

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

ABSTRACT

The fantastic growth of the web and 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 analog pre-web era – anonymous defamation¹. U.S. courts are faced with the difficult, sometimes seemingly impossible task of balancing the right to a good name on the one hand against a speaker's First Amendment right to anonymous expression, even that which defames, on the other, in and with a medium that enables and encourages cheaply, even freely published, globally distributed, cached, and searchable expression.²

KEYWORDS

Anonymous expression, reputation, digital discursive spaces

¹ For a discussion of the range of problems that the Internet has raised, 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 article, 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.

Brian Carroll, Ph.D

Associate Professor of Communication
and Director of the Honors Program
Berry College
Mount Berry, Georgia

Email: bc@berry.edu OR bc@unc.edu
Phone: 706.368.6944

Mail: Box 299, LAU 100
Berry College
Mount Berry, GA 30149-0299

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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 anonymously speak or publish. 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). This article proposes just such a standard for U.S. courts, hoping to contribute clarity and consistency in an area of the law that lacks both. In order to do this, this article also provides important historical context for a type of expression in the United States that pre-dates the country itself, a type that was instrumental in the country's own founding and organization.

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. It is difficult for a plaintiff to sue, after all, unless he or she knows whom to accuse. By most of the standards issued mostly by district courts and intermediate state courts, 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.¹ Of course, if the speaker is anonymous or pseudonymous, notifying that person of the action can prove difficult. Conversely, 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."²

To help courts navigate the competing interests in such cases, this article proposes a single, relatively high national standard or balancing test, one that includes a separate and controversial First Amendment balancing factor.³ In doing so, this article seeks to offer guidance to courts

1 Different 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 at <http://www.rcfp.org/newsitems/index.php?i=11906>, accessed June 9, 2011).

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

3 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).

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 in this area.⁴ In articulating and arguing for a high standard, this article builds on, expands, and updates the work of Jonathan D. Jones and, separately, Robert D. Richards. In his 2009 article, “Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?” Jones concluded that the presumption in the law should be in favor of preserving anonymity and “should only be overcome when the harm to the plaintiff in not unveiling the anonymous speaker far outweighs the harm done to the speaker by revealing her identity.”⁵ Richards similarly argued that a heightened standard “provides a balance of First Amendment interests and helps to ensure fairness for parties and potential parties.”⁶

In proposing a single standard or test, this article also 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.⁷ This article also argues against a takedown notice for online defamation similar to that legislated as part of the Digital Millennium Copyright Act⁸ and against criminalizing online defamation, which is seen as here as incompatible with the First Amendment and inconsistent with precedent over the past fifty years. This article also joins several news media organizations, including the Reporters Committee for Freedom of the Press, in calling for adoption of procedural safeguards to protect the identities of anonymous speakers online.⁹

4 In the Denver case cited previously (supra note 3), 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 3). 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).

5 Jonathan D. Jones, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?*, 7 First Amend. L. Rev. 421, 442 (Spring 2009).

6 Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 First Amend. L. Rev. 176, 200-01 (Fall 2009).

7 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.

8 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (Nov. 1, 1995)

9 *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).

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 attempting to balance free speech with the “poisonous” reality of “cruel, rage-filled, racist” comments “brimming with words you wouldn’t want your mother to hear you utter.”¹⁰ In another example of this devil’s bargain, the *Salt Lake Tribune* in Salt Lake City decided to allow readers to individually turn off comments, among other changes designed to “tighten up monitoring” of all online comments. The changes came in October 2011 in response to what the newspaper’s publisher called “vile, crude, insensitive, and vicious postings.”¹¹ The newspaper’s decision came after “a thorough review of online comments” and a months-long investigation by a team of its editorial staff.¹² Exactly a year prior, 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.¹³ Other news organizations are simply disallowing anonymity at all, utilizing sophisticated moderation systems, requiring real names, and in some cases even collecting credit card information for verification.¹⁴

10 *Our online comments policy is changing*, CHATTANOOGA TIMES-FREE PRESS, Jan. 1, 2012, A1. The newspaper explained changes to its online comments policy that included turning off comments on “fact-based articles, features or business stories, and accounts of sporting events.”

11 Tim Fitzpatrick, *Tighter monitoring for online comments, or no comments if you want*, THE SALT LAKE CITY TRIBUNE, Oct. 31, 2011, available: <http://www.sltrib.com/sltrib/news/52806057-78/comments-tribune-commenting-com.html.csp>. See also 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 Portland Press suspended online comments for a few days after changing its moderation system, but it 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 *Tighter monitoring for online comments, or no comments if you want*, The Salt Lake City Tribune, Oct. 31, 2011, available: <http://www.sltrib.com/sltrib/news/52806057-78/comments-tribune-commenting-com.html.csp>.

13 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.”

14 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://maui.news.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>).

The core constitutional protection for anonymous political speech is, therefore, being diluted, and from within the body politic.¹⁵ This threat poses a great risk to civic discourse, because the right to speak anonymously derives in part from the belief that a vibrant marketplace of ideas requires that some speakers be allowed to withhold their identities in order to protect themselves from retribution, punishment, or worse.¹⁶ This right also originates in the motive to direct attention to the ideas being expressed rather than on the person or people expressing them.¹⁷ If all mankind were of the same opinion, “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.”¹⁸ Justice John Paul Stevens supported this notion in his majority opinion in *McIntyre v. Ohio Election Commission*, declaring that anonymous speech allows the dissenting, the disenfranchised, and the disempowered to air their views while protecting them from retaliation and persecution.¹⁹ 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.”²⁰ The First Amendment is designed to protect speech that harms, after all, or it cannot have any real purpose at all.²¹

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:

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 York Times, Nov. 4, 2007, available: <http://www.nytimes.com/2007/11/04/opinion/04pubed.html>). All URLs visited October 15, 2010.

15 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).

16 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]). For Chief Justice Oliver 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). A district court in California recognized that “the free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously” (*Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1093–94 (W.D. Wash 2001)).

17 *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).

18 John Stuart Mill, *On Liberty* 16 (1947), F&S Crofts “Crofts Classics” edition.

19 *McIntyre v. Ohio Election Commission*, 514 U.S. 341–43 (1995). 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).

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

21 See Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* 58 (1997).

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.²²

A New York court seemed to echo Stevens's sensibility last year in declaring that courts need to consider the "freewheeling, anything-goes" writing style that prevails online when evaluating Internet communications for defamation and libel.²³ The anonymity of the email that was cause for the action in that New York court "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 decision in the case.²⁴

The urgency 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.²⁵ 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 if applied consistently could eliminate or at least reduce the amount of variance in thresholds used throughout the country. Next door to Virginia, the District of Columbia Court of Appeals affirmed the importance of anonymous speech by giving it "robust protection" in ruling against the forced disclosure of an anonymous tipster.²⁶

The current state of affairs

Anonymity in expression is regulated by a multitude of federal and state constitutional provisions, state and federal statutes, and state and federal court decisions. Just how broad a right one has to

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

23 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 Caribbean resorts.

24 *Id.*

25 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."

26 Haley Behre, D.C. court rules in favor of anonymous speech, The Reporters Committee for a Free Press, Jan. 18, 2012, available: <http://www.rcfp.org/node/123987>.

be anonymous in online spaces in the United States is unclear and unstable, and this right is being negotiated in realms outside the law.²⁷ 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.²⁸ Stevens cited *Talley v. California* in affirming 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."²⁹ 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 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 1997.³⁰ These courts have, therefore, generally sought to protect the identity of online speakers.³¹

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*.³² The Court has made clear that

27 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.

28 *McIntyre*, 514 U.S. 348, n. 5.

29 *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]).

30 *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."

31 *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).

32 *Cohen v. California*, 403 U.S. 15, 24–5 (1971).

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.³³ In declaring that defamation can be eligible for First Amendment protection, the Court in *New York Times v. Sullivan* in 1964 negated a premise in *Chaplinsky v. New Hampshire* decided twenty-two years prior, that because 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.³⁴

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.³⁵ 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.”³⁶ 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.”³⁷ John Adams articulated this same idea when he said that a man without “attachment to reputation, or honor, is undone.”³⁸ 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.³⁹

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, one once regarded as a civilized and just way of

33 *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).

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

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

36 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.

37 Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 Colum. L. Rev. 33 (1904).

38 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).

39 Veeder, *supra* note 37.

resolving disputes and restoring honor.⁴⁰ Until the late 1700s, in fact, dueling was viewed as nobler 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 even odd.⁴¹ However, 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.⁴²

Learning from the past

Certainly “new” or digital media have posed difficult questions for the law. 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 away from the technical capacities of the medium through or by which that speech had been expressed.⁴³ 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.⁴⁴ 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.”⁴⁵

40 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, article, *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.

41 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), in which the author 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.

42 Rodney A. Smolla, *The Law of Defamation* § 1:2, at 1-4 (2010).

43 Laurence H. Eldredge, *The Law of Defamation* §13, at 81 (1978).

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

45 Laurence H. Tribe, *American Constitutional Law* 865 (1988).

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 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.⁴⁶

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.⁴⁷ 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*.⁴⁸ A lion of pseudonymity, Benjamin Franklin is believed to have used more than forty different names or bylines other than his own during his long and illustrious publishing life.⁴⁹

A long and misunderstood tradition of anonymously and pseudonymously written novels is part of this tradition, as well. Anonymous authorship was an almost global practice.⁵⁰ Mark Twain, O. Henry, Voltaire, George Eliot, and George Sand all are pseudonyms. Jane Austen and Daniel Defoe frequently published anonymously, albeit for different reasons, while Charles Lutwidge Dodgson

46 *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 357 (1995).

47 “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]).

48 Burns, 353.

49 Robert Ellis Smith, *Ben Franklin’s Web Site: Privacy and Curiosity from Plymouth Rock to the Internet* 41-43 (2000).

50 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.

thought he could sell more books under the pen name Lewis Carroll.⁵¹ 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.⁵² 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.⁵³ 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.”⁵⁴

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.⁵⁵ The Economist magazine continues to eschew bylines to avoid journalists’ egos from interfering with the telling of the story.⁵⁶ This tradition continues in digital media, where, according to one survey in 2006, 55 percent of bloggers used pseudonyms.⁵⁷ Bibliographies of pseudonymous journalism have been published for Italy (Guida Della Stampa Periodica Italiana), the Philippines (El Periodismo Filipino), Sweden (Sveriges Periodiska Litteratur), 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.⁵⁸

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 Victoria 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

51 Lewis Carroll, *Alice’s Adventures in Wonderland & Through the Looking Glass*, in an introduction by Keith Carabine 12 (1993).

52 Griffin, 1, quoting James Raven.

53 Archer Taylor and Fredric J. Josher, *The Bibliographical History of Anonyma and Pseudonyma* 82 (1951).

54 Henry Hazlitt, *The Cult of Anonymity*, *The Nation* 36, October 1, 1930, 351.

55 Bill Reader, *An Ethical ‘Blind Spot’: Problems of Anonymous Letters to the Editor*, 20 *J. of Mass Media Ethics* 1, 65 (2005).

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

57 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>.

58 For more, see Taylor and Josher, *supra* note 53, at 172-174.

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.”⁵⁹

This hallowed place in American democracy and the many benefits of anonymity in expression add up to great freedom to speak.⁶⁰ 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.⁶¹ 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.⁶² Joe Klein, to “name” a prominent example, became a multi-millionaire in part because he wrote the political exposé *Primary Colors* 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 could have authored it.⁶³

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

59 Victoria Smith Ekstrand, *Whither Anon? Of McIntyre, Mormons, Manifestness, and the Motivations for Speaking Anonymously Online*, paper presented to the annual convention of the Association of Educators in Journalism and Mass Communication, St. Louis, Mo. (August 2011), 42.

60 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).

61 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.

62 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).

63 Gaby Wood, *Interview: True Colours*, *The Guardian Newspaper* (August 6, 2006), <http://www.guardian.co.uk/books/2006/08/06/usa.shopping>.

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.”⁶⁴

To make concrete 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 communications contexts.⁶⁵ 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.⁶⁶ 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.⁶⁷ In more interpersonal contexts, source anonymity has traditionally been much less normative.⁶⁸ In short, we have less experience with anonymity in social contexts, but

64 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).

65 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).

66 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).

67 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).

68 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).

with the explosive popularity of online social media such as Facebook and Twitter, we are rapidly getting a great deal more.⁶⁹

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.⁷⁰ 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.”⁷¹

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. This 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).⁷² 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.⁷³ In a sense, this removed to some extent the evaluation of what is newsworthy from traditional media gatekeepers

69 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. See also A. G. Sulzberger, *In Small Towns, Gossip Moves To the Web, and Turns Vicious*, New York Times, A1 (September 20, 2011).

70 A fractal is a geometric object between dimensions. 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).

71 Wolfson, *supra* note 21 at 61.

72 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).

73 Gelman, *supra* note 69 at 1335.

and gave the determination to the lone blogger, poster, e-mailer, or Facebook user.⁷⁴ The social and even civic benefits of this are unprecedented, but so are the legal questions these distribution methods raise.⁷⁵

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.”⁷⁶ 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.⁷⁷ 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.⁷⁸ The Washingtonienne blog subsequently went viral; coverage by several major newspapers and cable TV news networks contributed to Cutler’s newly found fame (or infamy).⁷⁹ Cutler didn’t seem to mind, but Robert not surprisingly did; he filed a law-

74 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).

75 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).

76 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.

77 April Witt, *Blog Interrupted*, *Wash. Post Magazine* W12 (August 15, 2004).

78 “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.

79 Daniel Solove, *The Future of Reputation: gossip, rumor, and privacy on the Internet* 53 (2007).

suit against Cutler in May 2005 for “invasion of privacy for public revelation of private facts.”⁸⁰ Robert presumably could not file for defamation because he did not contest the accuracy of Cutler’s descriptions and accounts of his sexual preferences and proclivities.⁸¹

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 claims⁸²; 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 response⁸³: Legislators generally do not listen or attend to what professors and journal authors have to say, including law professors and law students. 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.⁸⁴

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

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

81 Ibid.

82 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]).

83

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=1365326Who’s>.

84

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).

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.⁸⁵

Specifically, § 230 states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁸⁶ 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.”⁸⁷ 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.⁸⁸ 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.”⁸⁹ 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.⁹⁰ 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, there would be no 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

85 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).

86 §230 (f)(2).

87 §230 (f)(2).

88 *Zeran*, 129 F.3d at 330. For more on the development of ISP immunity through §230’s Good Samaritan provision, see *Richards*, *supra* note 8, a provision the author describes as “ripe for reform” (183).

89 §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.

90 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.

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.”⁹¹ The article cites an innocuous example, a story on tax policy 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.⁹² 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.⁹³ Scholars hoping to help in this area are left with the federal courts as their best option, as Jones has argued.⁹⁴ In navigating, analyzing, and adapting the competing discovery tests that have been generated by these courts, this article, 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*, one of the very few appellate courts to consider the issue.⁹⁵

A single, coherent national standard

As of early 2012, 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.”⁹⁶

91 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.

92 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.

93 *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.

94 Jones, *supra* note 7.

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

96 Kissinger and Larsen, *Untangling the Legal Labyrinth*, *supra* note 5 at 18.

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 content first appeared.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰

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."¹⁰¹ 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

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

98 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.

99 *Dendrite Int'l, Inc. v. Doe No. 3*, at 4.

100 *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.

101 775 A.2d, at 756.

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.¹⁰²

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.¹⁰³ These subsequent thresholds have ranged from low to high, with the prima 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."¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ The Dendrite court intro-

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Id., at 763.

103 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 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 & Eilers, 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 (2010), available at <http://ssrn.com/abstract=1651917>, visited Nov. 1, 2010.

104 *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).

105 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).

106 775 A.2d at 760.

duced 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 case and the need for disclosure to pursue that case.

The separate balancing factor has been rejected by some courts, though for different reasons. Others have simply avoided it altogether.¹⁰⁷ Some regard the additional step or balancing unnecessary and potentially confusing to the trial courts. One of the judges on the Brodie court, which adopted a test based on *Dendrite*, 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."¹⁰⁸ 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, Judge Adkins argued. 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," Adkins wrote.¹⁰⁹

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 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.¹¹⁰ 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

107 Jones, *supra* note 7 at 428. One prominent example was *Doe v. Cahill* 884 A.2d 451.

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

109 *Id.*, at 3.

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

another.”¹¹¹ The appellate court upheld this finding, then applied the Dendrite test, the standard the court had just adopted. 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.¹¹²

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 to protect his reputation and a defendant’s right to exercise free speech anonymously.”¹¹³ 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*.¹¹⁴ 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.¹¹⁵ Second, the *Cahill* court deemed the separate, additional balancing step unnecessary because the “summary judgment test is itself the balance,” a determination that, while not as dangerous to anonymous speakers as a “good faith” standard, still is “too easy on plaintiffs who wish to unmask anonymous commenters,” as Jones argued.¹¹⁶

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

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Id.

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Id.

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

114 *Id.* at 460-61.

115 *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)).

116 *Cahill*, 884 A.2d at 457. Jones, *supra* note 7 at 429.

a way as to show “reckless disregard of whether it was true or not,” a reckless disregard for the truth.¹¹⁷ Ten years 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.¹¹⁸ 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.”¹¹⁹ The *Cahill* court could have asserted this same reasoning in this new area of the law, but instead sidestepped the 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.”¹²⁰ 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.¹²¹

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.¹²² The findings of *Kissinger* and *Larsen* support this description.¹²³ The courts seem generally

117
New York Times Co. v. Sullivan, 254, 280 (1964).

118
Gertz v. Robert Welch, Inc., 418 U.S. 342 (1974).

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

120 *John Doe v. Cahill*, at 464.

121 Malloy, *supra* note 64 at 1192.

122 Matthew Mazzotta, *supra* note 103, 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.

123 *Kissinger and Larsen*, *supra* note 5 at 24.

split on which threshold for evidentiary showing is more appropriate, prima facie evidence or likely survival of a motion for summary judgment. This article 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.”¹²⁴ 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.¹²⁵

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 promulgating a standard informed by those that preceded it.¹²⁶ 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.¹²⁷ 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,”¹²⁸ 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.’”¹²⁹ 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 and a categorization that affords online expression the very highest levels of First Amendment protections.¹³⁰ The Brodie court noted that protections under the First

¹²⁴ *Krinsky v. Doe No. 6*, 74 Cal. Rptr. 3d at 244 (2006).

¹²⁵

Id., at 245, n. 14.

¹²⁶

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

¹²⁷

Id., 1-2.

¹²⁸

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).

¹²⁹

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).

¹³⁰ *Id.* 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).

Amendment have been extended to the Internet in John Doe actions by various courts.¹³¹

The court recognized, however, that in a “confrontation between defamation law and the use of the World Wide Web,”¹³² 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.¹³³ After 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.”¹³⁴

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 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.¹³⁵

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

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

132
Id., at 6.

133 *Id.*, at 14, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031, 1035 (1942).
134
966 A.2d 432 at 447.

135
Id., at 457.

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.¹³⁶ (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.¹³⁷)

In requiring a prima facie showing, the Brodie test would seem to avoid either 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 lenient on plaintiffs and too restrictive of Internet expression. Only a few courts, in fact, have adopted the low “good faith” standard.¹³⁸ 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.’”¹³⁹ 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 persuasively argues.¹⁴⁰

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 claim, a standard that essentially requires that plaintiff to prove his or her case before even identifying whom he or she would be

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

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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.

138 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.

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

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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).

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.¹⁴¹ 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.

The balancing step also would enable courts to consider the speaker’s expectation of privacy, and the potential consequences of a discover order to the speaker and others similarly situated.¹⁴² In the absence of a state or federal anti-SLAPP statute, determining 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, is a critical consideration in light of the First Amendment. 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, even in states lacking an anti-SLAPP statute.¹⁴³

In weighing 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, courts can use the balancing test to consider other potential consequences, as well, including harassment, intimidation, or silencing speakers who have done nothing wrong. 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.¹⁴⁴ 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. An explicit balancing criterion enabled courts, when material, to consider the privacy concerns of both the plaintiff and the defendant in an effort at discovery.

141 Mazzotta, *supra* note 103 at 802.

142 Jones, *supra* note 5 at 439.

143 George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 *Pace Envtl. L. Rev.* 3, 3 (1989).

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

Importantly, such a high standard also allows consideration of any claim of opinion privilege or protection for opinion, and the relevance of the identifying information to pursuing the claims.¹⁴⁵ 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 that cannot be reasonably interpreted as stating actual facts about an individual.¹⁴⁶ Statements that are not susceptible to being proved true or false should be protected, and the Brodie test's 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.¹⁴⁷ Such a consideration could help courts prevent plaintiffs from "sidestepping the protections of the First Amendment simply by engaging in creative pleading," as Mazzotta has observed.¹⁴⁸

The fifth and separate balancing factor 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.¹⁴⁹ 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 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

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

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

147 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.

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Mazzotta, supra 103 at 863.

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

more realistically counteract or respond to false statements than can private citizens.¹⁵⁰ 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.”¹⁵¹ 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.¹⁵²

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.”¹⁵³ 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 would give 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.”¹⁵⁴ 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

150 *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.

151 *Gertz v. Welch*, supra 150 at 342. The question of whether a person is a “limited public purpose” figure can be difficult and expensive to determine.

152 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).

153 *Gertz v. Welch*, at 345.

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Id.

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 communications law, and even trespass to chattels.¹⁵⁵

Against a DMCA-style takedown notice

In advocating a national standard, this article 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.¹⁵⁶ 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.¹⁵⁷ Some have argued that such a notice or takedown 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.¹⁵⁸

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

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For specific cases on some of these claims and questions, see Mazzotta, *supra* 133, 51 B. C. L. Rev. 833 at 840, n. 64, or Gleicher, n. 38.

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

157 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 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).

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See, e.g., Hallett, 260-1.

expression. The DMCA has criminalized legitimate research, stunted software development, and chilled expression.¹⁵⁹ 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.¹⁶⁰ 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.”¹⁶¹ It did not matter that the re-publishing was almost certainly protected by fair-use provisions of U.S. copyright law.¹⁶²

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.¹⁶³

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.¹⁶⁴ It would often be cheaper and

159 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).

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

161 *Id.*, at 215, quoting statements by Google to *The Chronicle of Higher Education*.

162 Title 17, U.S.C. § 107.

163 *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).

164 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.

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 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.¹⁶⁵ 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.¹⁶⁶

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 Internet.”¹⁶⁷ 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.”¹⁶⁸ 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

¹⁶⁵ 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).

¹⁶⁶ 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.ictjournal.washington.edu/Vol3/a014Horowitz.html>, visited Nov. 3, 2010.

¹⁶⁷ Susan W. Brenner, “Should Online Defamation Be Criminalized?” 76 *Miss. L. J.* 706 (2007).

¹⁶⁸ *Id.*, at 723-732.

defamation, or it would not were a similar incident to happen in the United States.¹⁶⁹ 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 article 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.¹⁷⁰ While recommending the 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.¹⁷¹ As Brenner herself acknowledges, "criminal libel is, to say the least, disfavored by American law,¹⁷² and it has been since 1964.¹⁷³ 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.¹⁷⁴ 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 take-down 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 enacted to combat frivolous suits by making it easier to

169 Brenner, *supra* 167 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.

170 *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.

171 *Id.*, at 704.

172 *Id.*, at 720.

173 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))).

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

terminate such lawsuits at an early stage, but most of the twenty-nine states (as of March 2012) that have such laws have limited them to expression made about or otherwise linked to government officials.¹⁷⁵

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 2007.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸

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.¹⁷⁹ 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."¹⁸⁰ Importantly,

175 Judge applies new anti-SLAPP law in Michael Moore case, news media update (Sept. 8, 2010); Texas Governor signs anti-SLAPP bill into law, news media update (June 20, 2011).

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

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Judge applies new anti-SLAPP law in Michael Moore case, news media update (Sept. 8, 2010).

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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 article 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 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).

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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 article was written, the bill, introduced in December 2009, was before the House Judiciary Committee, but passage is not imminent.

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California's statute extends the ability to initiate an anti-SLAPP motion to apply to the assertion of a right to remain anonymous.¹⁸¹ 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."¹⁸² 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 lawsuits that are unlikely to succeed, but that defendants in Pennsylvania will always bear the substantial costs of defending, even successfully.¹⁸³ 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.¹⁸⁴ 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."¹⁸⁵

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 and thereby gain the power of the court's order to discover their identity."¹⁸⁶ The *Seescandy.com* decision celebrated the "open communication and

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

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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).

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

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

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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.

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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).

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

robust debate” that is possible when “all the facts about one’s identity” are not known.¹⁸⁷ *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.¹⁸⁸

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 article 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.

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.¹⁸⁹ 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.¹⁹⁰

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Id.

188 *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.

189 See Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* 247 (1986).

190 See Zechariah Chafee, the first major American scholar of the First Amendment, in *Free Speech in the United States* 46 (1941).



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