests of the speaker and audience.[42] Although commercial speech is entitled to protection under the first amendment, the Supreme Court has recognized that commercial speech, being less valuable in relation to the core values of the first amendment, is entitled to considerably less protection than other kinds of speech.[43] If disparaging speech constitutes commercial speech in a particular case, then an injunction against such speech is not an unconstitutional prior restraint.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[44] the Court struck down a state prohibition on the publication of price terms in prescription drug advertisements. The Court, however, expressly recognized state power to regulate "deceptive or

37. *See* Dairy Stores, Inc. v. Sentinel Publishing Co., 191 N.J. Super. 202, 210 n.2, 465 A.2d 953, 957 (1983), *aff'd*, 198 N.J. Super. 19, 486 A.2d 344 (1985).

38. *See* Greenberg v. DeSalvo, 254 La. 1019, 229 So.2d 83 (1969), *cert. denied sub nom.* Greenberg v. Dunker, 397 U.S. 1075 (1970).

39. *See supra* notes 20-22 and accompanying text.

40. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1968) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

41. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 771 n.24 (1976). The Court explained that "the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Id.*

42. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

43. *Id.*

44. 425 U.S. 748 (1976).

misleading" commercial speech.[45] Thus, deceptive commercial speech is outside the protection of the first amendment.[46] Courts already enjoin other forms of deceptive commercial speech.[47] Once a court decides that one form of misleading or untruthful commercial speech is constitutionally enjoinable, then other forms, such as disparaging statements, should also be enjoinable.[48]

Although injunctions against disparagement are not per se unconstitutional, the factual similarity between disparagement and defamation claims[49] creates a potential barrier to injunctive relief. An injunction against a defamatory statement is an unconstitutional prior restraint of speech. If a statement simultaneously disparages a person's goods and defames his reputation, an injunction restraining the disparagement arguably restrains the defamation as well.[50] However, statements that primarily disparage should not receive constitutional protection. The Supreme Court has never converted unprotected speech into protected speech simply because the unprotected speech contains minor elements of protected speech.[51] Conversely, primarily defamatory statements are not enjoinable even though the speech contains elements of product disparagement.[52] The Court protects certain defamatory speech to ensure

45. *Id.* at 771 n.24.

46. In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980), the Supreme Court explained that for commercial speech to come within the first amendment, it must concern lawful activity and not be misleading.

47. In Alder, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), for example, the Pennsylvania Supreme Court upheld an injunction prohibiting the defendant from soliciting clients from the plaintiff law firm that had previously employed the defendant. The court held that the speech enjoined was not protected by the first amendment because it improperly interfered with existing contractual relationships. *Id.* at 423-28, 393 A.2d at 1179-81.

48. For example, a person who makes a false statement about his own goods and injures a competitor violates § 43(a) of the Lanham Act. *See supra* note 30. Furthermore, the injured competitor may seek injunctive relief in federal court. *See* Gilliam v. American Broadcasting Co., 583 F.2d 14 (2d Cir. 1976). No principled distinction exists between deceptive statements made about one's own goods and disparaging statements made about another's goods.

49. *See supra* note 23 and accompanying text.

50. *See, e.g.,* Greenberg v. DeSalvo, 254 La. 1019, 229 So.2d 83 (1969), *cert. denied sub nom.* Greenberg v. Dunker, 397 U.S. 1075 (1970). In *Greenburg,* the court overturned an injunction forbidding the defendant from referring to the plaintiff, who was an attorney, as a crook and a "slimy kike." *Id.* at 254 La. at 1031, 229 So.2d at 88. The court held that the statements could not be enjoined because "the personality of the plaintiff and his standing as a lawyer cannot be separated on a rational basis." *Id.*

51. *See, e.g.,* Valentine v. Chrestensen, 316 U.S. 52 (1942).

52. The Constitution prohibits courts from enjoining defamatory speech. Near v. Minnesota,

the flow of truthful speech.[53] Untruthful speech should not receive constitutional protection simply because it has defamatory elements. Courts should be free to enjoin speech with elements of disparagement and defamation if the injunction will not impede the flow of truthful speech.[54]

B. The Equitable Barrier to Injunctive Relief

Courts have also erected an equitable barrier to the availability of injunctive relief in disparagement actions. Equity traditionally has been reluctant to intervene in cases involving defamation or disparagement.[55] In *Prudential Assurance Co. v. Knott*,[56] a nineteenth-century English court held that "a false and injurious statement respecting the plaintiff's business" could not be enjoined. The court did not distinguish between statements causing pecuniary injury and those causing an injury to per-

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283 U.S. 697 (1931); Zarate v. Younglove, 86 F.R.D. 80, 103 (C.D. Cal. 1980); *see supra notes* 20-22 & 39 and accompanying text.

Courts face difficult and unresolved issues, however, when the false speech is substantially both disparaging and defamatory. For example, in Martin v. Reynolds Metals Co., 224 F. Supp. 978 (D. Or. 1963), *appeal dismissed*, 336 F.2d 876, *aff'd*, 337 F.2d 780 (9th Cir. 1964), the plaintiff erected a sign on his property near a highway reading, "THIS RANCH IS CONTAMINATED . . . FLOURIDE POISON FROM REYNOLDS METAL CO. KILLS OUR CATTLE." *Id.* at 979. The defendant counterclaimed for both disparagement and defamation. *Id.* The court held that the sign was defamatory; however, the disparagement claim failed because special damages were not proven. *Id.* at 980. If the court had found that the sign also disparaged Reynolds Metals' products, an injunction against the disparaging language would also have effectively enjoined defamatory language. The sign was not divisible into disparaging and defamatory elements. The court could only order taking down the whole sign. No amount of judicial creativity could have fashioned an injunction removing just the disparaging material.

53. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973); *see also* Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984) (defendant's published criticism of plaintiff's product may be constitutionally enjoined because "defendants have circulated their material for a number of years, and the court and jury have had the opportunity to gauge its actual impact").

54. *See infra* notes 63-65 and accompanying text (proposing a test for determining whether disparaging speech is enjoinable).

55. Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees, 400 Ill. 38, 41-42 (1948) (injunction directed at union's disparagement of department store vacated because "[t]he jurisdiction of a court of chancery does not extend to cases of libel (sic) . . . as to the character of quality of the plaintiff's property"); Murphy v. Daytona Beach Humane Soc'y, Inc. 176 So.2d 922 (Fla. App. 1965) (claim that defendant "is attempting to hamper the operations of [plaintiff] . . . by certain correspondence and publications which falsely attack the management and officers [and] cause irreparable harm" states no ground upon which equitable relief can be granted). *See also* C. TIEDMAN, A TREATISE ON EQUITY JURISPRUDENCE 487 (1883); J. WILLARD, TREATISE ON EQUITY JURISPRUDENCE 401 (1963) (courts will "not restrain a rival from publishing an advertisement tending to disparage another's work").

56. [1874] L.R. 10 Ch. App. 142, 144.

sonal reputation.[57] *Prudential* extended equity's traditional reluctance to enjoin defamation to disparagement cases because the court viewed these two torts as indistinguishable. *Prudential* was overruled, however, by an English statute that granted courts the power to enjoin disparaging statements.[58]

American courts also reject the premise underlying *Prudential* and define disparagement and defamation in fundamentally different manners, but often do not rely upon the distinction for the relief they grant.[59] Thus, American courts have effectively adhered to the *Prudential* doctrine by denying injunctive relief in disparagement actions.[60] Courts that refuse to enjoin disparagement are not furthering justice or equitable principles. Although substantial caselaw supports a flat prohibition on disparagement injunctions, the caselaw is an outgrowth of a discredited, overruled nineteenth-century English case.

A successful disparagement plaintiff has identified an injured property interest by demonstrating a specific pecuniary loss. The equitable barrier against disparagement injunctions leaves unprotected a merchant's interests in his goods and services, and is therefore inconsistent with one of the purposes of equity.[61]

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57. Disparaging statements injure property, while defamatory statements injure reputation. *See supra* notes 8-22 and accompanying text.

58. *See* E. MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 469 (1895).

59. *See, e.g.*, Murphy v. Daytona Beach Humane Soc'y Inc., 176 So.2d 922, 925 (Fla. 1965) ("It seems to be well settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property. . . . "); Marlin Fire Arms Co. v. Shield, 171 N.Y. 382, 64 N.E. 163 (1902); C. TIEDMAN, A TREATISE ON EQUITY JURISPRUDENCE 487 (1883) ("While the English have recently allowed injunctions . . . to restrain libelous publications against one's business, trade, or title to land . . . American courts have not manifested any disposition to follow the example of the English Courts. . . .").

60. *See, e.g.*, Robert E. Hicks Corp. v. National Salesmen's Training Ass'n, 19 F.2d 963, 964 (7th Cir. 1927); Martin v. Reynolds Metals Co., 224 F. Supp. 978, 984 (D. Or. 1963), *appeal dismissed*, 336 F.2d 876, *aff'd*, 337 F.2d 780 (9th Cir. 1964).

61. Courts have tried to deal with the harshness of the equitable barrier to disparagement injunctions by developing a broad exception to the flat prohibition against such injunctions. Thus, some courts hold that disparagement can be enjoined if the disparagement was accompanied by other, independently enjoinable, tortious acts. *See, e.g.*, Maytag Co. v. Meadows Mfg. Co., 35 F.2d 403, 407-08 (7th Cir. 1929), *cert. denied*, 281 U.S. 737 (1930) (enjoining defendant's propaganda campaign designed to intimidate customers and dealers interested in purchasing plaintiff's product); Lion Oil Co. v. Sinclair Ref. Co., 252 Ill. App. 92, 98 (1929) (enjoining defendant's campaign of disparaging statements because defendant made no effort to stop the slanderous statements).

III. A THEORY OF INJUNCTIVE RELIEF FOR PRODUCT DISPARAGEMENT CLAIMS

Injunctive relief in disparagement actions can provide an appropriate remedy for disparagement victims and also protect the defendant's first amendment rights. First, courts should freely enjoin purely or primarily disparaging speech.[62] Second, courts should enjoin speech that is both disparaging and defamatory if the defendant acted with "actual malice."[63] An actual malice requirement would accommodate both the defendant's first amendment rights and the plaintiff's interests in his goods and services. Moreover, any defamatory speech incidentally affected by the injunction against the disparagement is already accorded less first amendment protection because the defendant had actual malice.[64]

The use of an actual malice test to determine the propriety of disparagement injunctions would be constitutional and effective. Although all plaintiffs will not be able to demonstrate actual malice, those defendants who repeatedly disparage the plaintiff's goods or services will be enjoined. A defendant who knowingly or recklessly makes false statements is less likely to be deterred by the threat of monetary damages than other defendants. As a result, an injunction becomes the only adequate and effective form of relief.

Those speakers who aggressively criticize other products will not be enjoined if they believe that their statements are truthful. The flow of truthful commercial speech, with its attendant benefits, will therefore not be inhibited. Additionally, courts will be using a test that already has had wide application. The use of the actual malice test will not in itself produce additional litigation.

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62. The plaintiff's reputation is only affected slightly by purely or primarily disparaging speech. *See supra notes* 39-54 and accompanying text (discussing defamation law).

63. *See* text accompanying *supra* note 27 (defining "actual malice"). If a person expects an injunction only when he knows his statements are false, then the threat of an injunction will not deter those who believe they are speaking truthfully.

64. The Supreme Court allows a "public figure" defamation plaintiff to prevail only when the defendant has actual malice. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Thus, the Court has established a constitutional distinction between the protection afforded defamatory speech made with and without actual malice. A merchant who had critical comments about his competitors' products would have his comments suppressed only if the comments were false and the merchant knew or should have known the critical comments were false. His truthful comments would not be enjoined and his false comments would not be enjoined if the merchant does not believe they are false. Therefore, injunctive relief in disparagement claims in unlikely to suppress truthful speech.

IV. CONCLUSION

Injunctive relief in product disparagement actions faces much resistance based on ancient and discredited precedent. Many courts have held that disparagement injunctions are unconstitutional or outside the courts' equitable jurisdiction. The availability of injunctive relief in product disparagement actions, however, recognizes the close alliance between product disparagement and other commercial torts. The tort of product disparagement protects the plaintiff's interest in the value of his goods and services. As with any other commercial tort, courts should enhance that protection by enjoining disparaging statements.

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