


1-15-2012

## Liable for Your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites

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### Recommended Citation

Geelan Fahimy *Liable for Your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites*, 39 Pepp. L. Rev. 2 (2013)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol39/iss2/3>

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# Liable for Your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites

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## I. INTRODUCTION

On March 18, 2007, a fourteen-year-old eighth grader created a fake MySpace profile depicting her middle school principal, James McGonigle.<sup>1</sup> The profile included a picture of the principal and suggested that he was a pedophile and sex addict—the profile address was titled “kids rock my bed.”<sup>2</sup> The principal was also described “as a forty year old, married, bisexual man living in Alabama.”<sup>3</sup> In the interests section of the profile, his interests were listed as: “detention, being a tight ass, riding the frainttrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, [and] hitting on students and their parents.”<sup>4</sup> Further outlandish, crude, and false statements described the principal as a “hairy, expressionless, sex addict, fa[t] ass.”<sup>5</sup> In one part of the profile, the “principal” purportedly wrote the following about himself:

[I have come to MySpace] so I can pervert the minds of other principals to be just like me. I know, I know, you’re all thrilled. Another reason I came to [MySpace] is because I am keeping an eye on you students who I care for so much . . . . For those who want to be my friend, and aren’t in my school, I love children, sex (any kind), dogs[,] long walks on the beach, tv, being a dick head and last but not least my darling wife who looks like a man . . . [S]o please feel free to add me, message me[,] whatever.<sup>6</sup>

As a result of this fraudulent MySpace profile, the student was suspended from school for ten days.<sup>7</sup> The student responded by filing a

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1. J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07CV585, 2008 WL 4279517, at \*1 (M.D. Pa. Sept. 11, 2008), *aff’d on other grounds*, 593 F.3d 286 (3d Cir. 2010).

2. *Id.* (citation omitted).

3. *Id.*

4. *Id.*

5. *Id.* (citation omitted).

6. *Id.* (citation omitted).

7. *Id.* at \*2.

lawsuit and claiming that the suspension violated her First Amendment free speech rights.<sup>8</sup>

This case illustrates one of the many ways in which misrepresentations take place on social networking sites and how people use these sites to engage in abusive and deceitful conduct.<sup>9</sup> More importantly, this case presents several crucial questions that will be central to future litigation involving social networking sites: Can misrepresentation law serve as a mechanism for regulating dishonesty on these websites?<sup>10</sup> Specifically, can deceitful statements on social networking sites constitute a “misrepresentation” under tort law?<sup>11</sup> Are there instances where these misrepresentations can be criminal?<sup>12</sup> Finally, would the application of misrepresentation law infringe on a social network user’s First Amendment free speech rights?<sup>13</sup>

This Comment emphasizes that the growth of social networking sites has far surpassed cyberspace governance and the development of rules regulating the use of these websites.<sup>14</sup> Thus, courts should refine their approach to misrepresentation law to adequately address the challenges posed by social networking sites.<sup>15</sup> This Comment argues that courts should apply misrepresentation law to online deceit and adopt a balancing test that considers a totality of the circumstances—free speech implications and the egregiousness of the lie—in deciding whether tort liability or criminal penalties are appropriate.<sup>16</sup>

Part II of this Comment presents an overview of misrepresentation law and the rise of social networking sites.<sup>17</sup> Part II also discusses the various motives for lying and the ways in which misrepresentations can occur on social networking sites.<sup>18</sup> Part III analyzes whether misrepresentation law is an appropriate mechanism for regulating behavior on social networking

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8. *Id.* at \*3. For further free speech cases relevant to fake online profiles, see *infra* Part IV.A.

9. See *supra* notes 1–7 and accompanying text.

10. See *infra* Part III.A–B.

11. See *infra* Part III.A.

12. See *infra* Part III.B.

13. See *infra* Part IV.A.

14. See Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 80 (2003) (“[T]ort law continues to lag behind the technological dilemmas created by an increasingly networked society.”).

15. See *infra* notes 372–74 and accompanying text.

16. See *infra* notes 364–74 and accompanying text.

17. See *infra* Part II.

18. See *infra* Part II.

sites.<sup>19</sup> Part IV discusses the free speech implications of imposing misrepresentation liability and argues that the application of misrepresentation law is appropriate in limited circumstances.<sup>20</sup> Part V concludes.<sup>21</sup>

## II. THE MANY FACES OF MISREPRESENTATION LAW AND THE EVOLUTION OF SOCIAL NETWORKING SITES

### A. *Misrepresentation Law*

Misrepresentation law is a complex subject that crosses many areas of law.<sup>22</sup> As such, misrepresentation claims can arise in both civil and criminal cases by means of a common law claim<sup>23</sup> or under a particular statute.<sup>24</sup> Depending on whether a given case is prosecuted criminally or civilly, the elements of the cause of action will vary.<sup>25</sup> Two of the main areas that misrepresentation law covers are tortious misrepresentations and criminal misrepresentations.<sup>26</sup>

#### 1. Tortious Misrepresentation

In tort law, three types of misrepresentation are actionable<sup>27</sup>—willful, negligent, and innocent.<sup>28</sup> Liability in tort for misrepresentation is further

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19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 1022–23 (11th ed. 2005) (emphasizing that the numerous available remedies for misrepresentation render this area of the law difficult and complex); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 684 (4th ed. 1971) (recognizing a further complication where “misrepresentation has been merged to such an extent with other kinds of misconduct that [in certain circumstances] neither the courts nor legal writers have found any occasion to regard it as a separate basis of liability”).

23. *See infra* text accompanying notes 27–75.

24. *See, e.g.*, 15 U.S.C. § 52 (1994) (making it illegal for any person, partnership, or corporation to disseminate false advertisements “[b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics”); 15 U.S.C. § 7802 (2004) (regulating unfair and deceptive acts and practices by making it unlawful for an athletic agent to “recruit or solicit a student athlete” by “giving any false or misleading information or making a false promise or representation”); 18 U.S.C. § 2252C(b) (2006) (imposing a fine and prison sentence of up to twenty years on one who “knowingly embeds words or digital images into the source code of a website with the intent to deceive a minor into viewing material harmful to minors on the Internet”).

25. *See infra* Part II.A.1–2.

26. Although misrepresentation law also encompasses misrepresentations made in the context of contracts, the scope of this paper does not address contract law.

27. Alfred Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679, 684 (1973). Generally, tort law, and specifically the tort of misrepresentation, is an area of state law. *See, e.g.*, CAL. CIV. CODE § 1709 (West 2010) (“One who willfully deceives another with intent to induce him

distinguished according to whether the resulting harm is economic or physical.<sup>29</sup> Although the tort of misrepresentation usually involves an interest in being free from economic loss due to the false statements of another person,<sup>30</sup> there can also be liability for non-economic losses, such as physical injury or emotional distress.<sup>31</sup> Consequently, a person harmed by another's deceit can seek legal redress in a civil case for pecuniary or physical damage by relying on a tort<sup>32</sup> cause of action for misrepresentation.<sup>33</sup> The standard of liability depends upon whether the misrepresentation was fraudulent, negligent, or innocent.

to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”). *But see* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 *YALE L. & POL'Y REV.* 429, 432, 448–63 (1996) (describing the constitutional grounds for federal involvement in tort law and presenting public policy reasons favoring federal involvement in certain areas of tort law).

28. This Comment will address fraudulent and negligent misrepresentations.

29. Compare RESTATEMENT (SECOND) OF TORTS § 525 (1977) (codifying liability for pecuniary loss caused by fraudulent misrepresentation), and RESTATEMENT (SECOND) OF TORTS § 552 (1977) (summarizing liability for pecuniary loss caused by negligent misrepresentation), with RESTATEMENT (SECOND) OF TORTS § 310 (1965) (discussing conscious misrepresentation involving risk of physical harm), and RESTATEMENT (SECOND) OF TORTS § 311 (1965) (codifying liability for negligent misrepresentation involving risk of physical harm).

30. SCHWARTZ ET AL., *supra* note 22, at 1022.

31. *See, e.g.,* *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 485 (S.D. Ohio 1982) (“Ohio law permits the recovery of punitive or nonpecuniary damages for intentional, willful, and wanton acts, or by malice inferred from conduct and surrounding circumstances.”); *Nelson v. Progressive Corp.*, 976 P.2d 859, 867–68 (Alaska 1999) (finding that emotional distress damages are recoverable for the tort of misrepresentation where the emotional distress is “severe”); *Schroeder v. Auto Driveaway Co.*, 523 P.2d 662, 671–72 (Cal. 1974) (finding that store owner could recover damages for behavior that annoyed him in an action for fraud); *Allen v. Jones*, 163 Cal. Rptr. 445, 450 (Ct. App. 1980) (holding that mental distress damages could be recovered where the allegations of wrongdoing are specific); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (allowing recovery for emotional distress in a misrepresentation action); *McRae v. Bolstad*, 646 P.2d 771, 775 (Wash. Ct. App. 1982) (holding that mental suffering damages were compensable in an action for fraudulent misrepresentation where the mental suffering is manifested by “objective symptoms”); *see also* Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 *VAND. L. REV.* 1, 3 (1989) (arguing that the distinction between personal and commercial torts is unrealistic in a “modern consumer society” and that various public policy factors weigh in favor of recognizing fraud as a dignitary tort and awarding emotional distress damages). *See generally* Steven J. Gaynor, Annotation, *Fraud Actions: Right to Recover for Mental or Emotional Distress*, 11 *A.L.R.5TH* 88 (1993).

32. SCHWARTZ ET AL., *supra* note 22, at 1 (“‘Tort’ comes from the Latin word ‘tortus,’ which means twisted, and the French word ‘tort,’ which means injury or wrong. A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy.”).

33. Such an action has often been linked to the common law action of deceit. Laura Barke, *When What You Don’t Know Can Hurt You: Third Party Liability for Fraudulent Misrepresentation in Non-Commercial Settings After Doe v. Dilling*, 888 *N.E.2d* 24, 34 *S. ILL. U. L.J.* 201, 203 (2009).

*i. Fraudulent Misrepresentation*

As codified in the *Restatement (Second) of Torts*, there are two types of fraudulent misrepresentation—one that causes *economic* harm<sup>34</sup> and one that causes *physical* harm.<sup>35</sup> In defining the former, section 525 of the *Restatement (Second) of Torts* provides:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.<sup>36</sup>

Accordingly, the prima facie case for fraudulent misrepresentation includes: (1) a false representation; (2) intent to induce reliance; (3) justifiable reliance; and (4) damages.<sup>37</sup> In this context, a “misrepresentation” not only includes written and spoken words, but it also encompasses “*any other conduct* that amounts to an assertion not in accordance with the truth.”<sup>38</sup> In other words, it is a misrepresentation when words or conduct assert the existence of a fact that does not really exist.<sup>39</sup>

Generally, in order for the misrepresentation to be of a fraudulent character, the maker must “know[] or believe[] that the matter is not as he represents it to be.”<sup>40</sup> The misrepresentation can also, however, be fraudulent in two other circumstances: (1) where the maker “does not have

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Before the eighteenth century, the tort of deceit was limited to contractual relationships. *Id.* Today, however, it is not necessary for there to be a contractual dealing between the parties in order to bring a claim for fraudulent misrepresentation. *Id.*; see also Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1018 (2003) (distinguishing how materiality is a required element to recover damages in tort for misrepresentation, but not to obtain rescission in contracts law).

34. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

35. RESTATEMENT (SECOND) OF TORTS § 310 (1965).

36. RESTATEMENT (SECOND) OF TORTS § 525 (1977); see also BLACK’S LAW DICTIONARY 1022 (8th ed. 2004) (defining fraudulent misrepresentation as “a false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and that is intended to induce a party to detrimentally rely on it”).

37. See RESTATEMENT (SECOND) OF TORTS § 525 (1977).

38. RESTATEMENT (SECOND) OF TORTS § 525 cmt. b (1977) (emphasis added).

39. *Id.*

40. RESTATEMENT (SECOND) OF TORTS § 526 (1977); see also *Bergeron v. Ridgewood Sec. Corp.*, 610 F. Supp. 2d 113, 118, 143 (D. Mass. 2009) (finding that the defendants knew their statements about planning a \$500 million initial public offering were false given the fact that they made the statements “despite knowing that no feasibility study had been conducted and that little if any work had been done”); *Commerce Bancorp, Inc. v. BK Int’l Ins. Brokers, Ltd.*, 490 F. Supp. 2d 556, 563 (D.N.J. 2007) (granting a seller’s motion to dismiss where the prospective purchaser of a corporation failed to allege facts to establish that the seller’s statements were knowingly false); *Parker v. Fla. Bd. of Regents ex rel. Fla. State Univ.*, 724 So. 2d 163, 168 (Fla. Dist. Ct. App. 1998) (interpreting the scienter requirement of fraudulent misrepresentation to require bad faith).

the confidence in the accuracy of his representation that he states or implies,” or (2) where the maker “knows that he does not have the basis for his representation that he states or implies.”<sup>41</sup> Fraudulent misrepresentations may include *ambiguous representations* capable of two interpretations,<sup>42</sup> *materially misleading representations* which are incomplete and do not state “additional or qualifying matter,”<sup>43</sup> and *representations of intention* where the maker does not in fact have the intent represented.<sup>44</sup>

As to the second requirement, that the misrepresentation be made to induce another to act, the maker of the misrepresentation may be liable not only to the person he *intends* to induce to act or refrain from acting, but also to any person he “has reason to expect”<sup>45</sup> to act or refrain from acting.<sup>46</sup> As

41. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

42. *See, e.g.*, BP Amoco Chem. Co. v. Flint Hills Res., LLC, 600 F. Supp. 2d 976, 992 (N.D. Ill. 2009) (citing RESTATEMENT (SECOND) OF TORTS § 527 (1977)) (holding that an ambiguous statement which was subject to multiple interpretations in the context of an asset purchase and sale agreement could still support a claim for fraudulent misrepresentation).

43. RESTATEMENT (SECOND) OF TORTS § 529 (1977). *See also* Catalina Yachts v. Old Colony Bank & Trust Co. of Middlesex Cnty., 497 F. Supp. 1227, 1236 (D. Mass. 1980) (suggesting that *selective disclosure* by a bank could constitute fraudulent misrepresentation under the RESTATEMENT (SECOND) OF TORTS § 529 (1977) if it was meant to “misrepresent the financial status of its customer[s]”). The *Restatement (Second) of Torts* also provides some examples: stating that a title to land was upheld by a court, but failing to mention that the court’s decision has been appealed, or mentioning that all tenants pay a certain rent without stating that a rent control agency must approve the rent. RESTATEMENT (SECOND) OF TORTS § 529 cmt. b (1977).

44. *See, e.g.*, Zhang v. Mass. Inst. of Tech., 708 N.E.2d 128, 134–35 (Mass. App. Ct. 1999) (finding that the defendant was entitled to summary judgment on a misrepresentation claim brought by an employee at the university research laboratory alleging that the defendant misrepresented the duration of employment because the plaintiff could not establish that the associate director misrepresented his intent to renew employment—an “essential element” of the plaintiff’s misrepresentation claim); *see also* RESTATEMENT (SECOND) OF TORTS § 530 (1977).

45. RESTATEMENT (SECOND) OF TORTS § 531 cmt. d (1977). “One has reason to expect a result if he has information from which a reasonable man would conclude that the result will follow or would govern his conduct upon the assumption that it will do so.” *Id.*

46. *Id.* § 531. The requisite intent is satisfied if the maker of the misrepresentation “either acts with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct.” *Id.* § 531 cmt. c; *see also* Dloogatch v. Brincat, 920 N.E.2d 1161, 1172 (Ill. App. Ct. 2009) (Murphy, J., concurring) (agreeing with the majority that a shareholder’s complaint for fraudulent misrepresentation should be dismissed, but emphasizing that “inducing another to refrain from action is sufficient to state a cause of action for fraud [and that this principle] should apply equally to cases where a plaintiff is induced to refrain from selling stock”). The maker of the misrepresentation can also be liable to a third party to whom the representation was not directly made if the maker has “information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct.” RESTATEMENT (SECOND) OF TORTS § 531 (1977). *Compare* W.L. Lindemann Operating Co. v. Strange, 256 S.W.3d 766, 780–81 (Tex. App. 2008) (finding that the defendant oil-well operator would have known that telling the plaintiff’s partner that he was “waiting for the water to hit” before pumping plaintiff’s wells would reach and influence plaintiff’s conduct because the parties had been



such, there is no liability for misrepresentations relied on by people whom the maker did not intend or have reason to expect to act or refrain from acting.<sup>47</sup>

In order to recover, the plaintiff also must have been justified in relying on the misrepresentation.<sup>48</sup> Reliance is justified where the misrepresentation is *material*<sup>49</sup> from either an objective standard—a “reasonable man” would rely on that misrepresentation in deciding to act—or a subjective standard—the maker of the misrepresentation “knows or has reason to know that *its* recipient regards or is likely to regard the matter as important in determining his choice of action.”<sup>50</sup> However, where the recipient of the fraudulent

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doing business for thirty to forty years and defendant had prior dealings with plaintiff’s partner regarding the leases), *with* *Marshall v. Kusch*, 84 S.W.3d 781, 785 (Tex. App. 2002) (finding no evidence supporting a fraudulent misrepresentation claim brought by a buyer of a ranch alleging misrepresentations about the presence of anthrax on the ranch because the representations were made to a previous buyer and were not communicated to the plaintiff).

47. RESTATEMENT (SECOND) OF TORTS § 531 cmt. b (1977). However, there can still be liability to a party who justifiably relied on the maker’s misrepresentations even if those misrepresentations were not directly made to that party. *See, e.g.*, *Adams v. United States*, 622 F. Supp. 2d 996, 1004 (D. Idaho 2009) (citing RESTATEMENT (SECOND) OF TORTS § 533 (1977)) (denying the defendant chemical company’s motion for summary judgment given that liability for misrepresentation could be based on statements that the company made to others and intended to reach the plaintiff farmers). This is the case where a person makes a misrepresentation to a third party and intends or has reason to expect that the representation will be conveyed to another who justifiably relies on the misrepresentation. *See, e.g.*, *State v. Timblin*, 657 N.W.2d 89, 96–97 (Wis. Ct. App. 2002) (consulting the *Restatement (Second) of Torts* in a criminal case for felony theft to find that the defendant could not dispute responsibility on the grounds that he did not speak directly to the victims because there was probable cause that the victims relied on the misrepresentations, and that the defendant intended or had reason to expect that the statements would be relayed to the victims).

48. *See, e.g.*, *Collins v. Huculak*, 783 N.E.2d 834, 839 (Mass. App. Ct. 2002) (holding that three sons could not have reasonably relied on their father’s false statement that a document the sons signed was for a bank, when in reality it was a deed conveying each son’s interest to his father and sister, because suspicious circumstances like the father’s refusal to let the sons read the document made it so that reliance was not justified); *see also* RESTATEMENT (SECOND) OF TORTS § 537 (1977); Sheila B. Scheurman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 14–20, 46 (2006) (arguing that state courts should enforce the traditional reliance requirement at the class certification stage in consumer fraud class actions in order to lessen consumer class action abuse).

49. *See* *Sherwin*, *supra* note 33, at 1018 (emphasizing that materiality is a required element to recover in tort for misrepresentation, but not to obtain rescission under contract law). Some scholars have found that “the role of materiality within the overall doctrine of misrepresentation is unclear” because, depending on what source one relies on, materiality can be seen as either a “separate requirement or a subcategory of justifiable reliance.” *Id.* at 1019–20. These two requirements of justifiable reliance and materiality have been explained by Prosser and Keeton—generally justifiable reliance is concerned with “representations that *should not be believed*,” while materiality is concerned with “representations that *should not be acted on*.” *Id.* at 1020–21 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108 (5th ed. 1984) (emphasis added)).

50. RESTATEMENT (SECOND) OF TORTS § 538 (1977) (emphasis added). Finally, reliance is still justified even if the person who relied could have discovered the falsity of the representation through an investigation. *Id.* § 540.

misrepresentation knows that the representation is false or where the representation is obviously false to him, the recipient is barred from recovery because his reliance would not be justified.<sup>51</sup>

Finally, the recipient of the fraudulent misrepresentation must establish that he suffered damages as a result of the misrepresentation.<sup>52</sup> The damages are measured by the pecuniary loss to the recipient.<sup>53</sup>

51. See *Smith v. Duffey*, 576 F.3d 336, 339 (7th Cir. 2009) (dismissing plaintiff's claim for fraud where "no businessman in his right mind" could believe the defendants' statement that the share price of stock would be unaffected by a stock split where each share would be split into four shares); see also RESTATEMENT (SECOND) OF TORTS § 541 (1977). Generally, reliance is also unjustified when the fraudulent misrepresentation is the maker's opinion and the opinion relates to a fact that is immaterial. RESTATEMENT (SECOND) OF TORTS §§ 542–543 (1977); see also RESTATEMENT (SECOND) OF TORTS § 544 (1977) (explaining when reliance on a statement of intention is justified); RESTATEMENT (SECOND) OF TORTS § 545 (1977) (detailing when reliance on a misrepresentation as to a matter of law is justified).

52. RESTATEMENT (SECOND) OF TORTS § 547 (1977); see also BLACK'S LAW DICTIONARY 1030 (9th ed. 2009) (Pecuniary loss is "a loss of money or of something having monetary value."). Despite the general notion that the tort of misrepresentation does not involve personal injury or damages other than pecuniary loss, section 557A of the *Restatement (Second) of Torts* appears to allow recovery for non-economic loss by imposing liability for physical harm to a person or to his chattel or land. RESTATEMENT (SECOND) OF TORTS § 557A cmt. a (1977) (suggesting that the recovery for physical harm is separate from economic injury by emphasizing that, *in addition to* recovery for physical harm, liability may "also extend[] to the economic loss resulting from the physical harm"). A number of courts have interpreted this issue of recovery for non-pecuniary loss under section 557A, with some allowing and others denying damages for emotional distress in an action for fraud. Compare *Tolliver v. Visiting Nurse Ass'n of Midlands*, 771 N.W.2d 908, 915–16 (Neb. 2009) (finding that section 557A does not allow recovery for non-economic loss by interpreting the language in comment (a) to mean that the defendant would be liable for pecuniary loss normally allowed, *as well as* for other economic losses like "monetary losses for medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of domestic services, loss of employment, and loss of business or employment opportunities"), with *Asher v. Reliance Ins. Co.*, 308 F. Supp. 847, 854 (N.D. Cal. 1970) (finding that a case involving a contract actually sounded in tort for fraudulent misrepresentation and thus damages for mental suffering were available), and *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (allowing recovery for emotional damages in a misrepresentation action "where 'the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm'" (citation omitted)). Some scholars who also have considered the issue have proposed that misrepresentation law can provide a remedy for physical injuries and not just economic loss. See, e.g., Barke, *supra* note 33, at 204–10 (explaining that numerous jurisdictions have allowed fraudulent misrepresentation claims in the following personal settings: transmission of venereal diseases, wrongful adoption, inducement of marriage, and statements regarding sterility or birth control); Steven J. Weingarten, Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 744–45, 752 (1984) (arguing that misrepresentation law should apply to negligent speech that results in physical harm).

53. RESTATEMENT (SECOND) OF TORTS § 549 (1977).

In addition to liability for pecuniary loss under section 525, section 310 of the *Restatement (Second) of Torts* provides a cause of action for conscious misrepresentation involving risk of physical harm.<sup>54</sup> Accordingly,

[a]n actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.<sup>55</sup>

In addition to representations of fact, section 310 also imposes liability for both representations of opinion and law.<sup>56</sup> Moreover, liability not only extends to the person intended to be influenced by the misrepresentation, but to all others who the maker could foresee would be harmed by the misrepresentation.<sup>57</sup> Generally, liability for conscious misrepresentations resulting in physical harm applies in cases where a misrepresentation about the physical condition of a thing—land, structures, or a chattel—induces another “to believe that the thing is in safe condition for his entry or use, or induces a third person to hold the land or chattel open to the entry or use of the other in the belief that it is safe for the purpose.”<sup>58</sup>

#### *ii. Negligent Misrepresentation*

In addition to fraudulent misrepresentation, a person may be liable in tort under another standard of liability—negligence.<sup>59</sup> As codified in the

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54. RESTATEMENT (SECOND) OF TORTS § 310 (1965).

55. *Id.*

56. *Id.* § 310 cmt. b.

57. *Id.* § 310 cmt. c; *see also* *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 593 (Cal. 1997).

58. RESTATEMENT (SECOND) OF TORTS § 310 (1965); *see, e.g.*, *Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, 672 F. Supp. 2d 752, 759 (E.D. La. 2009) (finding that the plaintiff made a prima facie showing of intentional misrepresentation where the seller of natural gas flow lines misrepresented and withheld information about pipes used in the flow lines, which resulted in damage to the plaintiff’s land). Not all causes of action for fraudulent misrepresentation resulting in physical harm involve misrepresentations as to the physical condition of a “thing.” RESTATEMENT (SECOND) OF TORTS § 310 cmt. c (1965); *see, e.g.*, *Passmore v. Multi-Mgmt. Servs., Inc.*, 810 N.E.2d 1022, 1025–26 (Ind. 2004) (involving a suit for physical injuries based on misrepresented information made about a person in favorable employment recommendations).

59. RESTATEMENT (SECOND) OF TORTS § 528 (1977) (“A representation that is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation.”); *see also* Steven M. Henderson, *Walking the Line Between Contract and Tort in Construction Disputes: Assessing the Use of Negligent Misrepresentation to Recover*

*Restatement (Second) of Torts*, there are two types of negligent misrepresentation—one that concerns economic harm resulting from negligent speech<sup>60</sup> and one that concerns physical harm.<sup>61</sup> Section 552 of the *Restatement (Second) of Torts* summarizes the former:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.<sup>62</sup>

Although this standard encompasses liability for opinions as well as statements of fact,<sup>63</sup> the maker of the representation must have a pecuniary interest in the transaction to be found liable.<sup>64</sup> If the information is given needlessly in the sense that the maker has no pecuniary interest at stake, there is no liability under section 552.<sup>65</sup> Liability is further limited under

*Economic Loss After Presnell*, 95 KY. L.J. 145, 148 (2005) (analyzing Kentucky negligent misrepresentation in the context of construction disputes); Philip Steven Horne, *Onita Pacific Corp. v. Trustees of Bronson: The Oregon Supreme Court Recognizes the Negligent Misrepresentation Tort*, 72 OR. L. REV. 753, 753 (1993) (discussing how Oregon officially recognized negligent misrepresentation); Alissa J. Strong, “*But He Told Me It Was Safe!*”: *The Expanding Tort of Negligent Misrepresentation*, 40 U. MEM. L. REV. 105, 108–09 (2009) (tracing the history of the tort of negligent misrepresentation and arguing that courts should place limits on the tort, codified in section 311 of the *Restatement (Second) of Torts*, because “the expansion of the tort has had a chilling effect on the free flow of information”); Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 845, 847 (2008) (clarifying the tort of negligent misrepresentation as applied in Texas and explaining who has standing to assert such a claim under Texas law).

60. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

61. RESTATEMENT (SECOND) OF TORTS § 311 (1965); *see also* Strong, *supra* note 59, at 109–10 (focusing on the limits of liability for physical harm resulting from negligent speech under section 311 of the *Restatement (Second) of Torts*).

62. RESTATEMENT (SECOND) OF TORTS § 552 (1977). Liability for negligent misrepresentation is more limited than liability for fraudulent misrepresentation. *Compare id.* (requiring that the maker of the representation make the representation “in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest”), *with* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (extending liability to anyone “who fraudulently makes a misrepresentation of fact, opinion, intention or law” and otherwise meets the requirements for fraudulent misrepresentation).

63. RESTATEMENT (SECOND) OF TORTS § 552 cmt. b (1977).

64. *Id.* § 552.

65. *Id.* § 552 cmt. c (analogizing the pecuniary interest requirement under section 552 to situations where a person gratuitously gives chattel to another and therefore only has a duty to reveal

section 552 because these kinds of negligent misrepresentations only involve pecuniary harm, not physical harm to the plaintiff.<sup>66</sup> Furthermore, liability only extends if the maker of the representation fails to exercise the degree of care that a reasonable man would exercise in providing the information to the plaintiff.<sup>67</sup> Finally, the plaintiff's contributory negligence in relying on the misrepresentation bars recovery.<sup>68</sup> Given these limitations, liability for negligent misrepresentations resulting in pecuniary loss tends to be much narrower in scope than liability for fraudulent misrepresentations.<sup>69</sup>

While actions for misrepresentation under section 552 usually involve false information meant to guide others in their business transactions, misrepresentation claims for physical harm under section 311 impose no such requirement.<sup>70</sup> Rather, section 311 provides:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.<sup>71</sup>

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information that he knows makes the chattel dangerous for use). The pecuniary interest requirement is satisfied where the maker of the representation is given some kind of consideration for providing the information or where the information is supplied in the course of the maker's business, profession, or employment. *Id.* § 552 cmt. d.

66. *Id.* § 552 cmt. a.

67. *Id.* § 552 cmt. e. Whether the defendant acted in an objectively reasonable manner is fact-dependent and varies according to the recipient's expectations based on the pertinent circumstances. *Id.*

68. *Id.* § 552A ("The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying.").

69. *Id.* § 552 cmt. a ("The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions. Honesty requires only that the maker of a representation speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he says. . . . Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect.").

70. RESTATEMENT (SECOND) OF TORTS § 311 (1965). *See also* Strong, *supra* note 59, at 110 (emphasizing that although section 552 of the *Restatement (Second) of Torts* requires "a commercial relationship between the parties," section 331 does not include such a requirement).

71. RESTATEMENT (SECOND) OF TORTS § 311 (1965). A cause of action for negligent misrepresentation varies by state, however, as not all states have adopted section 311 of the *Restatement (Second) of Torts*. *Compare Willis v. Bender*, 596 F.3d 1244, 1259 n.9 (10th Cir. 2010)

Similar to liability for negligent misrepresentations causing pecuniary loss, liability for negligent misrepresentations resulting in physical harm usually involves representations made in a professional or business capacity.<sup>72</sup> Even so, this is not an actual requirement, as there can still be liability under section 311 where a person negligently provides information to another “in the course of an activity which is in furtherance of his own interests.”<sup>73</sup> Moreover, unlike section 552, section 311 does not limit liability when the negligent information is provided gratuitously.<sup>74</sup> The key for liability under section 311 is that the negligent misrepresentation caused physical harm to the plaintiff.<sup>75</sup> In addition to civil liability, misrepresentations can be criminalized.

(emphasizing that Wyoming has not adopted the tort of negligent misrepresentation resulting in physical harm as codified under section 311 of the *Restatement (Second) of Torts*, and *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 351 (Minn. Ct. App. 2001) (reiterating that Minnesota only recognizes negligent misrepresentation actions for pecuniary loss and not for risk of physical harm), and *Richland Sch. Dist. v. Mabton Sch. Dist.*, 45 P.3d 580, 587 (Wash. Ct. App. 2002) (“Washington has never adopted *Restatement (Second) of Torts* section 311 and no published case has discussed its applicability to Washington common law. On these facts, we decline to adopt [s]ection 311 as a basis for negligent misrepresentation.”), with *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 593 (Cal. 1997) (acknowledging that California has adopted section 311 of the *Restatement (Second) of Torts*, and *Hall v. Ford Enters., Ltd.*, 445 A.2d 610, 612 (D.C. 1982) (recognizing that Washington D.C. allows claims for negligent misrepresentation resulting in physical harm and explaining the elements for such a cause of action in the jurisdiction).

72. See RESTATEMENT (SECOND) OF TORTS § 311 (1965). But see RESTATEMENT (SECOND) OF TORTS § 525 (1977); RESTATEMENT (SECOND) OF TORTS § 310 (1965) (including no similar requirement that the representation be made in a professional or business capacity).

73. RESTATEMENT (SECOND) OF TORTS § 311 cmt. b (1965).

74. Compare *Id.* § 311, with RESTATEMENT (SECOND) OF TORTS § 552 (1977). Furthermore, in allowing recovery for physical harm caused by purely gratuitous, negligent information, section 311 of the *Restatement (Second) of Torts* provides for a broader basis of liability than was allowed under the *Restatement (First) of Torts*. Compare RESTATEMENT (FIRST) OF TORTS § 311 (1934) (“One a part of whose business or profession it is to give information upon which the bodily security of others depends and who in his business or professional capacity gives false information to another is subject to liability for bodily harm . . .” (emphasis added)), with RESTATEMENT (SECOND) OF TORTS § 311 (1965) (“One who negligently gives false information to another is subject to liability for physical harm . . .”).

75. The *Restatement (Second) of Torts* defines physical harm as “physical impairment of the human body, or of land or chattels.” RESTATEMENT (SECOND) OF TORTS § 7 (1965). Bodily harm is further defined as “physical impairment of the condition of another’s body, or physical pain or illness.” *Id.* § 15. In applying section 311, some courts have attempted to define the limits of the physical harm requirement. See, e.g., *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 48 F. Supp. 2d 885, 891 (D. Minn. 1999) (finding that sexual assault fails to satisfy the physical injury requirement because the physical harm requirement “excludes offensive bodily contact . . . even though the contact may offend a reasonable sense of personal dignity, unless the contact produces ‘physical impairment of the condition of another’s body, or physical pain, or illness’” (citation omitted)); *Friedman v. Merck & Co.*, 131 Cal. Rptr. 2d 885, 909 (Ct. App. 2003) (affirming dismissal of a case

## 2. Criminal Misrepresentation

A misrepresentation can be a crime as a matter of federal or state law.<sup>76</sup> What distinguishes a criminal misrepresentation from a civil one is “the judgment of *community condemnation* which accompanies and justifies [the] imposition [of a criminal sanction].”<sup>77</sup> In other words, a criminal misrepresentation “is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”<sup>78</sup> Through various statutes, different jurisdictions have expressed their “community condemnation” of online misrepresentations.<sup>79</sup>

Some statutes that criminalize misrepresentations focus on online harassment.<sup>80</sup> For example, a Texas law makes it a felony of the third degree—punishable by two to ten years in prison and a fine of up to \$10,000—to use “the name or persona of another person to . . . create a web page” or post “one or more messages on . . . a commercial social networking site”<sup>81</sup> “without obtaining the other person’s consent and with the intent to harm, defraud, intimidate, or threaten any person . . .”<sup>82</sup> The law also makes it a class A misdemeanor—punishable by up to one year in prison and a fine of up to \$10,000—to send “an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any

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where the “direct result of defendant’s alleged wrongdoing was emotional rather than physical harm” and emphasizing that California does not recognize suits for negligent misrepresentation resulting in a risk of emotional injury); *see also* Amy Leonard, *The Rise of Neo-Scientists Advocating for Polluters and the Laws That Deter Them*, 20 TUL. ENVTL. L.J. 305, 344–45 (2007) (arguing that section 311 should apply to neo-scientists who present false information about health and safety issues, such as the nature of environmental contamination or effects of a particular chemical resulting in physical harm).

76. “[I]n every state and in the federal system, legislators . . . exercise primary responsibility for defining criminal conduct and for devising the rules of criminal responsibility.” JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 4 (4th ed. 2007).

77. *Id.* at 2 (emphasis added).

78. *Id.* at 3.

79. *See infra* notes 80–90 and accompanying text.

80. Other statutes commonly criminalize online harassment like cyberbullying, which does not necessarily involve any misrepresentation. *See, e.g.*, LA. REV. STAT. ANN. § 14:40.7(A) (2010) (criminalizing cyberbullying—“the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen”).

81. A “commercial social networking site” is defined as:

[A]ny business, organization, or other similar entity operating a website that permits persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication with other users or the creation of web pages or profiles available to the public or to other users.

TEX. PENAL CODE ANN. § 33.07(f)(1) (West 2009). However, the “term does not include an electronic mail program or a message board program.” *Id.*

82. *Id.* § 33.07(a).

person” if it is done “(1) without obtaining the other person’s consent; (2) with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication; and (3) with the intent to harm or defraud any person.”<sup>83</sup> Other states have started to follow this approach to regulate misleading online behavior.

On January 1, 2011, California added a provision to its penal code that makes it a crime to impersonate another person on a social networking site.<sup>84</sup> Specifically, “any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person”<sup>85</sup> is punishable “by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.”<sup>86</sup> In order to be guilty under this statute, the impersonation has to be “credible.”<sup>87</sup> Moreover, guilt extends to “opening an e-mail account or an account or profile on a social networking Internet Web site in another person’s name.”<sup>88</sup> The statute also provides for a civil action under another section of the penal code<sup>89</sup> for a person who suffers damage or loss as a result of the impersonation.<sup>90</sup> Statutes like those in Texas and California reflect a modern trend towards criminalizing deceit on social networking sites. In light of these kinds of laws that impose serious criminal sanctions for social networking misrepresentations, it is necessary to consider how misrepresentations take place on these websites.

### *B. Deceit in a Networked World*

In today’s networked world, misrepresentation is not limited to commercial transactions, or solely disseminated through traditional sources

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83. *Id.* § 33.07(b). A defendant prosecuted under any part of the statute can assert a defense if the actor is a commercial social networking site or another entity listed in the statute. *Id.* § 33.07(e)(1)–(5). It is also a defense if the defendant acted as an employee of a commercial social networking site or another entity listed in the statute. *Id.*

84. CAL. PENAL CODE § 528.5 (West 2011).

85. *Id.* § 528.5(a).

86. *Id.* § 528.5(d).

87. *Id.* § 528.5(a). “[A]n impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated.” *Id.* § 528.5(b).

88. *Id.* § 528.5(c).

89. *Id.* § 502.

90. *Id.* § 528.5(e).



of distribution and news.<sup>91</sup> Rather, the online information age has provided a forum that is particularly conducive to misrepresentation. Cyberspace facilitates deceptive behavior given the availability of anonymous communications.<sup>92</sup> Online social networking sites<sup>93</sup> play a crucial role in connecting people all around the world—a level of interconnectedness

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91. The Internet has not only had profound implications for misrepresentation law, which has yet to be considered in depth by any court or scholar, but it has also affected other areas of the law. *See, e.g.*, David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261 (2010) (discussing the ways in which defamation law has been affected by a networked society); Ian Byrnsie, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 458–68 (2008) (analyzing the ways in which legal issues are implicated when an employer investigates an applicant’s social networking profile and discussing implications in the areas of privacy, discrimination, the Fair Credit Reporting Act, and defamation); Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 68, 101–02 (2002) (arguing that the Internet has increased the threatening effects of online speech and has changed the way that courts should approach true threats in the context of speech and the First Amendment); Sung In, *Death of a Trademark: Genericide in the Digital Age*, 21 REV. LITIG. 159, 176 (2002) (discussing the interplay between trademark “genericide” and the “explosive growth of the Internet”); Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 211–16 (2009) (suggesting a new revised approach to the Communications Decency Act in light of the evolution of online posting on blogs and social networking sites); Rustad & Koenig, *supra* note 14, at 80 (examining how courts have applied traditional tort concepts to the Internet and concluding “that tort law continues to lag behind the technological dilemmas created by an increasingly networked society”).

92. *See* Stephanie Rosenbloom, *Putting Your Best Cyberface Forward*, N.Y. TIMES, Jan. 3, 2008, <http://www.nytimes.com/2008/01/03/fashion/03impression.html?pagewanted=all> (discussing “impression management”—the way in which people control how they are perceived—in the context of cyberspace and suggesting that “[s]ome misrepresentation stems from the actual structure of networking sites”). Professor David Whittier from Boston University’s School of Education has suggested that it is “just so much easier to pretend to be someone else online [and that] [p]eople are very eager to try it out . . . .” Tim Barker, *Tech Tuesday: Role-Playing Online Draws Eye of the Law*, THE JAMES LOGAN COURIER (Jan. 22, 2008, 7:53 AM), <http://www.jameslogancourier.org/index.php?itemid=3215>.

93. John A. Barnes was the first scholar to use the term “social network.” DAVID KNOKE & SONG YANG, *SOCIAL NETWORK ANALYSIS* 8 (2d ed. 2008). As an anthropologist, Barnes studied the relationships among people on a Norwegian island. *Id.* As a result of his studies, he concluded that social interactions are a “‘set of points some of which are joined by lines’ to form a ‘total network’ of relations.” *Id.* at 8–9 (citation omitted). Today, there are numerous studies on “social network” analysis. *See, e.g., id.*; Damon Centola, *The Spread of Behavior in an Online Social Network Experiment*, 329 SCIENCE 1194 (2010); Joseph Galaskiewicz & Stanley Wasserman, *Introduction: Advances in the Social and Behavioral Sciences from Social Network Analysis, in ADVANCES IN SOCIAL NETWORK ANALYSIS: RESEARCH IN THE SOCIAL AND BEHAVIORAL SCIENCES* xi, xii (Stanley Wasserman & Joseph Galaskiewicz eds., 1994); Gueorgi Kossinets & Duncan J. Watts, *Empirical Analysis of an Evolving Social Network*, 311 SCIENCE 88 (2006). Social network analysis focuses on the “relationships among social entities and on the patterns and implications of these relationships.” Galaskiewicz & Wasserman, *supra*, at xii. Rather than studying individuals, scholars in this area of study focus on social entities. *Id.* In this context, a social network is defined as “a structure composed of a set of actors, some of whose members are connected by a set of one or more relations.” KNOKE & YANG, *supra*, at 8. Essentially, different relationships constitute different networks. *Id.*

unimaginable before the development of these sites—and thus multiply the situations in which people make representations to others.<sup>94</sup> The development and effects of social networking sites emphasize that misrepresentation law may be an appropriate mechanism for regulating Internet activity.<sup>95</sup>

### 1. The Rise of Social Networking Sites

Over the past five centuries, new transportation and communication devices have created a more “networked” world.<sup>96</sup> Technology has evolved from sails and steam power to railroads and radios, and eventually to telephones and the Internet.<sup>97</sup> Today, modern technology, especially the Internet, provides people around the world with the opportunity to interact personally or commercially.<sup>98</sup> In this context of the online world, social

94. According to Thomas L. Friedman, the millennium marked a new era—“Globalization 3.0”—which “is shrinking the world from a size small to a size tiny.” THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 10 (2005). In this era of Globalization 3.0, the dynamic force is “the newfound power for *individuals* to collaborate and compete globally.” *Id.*

95. In assessing the effects of social networking sites and their implications for misrepresentation claims, free speech issues must be taken into consideration. *See, e.g.*, Strong, *supra* note 59, at 118 (arguing that “[c]ourts must strike a balance between the value of shared information (particularly regarding physical safety) and the value of holding people accountable for negligently inaccurate speech about such risks”); *see also infra* Part III.

96. Ardia, *supra* note 91, at 270.

97. *Id.*

98. While most people view the Internet as an advantageous and necessary advance for society, the Internet can be seen as a double-edged sword and perhaps a necessary evil. For example, the language of the Communications Decency Act evidences the benefits of the Internet and the value that the federal government has placed on it. 47 U.S.C. § 230 (2006) (“(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops. (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity. (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”). However, some scholars have argued that the rise of the Internet has led to the destruction of territorial borders and a diminishing of the nation-state. *See infra* note 373 and accompanying text. This tension between the benefits and disadvantages of the Internet is further evidenced by studies on how the Internet has caused changes in the way that people think and concentrate. *See, e.g.*, NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* (1st ed. 2010). The reality of cyber-crime and cyber-harassment also emphasizes the negative implications of the Internet. *See* Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online*

networking sites<sup>99</sup> have played an integral role in creating virtual communities.<sup>100</sup>

Two of the most popular and pervasive social networking sites, Facebook and MySpace, were launched in 2004.<sup>101</sup> By the end of 2008 and the start of 2009, social networking became even more popular than e-mail.<sup>102</sup> In fact, Internet users currently spend about ten percent of their online time on social networking sites.<sup>103</sup> Originally, these sites were

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*Harassment*, 32 HARV. J.L. & GENDER 383, 429 (2009) (discussing how there has been a monetization of Internet harassment and how this has had negative implications, as reputation defense services actually perpetuate harassment in order to receive financial benefits from the services they provide); Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 237–40 (2008) (describing how the anonymous nature of the Internet actually helps to facilitate cyber-harassment); Rustad & Koenig, *supra* note 14, at 81 (“The Internet provides a venue for new types of sexual harassment and for vicious hate crimes.”). As of 2008, cyber-crime was estimated to be a \$105 billion market. Leslie D’Monte, *Virtual Nightmares Ride High*, COMPUTER CRIME RESEARCH CENTER (Jan. 3, 2008), <http://www.crime-research.org/articles/e-commerce08/>.

99. For a step-by-step description of how social networking sites work, see generally U.S. CITIZENSHIP & IMMIGRATION SERVS., SOCIAL NETWORKING SITES AND THEIR IMPORTANCE TO FDNS (July 20, 2010), available at [http://www.eff.org/files/filenode/social\\_network/DHS\\_CustomsImmigration\\_SocialNetworking.pdf](http://www.eff.org/files/filenode/social_network/DHS_CustomsImmigration_SocialNetworking.pdf); see also Catherine Dwyer et al., *Trust and Privacy Concern Within Social Networking Sites: A Comparison of Facebook and MySpace*, 13 AMCIS PROC. (2007), available at <http://csis.pace.edu/~dwyer/research/DwyerAMCIS2007.pdf>.

100. See Ardia, *supra* note 91, at 271–72 (“Virtual communities have sprung up, social networks have bloomed, and individuals are rushing onto the Internet to engage, argue, and disparage each other.”). For many people, social networking sites are virtual communities through which they can make important personal contacts with others in seeking jobs. See Jeff Greer, *The Art of Self-Marketing Online*, U.S. NEWS & WORLD REPORT, Apr. 15, 2010, at 30, available at <http://www.usnews.com/education/articles/2010/04/15/the-art-of-self-marketing-online> (arguing that people should use social networking sites and expand their presence on the Internet in order to find a job in a harsh economic climate). Generally, all social networking sites serve the same function—they help people communicate with friends, family, and coworkers, and they “facilitate the sharing of information through the social graph, the digital mapping of people’s real-world social connections.” *Factsheet*, FACEBOOK, <https://www.facebook.com/press/info.php%20?factsheet> (last visited Nov. 17, 2011); see also Shannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, 66 BENCH & B. MINN. 22, 22–23 (2009) (mentioning that social networking sites are also “key source[s] of information” about people); Laura Locke, *The Future of Facebook*, TIME, July 17, 2007, available at <http://www.time.com/time/business/article/0,8599,1644040,00.html> (covering an interview with Facebook’s founder, Mark Zuckerberg, who explained that Facebook is intended to model the “real” connections that people have in the world, rather than to build a new community or new connections).

101. *Timeline*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet#!/press/info.php?timeline> (last visited Feb. 7, 2012); *Timeline*, MYSPACE, <http://myspace-press.burakccg.com/timeline-2> (last visited Feb. 7, 2012).

102. Lisa Thomas, *Social Networking in the Workplace: Are Private Employers Prepared to Comply with Discovery Requests for Posts and Tweets?*, 63 SMU L. REV. 1373, 1373 (2010).

103. *Id.* Apparently, Russians spend more time on social networking sites than any other people. Robin Wauters, *comScore: Russians Spend More Time on Social Networks than the Rest of World*, TECHCRUNCH EUROPE (July 2, 2009), <http://eu.techcrunch.com/2009/07/02/comscore-russians-spend-more-time-on-social-networks-than-rest-of-world/>. For a study on how users differ in their levels of engagement with social networking sites, see generally Eszter Hargittai & Yu-li Patrick Hsieh, *From Dabblers to Omnivores: A Typology of Social Network Site Usage*, in A NETWORKED

predominantly used by teenagers and young adults; however, many different segments of society use social networking sites today.<sup>104</sup> One 2010 survey suggests that forty-seven percent of Internet users aged fifty to sixty-four years old and twenty-six percent of those over sixty-five use social networking sites.<sup>105</sup> Given further statistics on Facebook and MySpace,<sup>106</sup> it is evident that social networking sites have become omnipresent and an integral part of many people's social lives.<sup>107</sup>

SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 146 (Zizi Papacharissi ed., 2010). Other studies have focused on education and online skills as factors affecting the varying uses of the Internet by young adults. See, e.g., Paul DiMaggio et al., *Digital Inequality: From Unequal Access to Differentiated Use*, in SOCIAL INEQUALITY 355–400 (Kathryn M. Neckerman ed., 2004).

104. Nicolas P. Terry, *Physicians and Patients Who “Friend” or “Tweet”*: Constructing a Legal Framework for Social Networking in a Highly Regulated Domain, 43 IND. L. REV. 285, 286 (2010). According to one study, thirty-five percent of adults and sixty-five percent of teenagers using the Internet have social networking profiles. AMANDA LENHART, PEW INTERNET, ADULTS AND SOCIAL NETWORK WEBSITES 1 (Jan. 14, 2009), available at <http://socialnetworking.procon.org/sourcefiles/PEWJan2009.pdf>.

105. *The Aging of Social Networks*, SOCIAL MEDIA OPTIMIZATION (Sept. 15, 2010), <http://social-media-optimization.com/2010/09/the-aging-of-social-networks/> (providing the following reasons for the appeal of social networking sites to adults: (1) reconnecting with people; and (2) keeping up with the lives of one's children and grandchildren). But see *A Look at Twitter Demographics*, SOCIAL MEDIA OPTIMIZATION (Feb. 16, 2010), <http://social-media-optimization.com/2010/02/a-look-at-twitter-demographics/> (explaining that Twitter was originally more popular with adults, unlike other social networking sites, but that the fastest growing segment on the social networking site is those who are twenty-four years old and younger).

106. See *infra* notes 108–18 and accompanying text.

107. Social networking sites have become such an integral part of everyday life that even politicians recognize the necessity of using these sites in order to reach out to voters. See *Legislative Social Media Sites*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13409> (last updated Oct. 31, 2011) (tracking the use of social networking sites by state legislative agencies and caucuses to reach out to constituents, and evidencing that Facebook, MySpace, Twitter, and YouTube have become popular with these legislators and caucuses). In 2009, the White House “announced that it was joining Twitter, Facebook, and MySpace to meet President Barack Obama’s call one week earlier ‘to reform our government so that it is more efficient, more transparent, and more creative.’” *Are Social Networking Sites Good for Our Society?*, PROCON.ORG, <http://socialnetworking.procon.org/#Background> (last updated Nov. 14, 2011). These attempts by politicians to make use of social networking sites seem founded, given that over one-fourth of American voters under thirty years old reported that they got information about the 2008 presidential campaigns via social networking sites. PEW RESEARCH CENTER, SOCIAL NETWORKING AND ONLINE VIDEOS TAKE OFF: INTERNET’S BROADER ROLE IN CAMPAIGN 2008, at 9 (Jan. 11, 2008), available at <http://people-press.org/report/384/internets-broader-role-in-campaign-2008>. Social networking sites have had a profound impact in the international context as well. In 2009, Iranians used Twitter to evade the government’s control of other media forms during the Iranian presidential elections. Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, TIME, June 17, 2009, available at <http://www.time.com/time/world/article/0,8599,1905125,00.html>. During these elections, the United States State Department even asked Twitter to delay a network

Currently, Facebook has over 800 million users who share over 250 million photos per day.<sup>108</sup> More than 400 million of these users log on in any given day, and approximately 350 million users access the site through a mobile device.<sup>109</sup> On average, users have 130 friends, and the site has over 900 million pages, groups, events, and community pages.<sup>110</sup> Overall, Facebook has a tremendous global reach, which is evident by the fact that seventy-five percent of Facebook users are from outside of the United States.<sup>111</sup>

Similarly, MySpace has over 100 million users, fifty percent of whom are outside of the United States.<sup>112</sup> The site is used in twenty-nine different regions and is translated into fifteen different languages.<sup>113</sup> In the United States, fifty percent of MySpace users are between the ages of twelve and thirty-four.<sup>114</sup> MySpace mobile users spend over forty minutes a week on the site—apparently the greatest mobile usage of any social networking site.<sup>115</sup> The site suggests that its users are connected “to the music, celebrities, TV, movies, and games that they love.”<sup>116</sup> Additionally, the social networking site also includes “MySpace Music”—the most popular music site in the world.<sup>117</sup> Through MySpace Music, five hundred new

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upgrade to allow the Iranian protestors to continue posting information about what was really going on in Iran during the elections. *Id.*

108. *Statistics*, FACEBOOK, <https://www.facebook.com/press/info.php?statistics> (last visited Nov. 18, 2011). In the United States, there are around 145,331,600 Facebook users. Andréa Ford, *The Global Network: Facebook Has Conquered America. Can It Take Over the World?*, TIME, Dec. 27, 2010, at 59, available at [www.time.com/time/pdf/global\\_network.pdf](http://www.time.com/time/pdf/global_network.pdf). Of all the states, Rhode Island has the most Facebook users—approximately sixty-five percent—while New Mexico has the lowest usage—approximately thirty percent. *Id.*

109. *Statistics*, *supra* note 108.

110. *Id.*

111. *Id.* Although Facebook is constantly blocked in China, approximately 92,540 Chinese people still use the site. Ford, *supra* note 108, at 59. In Japan, Facebook users can post information about their blood type on their Facebook profiles. *Id.* In Afghanistan, eighty-five percent of Facebook users are male. *Id.* India has approximately 16,509,680 Facebook users. *Id.* About eighty-six percent of Iceland’s population uses Facebook. *Id.* Unlike many other people, more Brazilians use Google’s Orkut than Facebook as their social networking site of choice—20.5 million more Brazilians used Orkut than Facebook by August 2010, and only 8,176,820 used Facebook. *Id.* Generally, proposed legislation from around the world highlights that social networking sites have had a wide global reach and have affected people internationally. *See, e.g.*, ARTICLE 29 DATA PROTECTION WORKING PARTY, OPINION 5/2009 ON ONLINE SOCIAL NETWORKING (June 12, 2009), available at [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163_en.pdf) (focusing on how social networking sites can be reformed to comply with European Union data protection law).

112. *Fact Sheet*, MYSPACE, <http://myspace-press.burakccg.com/fact-sheet> (last visited Nov. 18, 2011).

113. *Id.*

114. *Id.*

115. *Id.*

116. *About Us*, MYSPACE, <http://www.myspace.com/Help/AboutUs> (last visited Nov. 18, 2011).

117. *Fact Sheet*, *supra* note 112.

artists, twenty-five new albums, and over fifty live shows are added and premiered each week.<sup>118</sup>

Certainly, social networking sites are not limited to just Facebook<sup>119</sup> and MySpace.<sup>120</sup> Given the plethora of these sites and their pervasive nature, it is no surprise that social networking sites have multiplied the situations in which people can misrepresent not only themselves, but virtually anything.<sup>121</sup>

## 2. The Prevalence of Misrepresentations in an Interconnected Society

In order to understand the misrepresentations that people make through social networking sites, it is necessary to first consider the extent to which people lie and make misrepresentations in a broader context. Some scholars have suggested that society is becoming increasingly dishonest.<sup>122</sup> One study has revealed that most people tell an average of two to three lies within a ten minute conversation.<sup>123</sup> Another study has suggested that people lie in one out of three normal conversations and tell anywhere from

118. *Id.*

119. One source suggests that Facebook is still the most popular U.S. social networking site. *See Top Twenty Five Social Networking Sites—May 2009*, SOCIAL MEDIA OPTIMIZATION (June 22, 2009), <http://social-media-optimization.com/2009/06/top-twenty-five-social-networking-sites-%e2%80%93-may-2009/>.

120. In addition to these two sites, the top twenty social networking sites in the United States include Twitter, Classmates.com sites, Mylife.com sites, Windows Live Profile, Buzznet, Bebo, Digg, Yahoo! Buzz, LinkedIn, DeviantART, Tagged, hi5, Gaia Online, SodaHead.com, BlackPlanet.com, AOL Community, Plaxo, and FunAdvice.com. *See id.* For a list of social networking sites popular in different countries and the corresponding registered users per site, see U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 99, at 2.

121. It is important to note, however, that these sites do not only facilitate misrepresentations, but actually also permit the detection of fraudulent behavior. *See, e.g.,* Roberto Ceniceros, *Comp Cheats Confess All on Social Network Sites*, 43 BUS. INS. 1 (2009) (discussing how social networking sites are useful tools for worker compensation claim investigators to detect fraudulent claims by discovering information posted online about the claimant's activities that contradicts allegations of physical injury).

122. *Q and A with Robert Feldman*, ROBERTFELDMAN.ORG, <http://www.robertfeldman.org/conversation.php> (last visited Nov. 18, 2011) (suggesting that, since the lies of the Clinton era, Americans have become "more tolerant of deception").

123. *Id.*; *see also* ROBERT FELDMAN, *THE LIAR IN YOUR LIFE: THE WAY TO TRUTHFUL RELATIONSHIPS* (2009). On the moral depravity of lying, *see generally* SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978); IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives*, in IMMANUEL KANT: CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346 (Lewis White Beck ed. & trans., Univ. of Chi. Press 1949) (1797); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing With Evil*, 15 PHIL. & PUB. AFF. 325 (1986).

zero to forty-six lies in one week.<sup>124</sup> Among university students, ninety-two percent lied to their close friends.<sup>125</sup> It has also been proposed that children may lie more than adults, and women more than men.<sup>126</sup>

In order to understand the legal implications of lying, scholars and social psychologists have proposed various theories and explanations as to why people deceive others or misrepresent themselves.<sup>127</sup> Many assume that people pervert the truth or intentionally mislead others to make themselves more agreeable and “to avoid giving offense to others or to maintain good social relations.”<sup>128</sup> In addition to politeness, other motivations for lying are guilt and self-promotion.<sup>129</sup> Other times, people lie to preserve the innocence of children and even to brag about one’s own ability to get away with lying.<sup>130</sup> In the aggregate, these white lies can “create a climate for greater deceptions, leading to ‘a culture of lies’ that pervades today’s society.”<sup>131</sup>

However, not all lies have the same moral reprehensibility or nefariousness and the need for a legal remedy or punishment may depend on the type of deceit involved.<sup>132</sup> In order to determine the appropriate legal mechanism for regulating misrepresentations on social networking sites, it helps to view misrepresentations as a part of a “taxonomy” of lies.<sup>133</sup> Essentially, there are varying degrees of misrepresentations—lies “without any redeeming properties,” white lies that do not have serious implications, fibs that are selfishly motivated, compassionate lies meant to “spare the hearer,” and justified lies.<sup>134</sup> Depending on the motivation for the misrepresentation and the gravity of its negative effects or resulting injury, a legal remedy may or may not be appropriate.<sup>135</sup>

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124. Bruce Fraser, *The Neutral as Lie Detector: You Can’t Judge Participants by Their Demeanor*, 4 PEPP. DISP. RESOL. L.J. 259, 259 (2004).

125. *Id.*

126. Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 166 (1999).

127. *See, e.g., Q and A with Robert Feldman*, *supra* note 122 (explaining that people lie “to make social interactions proceed more smoothly,” “to be agreeable or to . . . feel better about [themselves],” and “to build themselves up or to gain some advantage over [others]”); Rosenbloom, *supra* note 92 (suggesting that people may misrepresent themselves online “to express an idealized or future version of themselves—someone who is thinner or has actually finished Dante’s ‘Inferno’”).

128. Green, *supra* note 123, at 169; *see also* Rosenbloom, *supra* note 92.

129. Fraser, *supra* note 124, at 259.

130. *Id.*

131. *Robert Feldman*, ROBERTFELDMAN.ORG, <http://www.robertfeldman.org/index.php> (last visited Nov. 18, 2011).

132. *See* Green, *supra* note 123, at 169 (discussing circumstances under which a lie or deception might be justified); *see also* Allen, *supra* note 126, at 169 (suggesting that the morality of lying depends on who is lying, who is being lied to, and what the lying concerns).

133. Fraser, *supra* note 124, at 260.

134. *Id.*

135. *See infra* note 361 and accompanying text.

Through the growth of social networking sites, the opportunities for people to make misrepresentations and deceive others have significantly multiplied.<sup>136</sup> This is arguably facilitated by the anonymous nature of online communications,<sup>137</sup> even if people do in fact use their real identities on social networking sites.<sup>138</sup> To the same extent that research discloses that

136. See WEB OF DECEPTION: MISINFORMATION ON THE INTERNET (Anne P. Mintz ed., 2002) (discussing how the Internet has allowed intentionally misleading information to flourish and mentioning the implications these misrepresentations have had on things like privacy, online purchases, business decisions and more). In addition to encouraging and facilitating misrepresentations, our globally networked world has also had profound effects in other areas of the law. Rustad & Koenig, *supra* note 14, at 79–80 (“The globally-networked world has created new civil wrongs such as cyberpiracy, online gambling, pop-up advertising, cybersquatting, spamming, tarnishment through linking, cybersmearing, and dot.org hate web sites for which effective legal remedies are only beginning to evolve.”); see also David Finkelhor, Janis Wolak & Kimberly J. Mitchell, *Online Safety: Why Research Is Important*, PUBLIUS PROJECT (June 27, 2010), [http://publius.cc/online\\_safety\\_why\\_research\\_important](http://publius.cc/online_safety_why_research_important) (arguing that research for online safety programs is necessary and mentioning a few high-profile cases highlighting the dangers of the Internet); *Top 10 People Caught on Facebook*, TIME, [http://www.time.com/time/specials/packages/article/0,28804,1943680\\_1943678\\_1943657,00.html](http://www.time.com/time/specials/packages/article/0,28804,1943680_1943678_1943657,00.html) (last visited Nov. 18, 2011) (mentioning an instance where Facebook was used as a “crime-fighting tool” by allowing police to arrest Steelers fans who posted pictures of themselves destroying property in the street after the Super Bowl).

137. See Jameson, *supra* note 98, at 238–39 (“Anonymity on the Internet allows individuals to provide opinions and information that they might never otherwise divulge, including information that is false and harmful to third parties.”). In fact, “[w]hen people are less accountable for their conduct, they are more likely to engage in unsavory acts. When anonymous, people are often much nastier and more uncivil in their speech. It is easier to say harmful things about others when we don’t have to take responsibility.” *Id.* at 239 (quoting DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 140 (2007)).

138. Rosenbloom, *supra* note 92 (“Some misrepresentation stems from the actual structure of networking sites. For instance, people who decide to grow younger on dating Web sites often do so by a couple of years because they would otherwise be filtered out of search results that use age brackets.”). *But see id.* (suggesting that misrepresentation may be less of an issue on social networking sites because people are less likely to deviate from the truth where they are monitored by a network of friends); Kim Hart, *The Rise of Alter Egos in Everybody’s Space: After Oversharing, Users Recast Their Online Personas*, WASH. POST, May 2, 2008, [http://www.washingtonpost.com/wp-dyn/content/article/2008/05/01/AR2008050103513\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/05/01/AR2008050103513_pf.html) (mentioning that places like Facebook are not places to experiment with one’s identity, but are rather places to mirror real-life personalities and social contexts); Finkelhor et al., *supra* note 136 (suggesting that, despite the problems that anonymity might pose, the Internet may actually have more protective qualities and serve to mitigate harms suffered by victims of cyberbullying or sexual assault, as they are somewhat shielded by a virtual world). Other sources, like the Department of Homeland Security, have found that social networking sites have actually been helpful for the Office of Fraud Detection and National Security to detect immigration fraud. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 99, at 1 (“Generally, people on these sites speak honestly in their network because all of their friends and family are interacting with them via IM’s (Instant Messages), Blogs (Weblog journals), etc.”). On the importance of anonymous speech and its role in the marketplace of ideas, see generally Brief of Amici Curiae Citizen Media Law Project et al. at 2–3, *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010) (No. 03-08-0805).



lying is more rampant in e-mail than in face-to-face communications, misrepresentation is arguably even easier on social networking sites.<sup>139</sup> Even the social networking sites themselves acknowledge the potential problems with misrepresentation that can easily occur through the use of the sites.<sup>140</sup> Essentially, there may be something inherent in the nature of social networking sites that makes lying easier than it would be in other forms of communication.<sup>141</sup>

Some social psychologists have found that people modify, and perhaps misrepresent, their personalities on these sites to meet certain goals.<sup>142</sup> This kind of tailoring of one's personality is especially pronounced when people have to deal with "competing audiences" on social networking sites.<sup>143</sup> Another factor inherent in the nature of social networking sites that might further fuel misrepresentations and fabricated personalities is their lack of privacy.<sup>144</sup> In other words, "[m]odifying online personalities in search of more privacy" might be "a natural evolution in our relationship with these technologies."<sup>145</sup> One study proposes that privacy concerns and trust on social networking sites might affect information sharing—the extent to which people share identifying or true information.<sup>146</sup> Another explanation for why people might be more likely to lie on social networking sites is the

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139. *New Research Finds Workers More Prone to Lie in E-mail*, EUREKALERT! (Sept. 25, 2008), [http://www.eurekalert.org/pub\\_releases/2008-09/lu-nrf092508.php](http://www.eurekalert.org/pub_releases/2008-09/lu-nrf092508.php); see also David Wood, *No Easy Remedy for Imposter Postings on Social Networking Sites: Like Graffiti, Phony Postings are Offensive But Hard to Control*, CONSUMERAFFAIRS.COM (Mar. 17, 2008), [http://www.consumeraffairs.com/news04/2008/03/myspace\\_impostors.html](http://www.consumeraffairs.com/news04/2008/03/myspace_impostors.html) ("One of the things intriguing to me is that people will do things on the Internet that they wouldn't think of doing in a newspaper or magazine . . . ." (quoting Loyola Law School Professor John Nockleby)).

140. See Locke, *supra* note 100. For example, Facebook recognizes misrepresentation as a violation of the company policy and deactivates accounts made under fake names. *Id.*; see also Hart, *supra* note 138.

141. Evan E. North, Comment, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1299 (2010) ("[S]ocial-networking sites lack meaningful controls to prevent users from falsifying information to mislead other users.").

142. Hart, *supra* note 138.

143. *Id.* In making representations on social networking sites, people do not only communicate with friends, but their communications are often available to and accessible by family, co-workers, and perhaps even strangers. See *id.*

144. *Id.*

145. *Id.* (quoting Pew Internet Senior Research Specialist Mary Madden); see also *Facebook Users: Trading Privacy for Friends?*, AFP (Sept. 26, 2007), <http://afp.google.com/article/ALeqM5hnJl3rLVq-uXFqcWpp03J7JeYaxA> ("We are really heading into new modes of publishing ourselves, we are kind of learning on the job . . . .").

146. See generally Dwyer et al., *supra* note 99. In a comparison of Facebook and MySpace, it appears that Facebook members, who are more trusting of Facebook than MySpace users are of MySpace, are more likely to include truthful, identifying information on their profiles. *Id.*

lack of inhibition and the sense of freedom in online communications.<sup>147</sup> Through this sense of freedom, people are able to create whatever persona they want for themselves.<sup>148</sup>

Usually, the misrepresentations are harmless, rather than intentional or destructive.<sup>149</sup> For example, people may often exaggerate or lie about the kinds of television shows or books that they like to make themselves appear more intelligent.<sup>150</sup> Others “strategically lie” on online dating sites about their age, weight, height, personal attributes, interests, assets, goals, and past relationships.<sup>151</sup> Most people are familiar with these kinds of misrepresentations and would agree that these white lies are not worthy of serious legal ramifications. However, other types of lies on these social networking sites merit a legal remedy. For example, cybercrimes such as identity theft—a quintessential form of misrepresentation—certainly merit legal consequences.<sup>152</sup> Social networking sites may also make it easier for online sexual predators to misrepresent their identities with fake profiles<sup>153</sup> to gain the trust of their victims.<sup>154</sup> A recent document by the United States

147. Barker, *supra* note 92 (“It’s just so much easier to pretend to be someone else online. People are very eager to try it out.” (quoting Boston University School of Education Professor David Whittier)).

148. Charles W. Bryant, *Are People More Honest or Dishonest on Social Networks?*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/social-networking/information/social-networks-honesty.htm/printable> (last visited Nov. 18, 2011).

149. *Id.*

150. *Id.*

151. See Jeffrey A. Hall et al., *Strategic Misrepresentation in Online Dating: The Effects of Gender, Self-Monitoring, and Personality Traits*, 27 J. SOC. & PERS. RELATIONSHIPS 117 (2010) (studying the gender differences in misrepresentation and arguing that certain demographic and personal characteristics are predictors of misrepresentation).

152. Jane Schmitt, *Crimes in Cyber Space*, COMPUTER CRIME RESEARCH CENTER (May 28, 2008), [http://www.crime-research.org/analytics/computer\\_crime22/](http://www.crime-research.org/analytics/computer_crime22/) (describing the rise of cyber liability as one of the “fastest-growing segments of the national property and casualty market” and discussing the emergence of cyber-insurance in response to cyber-crime).

153. Generally, masquerading behind a fake identity can be a real problem on social networking sites. John Nockleby, a Professor of Law at Loyola Law School, has suggested that “[m]asquerading as another person certainly could potentially violate several torts.” Wood, *supra* note 139.

154. As of 2009, MySpace reported that there were 90,000 registered sex offenders who had profiles on the site. *Are Social Networking Sites Good for Our Society?*, *supra* note 107 (citing Nathan Olivarez-Giles, *More Sex Offenders Joined MySpace Than Previously Acknowledged*, L.A. TIMES, Feb. 4, 2009). Facebook declined to report the number of sex offenders using its site. *Id.* Recognizing the dangers of online predators, Illinois passed a law in August 2009, which prohibited sex offenders from using social networking sites. 720 ILL. COMP. STAT. 5/16D-2 (repealed 2011). One study suggests that online sexual predators are actually more common on chat rooms and instant messaging than on social networking sites. *Are Social Networking Sites Good for Our Society?*, *supra* note 107.

Citizenship and Immigration Services suggests that federal agents might also use social networking sites to create phony profiles in order to detect fraud and see if people are in valid relationships or are trying to deceive immigration services.<sup>155</sup>

Misrepresentations on these sites can also create problems with intellectual property.<sup>156</sup> For example, a group of people pretended to be new students at various universities and created fake “Class of 2014” Facebook group pages for incoming students at those schools.<sup>157</sup> Through this scheme, admitted students searching for their university’s official Facebook page would instead find a fake Facebook page with the university’s logo, raising issues of intellectual property infringement.<sup>158</sup> These misrepresentations not only had the potential to harm universities and their intellectual property, but also individual incoming students through deceptive data collection, by stealing identities, and tricking new students into buying items.<sup>159</sup> In sum, misrepresenting, masquerading, and lying are common in every day social networking use. As of today, however, there is no case or study explicitly addressing the application of misrepresentation law to the numerous instances of deceit on social networking sites.<sup>160</sup>

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155. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 99, at 1. British fraud investigators have also made use of social networking sites in order to detect whether people are lying to get government financial benefits. *Benefits Liars Get Found Out on Facebook: Benefits Bosses Are Trawling Profiles on Facebook to Catch Cheats*, METRO (Mar. 24, 2009), <http://www.metro.co.uk/news/594767-benefits-liars-get-found-out-on-facebook>.

156. See, e.g., In, *supra* note 91, at 187 (addressing trademark genericide in the context of the Internet and suggesting that the Internet might actually be used to “offset the threat of genericness that the Internet presents for . . . protected marks”).

157. *Return of the Fake Facebook Class Groups: Are You Ready?*, INSIDETIMSHHEAD (Oct. 12, 2009, 11:36 PM), <http://insidetimshead.wordpress.com/2009/10/12/return-of-the-fake-facebook-class-groups-are-you-ready/>.

158. See *id.* Modernly, a trademark is defined as “a designation used ‘to identify and distinguish’ the goods of a person.” 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 4TH § 3:1 (2011) (citation omitted). Essentially, trademarks identify a seller’s goods and distinguish them from other sources. *Id.* In order for a word or symbol to qualify as a trademark, there usually must be:

- (1) [T]he tangible symbol: a word, name, symbol or device or any combination of these;
- (2) type of use: actual adoption and use of the symbol as a mark by a manufacturer or seller of goods or services; [and]
- (3) the function: to identify and distinguish the seller’s goods from goods made or sold by others.

*Id.*

159. *Return of the Fake Facebook Class Groups: Are You Ready?*, *supra* note 157.

160. Rustad & Koenig, *supra* note 14, at 130, 138 (mentioning that at least as of 2003, consumers had “yet to obtain any tort judgment for misrepresentation or fraud arising out of online transactions” and “[n]o certified class of plaintiffs ha[d] recovered for an Internet-related injury due to fraudulent advertisements”).

### III. LYING TO THE ONLINE COMMUNITY: THE APPLICABILITY OF MISREPRESENTATION ACTIONS

Although misrepresentation covers the law of torts, contracts,<sup>161</sup> and criminal law, it is still a specific area of the law in the sense that a misrepresentation claim is broken down into elements and has traditionally been raised in limited contexts.<sup>162</sup> With the growth of social networking sites, however, online misrepresentation has given rise to a variety of claims outside these traditional ways of understanding misrepresentation.<sup>163</sup> In other words, online deceit has led to a variety of legal implications, but the law of misrepresentation has yet to provide a cause of action for such misrepresentations.<sup>164</sup> Even though the current state of the law does not indicate such a trend, traditional misrepresentation law could provide a remedy for misrepresentations on social networking sites and be an appropriate mechanism for regulating online behavior.<sup>165</sup>

#### A. *Is It a Tort to Lie on Your Social Networking Profile?*

##### 1. Fraudulent Misrepresentation

In a successful fraudulent misrepresentation action, several elements must be established before recovery is possible.<sup>166</sup> For example, there must be evidence of some kind of misrepresentation.<sup>167</sup> Thus, the first question is whether people on social networking sites assert facts that do not really exist.

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161. As mentioned before, the scope of this Comment does not cover misrepresentation law in the context of contract law.

162. See *supra* Part II.A.1–2.

163. See *supra* notes 136, 149–59 and accompanying text.

164. See Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 6 (2002) (explaining that “[t]orts in cyberspace have been slow to develop, partially as the result of tort reform and new judicial subsidies benefiting Internet service providers, telecommunications giants and media moguls” and arguing that “[t]ort rights and remedies must be strengthened so that they can play their traditional social control role in the information age”).

165. See *infra* text accompanying notes 364–74. One potential argument in favor of allowing recovery in a misrepresentation action for deceit on social networking sites is the fact that people generally cannot recover from social networking sites, which are immune under the Communications Decency Act, 47 U.S.C. § 230 (2006). See 47 U.S.C. § 230(c)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

166. See *supra* note 36 and accompanying text.

167. See *supra* text accompanying notes 38–39.

### *i. Misrepresentation*

The misrepresentation requirement is easy to satisfy seeing that lying on these sites is quite common.<sup>168</sup> People often post false information about their age, appearance, musical preferences, hobbies, prior work history, and educational background.<sup>169</sup> On Facebook, people can assert facts that do not exist in the simplest of ways by posting false information on their own profiles or by creating fake profiles.<sup>170</sup>

Of greater concern is when people masquerade behind other identities by creating fake profiles<sup>171</sup> with false pictures and misleading information—a common occurrence.<sup>172</sup> In *La Russa v. Twitter, Inc.*, for example, a person used a fictitious profile on Twitter<sup>173</sup> to pretend to be Tony La Russa, the

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168. See *supra* notes 136, 149–59 and accompanying text. Sometimes lying on these sites can actually harm the business of another. See, e.g., Complaint, *Horizon Grp. Mgmt., LLC v. Bonnen*, No. 2009L008675 (Ill. Cir. Ct. July 20, 2009). In *Horizon Group Management, LLC v. Bonnen*, for example, a former tenant posted an allegedly false statement about an apartment leasing and management company on her Twitter account. *Id.* ¶¶ 1–2, 7. The statement—“Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s okay”—suggested that the plaintiff had its tenants living in moldy apartments. *Id.* ¶ 7. Although the company brought suit for defamation, the suit was based on an allegedly false statement made on a social networking site—an element that would also have to be established if the suit had been for fraudulent misrepresentation. *Id.* ¶¶ 8–10.

169. Studies suggest that these kinds of lies can be the result of trying to please others or to gain social acceptance. See *supra* text accompanying note 128.

170. Misrepresentation is so common on Facebook that the site “has tried to reduce the likelihood of misrepresentation by maintaining a database of names it believes users could employ to establish false identities.” North, *supra* note 141, at 1299–300.

171. Many of these fictitious profiles have led to a variety of lawsuits. See *infra* text accompanying notes 174–80. In *Draker v. Schreiber*, for example, several students created a fake MySpace profile page for their vice principal. *Draker v. Schreiber*, 271 S.W.3d 318, 320–21 (Tex. App. 2008). The profile contained the vice principal’s “name, photo, and place of employment, as well as explicit and graphic sexual references.” *Id.* at 320. The vice principal sued the students for defamation, libel per se, civil conspiracy, and gross negligence. *Id.* at 321. She also sued the parents for negligence and gross negligence in failing to supervise the students’ Internet use. *Id.* In trying to deal with this kind of behavior, different scholars have proposed potential causes of action that could help to regulate fake profiles. See, e.g., Bradley Kay, Note, *Extending Tort Liability to Creators of Fake Profiles on Social Networking Websites*, 10 CHI.-KENT J. INTELL. PROP. 1, 1 (2010) (discussing how suits for misappropriation and the right of publicity “should be extended to false profiles made on social networking websites”).

172. “[A]nyone could create multiple identities on Facebook or any other social networking site simply by registering with the same name twice and maintaining separate groups of friends on each account. Misrepresentation is possible if a user were to register using someone else’s name and post incriminating information.” North, *supra* note 141, at 1300; see also *infra* text accompanying notes 278–87, 300–05.

173. Twitter is a real-time information network that allows a person to follow conversations on different public streams. *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Nov. 18, 2011). People use the site to send and read messages that are called Tweets—posts of up to 140 characters on the user’s profile. *Id.* As of September 2010, the site had 175 million registered users with an average of 95 million tweets written each day. Stacey Santos, *Social Media and the Tourism Industry Statistics*, STIKKY MEDIA, <http://www.stikkymedia.com/articles/social-media-and-the-tourism-industry-statistics> (last visited Nov. 18, 2011).

manager of the St. Louis Cardinals.<sup>174</sup> The person allegedly stole La Russa's identity and posted tweets<sup>175</sup> on the site using his name and photo.<sup>176</sup> As such, La Russa sued Twitter, Inc. for trademark infringement, invasion of privacy, cyber-squatting, and other claims.<sup>177</sup> After the suit was filed, Twitter removed the fake profile, and La Russa eventually dropped the lawsuit.<sup>178</sup> Even though this suit was brought for trademark infringement, the case emphasizes that even *conduct* on social networking sites—like creating a fake identity—can constitute a “misrepresentation.”

Not all instances of imposters who create fictitious profiles, however, necessarily involve false representations. In *Yath v. Fairview Clinics, N.P.*, for example, a health care provider employee created a fake MySpace profile titled “Rotten Candy” and disclosed true, but private, information about the plaintiff patient—that she had a sexually transmitted disease and a sex partner besides her spouse.<sup>179</sup> In creating the profile, the employee used a photograph of the plaintiff.<sup>180</sup> Although the representations in this case were accurate, the very masquerading behind a sham profile constitutes the misrepresentation. As mentioned before, “[m]asquerading as another person certainly could potentially violate several torts,”<sup>181</sup> and one of these torts could be fraudulent misrepresentation.<sup>181</sup> In these circumstances where there is an imposter on a social network, courts should be more willing to find that the “misrepresentation” requirement is satisfied.<sup>182</sup> This is

174. Complaint ¶¶ 5, 7–8, *La Russa v. Twitter, Inc.*, No. CGC-09-488101 (Cal. Sup. Ct. May 6, 2009) [hereinafter *La Russa Complaint*].

175. See *supra* text accompanying note 174.

176. *La Russa Complaint*, *supra* note 174, ¶ 7.

177. *Id.* ¶¶ 1, 4, 6. Although this suit was based on a false profile on Twitter, some social networking sites, like Twitter, actually allow fake profiles that are harmless. See *Kay*, *supra* note 171, at 22 (“Twitter does, however, allow parody accounts that a reasonable person would know is a joke. These policies show that [social networking site] creators contemplated parody profiles and made decisions about whether or not the creator of a fake profile should be punished.” (footnote omitted)).

178. Jane E. Kirtley, *Privacy Protection, Safety and Security*, 987 *PLI/PAT* 15, 100 (2009) (suggesting that one reason La Russa dropped the suit was because Twitter would likely be immune under the Communications Decency Act, 47 U.S.C. § 230 (2006)).

179. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 37–39 (Minn. Ct. App. 2009).

180. *Id.* at 39.

181. See *supra* note 153 and accompanying text.

182. Such a finding would be supported by the literal language of section 525 of the *Restatement (Second) of Torts* and the policy of social networking sites, which discourages fraudulent behavior. See, e.g., *MySpace.com Terms of Use Agreement*, MYSPACE (June 25, 2009), <http://www.myspace.com/Help/Terms> (emphasizing that it is a violation of MySpace company policy to post content on the site that “promotes information that you know is false or misleading” or “includes a photograph or video of another person that you have posted without that person’s

supported by the flexible definition of “misrepresentation” under the *Restatement*—written and spoken words, as well as “any other conduct that amounts to an assertion not in accordance with the truth.”<sup>183</sup>

When a person lies on a social networking site, they are using written and spoken words that are not in accordance with the truth. Similarly, a person who masquerades as another displays “conduct” that is not in accordance with the truth. Thus, just as people lie in face-to-face communications, they also assert facts that do not really exist on social networking sites.<sup>184</sup> In order for these lies to be actionable in tort, however, further elements must be established.

*ii. Knowledge of Falsity*

The lie told on a social networking site must be fraudulent—one that the person knows is false.<sup>185</sup> This element is satisfied where a person makes a statement on a social networking site and knows or believes it is not as he represents it. For example, if a man represents himself on MySpace as a young female looking for friendship and knows that he is actually a fifty-year-old man, then he *knows* that his representation is false. Similarly, if a person represents on a dating site<sup>186</sup> that he is a doctor or makes a certain

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consent”). As part of its terms of use, Facebook provides that “[y]ou will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.” *Statement of Rights and Responsibilities*, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/terms.php?ref=pf>. In fact, Facebook does not allow its users to use the site to do “anything unlawful, *misleading*, malicious, or discriminatory.” *Id.* (emphasis added). Even other countries are starting to recognize that masquerading on social networking sites is unjustified behavior. *See, e.g.*, ARTICLE 29 DATA PROTECTION WORKING PARTY, *supra* note 111 (recommending in a proposed legislation by the European Union that social networking sites comply with European Union law by prohibiting people from posting photographs of other people without their consent).

183. *See supra* text accompanying note 38.

184. The anonymous nature of online communication may actually fuel misrepresentations on social networking sites. *See supra* note 137; *see also* Bartow, *supra* note 98, at 428 (“The supposed anonymity offered by the Internet brings out the worst in many people.”). Because the virtual world is removed from reality and face-to-face communications, “the body is free of the physical constraints and is able to take up multiple identities.” Murray Watts, *Deception and Authenticity. How False and Misleading Profiles Are Impacting Online Dating.*, ONLINE CONFERENCE ON NETWORKS AND COMMUNITIES (Apr. 28, 2010), <http://networkconference.netstudies.org/2010/04/deception-and-authenticity-how-false-and-misleading-profiles-are-impacting-online-dating-2/>.

185. *See supra* note 40 and accompanying text.

186. Online dating has become popular and commonplace today. *See* SONALI FERNANDO, SOULMATES: TRUE STORIES FROM THE WORLD OF ONLINE DATING (2010) (giving advice for online dating in terms of dating etiquette and creating effective profiles). One of the most popular and supposedly reputable online dating sites is Match.com. *See About Match.com*, MATCH.COM, <http://www.match.com/help/aboutus.aspx?lid=4> (last visited Nov. 18, 2011). It was launched in 1995 and now serves twenty-four countries and territories. *Id.* A given profile on the site can include up to twenty-six photos and other information about the person. *Id.* Other popular online dating sites include eHarmony, Lavalife, OkCupid, and PlentyofFish. *See* EHARMONY,

salary, when he knows that he does not actually have that occupation or salary,<sup>187</sup> then he knows “the matter is not as he represents it to be.”<sup>188</sup> Other instances of fraudulence are more harmful.

In communicating with others on online dating sites,<sup>189</sup> for example, some people knowingly misrepresent the status of their venereal illnesses by lying and telling potential partners that they do not have any sexually transmitted diseases.<sup>190</sup> Many courts have recognized a misrepresentation action in these circumstances.<sup>191</sup> Furthermore, this scienter element can be satisfied even if a social networker makes an ambiguous statement subject to multiple interpretations<sup>192</sup> or an incomplete representation that does not state additional qualifying matter.<sup>193</sup> Generally, fraudulence is relatively easy to establish with lies told on social networks; however, further elements are required in order to maintain a successful cause of action.

### *iii. Intent to Induce*

The next element for fraudulent misrepresentation requires that the misrepresentation on a social networking site be made to induce another to act or refrain from acting.<sup>194</sup> Because fraudulent misrepresentation actions

<http://www.eharmony.com/> (last visited Nov. 18, 2011); LAVALIFE, <http://www.lavalife.com/> (last visited Nov. 18, 2011); OKCUPID, <http://www.okcupid.com/> (last visited Nov. 18, 2011); PLENTYOFFISH, <http://www.plentyoffish.com/> (last visited Nov. 18, 2011). Many of these sites recognize the reality of lying on social networks and thus prohibit such conduct in their terms of use. See, e.g., *Match.com Terms of Use Agreement*, MATCH.COM, <http://www.match.com/registration/membagr.aspx?lid=4> (last updated Sept. 7, 2011) (Membership can be terminated and further legal action taken for content that “promotes information that is false [or] misleading.”). Match.com commands that its members “will not provide inaccurate, misleading or false information to the [c]ompany or to any other [m]ember.” *Id.* The site specifically prohibits people from impersonating another person or entity. *Id.*

187. Because “[w]omen tend to desire men who have a high socioeconomic status,” it is common for men to lie about their professions on online dating sites. See Watts, *supra* note 184 (citation omitted). Similarly, it is common for women to misrepresent their weight or age or to use photographs that distort the reality of their appearance. *Id.*

188. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

189. Some dating sites, like [www.positivesingles.com](http://www.positivesingles.com), actually cater to people with sexually transmitted diseases by allowing users to find and date others with the same condition. See POSITIVE SINGLES, [www.positivesingles.com](http://www.positivesingles.com) (last visited Nov. 18, 2011).

190. See Watts, *supra* note 184 (discussing how false profiles in the context of online dating can have negative consequences).

191. See Mekel, *infra* note 226, at 943 (“[C]ourts specifically have focused on a plaintiff’s ability to show the defendant’s knowledge of or belief in his or her diseased condition . . .”).

192. See *supra* text accompanying note 42.

193. See *supra* text accompanying note 43.

194. See *supra* notes 45–46 and accompanying text.



traditionally have been maintained in instances that involve a transaction resulting in economic loss,<sup>195</sup> a plaintiff can likely establish the intent to induce requirement where the misrepresentation on a social networking site includes some kind of transaction.<sup>196</sup> These cases will usually involve the use of certain social networking features that facilitate business between users.<sup>197</sup> Thus, the use of a fraudulent misrepresentation claim will allow courts to appropriately regulate online behavior while simultaneously ensuring that liability will be limited to specific circumstances involving business transactions.

When the misrepresentation on a social networking site merely involves a fake profile or general lies,<sup>198</sup> there may be issues as to whether the intent to induce requirement is satisfied. In these cases, the crucial problem is that the profiles are often addressed to a wide audience and not to any person in particular.<sup>199</sup> Essentially, it is not clear who is intended to be induced by the misrepresentation—an essential element to maintain a successful fraudulent misrepresentation action.<sup>200</sup> A plaintiff may try to avoid these problems by arguing that the defendant had “reason to expect” that the plaintiff would act

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195. See *supra* text accompanying note 34.

196. One instance where this arguably may be the case is where people post information about their apartment or one of their items on a social networking feature like the Facebook Marketplace. See *infra* note 197. It is not uncommon for people to scam others through this Facebook feature in ways that are intended to induce others to act. See *Facebook Marketplace Scam’s*, FACEBOOK, <http://www.facebook.com/group.php?gid=22114954117#!/group.php?gid=22114954117&v=info> (last visited Nov. 18, 2011) (a Facebook group page dedicated to “spread[ing] the awareness of the mass amounts of scamming going on in the marketplace”). Some Facebook Marketplace users, for example, have complained about selling items to buyers in West Africa who alleged that they would pay through PayPal, a business that allows for global e-commerce by enabling its members to make payments and money transfers through its services. *Id.*; see *Welcome to the Press Center*, PAYPAL, <https://www.paypal-media.com/who> (last visited Nov. 18, 2011). In the end, the seller discovers that he has been the victim of a scam and is never paid for his items. See *Facebook Marketplace Scam’s, supra*. Assuming that such transactions and posts on the Marketplace are fraudulent misrepresentations, it is easy to see how they are made to induce others to act—to have them send their items to the defrauding buyer. See *id.*

197. The Facebook Marketplace, for example, is a feature that allows users to post free classified advertisements. *Marketplace*, FACEBOOK, [http://apps.facebook.com/marketplace/?cm\\_mmc\\_o=PBBLFzyLCjC\\_BBLFzyLCjC\\_BBLFzyLCjCtBFw&ref=bookmarks&count=5](http://apps.facebook.com/marketplace/?cm_mmc_o=PBBLFzyLCjC_BBLFzyLCjC_BBLFzyLCjCtBFw&ref=bookmarks&count=5) (last visited Nov. 18, 2011). Some of the categories available for posting these ads include For Sale, Housing, and Other. *Id.* The Marketplace even has a “Jobs” section where people can search for jobs by location and key terms. *Id.*

198. See *supra* notes 171–82 and accompanying text.

199. See *supra* note 143 and accompanying text.

200. See RESTATEMENT (SECOND) OF TORTS § 531 cmt. b (1977) (“If the maker neither intends nor has reason to expect that the misrepresentation will reach a *particular* person or *class* of persons or that they will act or refrain from acting in reliance upon it, the fact that it does reach them and they do so act does not [support a finding of liability].” (emphasis added)). Regardless, it might be the case that this intent to induce requirement can still be satisfied if the plaintiff can prove that he was a person who the defendant had a “reason to expect” to act or refrain from acting. See *supra* text accompanying notes 45–46.

or refrain from acting.<sup>201</sup> Moreover, the plaintiff can argue that there are circumstances in which non-transactional communications on social networking sites can be sufficiently directed to one person to meet the intent to induce requirement.<sup>202</sup> This does not mean that the connection between the people communicating through social media has to rise to the level of a confidential relationship in order to establish this element.<sup>203</sup> Certainly, an online stranger can still be liable to another for fraudulent misrepresentation so long as that stranger intended to induce another user.

In light of the various statutes that criminalize misrepresentations on social networking sites, it would be entirely reasonable for courts to find that elements like “intent to induce” in a civil cause of action can be satisfied without too stringent of requirements.<sup>204</sup> Such an approach would be desirable because it would provide civil recourse to a person harmed by social networking abuse—a potentially beneficial and more lenient alternative to criminalizing online speech.<sup>205</sup> Overall, a misrepresentation should be one that involves some kind of transaction on a social networking site or one that is sufficiently directed to a particular person or audience in order to establish “intent to induce.”<sup>206</sup> This is one of the crucial ways in which courts can maintain a balance in regulating online deceit while ensuring that misrepresentation law is not expanded to the point of unlimited liability. Even so, the context in which the misrepresentation takes place—transactional or personal—should not dictate recovery. Rather, the guiding principle should be that the law penalizes fraud in certain circumstances because society tends “to think of deliberate deception—fraud—as a grave moral wrong.”<sup>207</sup> This is yet another important factor to be balanced in the

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201. See *supra* notes 45–46 and accompanying text.

202. For example, “[t]he private messaging function on Facebook is sufficiently similar to e-mail communications” to make it so that the communication is clearly between two people. North, *supra* note 141, at 1300. “As with e-mail, the site’s user-to-user interface allows messages to be sent to a single recipient or several recipients.” *Id.* Thus, if a misrepresentation that otherwise meets the elements of a fraudulent misrepresentation is made through a private message, it is arguable that the intent to induce requirement can be satisfied. See *id.*

203. See *B.N. v. K.K.*, 538 A.2d 1175, 1184 (Md. 1988) (citing RESTATEMENT (SECOND) OF TORTS § 557A cmt. a (1977)) (finding that “the existence of a confidential relationship [was] not essential to [the plaintiff’s] cause of action for fraud” because the defendant “had a general tort duty”).

204. See *supra* notes 80–90 and accompanying text.

205. See *supra* notes 80–90 and accompanying text.

206. See *supra* notes 199–202 and accompanying text.

207. Sherwin, *supra* note 33, at 1017. Moreover, a legal remedy is appropriately based on the rationale that “[d]eception denies the autonomy of the person deceived and undermines the foundation of trust in human interaction.” *Id.*

totality of circumstances when courts decide if misrepresentation law should provide a successful cause of action.<sup>208</sup> This standard should be kept in mind in deciding whether the next element, justifiable reliance, is satisfied.

*iv. Justifiable Reliance*

In addition to the intent to induce requirement, there must also be actual and justified reliance<sup>209</sup>—possibly the most difficult element to fulfill—which guarantees that courts regulating online behavior through misrepresentation law would not do so without limitations. With misrepresentations on social networking sites that involve some type of transaction,<sup>210</sup> the actual reliance occurs when people act or refrain from acting as a result of the representation.<sup>211</sup> However, it is not certain whether such reliance is *justified* even if people do actually rely on the misrepresentation.

Generally, relying on representations made on social networking sites may be unjustified given the very nature of anonymous online speech.<sup>212</sup> Even if the identity of the speaker is known, a person who uses a social networking site may bear a certain level of risk in that he or she should know that people do not always tell the truth on these sites—the very nature of these sites might make it so that reliance is not justified. However, if a

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208. See *supra* text accompanying notes 132–33.

209. See *supra* text accompanying notes 48–51. In *Seit-Olsen v. Reliance Appraisals, LLC*, for example, the court found that the plaintiff could not maintain an action for fraudulent misrepresentation because she could not prove reliance on an Internet listing concerning the size of a home and room for a two-car garage. *Seit-Olsen v. Reliance Appraisals, LLC*, No. 264470, 2006 WL 1113936, at \*3–4 (Mich. Ct. App. Apr. 27, 2006).

210. Actual and justified reliance is not limited to representations made in commercial transactions. See *infra* note 213 and accompanying text. One instance where courts have recognized fraudulent misrepresentation actions even though there is no business exchange is when a person relies on another’s assurance that they do not have any venereal diseases—a very private matter that does not involve any kind of business transaction. Barke, *supra* note 33, at 204–05. Given the popularity of online dating, many people may now be relying on a prospective lover’s online statement about their sexually transmitted diseases.

211. In the case of misrepresentations made on Facebook Marketplace, for example, a person will actually buy or sell an item or possibly sublease an apartment in reliance on the fraudulent assertion. See *supra* note 196.

212. Many social networking sites imply that reliance on statements made by other users may be unjustified. See, e.g., *Match.com Terms of Use Agreement*, *supra* note 186 (“Opinions, advice, statements, offers, or other information or content made available through the [s]ervice . . . should not necessarily be relied upon.”). Reliance may be further unjustified because “it is [often] very difficult to locate and sue people for their speech on the Internet. Much speech on the Internet is anonymous, it may be difficult to locate the person who is speaking, or the person may be overseas.” Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009). However, it is arguable that social networking sites actually foster speech that is connected to an identified speaker by encouraging people to use their true identities when creating online profiles. See *supra* note 138 and accompanying text.

plaintiff can establish that the misrepresentation was objectively or subjectively material, then reliance is justified.<sup>213</sup> Moreover, it may be the case that reliance should not even be required in the context of social networking dishonesty—state statutes have carved out exceptions for specific misrepresentations that are illegal and do not have to comply with the strict requirements of fraudulent misrepresentation.<sup>214</sup> Given the current state of the law, however, reliance is a required element, and it is likely that reliance will be more reasonable when the misrepresentation involves some kind of transaction or is directed to a particular person, but not when it merely involves a general lie.<sup>215</sup> Even if courts find reliance, there must be recoverable damages to bring the deceit within the scope of fraudulent misrepresentation.

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213. *See supra* text accompanying note 50. For example, if a misrepresentation is unrelated to any kind of transaction on a social networking site, reliance may still be justified where the plaintiff can establish that a reasonable man would rely on the misrepresentation in deciding to act, or that the defendant knew the plaintiff would likely consider the misrepresentation in deciding to act. To successfully meet this requirement, the plaintiff will have to plead the facts with particularity. *See* FED. R. CIV. P. 9(b) (“In alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . .”). Given this heightened pleading requirement, a conclusory statement that there was justifiable reliance, without more, is not enough. *See id.*

214. *See, e.g.,* CAL. BUS. & PROF. CODE § 17529.5 (West 2006). In addressing misrepresentations in commercial e-mail advertisements, California state law provides for recovery without proof of reliance or actual damages. *Id.*; *see also* *Asis Internet Servs. v. Consumerbargaingiveaways, LLC*, 622 F. Supp. 2d 935, 941 (N.D. Cal. 2009) (“Section 17529.5(a) does not . . . purport to require reliance or actual damages . . .”). Specifically, the law makes it “unlawful for any person or entity to advertise in a commercial e-mail advertisement[,] either sent from California or sent to a California electronic mail address,” an “e-mail advertisement [that] contains or is accompanied by falsified, misrepresented, or forged header information.” CAL. BUS. & PROF. CODE § 17529.5(a)(2) (West 2006). It is further unlawful to make these kinds of advertisements where “[t]he e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” *Id.* § 17529.5(a)(3). If it is possible to allow recovery without proof of reliance in this context, it might be reasonable to do the same for misrepresentations on social networking sites, where commercial advertisements are currently on the rise. *See* Debra Aho Williamson, *Social Networking Ad Spending Update*, EMARKETER (May 13, 2008), <http://www.emarketer.com/Article.aspx?R=1006278> (estimating that money spent on social networking advertisements will reach \$2.6 billion in 2012).

215. It would be unwarranted, for example, to sue a person for fraudulently misrepresenting their age or appearance—a potentially immaterial representation—on a social network. *See supra* text accompanying note 49.

v. *Damages*

For a social networking lie to be considered a tortious and fraudulent misrepresentation, the lie must result in pecuniary loss<sup>216</sup> or physical harm.<sup>217</sup> Generally, a misrepresentation made on a social networking site can cause the same damage as misrepresentations made in other contexts. A person can be harmed economically,<sup>218</sup> physically,<sup>219</sup> or emotionally<sup>220</sup> by a lie that is told on an online profile.<sup>221</sup> Assuming that there is justifiable reliance on a misrepresentation that a social network user intended to induce another, there should be liability in tort so long as there was some cognizable injury.

Although some may argue that fraudulent misrepresentation actions should be limited to recovery for pecuniary loss under the *Restatement (Second) of Torts* section 525 or for physical harm under the *Restatement (Second) of Torts* section 310, this ignores the reality that many courts have actually allowed emotional distress recovery for fraudulent misrepresentations.<sup>222</sup> Thus, in these jurisdictions, there is no reason to prohibit a person who justifiably relied on another's fraudulent assertions on Facebook, MySpace, or Twitter from recovering for emotional distress.<sup>223</sup>

Similarly, recovery should not be automatically precluded merely because the damage caused by a social networking interaction is unrelated to

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216. *See supra* text accompanying note 34.

217. *See supra* text accompanying note 54.

218. It is possible that a lie someone tells on a social networking site could in fact cause another to suffer economic loss when the statement is made in some kind of business interaction. *See supra* note 196.

219. *See, e.g., infra* notes 278–305 and accompanying text.

220. For example, a person can be emotionally distressed where false information is posted online about their personal sexual activities. *See, e.g.,* *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 37–39 (Minn. Ct. App. 2009) (describing that the defendant created a fake MySpace profile to spread information about the plaintiff's sexually transmitted diseases).

221. *See supra* notes 169–83 and accompanying text.

222. *See supra* note 31 and accompanying text.

223. Some examples where a person can suffer emotional distress are when a rumor is spread on an online profile or when cyberbullying involves a fraudulent statement. *See State Cyberstalking, Cyberharassment and Cyberbullying Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13495> (last visited Nov. 18, 2011) (“[C]yberbullying is used for electronic harassment or bullying among minors within a school context.”). Cyberbullying is a common occurrence, especially among younger teenagers, where people maliciously make fraudulent statements online and on social networking sites to cause emotional distress to another person. *See id.* In these cases, the problem with allowing recovery in tort is that it may not be possible to prove actual or justifiable reliance. *See supra* text accompanying notes 48–51. Thus, a fraudulent misrepresentation action would not be appropriate where reliance cannot be established. Regardless, current cyberbullying laws provide adequate mechanisms for regulating this kind of behavior. *See State Cyberstalking, Cyberharassment and Cyberbullying Laws, supra* (explaining that current cyberbullying laws make “school districts the policy enforcers of such misconduct” and establish “sanctions for cyberbullying [that] range from school/parent interventions to misdemeanors and felonies with detention, suspension, and expulsion in between”).

any commercial transaction.<sup>224</sup> Although “[i]t is true that [the] tort [of fraudulent misrepresentation] is usually applied in a business setting, or to one in which some pecuniary loss is claimed, . . . a business setting and pecuniary loss are not necessarily required.”<sup>225</sup> In fact, many jurisdictions allow misrepresentation claims in personal, noncommercial settings that cause physical harm or impair one’s health.<sup>226</sup> Just as a sexually transmitted disease<sup>227</sup> or an induced marriage<sup>228</sup> can be a cognizable injury within the scope of recoverable damages, economic loss,<sup>229</sup> emotional distress,<sup>230</sup> and physical harm<sup>231</sup> caused by dishonesty on social networking sites should all meet the requisite damages requirement.<sup>232</sup> This would guarantee that

224. See *infra* text accompanying notes 226–32.

225. *B.N. v. K.K.*, 538 A.2d 1175, 1182 (Md. 1988) (citations omitted).

226. See, e.g., *id.* (allowing recovery for fraudulent misrepresentation where the resulting damage was the contraction of a contagious sexually transmitted disease); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 276 (Ct. App. 1984) (emphasizing that “contagious and dangerous diseases,” like genital herpes, are injuries that are within the scope of a claim for fraudulent misrepresentation). See also Michele L. Mekel, *Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus*; *Deuschle v. Jobe*, 66 MO. L. REV. 929, 929 (2001) (discussing tortious transmission cases involving genital herpes and human papillomavirus and arguing that there should be liability in tort for these wrongful transmission actions). In addition to representations as to the status of one’s venereal disease, courts have also recognized fraudulent misrepresentation claims for damages caused by other personal, noncommercial representations—when statements are made regarding sterility or birth control. See, e.g., *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 426 (Ct. App. 1983) (allowing a cause of action for deceit where a woman suffered injuries from an ectopic pregnancy resulting from intercourse with an attorney who falsely stated, “I can’t possibly get anyone pregnant”).

227. See *supra* note 226.

228. See *Leventhal v. Liberman*, 186 N.E. 675, 676 (N.Y. 1933) (finding that damages were recoverable where they were based on fraudulent misrepresentations made by the plaintiff’s father-in-law and sister-in-law inducing the plaintiff to marry her husband and where the damages were for her change in status “from a single woman to a married woman, [loss of] . . . consortium, attentions, and support of a well man, and endured mental pain and anguish as well as humiliation from being bound in matrimony to an invalid and a drug addict”).

229. See *supra* text accompanying note 34.

230. See *supra* note 31 and accompanying text.

231. The most tragic form of physical harm that can result is death. See *Chris V. Thangham, Mother Blames Social Networking Website Bebo for Death of 13-Year-Old Son*, DIGITAL JOURNAL (June 14, 2008), <http://www.digitaljournal.com/article/256115> (recounting the death of a thirteen-year-old boy who committed suicide after being repeatedly bullied on a social networking site). In these cases, however, recovery will not be likely because it requires proving that the cause of death (i.e., bullying) involved some kind of misrepresentation. See RESTATEMENT (SECOND) OF TORTS § 310 (1965); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

232. Depending on the nature of the damages—pecuniary loss or physical harm—there can be recovery either under the *Restatement (Second) of Torts* section 525 or *Restatement (Second) of Torts* section 310, assuming that there was justified reliance on a misrepresentation. See RESTATEMENT (SECOND) OF TORTS § 310 (1965); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

people do not abuse social networking sites and avoid liability based on trivial technicalities. In addition to a cause of action based on fraudulent misrepresentation, there may be recovery in tort for negligent misrepresentations made on social networking profiles.

## 2. Negligent Misrepresentation

Under a negligence standard of liability, there may be a successful cause of action for damages caused by a social network user's negligent speech.<sup>233</sup>

### *i. Doe v. MySpace, Inc.: A Model for Future Negligent Misrepresentation Actions*

In *Doe v. MySpace, Inc.*, the plaintiffs, a mother and her teenage daughter, brought suit against MySpace for negligent misrepresentation.<sup>234</sup> The suit alleged that MySpace failed to implement safety measures to protect minors from sexual predators on the site<sup>235</sup>—something that was assured by MySpace in its representations.<sup>236</sup> In addition to the public statements that MySpace made to emphasize the safety of the site for its younger users,<sup>237</sup> it also made representations on the site itself in the “Terms and Conditions” and “Tips for Parents” sections.<sup>238</sup> Specifically, the following representations were made: (1) “it is ‘illegal’ or ‘prohibited’ to ‘solicit personal information from anyone under 18,’” and (2) ““MySpace

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233. See Weingarten, *supra* note 52, at 752 (arguing that misrepresentation law is the “most appropriate [tort standard] for [regulating] nonlibelous negligent statements”).

234. *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008). The suit also involved claims for fraudulent misrepresentation, negligence, and gross negligence against MySpace. *Id.* Further claims for sexual assault and intentional infliction of emotional distress were brought against an individual defendant. *Id.* Originally, the suit was filed against MySpace, its parent company, and an individual defendant in Texas state court. *Id.*

235. *Id.*

236. *See id.*

237. For example, MySpace representatives made the following representations to CBS News: There are a number of specific procedures and policies in place to ensure users of all ages have a safe and meaningful experience. These include limiting use of the website to users who are at least 14 years of age and providing special protections to users who are under 16 so that their personal information cannot be accessed by persons they do not know.

Complaint ¶ 26, *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (No. D-1-GN-06-002209) [hereinafter MySpace Complaint]. MySpace's parent company also publicly represented the following: “We're being very proactive . . . . We plan to reach out further to school principals, church groups and community organizations to educate them on the safety measures we've developed.” *Report: Rupert Murdoch to take on CNBC*, ASSOCIATED PRESS, <http://www.msnbc.msn.com/id/11199184/> (last updated Feb. 6, 2006). For example, no one under fourteen is allowed on the site, and there are strict limits on who can access profiles of users under sixteen. *See MySpace Complaint, supra*, ¶ 26.

238. MySpace Complaint, *supra* note 237, ¶ 27.

members must be 14 years of age or older.”<sup>239</sup> Despite these representations, the plaintiffs alleged that underage users were still contacted and sexually assaulted by adult users.<sup>240</sup>

The plaintiffs argued that a negligent misrepresentation action was appropriate because: (1) “[Defendants] made express and implied representations to Plaintiffs in the course of MySpace’s business and/or during transactions in which [Defendants] had an interest;” (2) “[Defendants] knew or should have known that Plaintiffs were members of the class of persons that would receive their false and material representations;” (3) “These false and material representations included misstatements of material facts and were made in regard to the security and safety of MySpace for young underage MySpace users;” (4) “[Defendants] supplied this false information for the guidance of others and Plaintiffs in their business;” and (5) “[Defendants] did not exercise reasonable care or competence in obtaining and/or communicating information regarding the safety and security of MySpace for young underage MySpace users.”<sup>241</sup> The plaintiffs further pled that there was justifiable reliance on the negligent misrepresentations that led to injury—the then thirteen-year-old<sup>242</sup> plaintiff was contacted by a nineteen-year-old male MySpace user who sexually assaulted her.<sup>243</sup>

The defendants filed a motion to dismiss the case on the grounds of immunity under the Communications Decency Act,<sup>244</sup> and further asserted that the negligent misrepresentation claim did not meet the heightened pleading standard of the Federal Rule of Civil Procedure 9(b).<sup>245</sup> The United States District Court for the Western District of Texas dismissed the negligent misrepresentation claim without prejudice because it was not pled with sufficient particularity and because the plaintiffs admitted that they did

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239. *Id.*

240. *Id.* ¶¶ 19, 28.

241. *Id.* ¶¶ 74–76.

242. Although MySpace represented that no one under the age of fourteen could use the site, the plaintiff was able to make a profile when she was only thirteen years old. *Id.* ¶ 30.

243. *Id.* ¶¶ 30–35.

244. See 47 U.S.C. § 230(c)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). “[T]he Act provides interactive computer services with immunity” in order to protect them from being “crippled by lawsuits arising out of third-party communications.” *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007), *aff’d*, 528 F.3d 413 (5th Cir. 2008).

245. *Doe*, 474 F. Supp. 2d at 846.



not want to further pursue the claim.<sup>246</sup> The decision was reaffirmed by the Fifth Circuit.<sup>247</sup> *Doe v. MySpace, Inc.* foreshadows the possibility of future lawsuits for negligent misrepresentations made on social networking sites.<sup>248</sup>

In cases similar to *Doe v. MySpace, Inc.*, suits can be brought against individual users, rather than social networking sites, to avoid being barred by the Communications Decency Act.<sup>249</sup> Although the merits of the negligent misrepresentation claim were never determined in *Doe v. MySpace*,<sup>250</sup> the claim may have been successful if it had been pled with sufficient particularity and the plaintiffs had not voluntarily dismissed.<sup>251</sup> Essentially, the claim was dismissed on procedural grounds—not because negligent speech on a social networking site is not actionable under negligent misrepresentation.<sup>252</sup>

*Doe v. MySpace* may be a model for future negligent misrepresentation actions that are limited to pecuniary loss and involve commercial transactions on social networking sites.<sup>253</sup> For a lie to be actionable, it must first be made in the course of the defendant’s “business, profession or employment, or in any other transaction in which he has a pecuniary interest.”<sup>254</sup> In the context of social networking sites, this will almost always mean that a commercial transaction is involved—a requirement that appropriately limits liability and should thus encourage courts to apply misrepresentation law as a mechanism for regulating online behavior. For example, the plaintiffs in *Doe v. MySpace* would not be able to sue the nineteen-year-old sex offender for negligent misrepresentation because he was not making any representations in a business, professional, or employment capacity.<sup>255</sup> He also did not have a pecuniary interest in any

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246. *Id.* at 851. Essentially, the plaintiffs voluntarily withdrew their negligent misrepresentation claim. *See id.* The fraudulent misrepresentation claim was dismissed on the same grounds. *Id.* The plaintiff’s negligence and gross negligence claims were dismissed with prejudice on the grounds that they were barred by the Communications Decency Act and Texas common law. *Id.* at 847–52.

247. *Doe*, 528 F.3d at 422.

248. *See id.*

249. *See supra* note 165.

250. *See supra* notes 241–42 and accompanying text.

251. *See Doe*, 528 F.3d at 422.

252. *See id.* “Applying negligence principles to speech-based liability issues is not unusual. For instance, negligence is commonly applied as a fault standard in defamation law when the plaintiff is a private person.” Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 231 (2009).

253. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). The plaintiffs relied on a negligent misrepresentation claim, as codified by section 552 of the *Restatement (Second) of Torts*, stating that there were allegations of representations made “in the course of . . . business” meant “for the guidance of others and [p]laintiffs in their business.” *Id.*

254. *Id.*

255. *See supra* notes 231–38 and accompanying text.

transaction.<sup>256</sup> Because most negligent misrepresentations on social networks are made in a personal and non-transactional setting, recovery will likely be rare for economic harm.<sup>257</sup> However, if the statement is made in communications like those made on the Facebook Marketplace, then this requirement would be satisfied.<sup>258</sup>

Assuming that the online speech involves some kind of transaction, in which case it will likely meet the first requirement, the false information must also be made “for the guidance of others in their business transactions.”<sup>259</sup> This is yet another reason why recovery under section 552 of the *Restatement (Second) of Torts* will likely be limited to cases where there is a commercial transaction on a social networking site. Recovery would be further restricted to pecuniary loss.<sup>260</sup> Moreover, the negligent speech will not be actionable unless there is proof that there was justifiable reliance, and the maker of the representation failed “to exercise reasonable care or competence in obtaining or communicating the information.”<sup>261</sup> Given these requirements, there will be no liability for negligent speech on a social networking site that causes economic harm unless the representation was made in the course of some online business transaction. All of these limitations should assure courts that applying misrepresentation law to online deceit will not result in an unnecessary expansion of the tort of misrepresentation. However, a plaintiff can still avoid these limitations by bringing suit for negligent speech that causes physical harm.

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256. See *supra* notes 231–38 and accompanying text.

257. In the following illustration, the *Restatement (Second) of Torts* emphasizes that there can be no recovery where the misrepresentation is neither made in a business, professional, or employment capacity, nor in a transaction where the defendant has a pecuniary interest:

The A Newspaper negligently publishes in one of its columns a statement that a certain proprietary drug is a sure cure for dandruff. B, who is plagued with dandruff, reads the statement and in reliance upon it purchases a quantity of the drug. It proves to be worthless as a dandruff cure and B suffers pecuniary loss. The A Newspaper is not liable to B.

RESTATEMENT (SECOND) OF TORTS § 552 cmt. c, illus. 2 (1977). In this example, the newspaper has no pecuniary interest in any transaction. See *id.*

258. See *supra* note 196 and accompanying text.

259. RESTATEMENT (SECOND) OF TORTS § 311 (1965).

260. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

261. *Id.*

ii. *Negligent Online Speech Causing Physical Harm*

If a person negligently provides false information on a social networking site,<sup>262</sup> there can be liability for any resulting physical injuries.<sup>263</sup> The first question that must be considered is whether the statement was made in a business or professional capacity.<sup>264</sup> Most communications on social networking sites are not made in such a capacity. Given that the primary purpose of these websites is to connect friends and family, most of the online interactions are personal in nature.<sup>265</sup> However, this does not necessarily bar recovery because section 311 of the *Restatement (Second) of Torts* does not actually require that the statement be made in a business or professional capacity<sup>266</sup>—although this is usually the case. Thus, if a person negligently speaks<sup>267</sup> on a social networking site and another user reasonably relies on the statement, there can be recovery if further elements are satisfied.

The plaintiff has to be the recipient of the false information that is communicated online, or a third person whom the social network user—the defendant—“should expect to be put in peril.”<sup>268</sup> The following example is

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262. It is debatable whether this should be viewed as unpublished or published negligent misrepresentations. See Weingarten, *supra* note 52, at 756–57 (discussing the application of misrepresentation law to negligent oral speech and arguing that the same approach should be taken with negligent published speech). In personal communications between two people, it seems that statements on social networking sites are best viewed as unpublished negligent misrepresentations because they involve the negligent use of *language*. See *id.* However, if a statement is generally posted on a profile, it is also arguable that this constitutes a “publication.” See *id.*

263. See *supra* text accompanying note 61. Recovery is more likely under section 311 of the *Restatement (Second) of Torts* for physical harm than under section 552 for pecuniary loss—in the latter case “the courts have found it necessary to adopt a more restricted rule of liability.” *Randi W. v. Livingston Union Sch. Dist.*, 49 Cal. Rptr. 2d 471, 477 (Ct. App. 1995), *aff’d in part, rev’d in part sub nom. Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997).

264. See *supra* text accompanying note 72.

265. See *supra* notes 100, 143 and accompanying text.

266. See *supra* text accompanying note 73. See also *Randi W.*, 49 Cal. Rptr. 2d at 477–78 (“‘Misrepresentations involving a risk of physical harm constitute an exception to the ordinary rule that ‘liability [for negligent misrepresentations] is imposed only on those who supply information for business purposes in the course of a business or profession.’ The ordinary rule is based on the principle that, in financial matters, a plaintiff ‘cannot expect the defendant to exercise the same degree of care [in social meetings] as he would when acting in a business or professional capacity.’” (citations omitted)).

267. Some courts have even suggested that half-truths or failing to disclose can constitute “false information” under section 311 of the *Restatement (Second) of Torts*. See *Randi W.*, 49 Cal. Rptr. 2d at 478 (finding that letters of recommendation making positive assertions about a vice principal who sexually assaulted the plaintiff constituted “false information” even though none of the letters affirmatively stated that he was never “suspected or accused of any improper sexual misconduct with female students or that he [was] free of negative character traits”).

268. See *supra* note 71 and accompanying text. See also *Randi W.*, 929 P.2d at 591 (affirming that the plaintiff, a student who was sexually assaulted by her vice principal, was a third party who could recover for negligent misrepresentation even though the negligent misrepresentations were made to her school and not to her personally).

instructive: a person (A) acts as matchmaker and introduces two of her friends (B and C) to one another through MySpace.<sup>269</sup> By means of online communications, she assures B that C is a decent person and would make a great match.<sup>270</sup> If C had a record of domestic violence and A knew this or could have easily ascertained that this was the case, then B could arguably bring suit against A for physical harm inflicted by C. Under section 311 of the *Restatement (Second) of Torts*, B was the recipient of A's negligent speech and suffered physical harm.<sup>271</sup> Even if the communication was made generally to the online community and not directly to A, A may still be able to recover given that "[a] victim of physical violence need not rely on the negligent misrepresentation, or even be a party to it . . . ."<sup>272</sup>

Given concerns for unlimited liability and free speech rights, certain restrictions can be placed on liability for negligent speech on social networking sites. For example, liability can be limited to when there is a duty owed to the person harmed by the online statement.<sup>273</sup> Thus, liability would not extend to just anyone who is harmed by a representation made on a social networking site.<sup>274</sup> Even so, it is unclear what would actually satisfy this duty requirement—it is possible that online friendship would create a sufficient relationship between the person harmed and the maker of the representation to give rise to a duty.<sup>275</sup> Overall, in deciding whether liability for negligent misrepresentations made on social networking sites is appropriate, courts should consider the gravity of harm involved and the reprehensibility of the false information—balancing these factors in a

269. Some people actually provide professional matchmaking services online. *See Who We Are, MASTER MATCHMAKERS*, <http://www.mastermatchmakers.com/about-us> (last visited Nov. 19, 2011) (providing personal coaching and matchmaking services to bring couples together). Although these sites are businesses and not freely accessible to the public, they may qualify as social networking sites given their purpose of facilitating connections and communications between people.

270. These positive assurances are similar to negligent letters of recommendation that courts have found actionable. *See Davis v. Bd. of Cnty. Comm'rs*, 987 P.2d 1172, 1180 (N.M. Ct. App. 1999) (finding that letters recommending a person, who allegedly sexually abused the plaintiff, as an "excellent employee" were actionable for negligent misrepresentation).

271. *See supra* text accompanying note 71. What qualifies as physical harm varies by jurisdiction. *See, e.g., Grozdanich v. Leisure Hills Health Ctr., Inc.*, 48 F. Supp. 2d 885, 891 (D. Minn. 1999) (finding that although rape would fall within the scope of the physical harm requirement, "less brutally invasive sexual assault" may not).

272. *Davis*, 987 P.2d at 1180.

273. Some jurisdictions have interpreted section 311 of the *Restatement (Second) of Torts* to include such a duty. *See, e.g., Grozdanich*, 48 F. Supp. 2d at 888 (interpreting section 311 of the *Restatement (Second) of Torts* to include "a duty of reasonable care in conveying information" (citation omitted)).

274. *See id.*

275. *See* RESTATEMENT (SECOND) OF TORTS § 311 (1965).

totality of the circumstances would allow courts to apply misrepresentation law as a regulatory mechanism in limited cases.<sup>276</sup> The same principles should guide whether criminalizing dishonesty is appropriate.

*B. Is It a Crime to Lie on Your Social Networking Profile?*

Several states have already criminalized lying on social networking sites.<sup>277</sup> These laws suggest that those guilty of misrepresentation who have gone unpunished in the past would not be so lucky today in some jurisdictions.

1. Revisiting *United States v. Drew* and the Case of Elizabeth Thrasher

*i. United States v. Drew*

In *United States v. Drew*, a forty-seven-year-old woman, Lori Drew, was found guilty of a misdemeanor for creating a fake MySpace profile through which she eventually caused a thirteen-year-old girl, Megan Meier, to commit suicide.<sup>278</sup> Drew lived in the same city as Megan, who was a former classmate of Drew's daughter.<sup>279</sup> As part of a conspiracy against Megan, Drew and other conspirators created a fake MySpace profile for a fictitious sixteen-year-old boy named "Josh Evans."<sup>280</sup> The conspiracy was formed "for the purpose of committing the tortious act of intentional infliction of emotional distress."<sup>281</sup> As part of this conspiracy, Drew posted a photo of a boy without his knowledge or consent, and used the fake profile to flirt with Megan.<sup>282</sup> Less than one month after communicating online with Megan, "Josh" told her that he did not like her and that "the world would be a better place without her in it."<sup>283</sup> On that same day, Megan committed suicide by hanging herself in her bedroom closet.<sup>284</sup> Later that day, Drew deleted the fake MySpace profile.<sup>285</sup> Although a jury found Drew

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276. See *supra* text accompanying notes 150–52.

277. See *supra* notes 81–90 and accompanying text.

278. *United States v. Drew*, 259 F.R.D. 449, 452–53 (C.D. Cal. 2009).

279. *Id.* at 452.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* (citation omitted).

284. Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, <http://www.nytimes.com/2007/11/28/us/28hoax.html>.

285. *Drew*, 259 F.R.D. at 452.

guilty of a misdemeanor for violation of the Computer Fraud and Abuse Act,<sup>286</sup> her motion for acquittal was granted.<sup>287</sup>

Under current Texas or California law, Drew's fake MySpace profile would have caused her to be guilty of a third degree felony<sup>288</sup> or imprisoned for up to one year with a fine of \$1000.<sup>289</sup> Under both laws, it is a crime to impersonate another person through a social networking site.<sup>290</sup> Here, Drew clearly impersonated another person, a sixteen-year-old boy named "Josh Evans."<sup>291</sup> She created an entire profile with "Josh's" picture, and this was all done without the boy's consent<sup>292</sup>—a requirement under both laws.<sup>293</sup> Moreover, she created the fake profile to inflict intentional emotional distress on Megan.<sup>294</sup> This would satisfy the requirement that the impersonation be for the purpose of harming another.<sup>295</sup> Under California law, Drew's MySpace profile would also have to have been "credible."<sup>296</sup> This element would be met because Megan clearly "did reasonably believe"<sup>297</sup> that Drew was "Josh Evans."<sup>298</sup> Thus, under modern laws like those in Texas and California, Drew would have committed a crime by creating a fake MySpace profile.<sup>299</sup> Cases involving similar facts would be appropriately criminalized today.

286. Under this law, a misdemeanor crime involves three elements: (1) "the defendant intentionally [accessed without authorization] [exceeded authorized access of] a computer;" (2) "the defendant's access of the computer involved an interstate or foreign communication;" and (3) "by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information from a computer . . . [used in interstate or foreign commerce or communication]." *Id.* at 457 (citing NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION 8.79 (2003) (alteration in original)).

287. *Id.* at 468.

288. *See supra* text accompanying notes 81–82.

289. *See supra* text accompanying note 86.

290. *See supra* notes 80–90 and accompanying text.

291. *See Drew*, 259 F.R.D. at 452–53.

292. *Id.* at 452.

293. *See supra* text accompanying notes 81–82, 85.

294. *See Drew*, 259 F.R.D. at 452–53. The purpose or intent requirement could also be met if the impersonation was to defraud, intimidate, or threaten any person. *See supra* text accompanying notes 81–82, 85.

295. *See supra* text accompanying notes 82, 85.

296. *See supra* text accompanying note 87.

297. *See supra* note 87 and accompanying text.

298. *See supra* text accompanying note 284.

299. Under Texas law, Drew would be guilty of a third degree felony. *See supra* text accompanying note 81. Under California law, she could have been imprisoned up to one year in a county jail and/or fined up to \$1000. *See supra* text accompanying notes 84–86.

ii. *The Case of Elizabeth Thrasher*

In 2009, Elizabeth Thrasher, a forty-year-old woman, was charged with felony harassment for posting information about a seventeen-year-old girl on the “Casual Encounters” section of Craigslist.<sup>300</sup> The seventeen-year-old victim was “the daughter of the [current] girlfriend of Thrasher’s ex-husband.”<sup>301</sup> Thrasher posted the girl’s personal information—picture, e-mail address, and photo—in such a way that suggested she was looking for a sexual encounter.<sup>302</sup> As a result, the teenager was contacted by strange men who had her personal information and sent her vulgar messages and photos.<sup>303</sup> Although Thrasher was charged with felony harassment,<sup>304</sup> she was freed on a \$10,000 bond.<sup>305</sup>

Under criminal laws like those in Texas and California,<sup>306</sup> Thrasher would be found guilty of a crime just because she impersonated another person on a social networking site.<sup>307</sup> First, she used the persona of a seventeen-year-old girl to create a misleading post on Craigslist.<sup>308</sup> She specifically used the girl’s pictures and contact information without her consent.<sup>309</sup> Second, although it is not clear that she created the post to intimidate, threaten, or defraud anyone, she arguably intended to harm the girl.<sup>310</sup> This is evident from the circumstances surrounding the post’s creation—Thrasher had been arguing with the girl earlier on MySpace before creating the Craigslist post.<sup>311</sup> Moreover, the girl was the daughter of Thrasher’s ex-husband’s current girlfriend.<sup>312</sup> All of this suggests that Thrasher intended to harm the girl.<sup>313</sup> Under California law, the post was also “credible” because other men did in fact believe that Thrasher was a

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300. Kirtley, *supra* note 178, at 105–06.

301. *Id.* at 106.

302. *Id.*

303. *Id.*

304. Thrasher was the first woman to be charged with felony harassment under Missouri’s cyberbullying law, which was passed after the death of Megan Meier. *Id.*

305. *Id.*

306. *See supra* text accompanying notes 81–90.

307. *See* Kirtley, *supra* note 178, at 106. Under these laws, Thrasher’s attorney was incorrect to assume that such actions did not amount to a crime because they were merely akin to “someone posting a telephone number on a bathroom wall.” *Id.* Clearly, state legislatures have decided that such conduct on social networking sites is in fact criminal. *See supra* text accompanying notes 81–90.

308. *See* Kirtley, *supra* note 178, at 105–06.

309. *See id.*

310. *See id.*

311. *Id.* at 106.

312. *Id.*

313. *See id.*

seventeen-year-old girl.<sup>314</sup> Thus, in Texas, Thrasher would be guilty of a third degree felony,<sup>315</sup> and in California she would be guilty of a misdemeanor and spend up to one year in jail.<sup>316</sup> In addition to past cases involving people like Lori Drew and Elizabeth Thrasher, modern criminal laws will also have implications for future cases that are already being filed for social networking misrepresentations.

## 2. Predicting the Outcome of *Full Sail, Inc. v. Does*

On January 21, 2011, a corporation, Full Sail, Inc.,<sup>317</sup> and its president, Garry Jones, brought suit against unknown defendants for creating three fake accounts on Twitter.<sup>318</sup> The defendants allegedly pretended to be Jones and used the corporation's trademarks on the social networking sites.<sup>319</sup> One of the accounts included a photograph of Jones and tweets under his name, which he had not authored.<sup>320</sup> Jones's affiliation on the account was also listed as "Full Sail."<sup>321</sup> Supposedly, there was a disclaimer on the account saying that the fake account was "obviously a parody."<sup>322</sup> Based on these fraudulent accounts, the plaintiffs brought suit for several claims,<sup>323</sup> one of which was for violation of California's criminal impersonation statute.<sup>324</sup>

Assuming that jurisdiction and other preliminary issues of procedure are appropriate, this cause of action may be successful under California's law.<sup>325</sup> First, the defendants did knowingly impersonate Garry Jones without his

314. *Id.*

315. *See supra* text accompanying notes 81–82.

316. In California, she could also be fined up to \$1000 in addition to or in instead of imprisonment. *See supra* text accompanying note 86.

317. Full Sail, Inc. operates Full Sail University, an education institution in Florida focusing on careers in the entertainment industry. Complaint ¶¶ 8–9, Full Sail, Inc. v. Does, No. 3:11CV00325 (N.D. Cal. Jan. 21, 2011), 2011 WL 336927 [hereinafter Full Sail Complaint].

318. *Id.* ¶ 1.

319. *Id.*

320. *Id.* ¶¶ 23, 26.

321. *Id.* ¶ 30.

322. *Id.* ¶ 31.

323. These claims included claims for trademark infringement, violations of federal trademark laws, and federal and state dilution laws. *Id.* ¶¶ 43–51, 56–64. Further claims were brought for misappropriation of name and likeness under California law. *Id.* ¶¶ 52–55.

324. *See* CAL. PENAL CODE § 528.5 (West 2011).

325. *See id.* § 528.5(e) ("In addition to any other civil remedy available, a person who suffers damage or loss by reason of a violation of subdivision (a) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief pursuant to paragraphs (1), (2), (4), and (5) of subdivision (e) and subdivision (g) of [s]ection 502.").



consent.<sup>326</sup> The impersonation took place by means of fake accounts on Twitter.<sup>327</sup> Under California’s statute, guilt clearly extends to “opening . . . an account or profile on a social networking Internet Web site in another person’s name.”<sup>328</sup> Second, the impersonation was also “credible” assuming the alleged facts are true—other Twitter users actually believed that the account was Jones’s and left comments for him on his account.<sup>329</sup> Finally, the court will have to decide if the intent requirement is satisfied—whether the fake accounts were created “for purposes of harming, intimidating, threatening, or defrauding another person.”<sup>330</sup> The complaint alleges that the fake accounts were meant to “injure Plaintiffs’ reputations, and to disparage the services they offer.”<sup>331</sup> This would likely qualify as creating fake accounts for purposes of harming another person. However, this is debatable because the disclaimer on the profile clearly stated that it was a parody. If warning that something is in fact a parody eliminates any intent to otherwise “harm” another, then a civil cause of action under subsection (e) of the California statute would not be appropriate.<sup>332</sup> However, if parodies can still be considered as harming another, then this suit for fraudulent Twitter accounts may be successful under California law.<sup>333</sup>

Overall, modern penal codes suggest a trend toward criminalizing deceit on social networking sites. Some laws, like California’s statute, explicitly allow for a civil cause of action.<sup>334</sup> Pursuant to these laws, the prosecution or plaintiff would not have to establish any of the additional elements in cyberbullying laws requiring that the impersonation actually cause emotional distress. This is one reason why states should adopt approaches like those in Texas and California. These kinds of laws regulate online behavior and ensure that imposters and sexual predators cannot get away with abusing social networking sites based on technicalities of the law. Moreover, these laws are not overbroad or dangerous to free speech because guilt is limited to instances where the impersonation was made with the intent to harm, defraud, intimidate, or threaten another.<sup>335</sup> Thus, if a person

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326. Full Sail Complaint, *supra* note 317, ¶¶ 23, 26.

327. *Id.* ¶ 1.

328. *See supra* text accompanying note 88.

329. One Twitter user thanked Jones for the “opportunity to be at FullSailUniv.” Full Sail Complaint, *supra* note 317, ¶ 32. Another user said, “Im [sic] in month #3 Mr. Jones and loving it.” *Id.* A third person wrote, “thanks for the follow man! Almost half way done with Full Sail and I love it, THANKS A LOT.” *Id.* Finally, a fourth user said, “Excellent to see you on twitter, welcome to instant communication; and thanks for reaching out. You rock!” *Id.*

330. *See supra* text accompanying note 85.

331. Full Sail Complaint, *supra* note 317, ¶ 25.

332. *See* CAL. PENAL CODE § 528.5(e) (West 2011).

333. *See id.*

334. *See id.*

335. *See supra* text accompanying notes 81–82, 85.

creates a fake profile for his or her own amusement without the requisite intent, no guilt attaches. Another qualification is that the impersonation has to have been done without the consent of the person being impersonated.<sup>336</sup> In other words, it appears that a person would not be guilty under these laws if he impersonates another with that person's consent to harm, defraud, intimidate, or threaten another. California further limits criminal guilt by requiring the impersonation to be "credible."<sup>337</sup>

In light of these criminal laws and the fact that legislatures are beginning to respond to the effects of social networking sites, it is evident that these sites are playing an increasingly pervasive and vital role in facilitating communication and transactions in today's information age. Thus, future litigation in the area of misrepresentation law is likely, and further constitutional considerations are warranted.

#### IV. THE FREE SPEECH IMPLICATIONS OF APPLYING MISREPRESENTATION LAW TO MISREPRESENTATIONS ON SOCIAL NETWORKING SITES

Regardless of whether current law would allow misrepresentation actions for lies on social networking sites, it is necessary to determine whether the use of misrepresentation law to regulate such deceit is constitutionally appropriate.

##### *A. Does Regulating Online Behavior Hinder Free Speech Rights?*

The most important and obvious constitutional implication of regulating online statements is possible infringement on First Amendment free speech rights. Future litigation in the area of free speech on social networking sites is particularly likely with student speech.<sup>338</sup> As students continue to use

336. See *supra* text accompanying notes 81–82, 85.

337. See *supra* note 87 and accompanying text.

338. "Because students will continue to post reprehensible content to their web pages and engage in speech in other non-traditional forms and forums, questions will continue to arise as to whether and when administrators can reach beyond the school gates and prevent or punish such speech." Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1162 (2008). For an analysis of the constitutional issues concerning online student speech, see generally Calvert, *supra* note 252; Tova Wolking, *School Administrators As Cyber Censors: Cyber Speech and First Amendment Rights*, 23 BERKELEY TECH. L.J. 1507 (2008); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563 (2009); Carolyn Joyce Mattus, Comment, *Is It Really My Space?: Public Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District*, 16 B.U. J. SCI. & TECH. L. 318 (2010); Caitlin May, Comment, *"Internet-Savvy Students" and Bewildered*

these sites, and in increasing numbers, they will continue to make false and disparaging comments about others online.<sup>339</sup> In *Layshock v. Hermitage School District*, for example, a high school student claimed that his free speech rights were violated after he was suspended and banned from participating in the school's graduation ceremony for creating a fake MySpace profile of his principal.<sup>340</sup> The profile suggested that the principal was a "big steroid freak" and "big whore" who smoked a "big blunt" and had a "big keg" behind his desk.<sup>341</sup> The profile also provided inappropriate and false statements in response to questions.<sup>342</sup> The court found that this false and insulting student speech was in fact protected by the First Amendment because there was no nexus between the fake profile and a disruption of the school environment.<sup>343</sup> Although the case was limited to the context of student speech, it emphasizes that people who use the Internet as a means for mockery and inaccurate statements will likely claim the statements are protected free speech.<sup>344</sup> Thus, it is necessary to consider how important it is to shield these misrepresentations as protected First Amendment rights.<sup>345</sup>

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*Educators: Student Internet Speech Is Creating New Legal Issues for the Educational Community*, 58 CATH. U. L. REV. 1105 (2009).

339. In *R.O. v. Parma City School District Board of Education*, a middle school student sued, claiming that his free speech rights were violated after he was suspended for making a fake MySpace profile of his principal. *R.O. v. Parma City Sch. Dist. Bd. of Educ.*, No. 1:08CV0417 (N.D. Ohio Feb. 20, 2008). The parody profile included a picture of the principal and a heading titled "Your Princeypal." *Id.* Under the interests section, the principal's interests were stated as "giving students anal" and "jacking off in my office." *Id.* Further vulgar and inappropriate comments were made in other parts of the profile, listing the principal's favorite movies as "gay porn" and his favorite television show as "boy meets dildo." *Id.* The student also named Michael Jackson, Adolph Hitler, and Saddam Hussein as the principal's heroes. *Id.* Other comments rudely suggested that the principal had sexual relations with the assistant principal. *Id.* Despite all of these shocking and lewd comments, the student still sued, arguing that his suspension violated his free speech rights. *Id.* In another case, students claimed that a YouTube video making disparaging and defamatory statements about a thirteen-year-old classmate was protected free speech. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1097–98 (C.D. Cal. 2010). One of the students in the video called the classmate "a slut," "spoiled," and an "ugly piece of shit." *Id.* at 1108. The court found that the school's disciplinary actions against the maker of the video violated the student's First Amendment rights because the video did not substantially disrupt school activities. *Id.* at 1116, 1123.

340. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591–94 (W.D. Pa. 2007), *aff'd on reh'g*, 650 F.3d 205 (3d Cir. 2011).

341. *Id.* at 591.

342. *Id.* "In response to the question, 'ever been beaten up?,' the profile [said] 'big fag,'" and in response to, "'in the past month have you gone on a date?,'" the profile said "'big hard-on.'" *Id.*

343. *Id.* at 600–01.

344. *See id.*

345. *See Balkin, supra* note 212, at 427.

According to a Yale Law School First Amendment scholar, Jack Balkin:

The key values that underlie the First Amendment seem as important as ever: the protection of individual freedom to express ideas, form opinions, create art, and engage in research; the ability of individuals and groups to share their views with others, and build on the ideas of others; and the promotion and dissemination of knowledge and opinion.<sup>346</sup>

Balkin has compared the modern world of social networking sites, blogs, and search engines to the Enlightenment Era and has emphasized that First Amendment values remain just as important today as they did during the Enlightenment.<sup>347</sup> As such, “the most important decisions affecting the future of freedom of speech [related to the Internet] will not occur in constitutional law;” they will be decisions about *regulatory* issues.<sup>348</sup> Thus, in ensuring justice by providing a remedy for malicious and dangerous lies, it is equally important to balance regulatory interests with valid free speech interests.<sup>349</sup>

On the free speech side of the balancing test, there are clear reasons to protect false speech. The main reason to protect false statements made online is because “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”<sup>350</sup> The Supreme Court’s decision in *Gertz v. Robert Welch, Inc.* is instructive on this point.<sup>351</sup> The Court emphasized that there should be more protection for false ideas or opinions than for false factual statements.<sup>352</sup> Where the deception involves an idea or opinion, the “correction” depends “not on the conscience of judges and juries but on the competition of other ideas.”<sup>353</sup> False statements of fact, however, do not deserve the same level of protection because “there is no constitutional value in false statements of fact”—“[n]either the

346. *Id.*

347. *Id.*

348. *Id.* Other important decisions affecting the future of free speech in today’s technological context are decisions about technological designs, the formation of new business models, and the activities of online users. *Id.*

349. *See id.* at 432. “By choosing a regulatory scheme that lets the Internet function more or less as a general data transport system, we open up possibilities for a wide variety of new applications and services that can let people share information and opinions, build things together, and form online communities.” *Id.*

350. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

351. *See id.*

352. *See id.* at 339–40.

353. *Id.*

intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."<sup>354</sup> Thus, the extent of protection for false statements on social networking sites should take into consideration whether the speech is a statement of opinion or a false factual statement.<sup>355</sup>

Certainly, allowing misrepresentation suits for online deceit stifles speech. The possibility of a lawsuit will likely prevent online speakers from making certain statements out of fear that they might be subject to liability for assertions they did not know were incorrect. Despite these concerns, "today's networked environment warrants a rejection of free-speech absolutism."<sup>356</sup> Moreover, misrepresentation law is still a practical and necessary means for regulating abusive online behavior.<sup>357</sup> Thus, the application of misrepresentation law should be limited in such a way that it does not infringe on more speech than is necessary.<sup>358</sup> For example, it is probably inappropriate to suppress speech that is merely negligent, rather than intentionally fraudulent, just to provide a remedy to an injured plaintiff.<sup>359</sup> In these instances, the balance should weigh in favor of free speech rather than regulatory interests.<sup>360</sup> Moreover, free speech interests should be protected by limiting recovery according to the moral reprehensibility of the lie—a totality of the circumstances consideration.<sup>361</sup> Because not all lies involve the same level of moral depravity, a legal remedy through misrepresentation law should depend on the nefarious qualities of the lie. It is more appropriate to find civil or criminal liability

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354. *Id.* at 340.

355. The First Amendment does not protect "statements of fact (express or implied) that are clearly and convincingly proven in a judicial proceeding subject to independent appellate review to be known by the speaker to be false, or even consciously thought to be probably false but recklessly uttered anyway." Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1112–13 (2006).

356. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 97 (2009).

357. *See infra* Part IV.B.

358. *See* Balkin, *supra* note 212, at 442. "Free speech values increasingly depend on . . . regulatory decisions that keep the Internet open, either by limiting liability . . . or by discouraging anticompetitive behavior . . ." *Id.*

359. *See* Strong, *supra* note 59, at 118 (arguing that "[c]ourts must strike a balance between the value of shared information (particularly regarding physical safety) and the value of holding people accountable for negligently inaccurate speech about such risks").

360. *See id.*

361. *See supra* note 132 and accompanying text. The Ninth Circuit has cautioned against criminalizing all misrepresentations online because of free speech implications. *See* *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010) ("All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished. Indeed [if any lie could be punished] . . . then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time.").

when the lie on a social networking site is egregious and outrageously harmful than when it is a simple white lie.<sup>362</sup> In this way, a court can prevent frivolous lawsuits while also ensuring a remedy for a plaintiff injured by a baseless and damaging lie.<sup>363</sup> With these free speech considerations in mind, it is important to consider whether misrepresentation law is even necessary to regulate fraud on social networking sites.

*B. Is Misrepresentation Law Necessary to Manage Fraud on Social Networks?*

One important reason that misrepresentation law should be considered an appropriate cause of action for social networking lies is because people generally cannot recover from the social networking sites themselves, which remain immune from liability under the Communications Decency Act.<sup>364</sup> Under the Communications Decency Act, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>365</sup> This means that broadband companies and social networking sites are not liable for what other people say on those sites, no matter how damaging or even deadly.<sup>366</sup> Thus, a plaintiff injured by a social networking lie would be left without a remedy if he could not bring a misrepresentation cause of action against the maker of the misrepresentation.<sup>367</sup> To curb abuse of the anonymous nature of online communications and circumvent the immunity of social networking sites, misrepresentation law is an appropriate mechanism for regulating behavior on social networking sites.<sup>368</sup>

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362. Although many white lies may be baseless and intentional, it “does not lie within the power of any judicial system . . . to remedy all human wrongs.” *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 619 (Ct. App. 1980). Wrongs like “brutal words . . . are beyond any effective legal remedy and any practical administration of law.” *Id.* In fact, “[t]o attempt to correct such wrongs or give relief from their effects ‘may do more social damage than if the law leaves them alone.’” *Id.* (citation omitted).

363. *See id.*

364. *See* 47 U.S.C. § 230 (2006).

365. *Id.* § 230(c)(1).

366. *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (holding that the defendant was not liable for the illegal videos posted by one of its users); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding that AOL was not liable for the defamatory statements made by one of its users).

367. *See* Daniel H. Kahn, *Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms*, 11 COLUM. SCI. & TECH. L. REV. 176 (2010).

368. *See id.*

Misrepresentation law is further necessary to create a more responsible and safe online community.<sup>369</sup> “[B]ecause of the Web’s structural limitations on identity, norm-based social governance has not played a significant role on most sites.”<sup>370</sup> Rather, the lack of norms “has created an atmosphere in which abusive behavior is common, heightening the apparent need for new legal regulation.”<sup>371</sup> Allowing misrepresentation actions for deceit on social networking sites is one essential way of regulating abusive online behavior.<sup>372</sup> More importantly, applying misrepresentation law to social networking sites will strengthen torts in general as a means of controlling cyberspace in the information age.<sup>373</sup> As courts start to deal with future litigation involving social networking misrepresentations, they should be open to applying misrepresentation law as a regulatory mechanism on a case-by-case basis.<sup>374</sup>

## V. CONCLUSION

Misrepresentations come in many different forms—some are harmless, while others are life threatening and emotionally distressing. With the increasing popularity of social networking sites, people are able to disseminate false information and lie to wider audiences. Unfortunately, cyberspace governance has not kept up with the modern implications of social networking. Thus, courts should refine their approach to misrepresentation law in order to adequately regulate online deceit. In future litigation involving social networking sites, the application of misrepresentation law will necessarily depend on the lie at issue. Courts should be more willing to allow a cause of action where the deceit is intentional and outrageous. Essentially, a balancing test, which takes into consideration a totality of the circumstances and the free speech implications

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369. *See id.*

370. *Id.* at 176.

371. *Id.*

372. *See id.* (suggesting that social intermediaries allow “users to aggregate records of their activities across multiple sites,” which therefore could help to prevent abusive online behavior by allowing “many more sites to offer opportunities for users to govern each other through code-backed norms”).

373. One potential problem in applying misrepresentation law, however, involves the lack of territorial borders in a cyber-world—making the regulation of online behavior much more difficult. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1370 (1996) (arguing that the absence of territorial borders in cyberspace subverts “(1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign’s efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply”); *see also* JACK L. GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET: ILLUSIONS OF A BORDERLESS WORLD* (2006) (admitting that the Internet might change some things about the authority of the nation-state, but arguing that it will not change the fundamental role of governments).

374. *See supra* note 361 and accompanying text.

of regulating online representations, would ensure that online fraud does not go unpunished any longer.

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This Comment received the 2011 Sorenson award for Pepperdine Law Review's best student article.



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