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Abstract: This Article examines the evolution of the law governing libel suits against anonymous "John Doe" defendants based on Internet speech. Between 1999 and 2009, courts crafted new First Amendment doctrines to protect Internet speakers from having their anonymity automatically stripped away upon the filing of a libel action. Courts also adapted existing First Amendment protections for hyperbole, satire, and other nonfactual speech to protect the distinctive discourse of Internet message boards. Despite these positive developments, the current state of the law is unsatisfactory. Because the scope of protection for anonymous Internet speech varies greatly by jurisdiction, resourceful plaintiffs can make strategic use of libel law to silence their critics. Meanwhile, plaintiffs who are truly harmed by cybersmears will find little effective recourse in libel law. Though disheartening, the current state of the law may be a testament to the difficulty of balancing speech and reputation in the Internet age.

Introduction

Ten years ago, libel suits against anonymous "John Doe" defendants based on Internet postings were rare.[1] Only a few Doe cases[2] had made

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[1] *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 858 n.6 (2000) (listing libel cases as of 2000). Federal law largely bars libel suits against Internet service providers and website operators based on defamatory content posted by third parties. *See* 47 U.S.C. § 230(c) (2006). Courts have interpreted broadly the scope of immunity provided by § 230. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330–35 (4th Cir. 1997). *But see* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (holding website operator responsible for content posted by third parties where it "directly participate[d] in developing the alleged illegality").

[2] I refer here only to the Doe cases involving libel and related tort claims, and not to the separate line of Doe cases involving copyright infringement via file-sharing. The copyright infringement cases against Doe defendants involve a different, and arguably more limited, speech interest than the libel cases. *See* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (discussing the limited First Amendment interests involved in downloading files). For that reason, courts have balanced the relevant First Amendment interests differently in copyright infringement cases than in libel cases involving Doe defendants. *See, e.g.*, Arista Records LLC v. Does 1–16, No. 1:08-CV-765, 2009 WL 414060, at *3 (N.D.N.Y. Feb. 18, 2009) ("Because of the modest First Amendment right to

their way into reported decisions[3] and few judges seemed sensitive to the First Amendment issues involved.[4] Today, much has changed in both the nature of the Doe suits and courts' handling of them. This Article examines the evolution of this area of law and attempts to extract principles and insights relevant to emerging Internet speech disputes.

I. In the Beginning

Initially, the Doe cases tended to present as Goliath versus David scenarios. The typical Goliaths were companies or their leaders suing for libel after one or many "John Does" criticized them online, usually on a financial message board. After filing suit, the corporate Goliaths sought to obtain the identities of the Doe defendants by subpoenaing Internet Service Providers (ISPs). From there, it was usually a short step to unmasking the John Does. Many ISPs turned over the identifying information without even notifying the Does that it was being sought.[5] Even with notice, few Does had the resources to find counsel and file motions to quash. Those few Does who did file motions were often met with judicial hostility.[6] Many judges had little understanding of the culture of Internet message boards and simply ordered disclosure with no concern for the unique First Amendment interests involved.

These early Doe suits threatened First Amendment values and highlighted deficits in the U.S. Supreme Court's libel and anonymous speech jurisprudence. One major concern was the potential chilling effect of these lawsuits. Although any libel action is likely to have a chilling effect, the sudden proliferation of actions against defendants of modest means merely for speaking their minds threatened to subvert the Internet's promise of a more fully participatory public discourse.[7]

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remain anonymous when there is an allegation of copyright infringement, the Court must balance the tension between this minimally protected constitutional right and a copyright owner's right to disclosure of the identity of a possible trespasser of its intellectual property interest.").

[3] *See* Lidsky, *supra* note 1, at 858 n.6.

[4] *See e.g.*, *id.* Lee Tien was one of the first scholars to recognize the unique challenges of anonymous Internet speech cases. *See generally* Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 Or. L. Rev. 117 (1996).

[5] Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 n.5 (W.D. Wash. 2001) (discussing the problem of lack of notice).

[6] *See, e.g.*, Hvide v. John Does 1 through 8, No. 99-22831 CA 01, court order at 52-54 (Fla. Cir. Ct. May 25, 2000) (on file with author, who was acting as counsel for one of the Does at a hearing in which the judge compared anonymous Internet speakers to hooded Ku Klux Klan members and admitted that she did not use the Internet extensively).

[7] For an extended version of this argument, see Lidsky, *supra* note 1, at 888–98.

The revolutionary promise of the Internet as a medium of mass communication is to open the "marketplace of ideas" to all citizens.[8] The "old" mass media—newspapers, magazines, books, and broadcasters—placed a gatekeeper between the speaker and her audience.[9] The Internet removed that gatekeeper, allowing more speakers than ever before to reach a mass audience.[10] The resulting "democratization" of discourse made it harder for those in power to control the interpretation of public events and exposed them to criticism from new quarters.[11] And that in turn spurred the John Doe suits.[12]

Some newly empowered speakers were responsible critics publishing uncomfortable truths and constitutionally protected opinions, but others were not.[13] Both types of speakers, however, became targets of libel actions aimed at suppressing criticism and reestablishing existing hierarchies.[14] These often well-publicized actions signaled not only to named defendants, but to prospective critics as well, that they could be easily unmasked and subjected to costly litigation where the outcome hinged on the vagaries of a libel law not yet adapted to the cultures of Internet speech. Although the extent of the chilling effect was inher-

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[8] *See id.* at 894–95 ("The Internet gives citizens inexpensive access to a medium of mass communication and therefore transforms every citizen into a potential 'publisher' of information for First Amendment purposes.").

[9] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 10 (2004) ("Mass media create a technological bottleneck, and the people who control mass media are gatekeepers controlling its use.").

[10] As one scholar has noted, the characteristics of Internet speech include immediate publication without the intervention of intermediaries or editors to an international audience. Yuval Karniel, *Defamation on the Internet—A New Approach to Libel in Cyberspace*, 2 J. Int'l Media & Ent. L. 215, 220 (2009). The resulting speech, which may be anonymous, is potentially accessible, both freely and for free, to a mass audience. *Id.*

[11] *See* Doe No. 1 v. Cahill, 884 A.2d 451, 455 (Del. 2005). It is easy to overhype the revolutionary potential of the Internet. Citizens still need substantial resources to use the Internet to reach a mass audience, and even in the online environment, the traditional mass media still "provide a focal point for audience attention." Balkin, *supra* note 9, at 10; *accord* Matthew Hindman, The Myth of Digital Democracy (2008).

[12] Or at least, it spurred John Doe suits after § 230 of the Communications Decency Act ("CDA") foreclosed access to the most readily identifiable deep pocket defendant. *See supra* note 1.

[13] *See, e.g.*, Lidsky, *supra* note 1, at 866–68 (discussing the complaint in *HealthSouth Corp. v. Krum*).

[14] *See* Ford Motor Co. v. Lane, 67 F. Supp. 2d 745, 753 (E.D. Mich. 1999) (noting, in the trade secret context, that "[t]echnology blurs the traditional identities of David and Goliath"). *See generally* Elizabeth A. Rowe, *Proposing a Mechanism for Removing Trade Secrets from the Internet*, 12 No. 3 J. Internet L. 3 (2008) (providing further discussion of the problems caused by Internet disclosures of trade secrets); Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. Rev. 1425 (2009) (same).

ently unquantifiable, the Doe suits quickly became a serious concern for First Amendment advocates.

In addition to the inherently nebulous threat of chilling Internet speech, the Doe suits also threatened a specific First Amendment right—the right to speak anonymously. The technology and culture of the Internet multiplied exponentially the number of anonymous speakers contributing to public discourse. The right to speak anonymously, however, is not an absolute right. Speakers have no right to use anonymity as a shield against liability for defamation.[15] The difficulty for courts is that it is not always easy to discern whether a statement is defamatory. Calling a company a "scam" might be defamatory or it might be mere hyperbole; it all comes down to context. Thus, resourceful plaintiffs can file (or threaten to file) for libel almost any time they encounter harsh criticism online. If a mere allegation of libel, without more, is enough to force the unmasking of the alleged defamer, the First Amendment right to speak anonymously is largely meaningless. As of 1999, however, First Amendment jurisprudence provided defendants little protection from having their anonymity stripped away by the filing of a libel action.[16]

II. The New Legal Landscape

The legal landscape has altered considerably in the intervening decade. Faced with a growing number of anonymous speech cases, many courts have not only developed new legal doctrines to address the issues raised by the Doe cases, but have also made existing doctrines responsive to the culture of Internet discourse.

A. *Development of New Legal Doctrines*

Although the law governing anonymous speech is still developing, courts are beginning to converge on a set of standards to balance the right to speak anonymously with the rights of those injured by defamatory anonymous speech.[17] Put simply, these standards, or balancing

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[15] Or any other tort or crime.

[16] *See* Lidsky, *supra* note 1, at 858 n.6.

[17] For an illustrative sample of Doe cases and unmasking standards, arranged chronologically, see Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *4–*5 (D. Ariz. July 25, 2006); Highfields Capital Mgmt. L.P. v. Doe, 385 F. Supp. 2d 969, 975–76 (N.D. Cal. 2005); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); *In re* Baxter, No. 01-00026-M, 2001 WL 34806203, at *12 (W.D. La. Dec. 20, 2001); Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 244–46 (Ct. App. 2008); Doe No. 1 v. Cahill, 884 A.2d 451, 460–61 (Del.

tests, are designed to sort legitimate defamation actions from "cyber-slapps"—unfounded suits designed only to chill speech—at an early stage of the discovery process. Courts have crafted slightly different verbal formulae and added a varying number of factors to their tests, but most tests boil down to two main components.

The first component provides John Doe notice of the lawsuit and an opportunity to file a motion to quash to protect his anonymity.[18] Obviously, the notice requirement cannot be applied too stringently when the defendant's identity is unknown. Thus, courts have held that plaintiffs can satisfy this component by posting notice of the suit in the forum where Doe allegedly posted his defamatory statement.[19] Once notice is given,[20] the Doe has a short window of opportunity to assert his First Amendment rights.[21]

The second component of the balancing test requires plaintiffs to provide some indicia that their suits are viable libel actions before the

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2005); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001); *In re* Subpoena Duces Tecum to Am. Online, Inc. (*In re AOL*), 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000) *rev'd on other grounds sub nom*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001). I have previously offered my recommendations for what type of standards should govern disclosure of the Doe defendants' identity. Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 Notre Dame L. Rev. 1537, 1598–1602 (2007).

[18] *See, e.g.*, *Cahill*, 884 A.2d at 460–61; *Brodie*, 966 A.2d at 457.

[19] *Cahill*, 884 A.2d at 460–61 ("[W]hen a case arises in the internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted."). *But see Krinsky*, 72 Cal. Rptr. 3d at 244 (noting that even this is not a fixed requirement when the original Internet forum is no longer available or when the defendant clearly has received notice by other means, such as via his Internet service provider or the message board sponsor).

[20] Many ISPs now give their subscribers notice that their identity is being sought via subpoena. It would be even better if they were required to do so by statute. For example, federal law already prohibits operators of cable systems from disseminating subscriber data without consent, except in certain circumstances including when disclosure is necessary to render service and when disclosure is made to the government pursuant to a court order, in which case the subscriber must receive notice. *See* 47 U.S.C. § 551(c) (2006); *see also* Fitch v. Doe #1, 869 A.2d 722, 728–29 (Me. 2005) (holding that a cable system operator ISP could release subscriber information to a nongovernmental entity if the disclosure was made subject to a court order and the subscriber was notified).

[21] *See* Roger M. Rosen & Charles B. Rosenberg, *Suing Anonymous Defendants for Internet Defamation*, L.A. Law, Oct. 2001, at 19 ("Most ISPs now give their account holders two or more weeks' notice of a subpoena before divulging any information in response to it."); *see also* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 Yale L.J. 320, 349 (2008) (discussing advantages of a flexible rather than fixed time for response).

court will order disclosure of defendants' identities.[22] Courts have framed this component in various ways, ranging from requiring: (1) a "good faith basis" for plaintiff's claim;[23] (2) pleadings sufficient to survive a motion to dismiss;[24] (3) a showing of evidence sufficient to establish a prima facie case of defamation coupled with a balancing of the right to speak anonymously and the right to pursue a libel claim;[25] and (4) a showing of evidence sufficient to avoid summary judgment, without the additional balancing test.[26] Of these, the third standard—the prima facie case plus balancing standard—appears to be gaining ground as the dominant standard.[27]

Indeed, the Maryland Court of Appeals adopted this standard in 2009 in *Independent Newspapers, Inc. v. Brodie*.[28] Specifically, the court

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[22] *See Brodie*, 966 A.2d at 449–56 (reviewing the different "viability" standards employed by state and federal courts in John Doe cases). In the Doe cases decided thus far, courts appear to have assumed that the speech involved receives full First Amendment protection unless it is libelous. Courts have not addressed whether the balance between the interests of plaintiff and defendant should be struck differently if plaintiff is a private figure and the speech is of only private concern. It also remains to be seen how courts will decide cases involving allegedly defamatory commercial speech.

[23] *See 2TheMart.com*, 140 F. Supp. 2d at 1095; *In re AOL*, 52 Va. Cir. at 37.

[24] *See, e.g.*, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (involving trademark infringement claim against a John Doe rather than libel); Lassa v. Rongstad, 718 N.W.2d 673, 687 (Wis. 2006) ("When faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members, the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning the party for refusing to disclose that information.").

[25] This standard borrowed from *Dendrite International, Inc. v. Doe*, 775 A.2d 756, 760–61 (N.J. Super. A.D. 2001), was recently adopted by Maryland's highest court in *Independent Newspapers, Inc. v. Brodie*. 966 A.2d at 457; *see also* Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698–99 (N.Y. Sup. Ct. 2007) (applying qualified *Dendrite* standard).

[26] *Cahill*, 884 A.2d at 460–61. *Cahill* held that a plaintiff must support his claim with facts sufficient to defeat a motion for summary judgment. *See id.* at 460*; see also* McMann v. Doe, 460 F. Supp. 2d 259, 266–68 (D. Mass. 2006) (applying *Cahill* standard); *In re* Does 1–10, 242 S.W.3d 805, 821–23 (Tex. App. 2007) (same). This list oversimplifies the situation somewhat, as some courts have adopted their own variations on one of these standards. *See, e.g., Mobilisa*, 170 P.3d at 720–21 (adopting hybrid of *Cahill* and *Dendrite* standards). One court has held that its existing procedural rules, which allow defendants to move for protective order against discovery "sought in bad faith" or that "would cause unreasonable annoyance, embarrassment, [or] oppression" were sufficient to protect Doe defendants' First Amendment interests. Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425 Mar. Term 2004, 2006 WL 37020, at *9 (Pa. Com. Pl. Jan. 4, 2006). The great variety in legal standards suggests the need for a uniform rule to govern John Doe cases.

[27] For examples of courts applying *Dendrite*-based standards, see *supra* note 25. For examples of courts applying *Cahill*-based standards, see *supra* note 26.

[28] 966 A.2d at 457. In *Brodie*, the plaintiff sued a newspaper and three "John Does" for statements they posted on the newspaper's website. *Id.* at 442. The plaintiff, a businessman, sued for defamation and "conspiracy to defame" and subpoenaed the newspaper to reveal the identities of "John Does" associated with five screen names on its website. *Id.* The trial

held that in a defamation action involving anonymous speakers, a trial court should not order disclosure until five criteria are satisfied.[29] The first two criteria ensure that defendants have notice and an opportunity to defend.[30] The third requires the plaintiff to identify with specificity the allegedly defamatory statements made by defendants.[31] The fourth requires the trial court to "determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters."[32] Finally, "if all else is satisfied, [the trial court must] balance the anonymous poster's First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity, prior to ordering disclosure."[33] A few comments are in order regarding the third and fourth criteria.

First, the prima facie evidence standard offers Doe defendants little protection if it can be satisfied with "mere allegations of fact."[34] Thus, in applying the standard, courts have required the plaintiff to produce "sufficient evidence supporting each element of its cause of action, on a prima facie basis."[35] Second, a plaintiff can only be expected to provide prima facie evidence regarding those elements of the claim within the plaintiff's control.[36] Plaintiffs ordinarily will have ac-

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court promptly dismissed the newspaper from the case because it was immune from suit under the Communications Decency Act. *Id.* at 445. The trial court, however, denied the newspaper's motion for a protective order and required disclosure of the identities associated with five screen names. *Id.* at 447. Notably, plaintiff sued only three of these defendants: "CorsicaRiver," "Born & amp; Raised Here," and "chatdusoleil." *Id.* at 448. Plaintiff did not include "RockyRaccoonMD" and "Suze" in the suit, but alleged that they had made defamatory statements. *Id.* at 448–49. The trial court nonetheless ordered disclosure regarding all five screen names. *Id.* at 447. The Maryland Court of Appeals reversed, holding that the plaintiff "had not pleaded a valid defamation claim against any of them." *Id.* As a matter of defamation law, this holding is unexceptional. The three named defendants—"CorsicaRiver," "Born & amp; Raised Here," and "chatdusoleil"—had posted statements about someone other than plaintiff, and plaintiff's potential claims against two others—"RockyRaccoonMD" and "Suze"—were barred by the statute of limitations. *Id.* at 448–49.

[29] *Id.* at 457.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See Brodie*, 966 A.2d at 457 (Adkins, J., concurring).

[35] *Dendrite*, 775 A.2d at 760.

[36] *Krinsky*, 72 Cal. Rptr. 3d at 245 ("A plaintiff need produce evidence of only those material facts that are accessible to her."); *see also Cahill*, 884 A.2d at 463 (requiring, under a summary judgment standard, the plaintiff to "introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff's control*") (emphasis added).

cess to evidence regarding most elements of a defamation action at the outset of litigation. For example, a public figure defamation plaintiff must ordinarily plead and prove that the defendant published a false and defamatory communication concerning plaintiff with "actual malice"—i.e., with knowledge or reckless disregard of its falsity.[37] If plaintiff's claim is valid, he or she should have "easy access to proof" of all of these elements except actual malice.[38] Moreover, it is not unfair to expect the plaintiff to produce this evidence. The plaintiff will ultimately bear this burden anyway, and the new standard merely requires production of prima facie evidence prior to disclosure of defendant's identity.

An additional comment is in order regarding the balancing test applied in addition to the prima facie evidence standard. Arguably, a separate balancing test is unnecessary because a balancing of interests is built into the prima facie evidence standard.[39] Under the prima facie evidence standard, the defendant's right to speak anonymously outweighs the plaintiff's right to pursue a libel action unless and until the plaintiff presents evidence that the libel claim is viable; once this burden is met, the balance tips in favor of allowing plaintiff to pursue a claim for vindication of her reputation. An explicit balancing test serves only to tilt the scales further toward the protection of anonymous speech because presumably it allows even a viable defamation claim to be dismissed on the ground that it is not strong enough to outweigh defendant's First Amendment interests.[40]

Although courts may be converging on standards for curbing the use of libel suits to breach the right to speak anonymously, the piecemeal, state-by-state development of standards continues to make the scope of protection for John Does uncertain. Regardless of how high courts set the bar for plaintiffs for obtaining a John Doe's identity, these

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[37] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that public officials suing for defamation must prove actual malice); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending *New York Times Co. v. Sullivan* to encompass public figures). For further explanation, see Lyrissa Barnett Lidsky & R. George Wright, Freedom of the Press: A Reference Guide to the United States Constitution 67–70 (2004).

[38] *Cahill*, 884 A.2d at 464.

[39] *See, e.g.*, *id.* at 461 (asserting that balance is built into its summary judgment standard); *Brodie*, 966 A.2d at 458 (Adkins, J., concurring) (criticizing separate balancing test as "unnecessary and needlessly complicated").

[40] One potential advantage of a separate balancing test is that it would allow the court to consider, *in camera*, a defendant's actual motive for speaking anonymously before ordering disclosure. For example, if defendant could show that she spoke anonymously because she feared physical retaliation, a court might be more inclined to dismiss a viable defamation claim.

new standards will provide insufficient protection to anonymous online speech unless judges apply existing libel doctrines in ways that are responsive to the distinctive culture of Internet discourse. Luckily, there are signs that courts are doing just that.[41]

B. *Nuanced Application of Existing Doctrine*

Judges today are much more likely to have actually visited or used a chat room, message board, blog, or social network than they were a decade ago, and their familiarity with Internet discourse makes for better legal decisions in John Doe cases. A good illustration of how judicial understanding of Internet culture can affect outcomes in libel cases may be seen in the 2008 case, *Krinsky v. Doe 6*, decided by the California Court of Appeal.[42]

In *Krinsky*, the president of a corporation sued ten Doe defendants in Florida for libel and intentional interference with contractual relations.[43] Plaintiff then subpoenaed Yahoo! in California to turn over the identities attached to the Does' screen names.[44] Yahoo! notified the Does, one of whom, Doe 6, moved to quash on the grounds that disclosure of his identity would violate his First Amendment right to speak anonymously.[45] The trial court denied the motion to quash, but the California appellate court reversed, applying a "prima facie" showing standard similar to that used in *Brodie*,[46] though without a separate balancing test.[47]

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[41] For many Does, of course, this opportunity is meaningless because they cannot obtain legal counsel. The development of standards to protect the rights of Doe defendants is directly traceable to the work of public interest litigation groups such as the Electronic Frontier Foundation, Public Citizen, the American Civil Liberties Union, and the Electronic Privacy Information Center. As noted above, most of the early John Doe actions were brought against defendants of modest means. Then as now, many such defendants simply could not afford legal counsel to protect their First Amendment rights. For a handful, however, these public interest organizations provided critical assistance and pursued a litigation strategy that prodded judges to develop standards protecting the vitality of Internet speech and the rights of anonymous speakers. While many John Does still have difficulty finding counsel to protect their First Amendment rights, those that can find counsel at least have favorable precedent to employ thanks in large part to these organizations.

[42] 72 Cal. Rptr. 3d at 234.

[43] *Id.* at 234–35. To be precise, the plaintiff sued only nine of the ten for libel. *Id.* at 235.

[44] *Id.* at 235.

[45] *Id.*

[46] *See id.* at 244–46. The court tried to avoid being doctrinaire about the "procedural label" attached to "the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet" because different states "have different standards governing pleadings and motions." *Id.* at 244. Thus, the court evaluated Krinsky's showing under

The *Krinsky* court's understanding of Internet message boards was crucial to its determination of the key issue in the case: whether plaintiff had made a prima facie showing that Doe 6's statements were defamatory under Florida law.[48] There is no doubt that Doe 6's statements were vulgar and offensive. He called the plaintiff and other corporate officers "boobs, losers and crooks"[49] and set up a pretend monologue by the corporation's Vice President of Legal Affairs in which he contemplated performing oral sex on the plaintiff "even though she has fat thighs, a fake medical degree, 'queefs' and has poor feminine hygiene."[50] And plaintiff's claim that the statements were defamatory had more than an initial ring of plausibility. In Florida, a defamatory communication is one which "tends to harm the reputation of another as to lower him or her in estimation of community or deter third persons from associating or dealing with the defamed party."[51] Certainly accusing someone of criminal behavior and falsification of her medical degree would normally be defamatory if published in an article in a newspaper, and yet the court in *Krinsky* held that Doe 6's statements were not defamatory.[52]

The explanation for this curious result lies in the dichotomy between fact and opinion. A statement can only be defamatory if it asserts or implies objective *facts* about the plaintiff; otherwise, it will be deemed constitutionally protected opinion. The *Krinsky* court determined that Doe 6's assertions were opinion rather than fact based on a deeply contextual analysis of his speech.[53] The court clearly was influenced by the fact that Doe 6 spoke anonymously on a financial message board.[54] At the outset, the court noted that the prevalence of anonymous speech on the Internet contributes to a "relaxed communication style."[55] The court concluded that the informality of Internet message boards makes speech there more like "gossip" than "accurate report-

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a prima facie evidence standard, which was considered appropriate in light of Florida being a notice-pleading jurisdiction. *See id.* at 244–46; *see also* FLA. R. CIV. P. 1.110.

[47] *Krinsky*, 72 Cal. Rptr. 3d at 244–46.

[48] *See id.* at 246–50.

[49] *Id.* at 235.

[50] *Id.* at 235.

[51] *Id.* at 246–47 (quoting Wolfson v. Kirk, 273 So.2d 774, 776 (Fla. Dist. Ct. App. 1973)).

[52] *Id.* at 250.

[53] *See* 72 Cal. Rptr. 3d at 246–50.

[54] *See id.* at 248–50. The court defined a financial message board as a forum "which offers posters the opportunity to communicate with others concerning stock trading, corporate behavior, and other finance-related issues." *Id.* at 234.

[55] *Id.* at 237–38.

ing," noting "[h]yperbole and exaggeration are common, and 'venting' is at least as common as careful and considered argumentation."[56]

The *Krinsky* court clearly understood that anonymity is a double-edged sword. Anonymity frees speakers from inhibitions both good and bad. Anonymity makes public discussion more uninhibited, robust, and wide-open than ever before, but it also opens the door to more trivial, abusive, libelous, and fraudulent speech.[57] But the court also understood that vituperative anonymous speech on financial message boards often carries its own corrective, for it makes it less likely that reasonable readers will take it seriously.[58]

In fact, the court found it incumbent to use care in categorizing Doe 6's speech as defamatory precisely because debate in "Internet chat rooms or message boards" is so often "heated and caustic."[59] Doe 6 did not originate the controversy about plaintiff Krinsky's management of her corporation. Instead, he, along with many other message board posters, was responding to articles in the *Miami Herald* and *Bloomberg News* reporting that the corporation's Vice President of Legal Affairs was not a lawyer, and that he and Krinsky jointly owned a Rolls Royce and a $15 million mansion.[60] Not surprisingly, these reports triggered heated discussion on the message board, of which Doe 6's comments were part and parcel.

The tone of Doe 6's speech was perhaps the biggest indicator that he was not implying or asserting actual facts about plaintiff.[61] As the court noted, Doe 6 used a "sarcastic, derisive tone,"[62] "crude, ungrammatical language,"[63] "vulgar and insulting" words,[64] and his posts were "rude and childish."[65] All of these were cues to the "reasonable reader" that his "diatribe"[66] against three corporate officers (including plaintiff) as boobs, losers, and crooks was not a factual assertion of criminality; instead, calling plaintiff a "crook" was merely "juvenile name-calling"[67] and an expression of contempt.[68] In a similar vein, the court treated

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[56] *Id.* at 238.
[57] *Id.* (observing that anonymity "opens the door to libel and other tortious conduct").
[58] *See id.* at 249.
[59] *See Krinsky*, 72 Cal. Rptr. 3d. at 247.
[60] *Id.* at 249 n.19.
[61] *See id.* at 248–50.
[62] *Id.* at 248.
[63] *Id.*
[64] *Id.* at 249.
[65] *Krinsky*, 72 Cal. Rptr. 3d at 250.
[66] *Id.* at 249.
[67] *Id.*
[68] *Id.*

Doe 6's statement about plaintiff's "fake medical degree" as non-factual.[69] This accusation was instead "only the latest entry in a protracted online debate about whether plaintiff's medical degree from Spartan Health Sciences University in the West Indies justified her use of the 'M.D.' title in company documents."[70] In the context of the discussion thread from which it arose, the comment was an attempt to "ridicule" plaintiff, as were the "satirical" references to her poor feminine hygiene.[71]

The end result was that the court found Doe 6's speech, reprehensible as it was, constitutionally protected.[72] Thus, the court refused to allow breach of Doe 6's anonymity.[73] Where a court less well versed in Internet culture might have seen invective unworthy of protection,[74] the *Krinsky* court appreciated both the value of financial message boards as a forum for ordinary John Does to discuss corporate affairs and the distinctive nature of discourse on those boards.[75]

III. Lessons Going Forward

The cases above illustrate two trends in John Doe cases from the last decade. Courts have both (1) crafted new legal doctrines to protect anonymous speech, and (2) adapted existing First Amendment protections for hyperbole, satire, and other "non-factual" speech to protect the distinctive discourse of Internet message boards. These developments have garnered plenty of scholarly attention, so I shall content myself with three loosely connected observations.

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[69] *Id.*

[70] *Id.*

[71] *Krinsky*, 72 Cal. Rptr. 3d at 249.

[72] *Id.* at 250.

[73] *Id.*

[74] In one recent case, a federal district court refused to accept a Doe's argument that his posts to an Internet website were not defamatory because they appeared on a message board "well-known as a place for inane discussion and meaningless derogatory postings." Doe I v. Individuals, 561 F. Supp. 2d 249, 256 n.7 (D. Conn. 2008) [hereinafter *AutoAdmit*]. The court reasoned that people who searched for the plaintiff's name on the Internet might find the allegedly defamatory postings about her without knowing "the site's alleged reputation." *Id.* Thus, the judge concluded that plaintiff had made out a prima facie defamation case based on the statements themselves, and ordered disclosure of the Doe defendant's name. *Id.* For further discussion of the *AutoAdmit* case, see *infra* notes 80–106 and accompanying text.

[75] *See Krinsky*, 72 Cal. Rptr. 3d. at 234–50.

A. *A Uniform Standard Is Needed (Eventually)*

The development of appropriate standards to govern the John Doe cases has been and continues to be a piecemeal process, developing case-by-case and court-by-court. Even now, the scope of protection for John Doe's anonymity may depend on where a plaintiff chooses to sue (and can establish jurisdiction) and where the defendant's ISP, or the website on which he posted, is located. While courts continue to grope toward a consensus, the First Amendment right to speak anonymously online is compromised.

Even so, there is a positive aspect to piecemeal development of legal rules in this area. When the law is asked to solve a problem created by new technology, it is hard for the law to "get it right" unless decisionmakers understand not just the technology, but the social and cultural uses of the technology as well. The Doe cases illustrate the evolutionary process by which judges have come to understand how different Internet fora, and particularly message boards, work and what types of conversations take place there. In the meantime, the courts have served as "laboratories of experimentation," working out the kinks in the various procedural standards. This is pure speculation, of course, but up until this point, this process was probably preferable to having federal policymakers jump in with a one-size-fits-all solution to the John Doe problem before the social and technological implications were clear. Now, however, there is no reason to leave the scope of a constitutional right to be determined by lower courts. Instead, it is time for the U.S. Supreme Court to provide definitive guidance as to the proper balance between anonymous speech and the protection for reputation.

B. *The David vs. Goliath Paradigm May Be Shifting*

The need for Supreme Court intervention is particularly urgent because there are signs that the Goliath versus David paradigm may be shifting, with uncertain implications for future legal developments. Paradigm cases are important. One of the reasons courts have been willing to adopt balancing tests that tilt in favor of anonymous speech is because many of the early John Doe cases involved relatively powerful Goliaths trying to silence puny Davids who had deigned to criticize them on Internet message boards. Thanks to the hard work of cyber civil liberties advocates, courts came to appreciate that John Doe cases could involve cyberslapps just as easily as cybersmears, and they calibrated the legal doctrines accordingly. But what if judges come to believe harmful anonymous speech greatly outnumbers valuable anonymous speech? How charitable would judges have been in adopting

these doctrines if the paradigm anonymous speech cases were "cyber-bullying" cases against private figures?

The recent criminal case against Missouri mom Lori Drew cast the public spotlight on the harm that anonymous speakers can cause, and even prompted the development of a new legal theory to address that harm. The 49-year-old Drew opened a MySpace account as "Josh Evans," a teenage boy, in order to start a correspondence with her 13-year-old daughter's former friend, Megan Meier.[76] After winning Meier's trust, "Josh" cruelly "dumped" her by email, telling her: "The world would be a better place without you."[77] Meier emailed back: "You're the kind of boy a girl would kill herself over," and then hanged herself.[78] The story prompted so much outrage that a federal prosecutor had to concoct a way to prosecute Drew.[79] Essentially, the jury convicted Drew of "defrauding" MySpace by misrepresenting her identity and motives for opening an account. Although the Drew case is not a John Doe case, it certainly is a cautionary tale about the dangers of anonymous speech.

Another potentially paradigm-shifting John Doe case is *Doe I v. Individuals*, the so-called *AutoAdmit* case.[80] AutoAdmit.com ("AutoAdmit") is a message board for law students and prospective law students to share information about admissions, hiring possibilities, and other topics of interest.[81] Unfortunately, AutoAdmit also attracts a number of posters who use the site to make the most racist, sexist, and generally reprehensible posts imaginable.[82] Posters using screen names such as AK47, stanfordtroll, and Dirty Nigger targeted two Yale law students in particular with their venom.[83] For example, they posted that one of the students, Brittan Heller, had bribed her way into Yale and had a sexual affair with a Yale administrator.[84] They also posted that the other stu-

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[76] Jennifer Steinhauer, *Verdict in MySpace Suicide Case,* N.Y. Times, Nov. 26, 2008, at A25.

[77] *Id.*

[78] *Id.*

[79] *See id.* A jury convicted Drew of three misdemeanors for accessing a computer without authorization under the federal Computer Fraud and Abuse Act. *Id.*

[80] (*Autoadmit*) 561 F. Supp. 2d 249 (D. Conn. 2008). The plaintiffs brought copyright claims as well as claims for libel, invasion of privacy, and intentional infliction of emotional distress. *Id.* at 252. The trial judge later denied one defendant's motion to quash plaintiffs' subpoena *duces tecum* to the defendant's Internet service provider. *Id.* at 249. For more on the factual background of the case, see David Margolick, *Slimed Online*, Portfolio, Mar. 2009, at 80, *available at* http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying.

[81] *AutoAdmit*, 561 F. Supp. 2d at 251.

[82] *See* First Amended Complaint, *Autoadmit*, 561 F. Supp. 2d 249 (No. 307CV00909 CFD), 2007 U.S. Dist. Ct. Pleadings LEXIS 7536.

[83] *Id.* ¶¶ 30, 48–49.

[84] *Id.* ¶¶ 27, 31.

dent, Heide Iravani, had gonorrhea and was addicted to heroin.[85] Even more alarming were posts in which one poster threatened to force himself on Heller and "sodomize her. Repeatedly."[86] One poster made clear that he was a fellow Yale law student who had ogled Iravani in the gym.[87] Another posted a picture of her on a linked website's "beauty contest," and another wrote that "[w]omen named . . . Heide should be raped."[88] To add injury to insult, all of these atrocious comments were visible to anyone who chose to Google the names of Heller or Iravani.[89]

Many private-figure victims would lack the resources to bring a John Doe suit against their tormentors, particularly where the tormentors would be unlikely to have deep pockets to satisfy claims.[90] However, the AutoAdmit situation garnered so much publicity that the two women were able to get pro bono counsel to go after almost forty John Does who had posted on the website.[91] They brought defamation, copyright infringement, and other claims, and then successfully subpoenaed the identities of several of the John Does.[92] Although the claims were resolved out of court in a confidential settlement, it was clear from the outset that the plaintiffs had already won a victory of sorts.[93] Some of the unmasked defendants apologized or tried to settle;[94] some went to court;[95] and others paid social and professional penalties for their misbehavior.[96] The board's moderator finally agreed to remove some of

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[85] *Id.* ¶¶ 50, 54.

[86] *Id.* ¶ 21.

[87] *See id.* ¶ 36.

[88] First Amended Complaint, *supra* note 82, ¶¶ 39, 49.

[89] *Id.* ¶ 9.

[90] Some of the defendants appear to have had coverage for libel judgments via a homeowner's policy. *See* Margolick, *supra* note 80, at 118.

[91] *See AutoAdmit*, 561 F. Supp. 2d at 251.

[92] *Id.* at 252, 257.

[93] Edmund H. Mahony, *Ex-Yale Students Settle Internet Defamation Lawsuit*, HARTFORD COURANT, Oct. 22, 2009, at A1, *available at* http://www.courant.com/news/connecticut/hc-autoadmit1022.artoct22,0,3272457.story.

[94] *See* Margolick, *supra* note 80, at 86–87.

[95] *See, e.g.*, *AutoAdmit*, 561 F. Supp. 2d at 252.

[96] *See* Margolick, *supra* note 80, at 86–87. One of the defendants, law student Anthony Ciolli, was dismissed from the lawsuit, apparently based on his position as a director or administrator of the AutoAdmit website rather than on his own statements about plaintiffs. Nonetheless, his prospective employer rescinded his offer of employment upon learning of his involvement in the affair, presumably faulting his poor judgment in refusing to censor the offending posts. Amir Efrati, *Law Firm Rescinds Offer to Ex-AutoAdmit Executive*, Wall Street Journal Law Blog, http://blogs.wsj.com/law/2007/05/03/law-firm-rescinds-offer-to-ex-autoadmit-director/ (May 3, 2007, 11:02 EST). The plaintiffs were unable to obtain some identities because the posters sent their messages from public computers. *See* Margolick, *supra* note 80, at 87.

the offensive posts about the women, and the suit seems to have had a modest civilizing influence on the AutoAdmit message board by reminding posters that speech can indeed have consequences.[97] Moreover, both plaintiffs have obtained prestigious legal employment, despite the alleged harm to their reputations.[98]

It remains to be seen whether *AutoAdmit* or other cases highlighting the dark side of anonymous speech will influence future legislation or case law.[99] One might argue that the case demonstrates the efficacy of the "prima facie" balancing test developed in cases like *Independent Newspapers, Inc. v. Brodie* and *Dendrite International Inc. v. Doe No. 3*. The federal district judge in the *AutoAdmit* case denied defendant AK47's motion to quash a subpoena only after concluding that Heller and Iravani had made out a prima facie case of defamation against him.[100] Unlike the court in *Krinsky v. Doe 6,* the judge refused to accept the argument that the allegedly defamatory posts were non-factual because they appeared on a message board "well-known as a place for inane discussion and meaningless derogatory postings."[101] The court reasoned that people who searched for the plaintiff's name on the Internet might access the allegedly defamatory postings about her without knowing "the site's alleged reputation."[102] Thus, the prima face case was essentially made by the statements themselves, regardless of the message board context.[103]

It is worth pointing out that the district judge reasonably could have concluded that the statements were actionable even *within* the message board context. Although the message board was filled with inane comments, not every comment was meaningless; otherwise, there would be no First Amendment justification for protecting these forums. Moreover, some of the posters clearly sought to add credibility to their postings by claiming to know Heller and Iravani in the off-line world.[104] Many of the posts did include juvenile name-calling ("stupid bitch")

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[97] *See* Margolick, *supra* note 80, at 118.

[98] *See id.* at 86, 118.

[99] As I was writing this section, anonymous speakers in Iran were using their online resources to overcome government censorship and carry their protests against its totalitarian practices to the world. *See* Nazila Fathi, *Protesters Defy Iranian Efforts to Cloak Unrest*, N.Y. Times, June 18, 2009, at A1.

[100] 561 F. Supp. 2d at 256–57.

[101] *Id.* at 256 n.7.

[102] *Id.*

[103] *See id.*

[104] *See, e.g.*, First Amended Complaint, *supra* note 82, ¶ 36.

and sexist references to the women's appearances,[105] but some of the repeated allegations about the sexual behavior of the women arguably crossed the line from name-calling into assertions of fact. Even more disturbing, a few of the posts arguably fell into the unprotected speech category of "true threats," coupling as they did imprecations of sexual violence, posting of pictures of plaintiffs, and the implication that some posters had access to the women "off-line."[106] Finally, it bears emphasizing that the plaintiffs apparently became targets of abuse not because they ran a business, held public office, or sought to influence public affairs, but simply because of gender, intelligence, and appearance. Although their suit was clearly brought to silence their critics, there was relatively little danger of silencing discussion on matters of public concern.

C. *Libel Law Is Only a Partial Remedy for the Real Harms of Cybersmears*

The *AutoAdmit* case highlights one of the glaring limitations of libel law: its lack of effective remedies for the real harms suffered by victims of cybersmears.[107] Like many libel plaintiffs, the *AutoAdmit* plaintiffs wanted their dignity restored. They did not want every person who Googled their names to discover they had been the targets of young men's verbal abuse and sexual objectification. They wanted the ability to manage their own self-representations in the online environment. They doubtless wanted to exact vengeance on their tormentors, and, more simply, they wanted the offending posts taken down.

If libel law provides any of these remedies, it is largely by accident rather than design. Libel law gives successful plaintiffs compensatory and occasionally punitive damages,[108] remedies that are virtually mean-

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[105] *See id.* ¶¶ 18, 21, 42.

[106] *See id.* ¶¶ 25, 36, 39.

[107] As I have argued previously, the application of the actual malice standard in the Doe cases, or indeed in any cases involving non-media defendants, is also exceedingly problematic. Lidsky, *supra* note 1, at 915–19.

[108] The obstacles to recovery are high. The common law of defamation 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). For more on these technicalities, see Lidsky, *supra* note 1, at 872–74. The constitutional obstacles to plaintiffs' libel actions vary depending on the identity of the plaintiff, the identity of the defendant, and the type of speech at issue. *See* 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) (charting the constitutional requirements for different types of plaintiffs, defendants, and speech); *see also* Lidsky, *supra* note 1, at 874–75. In addition to common law and constitutional obstacles to recovery, some states have codified all or parts of their libel law, and state constitutional provisions may impose additional obstacles.

ingless when the defendant has no money to satisfy a judgment. Certainly, the act of suing brings some degree of vindication, acting as a public declaration of the falsity of defendants' statements.[109] Moreover, successfully unmasking a defendant may go a long way toward silencing not just that defendant but also others like him. Being unmasked, or even the fear of being unmasked, may prompt some defendants to express contrition and remorse. However, these remedies come from the strategic use of litigation rather than from libel law itself, and not even the indirect effect of libel law provides plaintiffs with the remedy they may desire most, namely, getting offending posts removed from the Internet.

The absence of a "take down" remedy in defamation law partly explains the rise of reputation management companies like ReputationDefender and Reputation Hawk. These companies provide several services. First, they monitor what is being said about their clients online. Second, they provide "positive content" to boost a client's online reputation and shift negative content "down" in search rankings. Third, they attempt to "scrub" a client's reputation by getting damaging content removed. Hiring a reputation management company sometimes provides an attractive alternative to suing for libel because suing often brings more attention to the libelous statements. A reputation management strategy can also be an adjunct to a defamation suit. For example, in the *AutoAdmit* case, ReputationDefender set up a website and petition drive to pressure AutoAdmit's operator to moderate the site and remove abusive postings.[110] ReputationDefender also enlisted law school deans, leading then-Dean Elena Kagan to urge Harvard Law School students to boycott AutoAdmit.[111] The immediate result was a backlash against plaintiffs on the message board, but the longer-term result may have been to move the negative postings about them down in Google's search engine ranking.[112]

Conclusion

For those worried about the harms caused by cybersmears, the current state of the law is dispiriting. An angry lover, a disgruntled employee, or simply a mischievous character assassin can start a campaign

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[109] *See* Randall P. Bezanson et al., Libel Law and the Press 162 (1987) (concluding that some plaintiffs feel that they win simply by suing).

[110] Margolick, *supra* note 80, at 86.

[111] *Id.*

[112] *See id.*

of lies, and often the victim will have little meaningful recourse. For those worried about harms caused by cyberslapps, there are also troubling signs. Courts have developed new legal standards, but the scope of protection of this First Amendment right varies greatly by jurisdiction. Even where there are protective legal standards in place, they provide no real protection to speakers without the resources to hire counsel. Though disheartening, the current state of the law may simply be a testament to the difficulty of balancing speech and reputation in the Internet age.