

Title:

Anonymous Screech: Protecting anonymous expression and reputation in a digital age

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Abstract

This Note examines the difficulty in balancing a person, company, or organization's right to reputation against an individual's right to anonymous expression online. Specifically, this Note proposes a single national standard or balancing test, one that includes a separate First Amendment balancing factor. In proposing a national standard, this Note argues against the institution of a takedown notice for online defamation similar to that legislated as part of the Digital Millennium Copyright Act and against any effort to criminalize online defamation. In challenging these problematic responses to the admittedly growing problem of anonymous defamation online, examined here are imbalances created by, among other things, ISP immunity granted by the Communications Decency Act and a lack of uniformity among state-level anti-SLAPP statutes.

End of abstract

Introduction

The fantastic growth of the web and, more generally, of digital discursive spaces, including those offered in and by social media, has exacerbated a problem long wrestled

with by the courts even in the pre-web, analog era – anonymous defamation.¹ The courts are faced with the difficult, sometimes seemingly impossible task of balancing an person, company, or organization’s right to a good name against a speaker’s First Amendment right to anonymous expression, even that which defames, in and with a medium (or collection of media and media formats) that enable and encourage cheaply, even freely published, globally distributed, cached, searchable expression.² A legitimate state interest exists in the compensation of individuals for the harm done to them by defamatory and false statements, but in making it too easy for plaintiffs to force the discovery of anonymous speakers’ identities, the state could unnecessarily, perhaps even unconstitutionally chill online expression. In John Doe defamation suits, therefore, courts are asked to weigh plaintiffs’ rights to seek redress for damaging, false expression against defendants’ rights to speak or publish anonymously. To do this, the courts need a national standard, which requires determining under what circumstances to grant a motion or subpoena to force disclosure of the anonymous defendant(s).

Typically the first step in a defamation action against an anonymous speaker for expression posted or published online is to seek a subpoena on the defendant’s Internet Service Provider (ISP) in order to obtain that speaker’s identity.³ It is difficult for a

¹ The Internet has confused many areas of and in the law, and legal scholars have noted this for some time. For a discussion of, for example, the range of law issues the Internet has generated, see Anita B. Frohlich, *Copyright Infringement in the Internet Age: Primetime for Harmonized Conflict of Law Rules?* 24 BERKLEY TECH. L.J. 51 (2009); Ashley Packard, *Wired But Mired: Legal System Inconsistencies Puzzle International Internet Publishers*, 1 J. INT’L MEDIA & ENT. LAW 57 (2007); and Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. PA. L. REV. 1975 (2005).

² In this Note, anonymous expression refers both to the truly anonymous – expression identified by no name or person, and as a subset of anonymity, pseudonymity, or expression identified by name, but not the legal name of the author.

³ See Jeffrey Terraciano, *Can John Doe Stay Anonymous?* WIRED.COM, Feb. 21, 2001, at <http://www.wired.com/news/privacy/0,1848,41714,00.html>

plaintiff to sue, after all, unless he or she knows whom to accuse. Once issued the subpoena, an ISP then notifies the accused that his or her identity is being sought in order to give that defendant an opportunity to contest the subpoena.⁴ Of course, if the speaker is anonymous or pseudonymous, it can be difficult notifying that person of the action. It is problematic on the other side, as well, because it is impossible to defend against a subpoena to force disclosure if you have not been notified of the subpoena in the first place. As one author put it, if a subpoena becomes *ex parte*, “one of the defendant’s most important defenses – his own vigorous advocacy – is eliminated.”⁵

To help courts navigate the competing interests in such cases, this Note proposes a single national standard or balancing test, one that includes a separate and controversial First Amendment balancing factor.⁶ In doing so, this Note seeks to offer guidance to courts addressing similar matters and to magistrate judges who are often the front line of defense for the First Amendment in these cases and yet who often are ignorant of the law

⁴ Different Internet service providers (ISPs) deal with subpoenas for the identity of anonymous speakers in different ways, usually in conformity to their own user agreements and privacy and use policies. See, e.g., *Cohen v. Google, Inc.*, No. 100012/09, 2009 WL 2883410 (N.Y. Sup. Ct. Aug. 17, 2009), in which Google fought a subpoena on behalf of an anonymous blogger using its Blogger.com service. More recently, an ISP attempted to fend off a subpoena from a magistrate judge in Denver over critical comments posted to a company’s Wikipedia page by disgruntled customers (See Clara Hogan, *Colorado case could affect online comment rights*, THE REPORTERS COMMITTEE FOR A FREE PRESS, June 7, 2011, available: <http://www.rcfp.org/newsitems/index.php?i=11906>, accessed June 9, 2011).

⁵ Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L. J. 320, 330 (2008).

⁶ For an example of such a test and fifth prong, see *Independent Newspapers v. Zebulon J. Brodie*, 407 Md. 415, 966 A.2d 432 (2009). The Court of Appeals of Maryland, one of the few appellate courts to develop such a test, included in its opinion a detailed analysis of most of the previous attempts by courts to balance the two rights or interests. The opinion offers one of the most comprehensive discussions of these earlier and competing tests available. Two media scholars have called the opinion “exhaustive” (Ashley I. Kissinger and Katharine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Speech*, 13 J. OF INTERNET L. 9, 19 (March 2010).

in this area.⁷ In proposing such a test, this Note also argues against a takedown notice for online defamation similar to that legislated as part of the Digital Millennium Copyright Act and against criminalizing online defamation, which is seen as here as incompatible with the First Amendment and inconsistent with the law for the past fifty years. This Note also joins several news media organizations, including the Reporters Committee for Freedom of the Press, in calling for the adoption of procedural safeguards to protect the identities of anonymous speakers online.⁸ In proposing a single standard or test, this Note examines imbalances created by, among other things, ISP immunity granted by § 230 of the Communication Decency Act, public figure-private citizen plaintiff distinctions, and the lack of uniformity among state-level anti-SLAPP statutes.⁹

Importance of the question

The question examined here is significant, even urgent. In light of an overall erosion of civility in online spaces that allow anonymity, newspapers throughout the country are re-considering their online reader comment policies, with some finding themselves in legal jeopardy because of those policies. As one newspaper editor put it, newspapers online are

⁷ In the Denver case cited previously (supra note 4), a magistrate judge “admitted to not being aware of ‘a substantial body of law in other jurisdictions addressing First Amendment concerns and the issuance of John Doe subpoenas like those requested here’” (supra note 4). Similarly, a magistrate judge in Polk County, Ga. Reflexively granted subpoenas in a case in which the local sheriff sought to unmask critics on several discussion boards (See Melody Dareing, *Topix CEO angry over Polk subpoenas seeking IDs*, THE CEDARTOWN STANDARD [Nov. 27, 2010], available: http://www.romenews-tribune.com/view/full_story/10458881/article-Topix-CEO-angry-over-Polk-subpoenas-seeking-IDs?; visited Dec. 2, 2010).

⁸ *Media groups urge court to protect anonymous speech*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, March 27, 2009, <http://www.rcfp.org/newsitems/index.php?i=10674>, visited Nov. 5, 2010. For more on the DMCA take-down policy, see *Batzel v. Smith*, 333 F.3d, at 1031 n.19. (9th Cir. 2003).

⁹ Anti-SLAPP laws are an attempt to combat strategic lawsuits against public participation (SLAPP) lawsuits that seeks to silence a critic through litigation or with the threat of litigation.

attempting to balance free speech with the reality of “uncivil, rude, mean-spirited, compassionless adults behaving . . . like children with no home training.”¹⁰ In one example of this devil’s bargain, the *Portland Press Herald* in Portland, Me., decided to temporarily shutter its reader comments sections in October 2010 in response to what the newspaper’s publisher called “vile, crude, insensitive, and vicious postings.”¹¹ The newspaper’s decision came after “months of careful consideration” in order to protect the public, according to its publisher. Just a week prior to the *Press Herald*’s decision, National Public Radio announced that due to wild growth in the number of its reader posts online, NPR would outsource comment moderator duties for NPR.org.¹² Other news organizations are simply disallowing anonymity at all, utilizing sophisticated

¹⁰ Calvin Stovall, *Internet snipers can’t hide behind free speech to justify vile comments*, PRESSCONNECTS.COM, Oct. 30, 2010, available <http://www.pressconnects.com/article/20101030/VIEWPOINTS/10310325/Internet-snipers-can-t-hide-behind-free-speech-to-justify-vile-comments>, visited Nov. 2, 2010. To make his point, Stovall re-printed one of the vile comments the site had removed, in response to a story titled, *Four suspended Binghamton High students offered readmission to school*: “Segregation is the answer. They can have a world away from the White man and live any way they want. They can have as much crime as they like. Illegitimacy can be 100%. Rap can be their national culture-no white man looking over their shoulder shaking their head in disgust. A 75 IQ would be considered a genius. 40% would be a passing grade, Oprah would be the standard of beauty. Free of Asian brain power and Western thought they can become completely Afro-centric. Elect 50 cent as their president. Their schools can teach the legends of great Negro dynasties where Christ, Moses, Mozart, Bach, Einstein, Freud, George Washington were Negroes. The negroes built the pyramids, Europe, China, landed on the moon all the while the white man was living in caves. Teach their kids the negro invented the White man in laboratories. While the white man splits the atom they can split the watermelon. Everything is equal of merit. Going to jail would give them more pride than going to medical school.”

¹¹ Damon Kiesow, *Portland Press Herald Drops Reader Comments in Response to ‘Vicious Postings*, POYNTERONLINE, October 20, 2010, available: <http://www.poynter.org/column.asp?id=101&aid=192998>, visited Nov. 1, 2010. The newspaper restored the comments section the next day after changing its moderation system, but did not announce or otherwise make public what the changes were (see Damon Kiesow, *Comments return to the Portland Press Herald*, POYNTERONLINE, Oct. 21, 2010, available: <http://www.poynter.org/column.asp?id=101&aid=193106>, visited Nov. 11, 2010.

¹² Andy Carvin, *Getting a Little Help With NPR Comments*, NATIONAL PUBLIC RADIO, October 12, 2010, available: <http://www.npr.org/blogs/inside/2010/10/12/130513924/getting-a-little-help-with-npr-comments>. The organization cited the overwhelming number of posts, “350,000 people registered to participate in the community, with as many as 3,000 comments posted on any given day.”

moderation systems, requiring real names, and in some cases even collecting credit card information for verification.¹³

The core constitutional protection for anonymous political speech is, therefore, under attack, and from within the body politic.¹⁴ This threat poses a great risk to civic discourse: the right to speak anonymously derives in part from the idea that a vibrant marketplace of ideas depends in part on some speakers being allowed to withhold their identities in order to protect themselves from retribution, punishment, or worse.¹⁵ This right also originates in the motive to direct attention to the ideas being expressed rather than on the person or people expressing them.¹⁶ If all mankind were of the same opinion,

¹³ The *Grand Island (Neb.) Independent* halted reader comments in 2009, bringing them back with a “real-name” policy and pre-publication approval (see Stephanie Romanski, *The Triumphant Return of Commenting*, STEPHANIEROMANSKI.COM, March 18, 2010, available: <http://www.stephanieromanski.com/2010/03/the-triumphant-return-of-commenting/>). Romanski is the newspaper’s Web editor. In September 2010, KSL-TV Salt Lake City shut down its reader comment section (see *Deseret Digital Media announces changes to comment boards at ksl.com*, DESERETNEWS.COM, Sept. 17, 2010, available: <http://www.deseretnews.com/article/700065814/Deseret-Digital-Media-announces-changes-to-comment-boards-at-kslcom-deseretnewscom.html>). *The Maui News* removed reader comments in 2008 because of “continual name-calling, crude language, profanity, slander, threats and racism” (see *Dear Readers*, THE MAUI NEWS, Sept. 23, 2008, available: <http://mauinews.com/page/content.detail/id/508831.html>). *The Las Vegas Sun* routinely removes anonymous comments from its site after 72 hours (see Rob Curley, *Sun changes story commenting policy to foster responsible dialogue*, LAS VEGAS SUN, Sept. 21, 2010, available: <http://www.lasvegassun.com/news/2010/sep/21/story-commenting-policy/>). *The Attleboro (Mass.) Sun Chronicle* suspended comments for three months in 2010, reinstated them in July but began requiring real names and credit card verification (see *The Sun Chronicle restores commenting section to website*, THE SUN CHRONICLE, July 14, 2010, available: <http://www.thesunchronicle.com/articles/2010/07/04/news/7630031.txt>). And *The New York Times* launched a “moderation desk” in 2007 to review reader comments before posting (see Clark Hoyt, *Civil Discourse, Meet the Internet*, THE NEW NEW YORK TIMES, Nov. 4, 2007, available: <http://www.nytimes.com/2007/11/04/opinion/04pubed.html>). All URLs visited October 15, 2010.

¹⁴ For “core constitutional” protections for anonymous expression, see *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

¹⁵ The idea of a robust marketplace of ideas comes from John Stuart Mill in *On Liberty*, in which he argued that where everyone can advance any theory, no matter its merits, truth is more likely to emerge and the community as a whole will be better off than if that theory were censored (in Ronald Dworkin, *A MATTER OF PRINCIPLE* 386 [1985]).

¹⁶ *McIntyre v. Ohio Election Commission*, 341-343, 357 (1995); *Talley v. California*, 64-65 (1960); *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 160, 166-167 (2002); and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 199-200 (1999). For Chief Justice Oliver

“minus one,” John Stuart Mill wrote, “mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”¹⁷ Justice John Paul Stevens supported this notion in his majority opinion in *McIntyre v. Ohio Election Commission* (1995), declaring that anonymous speech allows the dissenting, the disenfranchised, and the disempowered to air their views while protecting them from retaliation and persecution.¹⁸ In the majority opinion for the primary precedent case for the *McIntyre* ruling, *Talley v. California* (1960), Justice Hugo Black similarly wrote, “anonymity has sometimes been assumed for the most constructive purposes,” and marginalized minority groups have been able to criticize the majority “either anonymously or not at all.”¹⁹ The First Amendment is designed to protect speech that harms, after all, or it cannot have any real purpose at all.²⁰ Stevens’s majority opinion in *McIntyre* also recognized the potential effect of anonymity on the credibility and value of the message, and the ability of reasonable people to evaluate that credibility for themselves. Stevens advised plaintiffs not to:

underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.²¹

Wendell Holmes’s introduction of the notion of a “marketplace of ideas,” see *Abrams v. United States*, 250 U.S. 616 (1919); and *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967).

¹⁷ John Stuart Mill, *ON LIBERTY* 16 (1947), F&S Crofts “Crofts Classics” edition.

¹⁸ *McIntyre v. Ohio Election Commission*, 514 U.S. 341-43. Stevens also wrote (at 357) that anonymity provided a sort of “shield from the tyranny of the majority,” quoting Mill in *ON LIBERTY* (4-5).

¹⁹ *Talley v. California*, 362 U.S. 64, 65 (1960).

²⁰ See Nicholas Wolfson, *HATE SPEECH, SEX SPEECH, FREE SPEECH* 58 (1997).

²¹ *McIntyre v. Ohio Election Commission*, 514 U.S. 348, n. 11.

More recently, a New York court seemed to echo Stevens's sensibility in declaring that courts need to consider the "freewheeling, anything-goes" writing style that prevails online when evaluating Internet communications for defamation and libel.²² The anonymity of the email that was cause for the action "makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact," according to the New York court.²³

The urgency of the need to adopt a national standard is signaled by the codification by the state of Virginia of a "good faith" standard or calculus for weighing the conflicting rights of a speaker against those of an allegedly injured party seeking redress through the courts, a codification that is the law of the state.²⁴ Virginia's good faith test places a lower burden on plaintiffs relative to other standards and, therefore, possibly makes it too easy to force discovery of a speaker's identity. It is argued here that a more rigorous standard with respect to forcing discovery is appropriate with respect to the First Amendment, and that as a national standard, such a standard could eliminate or at least reduce the amount of variance in thresholds used throughout the country.

The current state of affairs

²² Emily Robertson, *Context Important for Internet Libel Cases, Court Says*, THE REPORTERS COMMITTEE FOR A FREE PRESS (May 23, 2011), available: <http://www.rcfp.org/newsitems/index.php?i=11860>, visited June 10, 2011. In the case, the New York Supreme Court Appellate Division held in *Sandals Resorts v. Google* that Google did not have to release email account information for an account holder who widely distributed anonymous email messages criticizing Sandals, an operator of luxury, all-inclusive Caribbean resorts.

²³ *Id.*

²⁴ Va. Code Ann. § 8.01-407.1(A)(1)(a). The Virginia General Assembly passed law that requires the subpoenaing party to show either that "one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed."

Anonymity in expression is regulated by a multitude of federal and state constitutional provisions, state and federal statutes, and, the focus here, a flurry of state and federal court decisions. Just how broad a right one has to be anonymous in online spaces in the United States is unclear and unstable, and this right is being negotiated in realms outside the law.²⁵ Most courts faced with questions that involve a speaker's claimed right to anonymity cite the majority opinion in *McIntyre v. Ohio Elections Commission*, an opinion that interprets into the First Amendment the right to anonymous expression by finding the state of Ohio's interests in "preventing fraudulent and libelous statements" and in "providing the electorate with relevant information" insufficient to justify a ban on anonymous speech that was not narrowly tailored.²⁶ Stevens cited *Talley v. California* in stating that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is *an aspect* of the freedom of speech protected by the First Amendment."²⁷ While perhaps the most explicit of the Supreme Court cases on anonymous expression, this verbiage still leaves room for interpretation, and it can be seen to weaken somewhat the degree or level of First

²⁵ As examples, see two online services dedicated to helping individuals monitor their privacy and protect their reputations, Reputation Defender, available <http://www.reputationdefender.com/>, and Reputation Hawk, available <http://www.reputationhawk.com/>, a service that offers "Internet Reputation Management. Both visited Nov. 11, 2010.

²⁶ *McIntyre*, 514 U.S. 348, n. 5.

²⁷ *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 342; *Talley v. California*, 362 U.S. 60 (1960). Emphasis added. The verbiage "an aspect" is intriguing in that it seemingly is less than categorical. This ambiguity combined with dissents from Thomas and Scalia, and with the open door for states to find "a compelling state interest," yield a lack of clarity on the breadth of First Amendment protection for anonymous expression. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the Court similarly found the expressed state interest in "protecting the privacy of the resident and the prevention of crime" unconvincing. And in *Tattered Cover, Inc. v. City of Thornton*, 44 P. 3d 1044, 1047 (Colo. 2002), Colorado's Supreme Court upheld a bookstore's refusal to surrender customer purchase data even though the book in question was a "how to" book on setting up a methamphetamine lab, demonstrating "the extent of judicial solicitude for the right to remain anonymous" (in A. Michael Froomkin, *Anonymity and the Law in the United States*, in *LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 8 [2009]).

Amendment protection to which anonymous expression is entitled. Fortunately, lower courts have applied the precedent set in *McIntyre* to online expression by recognizing that speech on the Internet is entitled to full First Amendment protection, as the Supreme Court declared in *Reno v. A.C.L.U.* in 1997.²⁸ These courts have, therefore, generally sought to protect the identity of online speakers.²⁹

This constitutional freedom protects even speech that is crass, offensive, insulting, or objectionable; in fact, it protects speech that is especially these things. “One man’s vulgarity is another’s lyric,” wrote Justice John Marshall Harlan, in *Cohen v. California*.³⁰ The Court has made clear that through the First Amendment the United States has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,” and that because that debate is sometimes messy, some false speech must be protected in order to ensure that uninhibited debate.³¹ In declaring that defamation can be eligible for First Amendment protection, in the landmark case *New York Times v. Sullivan* in 1964, the Court negated a premise in *Chaplinsky v. New Hampshire* decided twenty-two years prior that posited that because

²⁸ *Reno v. ACLU*, 521 U.S. 844, 870 (1997), which states that “Full First Amendment protection applies to speech on the Internet (844, 853, 870); *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 253–54 (D. Conn. 2008); *Doe No. 1 v. Cahill*, 884 A. 2d 451, 456 (Del. 2005). In *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001), the court ruled that the “right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse and far ranging exchange of ideas.”

²⁹ *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001); *Immunodemics, Inc. v. Doe*, 775 A.2d 773, 776 (N.J. Super. Ct. App. Div. 2001); *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001); *America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377, at *5 (Va. 2001); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

³⁰ *Cohen v. California*, 403 U.S. 15, 24-5 (1971).

³¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-2 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-1 (1974).

defamation was not deemed a valuable aspect of or contributor to public debate, it could not be seen as being included under the First Amendment.³²

The right to anonymous expression is not unlimited, however, and Stevens's terms, "an *aspect* of the freedom," hints at this. In *Buckley v. Valeo*, the Supreme Court seems to say that if a government regulation is narrowly tailored to advance a substantial state interest, political speech, including anonymous political speech, can be regulated.³³ One such legitimate state interest is compensating an individual for harm done to him or her by defamatory and false statements. As an old saying goes, "My right to swing my arm ends where your nose begins."³⁴ This limit on anonymous expression is the right to reputation, or in Van Vechten Veeder's words, that "one's good name" should be regarded and, therefore, protected by the law as any physical possession because that good name "gives to material possessions their value as sources of happiness."³⁵ John Adams articulated this idea when he said that a man without "attachment to reputation, or honor, is undone."³⁶ Character is what a person is; reputation is "what he seems to be," and because it is the result of observation of conduct, it is reputation "alone that is vulnerable," Veeder wrote.³⁷

³² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

³³ *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

³⁴ Quoted in Debra Cassens Weiss, *Satirical Law School Blog Leads to Harassment Probe Against Syracuse 2L*, ABA JOURNAL, October 20, 2010. Available: http://www.abajournal.com/news/article/satirical_law_school_blog_leads_to_harassment_probe_against_syracuse_2l. The article details an investigation at Syracuse University's law school into defamatory blog posts published to the pseudonymous Sucolitis blog.

³⁵ Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

³⁶ Quoted in Joanne B. Freeman, *Slander, Poison, Whispers, and Fame: Jefferson's 'Annas' and Political Gossip in the Early Republic*, 15 J. OF THE EARLY REP. 25, 31 (1995).

³⁷ Veeder, *supra* note 35.

The courts have found that tortious defamation “exposes a person to hatred, contempt, ridicule, or obloquy, or causes him to be shunned and avoided,” a definition consistent with the Restatement (Second) of Torts, which defines a communication as defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.”³⁸ More specifically, David Anderson has noted that defamation law strives to protect at least four types of reputational interests: a person’s relationship with others in the present; a person’s relationship with others in the future; a person’s relationship among the general public; and a person’s right to prevent a negative public image.³⁹

U.S. law on defamation is articulated in two torts: libel (written or published defamation) and slander (spoken defamation), both of which generally attempt to protect a person from the utterance of false assertions that would taint that person’s good name within his or her community. To be libel, an expression must be published, defamatory, and substantially untrue; it is publication, therefore, that marks libel as different from slander in giving the defamatory expression some permanent form.⁴⁰ Because it is spoken, slander is regarded as being “fleeting or evanescent.”⁴¹

Defamation torts protect reputation, or attempt to, by awarding damages to plaintiffs who successfully prove their claims – a crude justice at best, but one generally believed superior to dueling, the method antecedent to defamation tort law, a method

³⁸ RESTATEMENT (SECOND) OF TORTS. § 577 (1977); *Madison v. Yunter*, 589 P. 2d 126, 130 (Mont. 1978).

³⁹ David Anderson, *Reputation, Compensation & Proof*, 25 WM. & MARY L. REV. 747, 764-66 (1984).

⁴⁰ For the differences between libel and slander, compare *Villers v. Monsley*, (1769) 95 Eng. Rep. 886 (K.B.), with RESTATEMENT (SECOND) OF TORTS § 559 (1977).

⁴¹ Veeder, *supra* note 35 at 44.

once was regarded as a civilized and just way of resolving disputes and restoring honor.⁴²

Until the late 1700s, in fact, dueling was viewed as more noble than seeking redress in the courts. U.S. tort law simply substitutes money for blood, which, perhaps from a critical perspective outside the realm of law, would seem awkward and odd.⁴³

Recompense in money could be seen as progress over the punishment for defamation commonly exacted in the Middle Ages, which was to cut out the offender's tongue.⁴⁴

Certainly the very act of suing can bring some reward, but compared with dueling, damage money would seem even less capable of producing a desired outcome, notably the restoration of a person's honor and name. "A well-fought duel," argued historian David S. Parker, "reconciled the two adversaries, reestablished mutual respect, and 'cleansed' the stain caused by the original insult. No lawsuit or libel prosecution was capable of producing the same effect."⁴⁵ The cases that have produced the many balancing tests highlight the crudeness of the limitations of libel and defamation law,

⁴² See Jennie C. Meade, *The Duel*, GW MAGAZINE (Fall 2005). Available: http://www.gwu.edu/~magazine/archive/2005_law_fall/docs/feat_duel.html, visited Oct. 8, 2010; Barbara Holland, *Gentlemen's Blood: A History of Dueling* (New York: Bloomsbury, 2003); Cynthia A. Kierner, *Scandal at Bizarre: Rumor and Reputation in Jefferson's America* (New York: Palgrave Macmillan, 2004), in which the courts in 1792 were seen as a forum in which "Virginians could defend their most cherished assets – their property and their reputation . . . a rational alternative to the physical confrontations that nonetheless remained common in most Virginia communities" (43); Allison L. LaCroix, *To Gain the Whole World and Lose His Own Soul*, 35 HOFSTRA L. REV. (2004); C. A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. (2001); and David S. Parker, *Law, Honor, and Impunity in Spanish America: The Debate Over Dueling, 1870-1920*, 19 LAW & HIST. REV. (2001). According to Meade, Andrew Jackson perhaps engaged in more than a hundred duels before becoming president, killing at least one man.

⁴³ Odd, and also unpredictable, with tort law that is "filled with technicalities and traps for the unwary" (David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 Colum. L. Rev. 1282, 1285 [1942]). See also Rodney A. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519, 1525–45 (1987), an article that outlines the constitutional requirements for different types of plaintiffs, defendants, and speech. In addition, some states have codified libel law and have added hurdles in their constitutions.

⁴⁴ Rodney A. Smolla, THE LAW OF DEFAMATION § 1:2, at 1-4 (2010).

⁴⁵ Parker, 325. According to Meade, by 1839 all states and the District of Columbia had passed legislation prohibiting dueling.

which accomplishes the goals of plaintiffs as much by accident as by design. As such, the defamation torts represent a huge, complicated, inconsistent, and sometimes even “perverse” area of law, an area of jurisprudence described by Rodney Smolla as “dripping with contradictions and confusion [and] a vivid testimony to the sometimes perverse incongruity of the legal mind.”⁴⁶

Learning from the past

Certainly “new” or digital media have posed difficult questions for the law. Presaging the question of ISP immunity, the courts had difficulty determining what standard of liability to apply to telegraph operators in the 1800s.⁴⁷ It was not until 1950, in fact, that a court developed a standard for defamation transmitted via the telegraph, a standard that viewed telegraph services as distributors of third-party information rather than as publishers and, therefore, as eligible for some immunity.⁴⁸ The distributor categorization subsequently was adopted in U.S. tort law in 1966.⁴⁹

When television and radio first became popular, courts were asked to determine whether broadcast statements and depictions were more like libel or slander or, in other

⁴⁶ Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 1519.

⁴⁷ See Paul Israel, *FROM MACHINE SHOP TO INDUSTRIAL LABORATORY: TELEGRAPHY AND THE CHANGING CONTEXT OF AMERICAN INVENTION, 1830–1920* (1992).

⁴⁸ *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135 (4th Cir. 1950). From the decision: “it is only when the company has knowledge or reason to know that the messages are [defamatory] that it becomes liable for libelous matter contained therein” (at 137).

⁴⁹ W. Page Keeton, et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 113, at 812 (5th ed. 1984).

words, whether they were more like the printed word or the spoken word.⁵⁰ At first, the distinction hinged on whether there was a script or not, with scripted broadcasts seen more like libel and spontaneous or extemporaneous expression seen more like slander.⁵¹ As courts began recognizing the longer-term effects and injury that broadcast defamation could cause, especially when and where it was taped or recorded, they began applying traditional libel standards to broadcast material, holding radio and television broadcasters to the same standard of liability for third-party content as traditional publishers.⁵² The Restatement (Second) of Torts asserts that “one who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher,” reasoning that although radio and television transmit the human voice rather than written words, they are more analogous to publishing a newspaper or book than to distributing a telegraph wire.⁵³

Each new medium is invariably compared and analogized with the media that precede it, and this proved true with the Internet and its related technologies, media, and medium formats. With the telegraph, television, and radio, the courts had great difficulty retro-fitting each into the traditional defamation framework because these media’s underlying technologies of these media were not yet fully understood. Court decisions became more consistent when the law’s focus turned to the *impact* of the speech and

⁵⁰ For a discussion, see Thomas G. Ciarlone Jr. and Eric W. Wiechmann, *Cybersmear may be coming to a Website near you: A primer for corporate victims*, 70 DEFENSE COUNSEL J. 51 (Jan. 2003).

⁵¹ Laurence H. Eldredge, THE LAW OF DEFAMATION §13, at 83 (1978).

⁵² Anthony M. Townsend, et al., *Libel and Slander on the Internet*, 43 COMM. OF THE ACM 15, 1517 (June 2000). The State of California is an exception, still regarding defamatory statements on television and radio as slander rather than libel (Cal. Civ. Code Ann. 46, 48.5; *Arno v. Stewart*, 54 Cal. Rptr. 382 [Cal. App. 1966]). For the “permanence” of broadcasts when taped and replayed, see *See Eldredge*, The Law of Defamation §13, at 83.

⁵³ RESTATEMENT (SECOND) OF TORTS § 581(2) (1977).

away from the technical capacities of the medium through or by which that speech had been expressed.⁵⁴ Defamatory speech should not be protected in some instances “just because the defamer disseminated the message through one medium, but then not protected when the same speech is transmitted through a different medium,” Melissa Troiano argued.⁵⁵ The medium through which the defamatory content is published should have little or nothing to do with the court’s determination, and in proposing a national standard for compelled disclosure in anonymous defamation cases involving online expression, it is hoped consistency will result in the otherwise “frustrated tangle” of libel law, or some guidance in and through “the labyrinth for those seeking to clear their names.”⁵⁶

Traditions of Anonymous Speech

Anonymous expression, including that appearing in “[a]nonymous pamphlets, leaflets, brochures and even books,” has long played “an important role in the progress of mankind,” in the words of the Supreme Court in *Talley v. California*, a tradition that parties seeking disclosure must overcome. The high court recognized this tradition again in 1995:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain

⁵⁴ Eldredge, *THE LAW OF DEFAMATION*, supra note 51, at 81.

⁵⁵ Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 *AMER. U. L. REV.* 1465 (2006).

⁵⁶ Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 865 (1988).

anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.⁵⁷

Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings and/or used pen names, including James Madison, Alexander Hamilton, and John Jay, who each famously published the *Federalist Papers* under the name Publius.⁵⁸ Thomas Paine first published *Common Sense* under the pseudonym, “an Englishman,” while John Adams chose the unlikely alias of Humphrey Ploughjogger with which to write “everyman” columns for the *Boston Evening-Post*.⁵⁹ A lion of pseudonymity, Ben Franklin is believed to have used more than forty different names or bylines other than his own during his long and illustrious publishing life.⁶⁰

A long and misunderstood tradition of anonymously and pseudonymously written novels is part of this tradition, as well, and it was an almost global practice.⁶¹ Mark Twain, O. Henry, Voltaire, George Eliot, and George Sand all are pseudonyms. Jane

⁵⁷ *McIntyre v. Ohio Election Commission*, 514 U.S. 357 (1995).

⁵⁸ “Publius” was a tribute to an ancient ruler of Rome, Publius Valerius Publicola, and roughly translated means “friend of the people.” Albert Furtwangler, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* 51 (1984). Madison also anonymously wrote 18 articles for Philip Freneau’s *National Gazette*, articles that comprehensively criticized George Washington’s administration (Eric Burns, *INFAMOUS SCRIBBLERS* 281 [2006]).

⁵⁹ Burns, 353.

⁶⁰ Robert Ellis Smith, *BEN FRANKLIN’S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET* 41-43 (2000).

⁶¹ As one scholar of English literature explained, the motivations for publishing anonymously included “aristocratic or gendered reticence, religious self-effacement, anxiety over public exposure, fear of prosecution, hope of an unprejudiced reception, and the desire to deceive” (Robert J. Griffin, *Introduction, THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATIONS FROM THE SIXTEENTH TO THE NINETEENTH CENTURY* 7 [2010]). Often the author, with no copyright or claim to the fate of the writing, simply had no say in the matter; publishers decided what went on their books’ title pages. Griffin’s work shows that anonymity was for several centuries a dominant form, even the norm, of print culture, not an aberrant or eccentric way to write and to publish.

Austen and Daniel Defoe frequently published anonymously, albeit for different reasons, while Charles Lutwidge Dodgson thought he could sell more books under the pen name Lewis Carroll.⁶² One scholar estimated that more than 80 percent of all novels published in England during the period 1750-1790 were published either anonymously or pseudonymously. Though this percentage dropped to 62 percent during the 1790s, the number rose again to almost 80 percent by the 1820s.⁶³ Elsewhere in Europe, many members of the Italian and German academies of the early 1700s adopted “fanciful names” on a whim, much in the same way as they would don costumes for the many masquerade balls of the period.⁶⁴ Other authors writing about religion, politics, or theology during this time routinely sought refuge in anonymity, while two hundred years later, writers and artists in Paris agreed to publish anonymously in order to emphasize “the art as an ideal [and] not the ego.”⁶⁵

Anonymous writing also has a storied history in journalism, and throughout the world. Anonymous letters to the editor were common in local newspapers in early America in the late 1700s and regularly appeared in newspapers well into the 20th century: the *New York Times* published unsigned letters into the 1930s, and the *Chicago Tribune* and *Los Angeles Times* ran them as late as the 1960s.⁶⁶ *The Economist* magazine continues to eschew bylines to avoid journalists’ egos from interfering with the telling of

⁶² Lewis Carroll, *ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS*, in an introduction by Keith Carabine 12 (1993).

⁶³ Griffin, 1, quoting James Raven.

⁶⁴ Archer Taylor and Fredric J. Josher, *THE BIBLIOGRAPHICAL HISTORY OF ANONYMA AND PSEUDONYMA* 82 (1951).

⁶⁵ Henry Hazlitt, *The Cult of Anonymity*, *THE NATION* 36, October 1, 1930, 351.

⁶⁶ Bill Reader, *An Ethical ‘Blind Spot’: Problems of Anonymous Letters to the Editor*, 20 *J. OF MASS MEDIA ETHICS* 1, 65 (2005).

the story.⁶⁷ This tradition continues in digital media, where, according to one survey in 2006, 55 percent of bloggers used pseudonyms.⁶⁸ Bibliographies of pseudonymous journalism have been published for Italy (*Guida Della Stampa Periodica Italiana*), the Philippines (*El Periodismo Filipino*), Sweden (*Sveriges Periodiska Litterature*), the Netherlands (*Register op de Jaargangen 1-50 van de Nieuwe Gids*), Austria (*Die Hebraische Publizistik in Wien*), France, and the United States, among other nations and people groups.⁶⁹

It is the tradition of these noble, long-standing practices of anonymous and pseudonymous journalism, literature, and political writing that plaintiffs can find difficult to overcome in attempting to force disclosure of an anonymous poster online. As Smith Ekstrand wrote, “the tales of the Founding Fathers and *The Federalist Papers* serve as a compelling narrative against which plaintiffs must wage a major uphill battle in any anonymous speech case. Such compelling historical narratives will continue to be extraordinarily difficult for courts in anonymous online speech cases to ignore. After all, none of us is here without Publius.”⁷⁰

⁶⁷ Kevin Roderick, *Why the Economist Has No Bylines*, LA OBSERVED (July 13, 2003), http://www.laobserved.com/archive/2003/07/why_the_economi.php.

⁶⁸ Amanda Lenhart & Susannah Fox, *Bloggers: A Pursuit of the Internet's New Storytellers*, PEW INTERNET LIFE & PROJECT, July 19, 2006, <http://www.pewinternet.org/~media/Files/Reports/2006/PIP%20Bloggers%20Report%20July%2019%202006.pdf.pdf>.

⁶⁹ For more, see Taylor and Josher, *supra* note 64, at 172-174.

⁷⁰ Victoria Smith Ekstrand, *Whither Anon? Of McIntyre, Mormons, Manifestness, and the Motivations for Speaking Anonymously Online*, unpublished manuscript, 42.

This hallowed place in American democracy and the many benefits of anonymity in expression add up to great freedom to speak.⁷¹ Anonymous speakers can be unorthodox, eccentric, and experimental without risking damage to one's reputation. The absence of an author's name or byline can be important in the pure presentation of ideas, because anonymity removes reader biases or prejudices associated with any particular author, and because readers cannot rely on authorship cues, such as status markers or reputation, in interpreting and interacting with the message. Writing anonymously can eliminate or at least reduce the fear of retribution, such as being fired from one's job or social ostracism, a protection counted upon by many government and corporate whistleblowers.⁷² Not knowing the name behind a work can even add to that writing's appeal or attraction, which is a function of what communication scholars attempt to explain with Uncertainty Reduction Theory.⁷³ Joe Klein, to "name" a prominent example, became a multi-millionaire in part because he wrote the political exposé *Primary Colors*

⁷¹ For an excellent list of "rationales for anonymity," which includes a cataloging of many of the benefits of anonymity in expression, see Gary T. Marx, *What's in a Name? Some Reflections on the Sociology of Anonymity*, 15 THE INFORMATION SOCIETY 99-112 (1999). This cataloging includes benefits and utilities such as: facilitating the flow of information; obtaining personal information for research; encouraging attention to the content of the message; encouraging reporting, information seeking, and self-help; obtaining a resource or encouraging action involving illegality; protecting donors or those taking controversial but socially useful action; protecting strategic economic interests; protecting one's time, space, and person; aiding judgments based on specified criteria; protecting reputation and assets; avoiding persecution; enhancing rituals, games, play, and celebrations; encouraging experimentation and risk-taking; and protecting personhood (102). Marx also identifies the rationales for identifiability, which are accountability; reputation; dues paying and just deserts; organizational appetites: bureaucratic eligibility; interaction mediated by space and time; longitudinal research; health and consumer protection; currency of friendship and intimacy; social orientation to strangers; and reciprocity (105).

⁷² For the necessity of anonymity in whistleblower cases, see Kevin Sack, *Jury Quickly Acquits Nurse Who Anonymously Reported Doctor to Board*, NEW YORK TIMES, Feb. 12, 2010, A20. A nurse in West Texas was charged with "misuse of official information," a felony, after alerting the state medical board that a doctor at her hospital was practicing unsafe medicine.

⁷³ URT is rooted in the fundamental assumption that uncertainty can be unpleasant, explaining why individuals may seek to reduce it. For more, see Stephen A. Rains and Craig R. Scott, *To Identify or Not to Identify: A Theoretical Model of Receiver Responses to Anonymous Communication*, 17 COMMUNICATION THEORY 65 (2007).

anonymously in 1996. The fact-based novel's mysterious origins inspired readers to try to ferret out just who inside the Washington, D.C. beltway might have written it.⁷⁴

Internet speech: Public or private?

A challenge presented by much anonymous expression online is that it can be seen as having the qualities of both libel and slander, of both mass (or public) communication and interpersonal (or private) communication. Much of online expression, particularly communication in and through online social media, can be described as being fleeting or evanescent, as if it were spoken in conversation, a description that fits much of what takes place in or on Facebook, MySpace, and other online social networks. In practice, much of online expression does the work of interpersonal communication, and it has been extensively studied just this way by several disciplines. The medium or media through which it is expressed, however, is or are global and immediate, creating a permanent or at least more than fleeting or evanescent record of that otherwise ephemeral communication along the way. As one author put it, "one who falls victim to anonymous blogging has little ability to completely destroy the statements."⁷⁵

To concretize the difficulties in making this all-important distinction between public and private expression, it might be helpful to think about the kinds of expression that appear in online chat forums, online discussion boards, e-mail, and online gaming environments, many of which have explicitly social dimensions. Each of these can be regarded – and have been treated across disciplines of academic study – as interpersonal

⁷⁴ Gaby Wood, *Interview: True Colours*, THE GUARDIAN NEWSPAPER (August 6, 2006), <http://www.guardian.co.uk/books/2006/aug/06/usa.shopping>.

⁷⁵ S. Elizabeth Malloy, *Bloggership: How blogs are transforming legal scholarship: Anonymous bloggers and defamation: Balancing interests on the Internet*, 84 WASH. U. L. REV. 1187 (2006).

communications contexts.⁷⁶ Yet all of them utilize or otherwise depend on the Internet's web, which is treated by most disciplines as a mass medium or collection of mass media technologies, albeit a more interactive set of media than any previous mass medium.⁷⁷

This hybrid nature of much anonymous expression online presents unprecedented problems for the law. Historically, audiences for mass media have been regularly exposed to anonymous communication.⁷⁸ In more interpersonal contexts, source anonymity has traditionally been much less normative.⁷⁹ In short, we have less experience with it. With the explosive popularity of online social media such as Facebook and Twitter, however, we are getting a lot more experience.⁸⁰

⁷⁶ For examples of the various disciplinary approaches, see T. Postmes and M. Lea, *Social Processes and Group Decision Making: Anonymity in Group Decision Support Systems*, 43 *ERGONOMICS* 1252-1274 (2000); M. M. Mostyn, *The Need for Regulating Anonymous Remailers*, 14 *INTERNATIONAL REVIEW OF LAW, COMPUTERS, & TECHNOLOGY* 79-88 (2000); A. N. Joinson, *Self-disclosure in Computer-Mediated Communication: The Role of Self-awareness and Visual Anonymity*, 31 *EUROPEAN JOURNAL OF SOCIAL PSYCHOLOGY* 177-193 (2001); W. H. Dutton, *The Social Impact of Emerging Telephone Services*, 16 *TELECOMMUNICATIONS POLICY* 377-387 (1992); D. Antonioni, *Designing an Effective 360-degree Appraisal Feedback Process*, 25 *ORGANIZATIONAL DYNAMICS* 24-38 (1996); D. Myers, *Anonymity is Part of the Magic: Individual Manipulation of Computer-Mediated Contexts*, 10 *QUALITATIVE SOCIOLOGY*, 251-266 (1987); R. A. Roffman, J. Picciano, L. Wickizer, M. Bolan and R. Ryan, *Anonymous Enrollment in AIDS Prevention Telephone Group Counseling: Facilitating the Participation of Gay and Bisexual Men in Intervention and Research*, 23 *JOURNAL OF SOCIAL SERVICE RESEARCH* 5-22 (1998); and Julia T. Wood, *INTERPERSONAL COMMUNICATION: EVERYDAY ENCOUNTERS* (2010), in which the author states the because "many students today form and conduct relationships at least partially online, this edition of *Interpersonal Communication: Everyday Encounters* integrates research on online communication" (xi).

⁷⁷ Again, as merely one example of hundreds of articles that similarly treat or define the web and even the entire Internet, of which the web is just one application, see Merrill Morris and Christine Ogan, *The Internet as Mass Medium*, 46 *JOURNAL OF COMMUNICATION* 1, 39-50 (1996).

⁷⁸ See K. T. Wulfemeyer, *How and Why Anonymous Attribution is Used by Time and Newsweek*, 62 *JOURNALISM QUARTERLY* 81-86 (1985); and K. T. Wulfemeyer and L. L. McFadden, *Anonymous Attribution in Network News*, 63 *JOUR. QUART.* 468-473 (1986).

⁷⁹ Stephen A. Rains and Craig R. Scott, *To Identify or Not to Identify: A Theoretical Model of Receiver Responses to Anonymous Communication*, 17 *COMM. THEORY* 77 (2007).

⁸⁰ Lauren Gelman anticipates this in her article, *Privacy, Free Speech, and 'Blurry-edged Social Networks*, 50 *B.C. L. Rev.* 5, 1315 (2009). These "blurry edges" raise the question about why people publish to the whole world via the Internet when what they post often is intended only for a few, a question beyond the scope of this article.

This blending of the qualities that historically have defined public and private expression serves to form a sort of fractal in tort law, or a sort of hyperbolic geometric folding in on itself, to borrow a description from rubbersheet geometry.⁸¹ What the law does with anonymous speech online, therefore, is important if for no other reason than the implications for allowing or limiting the state in regulating private discourse and conversation, categories or kinds of expression that are essential to the democratic process. People form attitudes toward the issues important to them in largely private or interpersonal conversation, even gossip. Allowing the state to regulate and, therefore, censor private speech, even under the guise of chilling the infliction of emotional harm, could reduce speech “to irrelevance and blandness.”⁸²

It is artificial to separate public from private, mass from interpersonal, and more than that, it invites momentous intrusions by the state. If private, social conversation online puts people at risk, which in defamation law it does, little more than the relative litigation-averseness of and expense to would-be plaintiffs could be all that protects many speakers. Nicholas Wolfson hypothesizes this scene at a party to dramatize the implications:

“What do you think of Harry?”

“I cannot talk about Harry unless and until I research the truthfulness of the gossip in which I was about to engage.”⁸³

⁸¹ A fractal is a geometric object between dimensions. Rubbersheet geometry refers to a field of geometry called *topology*. Any figure drawn on a rubber sheet and stretched, usually hypothetically, is considered topologically unchanged. A Menger sponge, for example, is a cube-shaped geometric that is more than two dimensions but not quite three, with an infinite surface area but no volume. See Edward B. Burger and Michael Starbird, *THE HEART OF MATHEMATICS: AN INVITATION TO EFFECTIVE THINKING* 360, 472-3 (2010).

⁸² Wolfson, *supra* note 20 at 61.

⁸³ *Id.*, at 66.

The blended nature of online discourse presents all sorts of problems for the courts, not least of which is how to distinguish between publication of something of public interest or concern and the public disclosure of otherwise private facts, which tort law deals with as an invasion of privacy (intrusion upon seclusion).⁸⁴ Historically, for one's message to travel beyond its physical hearers, that message's speaker had to publish via a one-to-many, or mass, medium. As Lauren Gelman reasoned, the Internet changed this in enabling any speaker to communicate anything to the world, and to do so anonymously.⁸⁵ In a sense, this removed to some extent the evaluation of what is newsworthy from traditional media gatekeepers and gave the determination to the lone blogger, poster, e-mailer, or Facebook user.⁸⁶ The social and even civic benefits of this are unprecedented, but so are the legal questions these distribution methods raise.⁸⁷

⁸⁴ RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (2009). For a classic examples of this difficulty, see *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008); and *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994). The court in *Doe I v. Individuals, Whose True Names Are Unknown*, No. 3:07-CV-909 (D. Conn. filed Nov. 8, 2007), a case known as *AutoAdmit.com*, is one of the few rulings in John Doe subpoena cases to consider the expectation of privacy in its standard or test for disclosure. Two others are *Mobilisa, Inc. v. Doe 1*, 170 P.3d 720-21 (Ariz. Ct. App. 2007); and *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *5 (D. Ariz. July 25, 2006).

⁸⁵ Gelman, *Privacy, Free Speech, and 'Blurry-edged Social Networks*, 1335.

⁸⁶ For an overview of gatekeeping theory, see Dan Sullivan, *Gatekeeping Theory*, 86 JOURNALISM & MASS COMMUNICATION QUARTERLY 4, 941-42 (Winter 2009); or Pamela Shoemaker, *GATEKEEPING* (1991). For a specific application of gatekeeping theory, see, e.g., Dan Berkowitz, *Refining the Gatekeeping Metaphor for Local Television News*, 34 JOURNAL OF BROADCASTING & ELECTRONIC MEDIA 55-68 (Winter 1990); or Stephen D. Reese and Jane Ballinger, *The Roots of a Sociology of News: Remembering Mr. Gates and Social Control in the Newsroom*, 78 JOURNALISM & MASS COMMUNICATION QUARTERLY 641-58 (Winter 2001).

⁸⁷ For a few of these benefits, see Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 932-33 (2001); Martin M. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. Rev. 1083, 1130-31 (1999); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. Rev. 1653, 1670-73 (1998); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1834-38 (1995); Brian Carroll, *Culture Clash: Journalism and the Communal Ethos of the Blogosphere*, 1 INTO THE BLOGOSPHERE: RHETORIC, COMMUNITY, AND CULTURE OF WEBLOGS (Summer 2004), <http://www.intotheblogosphere.org>, visited Nov. 3, 2010; Brian Carroll and Katie Landry, *Logging on and letting out: Using online social networks to grieve and to mourn*, 30 BULLETIN OF SCIENCE, TECHNOLOGY & SOCIETY 341 (Fall 2010).

There is perhaps no better example of the geometric folding in on itself of essentially private communication distributed via a global publishing medium than the 2004 case study involving Jessica Cutler, a 24-year-old Senate staff assistant in Washington, D.C., who blogged about her sex life pseudonymously as “The Washingtonienne.”⁸⁸ Cutler said she created her blog to keep a few of her friends up to date on her adventures in D.C., but she eschewed a password-protected firewall because she said she thought “it would be too much trouble” for her friends.⁸⁹ Cutler was engaging in essentially gossip meant for only a few friends, but her salacious accounts were published on a medium with global reach. Once published, Cutler’s blog posts, which included detailed accounts of her sexual encounters, including those with co-workers and at least one married man, were available online to anyone in the world with an Internet connection, and they immediately were archived in multiple locations and, therefore, became searchable and quasi-permanent.

After several posts describing “nasty sex” with a co-worker named Robert, a sex partner who she said had “a nice ass” and was “into spanking,” Cutler’s blog was picked up by Wonkette, one of the more highly trafficked blogs at the time.⁹⁰ The Washingtonienne blog subsequently went viral; coverage by several major newspapers

⁸⁸ The blog is no longer active, but archived copies are available at Wonkette, <http://wonkette.com/4162/the-lost-washingtonienne-wonkette-exclusive-etc-etc>, visited Nov. 11, 2010.

⁸⁹ April Witt, *Blog Interrupted*, WASH. POST MAGAZINE W12 (August 15, 2004).

⁹⁰ “Washingtonienne Speaks!! Wonkette Exclusive! Must Credit Wonkette!! The Washingtonienne Interview!!” WONKETTE (May 21, 2004), available: <http://www.wonkette.com/politics/media/washingtonienne-speaks-wonkette-exclusive-must-credit-wonkette-the-washingtonienne-interview-9693.php>, visited Nov. 11, 2010.

and cable TV news networks contributed to Cutler's newly found fame (or infamy).⁹¹ Cutler didn't seem to mind, but Robert not surprisingly did; he filed a lawsuit against Cutler in May 2005 for "invasion of privacy for public revelation of private facts."⁹² Robert presumably could not file for defamation; he did not contest the accuracy of Cutler's descriptions and accounts of his sexual preferences and proclivities.⁹³

Possible solutions to the problem

Because anonymous expression is so valued in American democracy, solutions must be found to the problems it creates with respect to defamation. Possibilities include a statutory response, such as § 230 of the Communications Decency Act (CDA) that immunizes ISPs against libel claims⁹⁴; clarity from the Supreme Court, which has yet to specifically address online anonymous defamation; decisions and determinations by federal courts, including the many John Doe disclosure tests they have promulgated; self-regulation by publishers, ISPs, and distributors; and ethical conduct by the online anonymous speakers themselves.

Jason Miller pointed out the problem in proposing to Congress a legislative response: Legislators generally do not listen or attend to what professors and journal

⁹¹ Daniel Solove, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 53 (2007).

⁹² *Robert Steinbuch v. Jessica Cutler*, 8th Cir. U.S. (2005).

⁹³ *Ibid.*

⁹⁴ This "Good Samaritan" provision or safe harbor was legislated in response to the uncertainty created by two almost diametrically opposite rulings in cases involving assigning liability to ISPs or, more generally, providers of interactive computer services: *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 2005). Congress was worried that the Stratton decision would "create a disincentive for ISPs to regulate obscene content on their sites, and concerned that the decision would have a chilling effect on Internet speech and growth" (Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 *AMER. U. L. REV.* 1455 [2006]).

authors have to say, including law professors and law students.⁹⁵ So scholars who recommend changes to § 230 or that Congress legislate a policy for anonymous expression similar to the DMCA's takedown notice are the functional equivalent of cries in the wilderness. Brian Kalt's celebrated failure to rouse Capitol Hill's attention to a loophole in the law that seemingly allows homicide in a national park dramatizes this congressional reluctance.⁹⁶

Self-regulation by publishers, ISPs, and distributors is perhaps too much to hope for, as an October 2010 decision by NPR to outsource monitoring of the comment sections of its website underlines. The amount of anonymous expression, the sheer number of commenters online, demonstrates that Internet publishers are overwhelmed in and by online expression, including anonymous online expression. In addition, § 230 of the CDA removes much of the incentive to conduct this sort of surveillance or self-regulation, stripping away as it does liability for actionable material posted by third parties as long as the ISP did not assist in the creation or development of the statement.⁹⁷

Specifically, § 230 states that “no provider or user of an interactive computer

⁹⁵ JASON C. MILLER, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 JOURNAL OF TECHNOLOGY LAW & POLICY 230 (2008). Available at SSRN: <http://ssrn.com/abstract=1365326>Who's.

⁹⁶ Brian C. Kalt, *Tabloid Constitutionalism: How a Bill Doesn't Become a Law*, G'TOWN L. J. (2008). Available at SSRN: <http://ssrn.com/abstract=1136301>. In Kalt's argument, a loophole exists because though Yellowstone National Park is governed by District Court for the District of Wyoming, parts of the park are also in Montana and Idaho. Because of Article III of the U.S. Constitution, which requires that criminal trials be held in the state where the crime is committed, a crime committed in Idaho could not be adjudicated (1972).

⁹⁷ Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. §230 (2003). Some case law indicates that ISPs will be deemed not liable even when and where they do take an active role in the creation of content through editorial control. See *Zeran v. America Online, Inc.*, 29 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 27 Med. L. Repr. 1794 (D.N.M., Mar. 1, 1999), *aff'd*, 206 F.3d 980 (10th Cir., Mar. 14, 2000), *cert. denied*, 531 U.S. 824 (Oct. 2, 2000); and *Batzel v. Smith*, 372 F.Supp.2d 546 (2005).

service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹⁸ The statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”⁹⁹ In *Zeran v. America Online*, the Fourth Circuit determined that exercising traditional editing functions such as deciding whether to publish, withdraw, postpone, or alter content are not enough to transform an individual from a provider or user of an interactive computer service to an information content provider and, therefore, to surrender or otherwise become ineligible for immunity.¹⁰⁰ This ruling is a bit confusing given the statute’s verbiage, which defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”¹⁰¹ The CDA’s § 230 seems to suggest, then, in contrast to common law, that an interactive computer service could select, publish or re-publish a defamatory statement made by a third party, then refuse to remove the statement even after learning that the statement is false.¹⁰² The immunity available in the CDA, therefore, makes self-regulation implausible.

If the ethical practices of anonymous speakers online could be counted on to solve the problem of defamation, this Note would not need to be written, for there would be no

⁹⁸ §230 (f)(2).

⁹⁹ §230 (f)(2).

¹⁰⁰ *Zeran*, 129 F.3d at 330.

¹⁰¹ §230 (f)(3), cited in *Whitney Information Network, Inc. v. Xcentric Ventures, L.L.C.*, 199 F. App’x 738 (11th Cir. 2006), at 744.

¹⁰² Compare to the common law tort of defamation as articulated in the RESTATEMENT (SECOND) OF TORTS § 558 (1977), which provides a legal remedy to those injured by false statements that damage their reputation or good name.

problem in balancing the two rights. Much of anonymous expression is not ethical, which is not to speak to its legality or illegality, but some of it does unlawfully defame, and the problem seems to be worsening. In late 2010, a Montana newspaper described its slow realization that civility in anonymous forums is simply unattainable. “We clung to the hope that civility would win out — that the verbal vandals who inhabit anonymous forums would get tired of lobbing invective grenades and eventually contribute a useful thought,” wrote online specialist and reporter Donna Evaro and co-managing editor Gary Moseman, both of the *Great Falls Tribune*. “But, disappointed, we give up.”¹⁰³ The article cites an innocuous example, of a story on tax policy, a story that generated approximately 140 anonymous comments, half of which were deemed to have crossed the line into obscenity, libel, personal attacks, or otherwise irrelevant commentary. The courts, too, are finding themselves increasingly busy with defamation claims and disclosure motions, making the problem of anonymous “screech,” as one newspaper article described it, a growing one.¹⁰⁴ Between April 2009 and March 2010, approximately fifty libel cases involving anonymous bloggers had been added to the database of the Media Law Resource Center.¹⁰⁵

Scholars hoping to help in this area are left with the federal courts as their best option. In navigating, analyzing, and adapting the competing discovery tests that have

¹⁰³ *Tribune aims to make forums, comments, welcoming to all*, GREAT FALLS TRIBUNE, Dec. 26, 2010, available <http://www.greatfallstribune.com/article/20101226/OPINION/12260311/Tribune-aims-to-make-its-forums-comments-welcoming-to-all>, visited Jan. 1, 2011.

¹⁰⁴ Mackenzie Carpenter, *Free speech, privacy clash online: Anonymous bloggers and the websites that post their comments leading to lawsuits*, PITTSBURGH POST-GAZETTE, March 21, 2010, A10.

¹⁰⁵ *Id.* The article documents the “increasing number of legal actions against bloggers and websites” on defamation and privacy questions. The Center reported 250 legal actions involving bloggers since 2004, according to the article.

been generated by these courts, this Note, therefore, seeks to aid development of a national standard via the adoption of a Dendrite-type test, which was most carefully constructed, slightly modified, and persuasively explained in a subsequent case, *Independent Newspapers v. Zebulon J. Brodie*.¹⁰⁶

A single, coherent national standard

As of March 2011, more than twenty courts had issued disclosure tests or otherwise outlined criteria to determine when and under what circumstances to compel the discovery of an online anonymous poster or speaker in a defamation action. Because these tests have come almost exclusively from state and federal district courts, there is variety in what they require, in particular how strong a case a plaintiff should have to demonstrate before a court will issue a disclosure subpoena, which is “the critical element in each of the tests articulated by the courts.”¹⁰⁷

The Appellate Division of the Superior Court of New Jersey was the first appellate court in the United States to propose such a balancing standard, with the Brodie court in Maryland being only the second. The New Jersey court did so by ruling on two cases on the same day in July 2001. In the first, *Dendrite Int’l, Inc. v. Doe No. 3*, the court proposed a test that upheld a trial court’s requirement that the plaintiff, a developer of software for the pharmaceutical industry, attempt to notify the anonymous posters it wished to sue that they were the subjects of an application for discovery by at least posting a notice on the same Internet message board on which the potentially actionable

¹⁰⁶ *Independent Newspapers v. Zebulon J. Brodie*, 407 Md. 415, 966 A.2d 432 (2009).

¹⁰⁷ Kissinger and Larsen, *Untangling the Legal Labyrinth*, supra note 6 at 18.

content first appeared.¹⁰⁸ The court reasoned that the John Does should have a reasonable opportunity to file and serve opposition to the application. Virtually all of the various subpoena standards include this notice factor introduced by the Dendrite court, though how an anonymous speaker should be notified and how long he or she has to respond to the notice varies.¹⁰⁹

In the second part of the Dendrite test, the appellate court ruled that the company was required to “identify and set forth the exact statements purportedly made by each anonymous poster” that the company deemed defamatory.¹¹⁰ This level of specificity of evidence also is common in the various subpoena standards, presumably in order to prevent plaintiffs from using unfounded allegations as a cover, as well as to allow a defendant to examine and rebut the claims. The courts seem to agree that there is a need to balance the plaintiff’s right to protect his or her reputation against the defendant’s right to speak anonymously and, further, that a primary way to do this is to require an evidentiary showing on the merits of the plaintiff’s claim and some demonstration of need for the identifying information in order to proceed with the action.¹¹¹

¹⁰⁸ *Dendrite Int’l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001).

¹⁰⁹ Decisions with this criterion include *AutoAdmit.com*, 561 F. Supp. 2d at 254; *Seescandy.com*, 185 F.R.D. at 579; *Mobilisa*, 170 P.3d at 721; *Krinsky*, 72 Cal. Rptr. 3d at 244; *Cahill*, 884 A.2d at 460–61; *Solers*, 977 A.2d at 954; *Brodie*, 966 A.2d at 457; *Dendrite*, 775 A.2d at 760; *Quixtar*, 566 F. Supp. 2d at 1212–13, 1216–17; *Best Western Int’l*, 2006 WL 2091695, at *6; and *Greenbaum*, 845 N.Y.S.2d at 698. Two decisions notably do not include this: *2TheMart.com*, 140 F. Supp. 2d at 1095; and *AOL*, 52 Va. Cir. at 37.

¹¹⁰ *Dendrite Int’l, Inc. v. Doe No. 3*, at 4.

¹¹¹ *Sinclair*, 596 F. Supp. 2d at 132, 134; *Quixtar*, 566 F. Supp. 2d at 1212–13, 1216; *McMann*, 460 F. Supp. 2d at 268; *Best Western Int’l*, 2006 WL 2091695, at 4–5; *Highfields Capital*, 385 F. Supp. 2d at 970; *Alvis Coatings, Inc.*, 2004 WL 2904405, at 3; *SPX Corp.*, 253 F. Supp. 2d at 978; *Baxter*, 2001 WL 34806203, at 12; *Greenbaum*, 845 N.Y.S.2d at 698–99; *Reunion Indus.*, 80 Pa. D. & C.4th at 456; *Polito*, 78 Pa. D. & C.4th at 341–42; *In re Does 1–10*, 242 S.W.3d at 821; *Seescandy.com*, 185 F.R.D. at 579–80; *Cahill*, 884 A.2d at 459; *Dendrite*, 775 A.2d at 770–71; and *Mobilisa*, 170 P.3d at 720–21.

Third, the Dendrite court stated that it would carefully review the case to see whether the plaintiff had established a *prima facie* case against each John Doe or, in other words, that present is a strong factual case that supports a legally reasonable claim. The Dendrite court required that the plaintiff “produce sufficient evidence supporting each cause of action.”¹¹² Finding that Dendrite had failed to make a *prima facie* case because it could not demonstrate a connection between the allegedly defamatory posts and a drop in its stock price, the subpoena was quashed and the case dismissed. In applying the standard to the facts of the case, the court found that Dendrite had failed to produce sufficient evidence for each element of its defamation claim because it had not produced evidence of harm resulting from the anonymous speaker's statements.¹¹³

This *prima facie* case factor explains in part why the Dendrite test has proven so durable even though Dendrite is one of the earlier decisions in this area of the law; most courts since 2007, with some notable exceptions, have adopted versions of this *prima facie* case standard or threshold in determining what level of burden to place on a plaintiff to appropriately protect against the chilling effect on anonymous Internet speech, and the Dendrite opinion has been extensively cited by courts in developing their own standards.¹¹⁴ These subsequent thresholds have ranged from low to high, with the *prima*

¹¹² 775 A.2d, at 756.

¹¹³ *Id.*, at 763.

¹¹⁴ Some of the cases citing or otherwise noting the test promulgated in Dendrite include *Doe I v. Individuals (AutoAdmit.com)*, 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008); *Mobilisa, Inc. v. Doe 1*, Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 244–45 (Ct. App. 2008); *Doe No. 1 v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009). *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132–34 (D.D.C. 2009); *Quixtar Inc. v. Signature Management Team, LLC*, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008); *McMann v. Doe*, 460 F. Supp. 2d 259, 266–68 (D. Mass. 2006); *Best Western Int’l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at 4–6 (D. Ariz. Jul. 25, 2006); *Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969, 970–71 (N.D. Cal. 2005); *Alvis Coatings, Inc. v. Does 1 Through 10*, No. 3L94 CV 374-H, 2004 WL 2904405, at 3–4 (W.D.N.C. Dec. 2, 2004); *Greenbaum v. Google, Inc.*, 845

facie case standard placing a relatively high burden on the plaintiff. On the low end of the spectrum is the “good faith” test, which requires only that the plaintiff demonstrate “a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed.”¹¹⁵ In the middle are requirements to demonstrate that the claim can survive a motion to dismiss and another that the claim can withstand a motion for summary judgment, the latter being most often applied when the plaintiff is a public figure in order to avoid or stop trivial defamation lawsuits meant to primarily harass or unmask a critic.¹¹⁶

Finally, the most controversial of the test’s criteria: the Dendrite court added a separate balancing factor, determining that the John Does’ First Amendment right of anonymous free speech had to be balanced against Dendrite’s claim that the disclosure of the defendants’ identities was required, even after demonstrating a prima facie case, for the action to proceed.¹¹⁷ The Dendrite court introduced this notion of an explicit balancing factor in a test or standard that as a whole is constructed also to balance the First Amendment rights of the anonymous speaker against the strength of the plaintiff’s

N.Y.S.2d 695, 698–99 (Sup. Ct. 2007); *Reunion Industries, Inc. v. Doe 1*, 80 Pa. D. & C.4th 449, 456 (Com. Pl. 2007); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 March Term 2004, 2006 WL 37020, 8–9 (Pa. Com. Pl. Jan. 4, 2006); *Polito v. AOL Time Warner Inc.*, 78 Pa. D. & C.4th 328, 341 (Com. Pl. 2004). For a comprehensive cataloging of these tests, see Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. Rev. 833, Mazzotta (2010), available at <http://ssrn.com/abstract=1651917>, visited Nov. 1, 2010.

¹¹⁵ *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, 52 Va. Cir. 26, 37 (Cir. Ct. 2000). Also using a “good faith” standard was *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

¹¹⁶ For “motion to dismiss” standard, see *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (considering disclosure of an anonymous defendant in a trademark infringement claim); for “summary judgment,” see *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007) (considering a John Doe subpoena in a claim of trespass to chattels).

¹¹⁷ 775 A.2d at 760.

case and the need for disclosure to pursue that case.

The separate balancing factor has been rejected by some judges, though for different reasons. Some regard the additional step or balancing unnecessary and potentially confusing to the trial courts. One of the judges in the Brodie case, for example, concurred on the majority's decision and, in so doing, on the application of four of the five prongs or factors of the court's test, but he disagreed with the additional and discrete balancing test, calling it "unnecessary and needlessly complicated."¹¹⁸ The balancing prong was unnecessary in the judge's view because requiring a plaintiff to make a prima facie showing was in itself the balancing. By adding a separate First Amendment balancing prong or factor, trial courts could determine that a plaintiff's cause of action for defamation should not go forward even though that plaintiff met, on a prima facie basis, all of the common law requirements. Furthermore, in granting the trial courts this discretion, the majority decision in Brodie failed to specify "how the interests that trial courts are to balance differ from the interests that are already balanced in developing the substantive law of defamation," Judge Adkins wrote.¹¹⁹

This separate balancing prong was not controversial in *Dendrite*. In applying its own four-part test to the facts, the *Dendrite* court focused on the third prong, or on whether or not John Doe No. 3's statements were in fact defamatory. The lesson of *Dendrite* was that unless a defamed company can prove harm at the beginning of its case, the company will be unable to meet the *Dendrite* standard required to obtain the identities of anonymous Internet posters, which raises the question of why a plaintiff should have

¹¹⁸ *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (Md. 2009), (Adkins, J., concurring opinion at 458).

¹¹⁹ *Id.*, at 3.

to prove harm even in the discovery phase, before a defendant has even been identified and, therefore, when harm is not (yet) a part of the claim.

In the second case decided that summer day in 2001, *Immunomedics, Inc. v. Doe*, the same New Jersey court held that when an employer can demonstrate that an employee has breached his or her employment agreement or duty of loyalty by posting messages on the Internet that reveal the employer's confidential and proprietary information, the Dendrite standard can be more easily met by essentially waiving the need to demonstrate harm.¹²⁰ The trial court declared that the employee had "contracted away her right of free speech" when she signed a confidentiality agreement with the biopharmaceuticals manufacturer and that "there is no right to anonymous speech that harms another."¹²¹ The appellate court upheld this finding, then applied the Dendrite test, the standard the court had just adopted in Dendrite. Because Immunomedics had demonstrated that the poster was an employee and that the posts had breached her employment agreement, the disclosure of Jean Doe's identity was fully warranted, the court ruled. Furthermore, anonymous Internet posters under private contract "cannot hope to shield their identity and avoid punishment through invocation of the First Amendment," in the words of the opinion.¹²²

Another popular but markedly different standard used by the courts emerged from *Doe v. Cahill* in 2005, when a Delaware court held that a summary judgment standard is "the appropriate test by which to strike the balance between a defamation plaintiff's right

¹²⁰ *Immunomedics, Inc. v. Doe*, 342 N.J. Super. 160 (App. Div. 2001), <http://caselaw.findlaw.com/nj-superior-court-appellate-division/1283697.html>.

¹²¹ *Id.*

¹²² *Id.*

to protect his reputation and a defendant's right to exercise free speech anonymously.”¹²³

The court used a two-part standard that required the plaintiff, a Smyrna, Delaware, councilman, to take reasonable efforts to notify the anonymous defendant, a local blogger, and also to present evidence sufficient enough to establish “a prima facie case for each element of the claim,” a comparable burden on the plaintiff as that prescribed in *Dendrite*.¹²⁴ The Cahill court departed from *Dendrite* in two important ways. First, this court determined that public figure plaintiffs should not be required to provide evidence of “actual malice,” at least in the discovery phase, arguing that knowing the identity of the blogger is necessary before such a showing could be made.¹²⁵ Second, the Cahill court deemed the separate, additional balancing step unnecessary because the “summary judgment test is itself the balance.”¹²⁶

In deferring whether a public figure must meet a fault threshold of actual malice, the Cahill court made an important determination. In *Times v. Sullivan*, the Supreme Court significantly limited the defamation tort for public officials, requiring them to prove a fault level of actual malice to win a claim. Meeting this threshold of fault means proving or demonstrating that the person who made the defamatory, false statement either knew that that statement was untrue or behaved in such a way as to show “reckless disregard of whether it was true or not,” a reckless disregard for the truth.¹²⁷ Ten years

¹²³ *John Doe v. Cahill*, 884 A.2d 460 (Del. 2005).

¹²⁴ *Id.* at 460-61.

¹²⁵ *Id.* at 464. Some have argued that public figure plaintiffs bringing claims concerning public speech should have to produce evidence of actual malice (Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1243 (2007)).

¹²⁶ *Cahill*, 884 A.2d at 457.

after *Times v. Sullivan*, the Court imposed a similar limitation on “public figures,” or people who have gained a general level of notoriety or have voluntarily taken a public role in a particular public controversy or issue.¹²⁸ Since the ruling in *Gertz v. Welch* in 1974, well-known people have had to prove that a speaker who makes a defamatory statement intentionally lied. Private figures, on the other hand, have needed to prove only that the speaker or publisher was “negligent” in producing false statements, because every individual should have the right to protect his or her good name, described by the *Gertz* court as “the essential dignity and worth of every human being.”¹²⁹ The *Cahill* court could have asserted this same reasoning in this new area of the law, but instead sidestepped this question.

The *Cahill* court also reasoned that a victim of online speech criticism should be able to respond in the same forum in which the defamation appeared, and thereby “easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight.”¹³⁰ This is problematic, however, because there is little hope of reaching the same readers of the initial defamation, even on the same forum, especially given the ephemeral nature of most online expression. This type of retributive response is also likely to contribute to a tit-for-tat war of words, which is the opposite of what the common law is intended to accomplish.¹³¹

¹²⁷ *New York Times Co. v. Sullivan*, 254, 280 (1964).

¹²⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 342 (1974).

¹²⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 341 (1974), quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring).

¹³⁰ *John Doe v. Cahill*, at 464.

¹³¹ *Malloy*, 1192.

These early cases show variety in factors and in the burden of proof required of plaintiffs. As Matthew Mazzotta showed in his careful examination of ten representative tests, the trend in these standards is “towards requiring either prima facie evidence or summary judgment showings,” the standards in *Dendrite* and *Cahill*, respectively, because courts are increasingly concerned that lower thresholds like good faith or motion to dismiss are too low and thus more likely to be misused.¹³² The findings of Kissinger and Larsen support this description.¹³³ The courts seem generally split on which threshold for evidentiary showing is more appropriate, prima facie evidence or likely survival of a motion for summary judgment. This Note argues for the former as a higher burden of proof because, as a California court found in 2006, a “good faith” standard is too deferential to plaintiffs, while a summary judgment standard can be “unnecessary and potentially confusing.”¹³⁴ In *Krinsky v. Doe No. 6*, the court defined prima facie evidence as a demonstration of a legally reasonable claim and a strong factual case absent contrary facts, rebuttals from the defendant(s), and affirmative defenses.¹³⁵

The Brodie test

In *Independent Newspapers v. Brodie* (2009), a Maryland appellate court seemed to achieve the requisite balance between reputational concerns and free expression rights in

¹³² Matthew Mazzotta, *supra* note 114, 51 B. C. L. REV. 833, 851-852. See also AutoAdmit.com, 561 F. Supp. 2d at 255-56; *Mobilisa*, 170 P.3d at 720; *Krinsky*, 72 Cal. Rptr. 3d at 244-45; *Cahill*, 884 A.2d at 457-60; *Solers*, 977 A. 2d at 952-54; *Brodie*, 966 A.2d at 456-57; *Dendrite*, 775 A.2d at 760, 769-71.

¹³³ Kissinger and Larsen, *supra* note 6 at 24.

¹³⁴ *Krinsky v. Doe No. 6*, 74 Cal. Rptr. 3d at 244 (2006).

¹³⁵ *Id.*, at 245, n. 14.

promulgating a standard informed by those that preceded it.¹³⁶ A product of one of the Maryland court’s “first opportunities to consider legal issues arising from an Internet communications context,” the balancing test that was promulgated in the case flows from a few fundamental assumptions, legal facts, and traditions.¹³⁷ First, as the Brodie opinion states in its opening, “[i]ncluded within the panoply of protections that the First Amendment provides is the right of an individual to speak anonymously,”¹³⁸ recognizing that “the freedom to think as you will and to speak as you think’ is a ‘means indispensable to the discovery and spread of political truth.’”¹³⁹ Second, citing *Reno v. ACLU*, the Brodie court likened the Internet’s web to “a vast library including millions of readily available and indexed publications,” an analogy that compares expression online to expression in print rather than that spoken or even broadcast, a categorization that affords online expression the very highest levels of First Amendment protections.¹⁴⁰ The Brodie court noted that protections under the First Amendment have been extended to the Internet in John Doe actions by various courts.¹⁴¹

¹³⁶ *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (Md. 2009).

¹³⁷ *Id.*, 1-2.

¹³⁸ *Id.*, at 10, citing *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166, 122 S. Ct. 2080, 2089, 153 L. Ed. 2d 205, 219 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200, 119 S. Ct. 636, 646, 142 L. Ed. 2d 599, 614 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42, 115 S. Ct. 1511, 1516, 131 L. Ed. 2d 426, 436 (1995); *Talley v. California*, 362 U.S. 60, 64, 80 S. Ct. 536, 538, 4 L. Ed. 2d 559, 563 (1960).

¹³⁹ 407 Md. 415, 966 A.2d, at 9, citing *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 1787-1788, 29 L. Ed. 2d 284, 293 (1971) and quoting *Whitney v. California*, 274 U.S. 357, 375-377, 47 S. Ct. 641, 648-649, 71 L. Ed. 1095, 1105-1106 (1927) (Brandeis & Holmes, JJ., concurring), overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. The opinion then quotes Stevens’s *McIntyre* opinion at length (*McIntyre*, 514 U.S. at 341-42, 115 S. Ct. at 1516, 131 L. Ed. 2d at 436).

¹⁴⁰ 407 Md. 415, 966 A.2d, at 6, citing *Reno v. ACLU*, 521 U.S. 844, 852-53, 117 S. Ct. 2329, 2335, 138 L. Ed. 874, 885-86 (1997).

¹⁴¹ As evidence, the court cites several well known John Doe cases discussed or otherwise referenced in this

The court recognized, however, that in a “confrontation between defamation law and the use of the World Wide Web,”¹⁴² the right to anonymity is not absolute and “may be limited by defamation considerations,” because “libelous utterances are not within the area of constitutionally protected speech,” are not an “essential part of any exposition of ideas,” and are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,” to quote various parts of the opinion.¹⁴³ After very carefully defining the relevant technical terms and technologies, and laying out the facts of the case, the Brodie court explicitly states that it did not grant appeal simply to evaluate the parties’ claims, “but to provide guidance to the trial courts in defamation actions, when the disclosure of the identity of an anonymous Internet communicant is sought.”¹⁴⁴

The Brodie test recommends that in determining whether to force disclosure of a John Doe defendant, a court should (1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board; (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application; (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster alleged to constitute actionable speech; (4) determine whether the

Note, including *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash 2001); *Cahill*, 884 A.2d at 456; *Dendrite Int’l, Inc. v. John Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

¹⁴² *Id.*, at 6.

¹⁴³ *Id.*, at 14, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031, 1035 (1942).

¹⁴⁴ 966 A.2d 432 at 447.

complaint has set forth a prima facie defamation action against the anonymous posters; and (5), if all else is satisfied, balance the anonymous poster's First Amendment right of free speech against the strength of the prima facie case presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity.¹⁴⁵

After carefully reviewing the standards issued in Cahill, Dendrite, Columbia Insurance Co. v. Seescandy.com, Doe v. 2theMart.com, Mobilisa v. Doe, and Sony Music Entertainment v. Does 1-40, the Brodie court issued its own criteria for determining whether a plaintiff has established a prima facie case for defamation, requiring evidence (1) the defendant made a defamatory statement to a third person, (2) the defamatory statement is false, (3) the defendant has been shown to be legally at fault in making the statement, (4) the plaintiff has demonstrated that he or she has suffered harm. These criteria are consistent with the major libel case precedents for libel per se since Times v. Sullivan in 1964 and before, and they cite specifically the criteria from Offen v. Brenner (2007), a libel suit also decided by the Maryland Court of Appeals.¹⁴⁶ (For a claim of defamation per quod, the Brodie court recommends requiring that extrinsic facts be stated in the complaint to establish the defamatory character of the words or conduct.¹⁴⁷)

In requiring a prima facie showing, the Brodie test would seem to avoid either

¹⁴⁵ Id., at 457.

¹⁴⁶ Offen v. Brenner, 402 Md. at 198, 935 A.2d 719, 724 (2007).

¹⁴⁷ The court cited M & S Furniture Sales Co., Inc. v. Edward J. De Bartolo Corp., 249 Md. 540, 544, 241 A.2d 126, 128 (1968) as precedent for this threshold. Libel per quod cases are rare because they involve a statement that is interpreted as non-harmful except when seen in a particular context, or that becomes libelous when something else, something not explicit in the statement, is added, typically by the plaintiff and typically something widely known, though not necessarily known to the speaker.

setting the threshold too low and, therefore, limiting or chilling free speech on the Internet. The Brodie court wisely eschews the lower “good faith basis” or “motion to dismiss” thresholds articulated in *Doe v. 2theMart.com* and *Columbia Insurance v. Seescandy.com*, respectively, as too restrictive of Internet expression. Only a few courts, in fact, have adopted the low “good faith” standard.¹⁴⁸ Justifying a higher threshold is the Internet’s unprecedented capacity to foster a marketplace of ideas, where, in the words of the Brodie opinion, “boundaries for participation in public discourse melt away, and anyone with access to a computer can speak to an audience ‘larger and more diverse than any of the Framers could have imagined.’”¹⁴⁹ This capacity, as well as others to “bypass commercial publishers and editors to transcend cultural and geographic barriers,” and to forge consensus on issues of public concern, are not theoretical but practical, and in promoting public discourse they “must be guaranteed the protection of the First Amendment,” the Brodie opinion very persuasively argues.¹⁵⁰

The Brodie balancing test also avoids setting the threshold too high by stopping short of requiring a showing of prima facie evidence for *all* elements of the plaintiff’s

¹⁴⁸ In addition to *2themart.com* and *Seescandy.com* cases, see *In re AOL*, 52 Va. Cir. 26, 37 (Cir. Ct. 2000); and *Klehr Harrison Harvey Branzburg & Ellers v. JPA Development WL 37020* (2005), in which the circuit court allowed a Philadelphia law firm to learn the identities of anonymous authors posting defamatory material on various websites by relying on Pennsylvania Rule of Evidence 4011, which prohibits only discovery that is sought in “bad faith” or would cause “unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party” (at 16). All a plaintiff needed to demonstrate, in other words, was “good faith” in pursuing the claim (at 4). The Klehr decision points to the need for a national standard.

¹⁴⁹ *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (Md. 2009), at 45, citing *Reno v. ACLU*.

¹⁵⁰ *Id.*, paraphrasing and quoting Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 634 (1990); and Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L.J. 855, 893-95 & n. 204 (2000).

claim, a standard that essentially requires that plaintiff to prove his or her case before even identifying whom he or she would be suing. Such a threshold would deprive the plaintiff of judgment as a matter of law. More generally, such a threshold would undermine personal accountability for what a person posts or publishes.

The fifth prong of the Brodie test, a separate balancing factor, is critically important in allowing trial courts to consider the causes of action and “the verifiable need for the particular identifying information sought,” to quote Mazzotta.¹⁵¹ By applying this fifth prong and balancing the anonymous poster’s First Amendment right of free speech against the strength of the prima facie case and the necessity for disclosure, the court can consider additional factors not specifically addressed by the test’s other prongs. These additional factors include whether the statements in question are part of an issue or debate of public concern, which would favor non-disclosure, or of a purely private nature; whether the statements could be considered expression for the purposes of whistleblowing; whether the scope of the unmasking request is too broad; and whether the plaintiff seeking disclosure is a public official, public figure, or private individual.

In determining plaintiff status, the court can consider which level of fault to require the plaintiff to show. In the absence of a state or federal anti-SLAPP statute, a separate balancing factor also allows a court to consider whether the action is primarily meant to chill speech or punish a speaker, a consideration relevant even after a plaintiff has made a legitimate evidentiary showing on the merits of his or her claim. In other words, a separate balancing prong would allow courts do recognize SLAPP suits as efforts to circumvent traditional First Amendment free speech concerns by subterfuge,

¹⁵¹ Mazzotta, supra note 114 at 802.

even in states lacking an anti-SLAPP statute.¹⁵²

The additional opportunity to balance competing rights and interests provided by the fifth and separate prong also gives a court the opportunity to consider the speaker's expectation of privacy, or "the potential consequence of a discovery order to the speaker and others similarly situated," as the *Mobilisa* court put it. Other "potential consequences" include harassment, intimidation, or silencing speakers who have done nothing wrong. The fifth prong also allows consideration of any claim of opinion privilege or protection for opinion, and the relevance of the identifying information to pursuing the claims. Finally, the court can consider whether the identifying information can be obtained another way.¹⁵³

To sue under privacy torts, typically a plaintiff must demonstrate publication of private truths, in contrast to the false statements that are at the center of most libel claims.¹⁵⁴ In addition, such publication typically has to concern issues or information in which the public has no legitimate concern and which would shame or humiliate a "reasonable" person. The fifth First Amendment balancing prong allows a court to consider the privacy concerns of both the plaintiff and the defendant in an effort at discovery.

Speaking to claims of statement of opinion as opposed to statement of fact, the U.S. Supreme Court has stopped short of creating a categorical defamation exemption for opinion, and it has narrowly defined opinion to statements that cannot be proved false or

¹⁵² George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989).

¹⁵³ *Mobilisa*, 170 P.3d at 720-21, 723-24.

¹⁵⁴ See *Danielle M. Dwyer v. Dirty World* (9th Cir., Ariz. 2011).

that cannot be reasonably interpreted as stating actual facts about an individual.¹⁵⁵ Statements that are not susceptible to being proved true or false should be protected, and the separate fifth prong allows if not invites a court to consider the published comments in this light. Where the comments constitute opinions, even rude ones, they generally should not form the basis of a libel claim. Where a court determines that published or posted online expression is merely opinion as opposed to a statement of fact, that court can dismiss the case because the First Amendment has been interpreted to exclude the government from having any jurisdiction over ideas, a notion known as the protective speech doctrine of opinion.¹⁵⁶ Such a consideration could help courts prevent plaintiffs from “sidestepping the protections of the First Amendment simply by engaging in creative pleading,” as Mazzotta observed.¹⁵⁷

The fifth and separate balancing factor also mitigates the chief weakness of requiring a prima facie case, which is that not all elements of a particular claim are within the plaintiff’s control, especially the identity of the anonymous speaker, a fact noted by the Mobilisa court.¹⁵⁸ A court should require plaintiffs to substantiate only those elements they can control, or those elements that are not dependent on unmasking. Though this caveat lowers the prima facie standard somewhat, the fifth and separate balancing factor allows a court to consider what the plaintiff should be able to show without weakening

¹⁵⁵ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

¹⁵⁶ *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 339-40 (1974); *Henry v. Nat’l Assn of Air Traffic Specialists Inc.*, 836 F. Supp. 1204, 1214 (D. Md. 1993); *Gifford v. Nat’l Enquirer Inc.*, 1993 WL 767192, at *5 (C.D. Cal.); *Davis v. Ross*, 754 F.2d 80, 85 (2d Cir. 1985); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977), cert. denied, 434 U.S. 834 (1977); *Greenbaum v. Google, Inc.*, 18 Misc. 3d 185, 845 N.Y.S.2d 695, 226 Ed. Law Rep. 237 (Sup 2007). In the Greenbaum case, the court observed that the statements of the pseudonymous “Orthomom” about a school board member were protected opinion.

¹⁵⁷ Mazzotta, *supra* 132 at 863.

¹⁵⁸ *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007).

the overall standard implicit in the whole of the test. This reason alone would seem to justify inclusion of this fifth factor in any national standard.

Finally, the fifth factor, as mentioned, allows a court to consider the status or category of the plaintiff and whether subpoenas to reveal a speaker's identity should be more difficult to obtain for public figures, recognizing that public figures typically enjoy greater access to media and, therefore, can more realistically counteract or respond to false statements than can private citizens.¹⁵⁹ In differentiating public figures from private citizens, the courts could at the same time distinguish online harassment from public debate, the latter of which merits strong constitutional protection and, to protect that public debate, has inspired anti-SLAPP statutes in some states. The requirement for clear and convincing evidence of actual malice has proven, quoting *Gertz v. Welch*, “an extremely powerful antidote to the inducement to . . . self-censorship.”¹⁶⁰ By applying this fifth factor, a court can require either proof of actual malice, which seems excessive at the subpoena stage, or at least a demonstration of the likelihood of being able to produce evidence of actual malice at trial. For public figure plaintiffs, a court could, in balancing the claims and the First Amendment, require that there be no other reasonable inference that is more likely to be true than that the anonymous speaker published with actual malice.¹⁶¹

¹⁵⁹ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); *Gertz v. Welch*, 418 U.S. 344 (1974). It is recognized that the egalitarian nature of web publishing and Internet communication has diminished this advantage somewhat.

¹⁶⁰ *Gertz v. Welch*, supra 155 at 342. The question of whether a person is a “limited public purpose” figure can be difficult and expensive to determine.

¹⁶¹ A similar standard was applied in a securities fraud case, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), a standard from the Private Securities Litigation Reform Act of 1995, specifically at 15 U.S.C. § 78u-4(b)(2) (2000). as Gleicher pointed out (at 356).

Of course defining who is a public figure can be difficult; public figures typically fit one of two descriptions: those who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes” or those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹⁶² The plaintiff category of public official, while clearer or more clearly demarcated than public figure, also can prove difficult to apply in some cases.

In short, while admittedly inviting some variance in how the national standard is applied, a separate balancing factor in that test would give the courts a final opportunity to step back to view the claim or contest holistically and in the context of the First Amendment. Because defamation law limits expression, and because so many suits are frivolously or malevolently brought to intimidate, such a factor would offer a reasonable safeguard against unnecessary disclosure. The factor is unlikely to, in Judge Adkins’s words, encourage or produce a “superlaw of Internet defamation that can trump the well-established defamation law.”¹⁶³ Rather, adoption of a separate balancing factor would do much to protect anonymous expression online from frivolous claims of defamation, not to mention tort action threats against anonymous speakers brought by mainly corporate entities for such separate claims as computer fraud, trademark infringement, Lanham Act violations, trade secret misappropriation, tortious interference with contracts, unfair competition, deceptive trade practices, unjust enrichment, violations of federal electronic

¹⁶² Gertz v. Welch, at 345.

¹⁶³ Id.

communications law, and even trespass to chattels.¹⁶⁴

Against a DMCA-style takedown notice

In advocating a national standard, this Note argues against any sort of Digital Millennium Copyright Act-like takedown notice or policy applied to defamation or, more specifically, to potentially defamatory anonymous expression online. Because the disclosure tests emerging from the appellate courts are increasingly sophisticated, resorting to a policy that could make it much easier for plaintiffs to silence speakers, just as they have done with the DMCA, by spurring ISPs to taking down legal expression out of fear of litigation if they do not, would be to compound the free speech problems of the DMCA in a new area of the law and, therefore, reverse progress made in and by the courts.

Enacted by Congress in 1998, the DMCA subjects an online service provider to distributor liability if that provider fails to remove from its service potentially copyright-infringing content posted by a third party if that provider knows or has been notified that the content infringes another's copyright.¹⁶⁵ As several legal scholars have proposed it, a DMCA-style takedown provision added to the CDA would remove § 230 immunity when and where an interactive service provider as defined by the CDA fails to remove a defamatory statement after being notified or otherwise is found to have knowledge of the defamatory nature of the statement.¹⁶⁶ Some have argued that such a notice or takedown

¹⁶⁴ For specific cases on some of these claims and questions, see Mazzotta, *supra* 132, 51 B. C. L. REV. 833 at 840, n. 64, or Gleicher, n. 38.

¹⁶⁵ H.R. Rep. No. 105-551(II), at 53-54 (1998).

¹⁶⁶ For arguments for DMCA-style liability policies for anonymous expression, see Robert T. Langdon, Note, *The Communications Decency Act § 230: Make Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. (1999); David E. Hallett, *How to Destroy a*

requirement applied to defamation online would restore the ISP and distributor liability removed by § 230 of the CDA, arguing that the CDA needs the same secondary liability provisions as those included in the DMCA.¹⁶⁷

If copyright litigation involving the DMCA is any guide, a DMCA-style takedown policy governing anonymous speech would not be in the best interests of First Amendment-protected free expression. The DMCA has criminalized legitimate research, stunted software development, and chilled expression.¹⁶⁸ Merely by threatening ISPs with litigation under the DMCA, intellectual property owners can silence speakers simply because they do not like what the online speakers have to say. This intimidation has on occasion censored First Amendment-protected parody and satire.¹⁶⁹ The Church of Scientology invoked the DMCA in calling for Google to block links to websites critical of the church, claiming that those sites were reprinting copyright-protected content owned by the church. Google blocked the sites, stating that, “Had we not removed these URLs, we would be subject to a claim of copyright infringement, regardless of its merits.”¹⁷⁰ It did not matter that the re-publishing was almost certainly protected by fair-use provisions of U.S. copyright law.¹⁷¹

Reputation and Get Away With It: The Communications Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online? 41 IDEA 259, 277 (2001); Ryan King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, DUKE L. & TECH. REV. (2003).

¹⁶⁷ See, e.g., Hallett, 260-1.

¹⁶⁸ Kembrew McLeod, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 4 (2007). McLeod describes the DMCA as “one of the biggest threats to free speech online” (213).

¹⁶⁹ *Id.*, at 213-214, describing Dow Chemical’s censoring of a group of related protest sites through the sites’ ISP.

¹⁷⁰ *Id.*, at 215, quoting statements by Google to THE CHRONICLE OF HIGHER EDUCATION.

If the DMCA has been used to erase or otherwise silence First Amendment-protected dissent and criticism, it is only logical to assume that individuals and corporate entities could and would similarly abuse a take-down policy specific to defamation. It also is probable that relatively few anonymous speakers would be willing to litigate to have their problematic expression restored. These online speakers would have to be willing to spend the money to fight back through the courts, and they would have to risk revealing their identities in order to pursue their claims, the very act of disclosure they had hoped to avoid by speaking or posting anonymously (or pseudonymously). Exposure, therefore, would be the punishment. Importantly, a federal appellate court determined that the DMCA did not allow using subpoenas to force disclosure of anonymous peer-to-peer file-sharers.¹⁷²

Furthermore, to hold ISPs liable for content published by third parties would not be unlike holding those who own walls, bridge over- and underpasses, and train cars liable for graffiti found on their property if they did not remove the graffiti in a timely manner.¹⁷³ It would often be cheaper and easier for a website to remove problematic content whenever a third party complained or cried “defamation” than to investigate the claims or default to standing by the expression under the First Amendment, a tendency

¹⁷¹ Title 17, U.S.C. § 107.

¹⁷² Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229 (D.C. Cir. 203), *cert. denied*, 543 U.S. 924 (2004).

¹⁷³ This analogy, presented here to demonstrate potential harm, is offered as an argument *for* take-down notices by Walter Pincus, in his article, *The Internet Paradox Libel, Slander & the First Amendment in Cyberspace*, 2 GREEN BAG 2d 279, 287 (1999), in which he quotes tort law: “One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication” (RESTATEMENT [SECOND] OF TORTS §577 (1977)). To support the analogy’s utility, Pincus cites two cases: *Hellar v. Bianco*, 244 P.2d 757 (Cal. Dist. Ct. App. 1942), which held the owner of a bar liable for not taking down graffiti in men’s bathroom; and *Tidmore v. Mills*, 32 So. 2d 769 (Ala. Ct. App. 1947), which concerned graffiti left on the side of a barn.

generally acknowledged in many of the arguments for a DMCA-style liability policy. An interactive computer service provider would much rather take down problematic expression than incur the expense of investigating whether in fact a statement is defamatory. It would be a greater risk, therefore, to leave up problematic expression, even First Amendment-protected expression, than to risk a lawsuit without CDA immunity.

A better solution would be for § 230 of the CDA to be rightly interpreted to grant immunity only insofar as an ISP has not made a significant contribution to the third-party material, or exercised editorial judgment that altered the meaning of that material.¹⁷⁴ As Karen Alexander Horowitz has established, decisions interpreting or otherwise relying on § 230 have been wildly inconsistent, from offering blanket immunity to depriving immunity when and where an ISP engaged in even minor editing.¹⁷⁵

Against criminalizing defamation

If a DMCA-style takedown notice is a step backward, to criminalize defamation would mark the return to a primitive era of First Amendment understanding in and by the law. Suggestions to criminalize speech are rare, and for good reason. One such suggestion, from University of Dayton law professor Susan Brenner, recommended a reconsideration of criminalizing online defamation because of “the ever-increasing influence of the

¹⁷⁴ See, e.g., *Barrett v. Rosenthal*, 40 Cal. 4th 33, 60 n. 19 (2006), where the court declared that “at some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source.” This decision also expanded § 230’s immunity to also cover an individual Internet “user” who is not a provider (*supra* note 7, at 60).

¹⁷⁵ Karen Alexander Horowitz, *When is § 230 Immunity Lost? The Transformation from Website Owner to Information Content Provider*, 3 SHIDLER J. L. COM. & TECH. 14 (Apr. 6, 2007), at <http://www.lctjournal.washington.edu/Vol3/a014Horowitz.html>, visited Nov. 3, 2010.

Internet.”¹⁷⁶ Brenner’s argument centers on the popularity of the Internet and, as a byproduct of that popularity, an increase in the potential harm of online defamation even to the level of becoming a state concern. As evidence, however, the author relies on a roster of cases that involve problems in online expression other than defamation, such as “ridicule,” “invasion of privacy,” and “false light.”¹⁷⁷ Central in the author’s argument, in fact, is the case of South Korea’s “dog poop girl,” an incident involving a dog owner traveling on Seoul’s subway system who refused to clean up after her dog. A passenger on the train shot video of the incident and posted it to the web, where the footage quickly became a sensation. However embarrassing the video might be, its publication does not meet any definition or standard of or for defamation, or it would not were a similar incident to happen in the United States.¹⁷⁸ As an event in Seoul that did not even initiate a lawsuit in the Korean courts, it is merely titillating, a red herring, and of no U.S. jurisprudential significance whatsoever.

Conspicuously absent in Brenner’s argument is even one online defamation case, specifically any one of those most frequently commented upon or cited by the courts. None of the cases discussed in this Note appear in the author’s argument. The article states that “some contend that criminal defamation is the only realistic option” for combating defamation in online spaces, but the only voices cited as making this contention are Noam Chomsky and a Canadian appellate court in a 2004 decision in property rights dispute involving a Chilean mining company.¹⁷⁹ While recommending the

¹⁷⁶ Susan W. Brenner, “Should Online Defamation Be Criminalized?” 76 *Miss. L. J.* 706 (2007).

¹⁷⁷ *Id.*, at 723-732.

¹⁷⁸ Brenner, *supra* 169 at 704. See *Korean Language Immortalizes ‘Dog Poop Girl’*, THE CHOSUN ILBO (Jan. 25, 2006), http://english.chosun.com/site/data/html_dir/2006/01/25/2006012561027.html.

imposition of criminal liability in cases in which the publication of defamatory matter “inflicted serious or substantial reputational harm,” the author cites no test cases that meet the proposed standard.¹⁸⁰ As Brenner herself acknowledges, “criminal libel is, to say the least, disfavored by American law,¹⁸¹ and it has been since 1964.¹⁸² This is true because regulation of political speech is not permitted under the First Amendment unless the restriction is narrowly tailored to serve a compelling state interest.¹⁸³ Criminalizing defamation would be an extraordinarily draconian step inconsistent with the First Amendment and one now more than forty-five years removed from the mainstream of U.S. legal interpretation.

In support of a national anti-SLAPP standard or law

Though recommending specific statutory relief (and, in the instance of arguing against a takedown notice, recommending against specific statutory responses) is problematic for the reasons previously outlined, if enacted a federal anti-SLAPP law could help balance reputational and expression rights. A federally guaranteed constitutional right is being jeopardized because SLAPPs are often brought as defamation actions with the goal of silencing legitimate speech on matters of public concern. Anti-SLAPP statutes are

¹⁷⁹ *Id.*, at 704; *Chomsky and Barrick Gold Corporation v. Lopehandia* (Ontario Court of Appeal, Docket No. C39837) (June 4, 2004) at n. 5 and 7, respectively.

¹⁸⁰ *Id.*, at 704.

¹⁸¹ *Id.*, at 720.

¹⁸² See *Times v. Sullivan*, 376 U.S. 254 (1964); *McConnell v. Federal Election Commission*, 540 U.S. 93, 265 (2003) (Thomas, J., dissenting) (“The very ‘purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail’”) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

¹⁸³ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *McIntyre v. Ohio Election Commission* (1995).

enacted to combat frivolous suits by making it easier to terminate such lawsuits at an early stage, but most of the twenty-eight states (as of March 2011) that have such laws have limited them to expression made about or otherwise linked to government officials.¹⁸⁴

To cite one example, the state of Georgia's anti-SLAPP statute "covers only speech linked to official proceedings," according to a ruling by the Georgia state Supreme Court in August 2007.¹⁸⁵ By contrast, Washington state recently revised its 1989 anti-SLAPP statute, the first in the country, in order to broaden its protections for those engaging in public free speech rather than merely those making statements directly to government officials.¹⁸⁶ Washington's revisions, which were ratified in 2009, were based on California's progressive anti-SLAPP law. The state-by-state patchwork approach and its resulting inconsistency have inspired debate on enacting a federal anti-SLAPP law by raising the question of why should a defendant in Pennsylvania or Michigan, states with no anti-SLAPP statute at all, should incur the high costs of litigation to defend against a frivolous lawsuit that in twenty-eight other states likely would be thrown out as SLAPPs.¹⁸⁷

¹⁸⁴ *Judge applies new anti-SLAPP law in Michael Moore case*, NEWS MEDIA UPDATE (Sept. 8, 2010).

¹⁸⁵ *Berryhill v. Georgia Community Support and Solutions, Inc.*, 281 Ga. Sup. Ct. 439 (2006), ruling on Code of Georgia § 9-11-11.1.

¹⁸⁶ *Judge applies new anti-SLAPP law in Michael Moore case*, NEWS MEDIA UPDATE (Sept. 8, 2010).

¹⁸⁷ Justin Kurtz, a 21-year-old college student in Kalamazoo, was sued for \$750,000 in a defamation suit by a local towing company displeased with a Facebook group Kurtz started, titled "Kalamazoo Residents against T&J Towing." T&J Towing removed Kurtz's car from his apartment parking lot and left him a \$118 fine despite the fact that Kurtz had a parking permit. The towing company argued that the car's removal was justified because the permit was not visible and claimed that the Facebook group has hurt its business. Michigan does not have an anti-SLAPP law. The judge's decision was pending when this Note was written (see *SLAPP Happy in America: Defending against meritless lawsuits and the need for a federal bill*, THE NEWS MEDIA & THE LAW (November 2010), available http://www.rcfp.org/news/mag/34-4/slapp_happy_in_america_22.html; visited Nov. 24, 2010). The California Anti-SLAPP Project maintains

A national standard modeled on California's anti-SLAPP statute is recommended here to prevent forum shopping and, specific to the question here, to prevent corporations from suing John Doe defendants in order to force disclosure of their identities and, in forcing disclosure, to silence them.¹⁸⁸ In California, "a cause of action against a person arising from *any act of that person in the furtherance of the person's right of petition or free speech* under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike."¹⁸⁹ Importantly, California's statute extends the ability to initiate an anti-SLAPP motion to apply to the assertion of a right to remain anonymous.¹⁹⁰ Once an anti-SLAPP motion has been filed in California, discovery is stayed while the defendant shows that the expression in question involves a public issue and was made "in furtherance of the defendant's right to free speech."¹⁹¹ There is no reason to believe that an anti-SLAPP law of this type could not prove effective at the national level. The discrepancy in the options of California defendants versus those in Pennsylvania (or Michigan or Georgia, etc.) means that plaintiffs in California would incur defendant costs only where they are shown to have brought

a website cataloging those states with anti-SLAPP statutes and listing those laws' verbiage: <http://www.casp.net/statutes/menstate.html>. For the debate on a federal version, see Dan Frosch, *Critical Web postings produce spate of retaliatory lawsuits; Some legislators seek to quell tactic seen as a threat to free speech*, THE INT'L HERALD TRIB. 21 (June 2, 2010); and Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607 (2006).

¹⁸⁸ U.S. House Representative Steve Cohen has introduced H.R. 4364, the Citizen Participation Act, a federal anti-SLAPP bill, which states that it is intended "to protect First Amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called 'SLAPPs.'" When this Note was written, the bill, introduced in December 2009, was before the House Judiciary Committee, but passage is not imminent.

¹⁸⁹ Cal. Civ. Proc. CODE § 425.16(b)(3), author's emphasis.

¹⁹⁰ Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 16 (2006), citing *Rancho Publ'ns v. Superior Ct.*, 68 Cal. App. 4th 1538, 1541 (4th Dis. App. Ct. 1999).

¹⁹¹ *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003).

lawsuits that are unlikely to succeed, but that defendants in Pennsylvania will always bear the substantial costs of defending, even successfully.¹⁹² If adopted, a federal anti-SLAPP law would create full, uniform, nationwide protection, enabling victims of SLAPP suits to make a motion to dismiss, stop discovery, and recover attorney's fees in the event that the claim is deemed meritless.

The need for anti-SLAPP relief will only increase. The now-defunct John Does Anonymous Foundation, a non-profit organization established to support anonymous speakers sued for online defamation, among other torts, estimated that between 1996 and 2001, more than 200 lawsuits were initiated by companies seeking disclosure of thousands of online John Does. None of the actions during this period resulted in a verdict or judgment against any of the John Does.¹⁹³ In 2000, America Online attempted to draw attention to the threat to expression that these lawsuits represent, stating in a brief that the "proliferation of these lawsuits and subpoenas threatens to have a chilling effect on protected speech and the growth of the online medium."¹⁹⁴

Anti-SLAPP laws are needed to ensure that, in the words of the majority opinion in another oft-cited online defamation case, *Columbia Insurance v. Seescandy.com* (1999), "people who have committed no wrong [are] able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit

¹⁹² Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 17.

¹⁹³ In Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 417 (2003). The foundation's URL now belongs to the New Republicans, a conservative branch of the Republican Party.

¹⁹⁴ Brief of Amicus Curiae America Online, Inc., at 14, *Melvin v. Doe, et al.*, Nos. 2115 WDA 2000 & 2116 WDA 2000 (Pa. Super. Ct., appeal from order Nov. 5, 2000).

and thereby gain the power of the court's order to discover their identity.”¹⁹⁵ The Seescandy.com decision celebrated the “open communication and robust debate” that is possible when “all the facts about one’s identity” are not known.¹⁹⁶ *DiMeo v. Max* (2006), a case in Pennsylvania, underlines the dangers to online expression posed by corporate entities willing to run up a defendant’s court costs simply to silence a critic. Emails presented during this case’s hearing demonstrated that the plaintiff was fully aware of the censoring power of even the threat of litigation, and that the plaintiff sought to leverage this power.¹⁹⁷

Conclusion

After examining the difficulty in balancing a person or corporate entity’s right to reputation against another’s right to anonymous expression online, it is clear that a single, coherent national standard is needed, and that such a test include a separate First Amendment balancing factor. In proposing such a standard, it has been argued here that a takedown notice for online defamation similar to that legislated as part of the Digital Millennium Copyright Act would be too suppressive of otherwise protected speech, and that criminalizing online defamation no longer has any basis in the law. In proposing a single standard or test, this Note also examined imbalances created by, among other things, ISP immunity, public figure-private citizen distinctions, and the lack of uniformity among state-level anti-SLAPP statutes.

¹⁹⁵ *Columbia Insurance v. Seescandy.com*, 185 F.R.D. 578 (N.D. Cal. 1999).

¹⁹⁶ *Id.*

¹⁹⁷ *DiMeo v. Max*, 433 F.Supp.2d 523, 533 (E.D. Pa. 2006). The defendant filed a motion to dismiss the case for failure to state a claim upon which relief can be granted, which the court granted with prejudice.

Free speech is too vital to democracy, and as the manifesting of liberty of thought, it is too vital to human dignity, to be thought about exclusively as doctrine.¹⁹⁸ Which disclosure test the courts adopt is important, but only in the context of the larger social ethic in which freedom of speech is only a part, a social ethic envisioned by the constitution as incorporating the attainment of truth and allowing free men and women to express their opinions on the things they care about.¹⁹⁹

¹⁹⁸ See Lee Bollinger, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 247 (1986).

¹⁹⁹ See Zechariah Chafee, the first major American scholar of the First Amendment, in *FREE SPEECH IN THE UNITED STATES* 46 (1941).