
Maintaining the Mask of the First Amendment: Procedural and Legislative Approaches to Protecting Anonymous Online Speech

*“Our nation has long prized a citizen’s right to speak anonymously. With the proliferation of the seemingly limitless vehicles for such speech on the Internet and the various forms of social media, our citizens now have outlets for anonymous free speech that were quite simply unimaginable only a decade ago.”*¹

I. INTRODUCTION

Defamation suits involving anonymous online speech swing between extremes: Some cases involve vulgar postings meant to harass and ridicule, while others take on a whistleblower-like significance in exposing possible political or corporate malfeasance.² Despite the prevalence of such cases, there are no national standards guiding a judge’s determination of when to reveal the identities of anonymous posters.³ Instead, courts have applied a jumble of tests.⁴ Some worried observers see the lack of uniformity and the accompanying uncertainties as threats to speak anonymously—a right the Supreme Court has jealously guarded.⁵

Complicating the issue is the variety of scenarios present in these defamation cases.⁶ These suits can be broadly separated into two factions: legitimate defamation suits sometimes called “cybersmears,” and illegitimate suits aimed

1. *Stone v. Paddock Publ’ns, Inc.*, 961 N.E.2d 380, 394 (Ill. App. Ct. 2011).

2. *Compare Doe I v. Individuals*, 561 F. Supp. 2d 249, 251-52 (D. Conn. 2008) (explaining vulgar and sexually offensive posts about two law students), with *Melvin v. Doe*, 49 Pa. D. & C.4th 449, 450-51 (2000) (raising allegations of possible judicial misconduct).

3. See Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1380-81 (2009) (explaining lack of national standards in unmasking anonymous Internet posters).

4. See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011) (noting dearth of appellate precedent and variety of standards trial courts employ); Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 339 (2008) (noting seven major standards applied for revealing anonymous Internet posters in defamation cases).

5. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (holding First Amendment protects right to speak anonymously); Brandon T. Crowther, Note, *Digitally Unknown: Why the Ninth Circuit Should Wish to Remain Anonymous in In re Anonymous Online Speakers*, 2012 BYU L. REV. 445, 460 (2012) (worrying Ninth Circuit decision will continue “chilling effects that encumber” right to speak anonymously).

6. See *supra* note 2 and accompanying text (illustrating range of situations present in online defamation cases).

merely at intimidating critics that resemble illegal Strategic Lawsuits Against Public Participation (SLAPPs), which are sometimes called “cyber-SLAPPs.”⁷ Cybersmear suits are typical defamation actions brought against an anonymous poster who has sought to sully the reputation of his or her target; such speech is not constitutionally protected.⁸ CyberSLAPPs, on the other hand, are baseless lawsuits that corporations, politicians, or others bring to silence critics engaged in constitutionally protected political speech online.⁹ Legitimate cybersmear cases and illegitimate cyberSLAPPs are both filed as defamation claims and can appear indistinguishable at first glance, making it difficult to balance one person’s right to speak anonymously against another person’s right to protect his or her reputation against defamation.¹⁰

This Note will trace the history of anonymous speech in the United States.¹¹ It will discuss the development of constitutional protections for anonymous speech and how the Supreme Court has applied those protections to online speech.¹² This Note will also discuss the development of defamation suits involving anonymous Internet posters and the varying approaches courts have employed in identifying such defendants.¹³ This Note will further argue against adopting national standards for determining when to identify an anonymous poster during defamation cases.¹⁴ Instead, this Note will posit that such decisions are best left to the courts to decide on a case-by-case basis.¹⁵ In

7. See Joshua R. Furman, Comment, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 214-16 (2001) (describing cybersmeas and use of anti-SLAPP laws in online defamation cases).

8. See Furman, *supra* note 7, at 217 (describing cybersmeas as frequently including “hyperbole or sarcasm” and ranging from “name-calling to sycophancy”).

9. See Digital Media Law Project, *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, DIGITAL MEDIA LAW PROJECT (last visited Oct. 12, 2014), <http://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (describing SLAPPs and anti-SLAPP laws).

10. Compare *Global Telemedia Int’l, Inc. v. Doe I*, 132 F. Supp. 2d 1261, 1263-64, 1270-71 (C.D. Cal. 2001) (holding defamation case frivolous and dismissed under anti-SLAPP law), with *Doe I v. Individuals*, 561 F. Supp. 2d 249, 255-57 (D. Conn. 2008) (ordering anonymous online poster identified in cybersmear suit).

11. See *infra* Part II.

12. See *infra* Part II.B. See generally *Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional statute criminalizing transmission of “indecent” and “patently offensive” material to minors over Internet).

13. See, e.g., *Doe v. Cahill*, 884 A.2d 451, 462 (Del. 2005) (announcing summary judgment standard for revealing anonymous posters); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super Ct. App. Div. 2001) (announcing prima facie standard for revealing anonymous posters); *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000) (announcing good-faith standard for revealing anonymous posters), *rev’d on other grounds sub nom.* *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469, 473-81 (2009) (describing various approaches for unmasking anonymous posters).

14. See Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 801 (2004) (arguing against rush to apply new standards for identifying anonymous posters).

15. See Vogel, *supra* note 14, at 801-02 (suggesting new standards offer little First Amendment benefit

analyzing cyberSLAPPs, however, this Note will advocate for robust anti-SLAPP laws to protect anonymous political speech against powerful interests.¹⁶ This Note will further argue that anti-cyberSLAPP laws can be powerful weapons to protect all-important political speech.¹⁷

II. HISTORY

Anonymous speech has a vaunted place in the establishment of the United States Constitution.¹⁸ More recently, the Supreme Court held “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”¹⁹ The rise of the Internet in recent decades, however, has created novel challenges to this right.²⁰ Courts assessing these challenges have applied varying approaches to protect anonymous online speakers.²¹ At the same time, Congress has not passed legislation creating uniform protections.²²

A. Anonymous Speech Protection and Its Extension to the Internet

From Thomas Paine’s *Common Sense* pamphlet to Publius’s pseudonymously-written *Federalist Papers*, many of the fledgling ideals that forged the nation were first expressed anonymously, thereby illustrating the profound place of anonymous speech in the United States.²³ The right to speak

and threaten other constitutional provisions).

16. See *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1263 (C.D. Cal. 2001) (dismissing defamation against anonymous Internet posters under anti-SLAPP law).

17. See Digital Media Law Project, *supra* note 9 (explaining anti-SLAPP laws).

18. See *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (calling right to speak anonymously fundamentally important to establishment of Constitution).

19. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

20. See Lidsky, *supra* note 3, at 1374 (describing early defamation cases against anonymous Internet posters as threatening “First Amendment values”). “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.” *Id.*

21. See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174-76 (9th Cir. 2011) (discussing, though declining to endorse, various approaches to identifying anonymous posters). “We leave to the district court the details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers.” *Id.* at 1777. See Crowther, *supra* note 5, at 460 (characterizing Ninth Circuit’s ruling in *In re Anonymous Online Speakers* as adding “to the confusion”); Lidsky, *supra* note 3, at 1385 (calling court-by-court development of standards “piecemeal process”); Moore, *supra* note 13, at 473-81 (describing tests to unmask anonymous posters from least to most exacting).

22. See Lidsky, *supra* note 3, at 1385 (describing federal policy makers’ fruitless attempts to create “one-size-fits-all solution”). “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.” *Id.*

23. See *McIntyre*, 514 U.S. at 343 n.6 (noting “Publius” as pseudonym of James Madison, Alexander Hamilton, and John Jay); Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2152-53 (2011) (“Anonymous publications have profoundly shaped American history going back to the colonial era.”). Thomas Paine’s “famous pamphlet *Common Sense*, widely recognized for its impact on the nascent independence movement, was originally published under the simple pseudonym ‘An Englishman.’” *Id.* at 2153.

anonymously does not appear within the text of the First Amendment, but the Supreme Court has recognized it in two landmark cases as an implicit free-speech right.²⁴ In *Talley v. California*, the Supreme Court recognized for the first time a right to speak anonymously by holding unconstitutional a city ordinance that prohibited the distribution of any handbills that did not include the name and address of the person who distributed, printed, or sponsored them.²⁵ The case stemmed from Talley's conviction under the ordinance after he passed out handbills urging people to boycott businesses that sold products from "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals."²⁶ The handbills included the name of an organization—"National Consumers Mobilization"—and a post office box number, but a municipal court decided that information did not meet the ordinance's requirements and fined Talley ten dollars.²⁷ The Court held that the ordinance targeted all speech too broadly to meet its supposed purpose of identifying those engaged in fraud, false advertising, and libel.²⁸

Thirty-five years later in *McIntyre v. Ohio Elections Commission*, the Court reaffirmed the right to anonymous political speech, calling it "a shield from the tyranny of the majority."²⁹ The Court in *McIntyre* struck down an Ohio law that required disclosure of who "paid for" election pamphlets, advertisements, and other publications in elections.³⁰ The Ohio election law was narrower than the law invalidated in *Talley*, and the Court's ruling helped further solidify First Amendment protections for anonymous speech.³¹ In *McIntyre*, the petitioner, Margaret McIntyre, had been fined one hundred dollars for passing out leaflets at a public meeting opposing a proposed local tax hike that did not clearly

24. See *McIntyre*, 514 U.S. at 342 (holding First Amendment protects author's decision to remain anonymous); *Talley v. California*, 362 U.S. 60, 64 (1960) (declaring ordinance requiring identification of handbill distributors unconstitutional); see also Boudin, *supra* note 23, at 2151 (calling First Amendment law "largely judge-made"). *Talley* "was the first recognition in the Court's modern jurisprudence of anything like a constitutional right to anonymous political speech." *Id.* at 2167.

25. See 362 U.S. at 63-64. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.*; see Boudin, *supra* note 23, at 2166-67 (calling decision first modern recognition of "anything like" right to anonymous political speech).

26. See *Talley*, 362 U.S. at 61 (describing handbills). The ordinance defined handbills as "any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." *Id.* at 63 n.4.

27. See *id.* at 61 (describing handbills' partial purpose to enroll members for National Consumers Mobilization).

28. See *id.* at 64 (noting counsel presented no legislative history suggesting such purpose to Court). The Court stated it would not decide the validity of an ordinance limited to preventing fraud, false advertising, and libel. See *id.*

29. See 514 U.S. 334, 357 (1995) (calling anonymous pamphleteering "honorable tradition of advocacy and of dissent").

30. See *id.* at 338 n.3 (stating text of law prohibiting anonymous communications aimed at influencing voters).

31. See Boudin, *supra* note 23, at 2167 (discussing differences between *McIntyre* and *Talley*).

identify the pamphlet's sponsorship.³² The Ohio Supreme Court upheld the conviction and distinguished the law from the ordinance in *Talley* on the basis that the Ohio law was narrower because its explicit purpose was the identification of people who distribute election materials containing falsehoods.³³ The U.S. Supreme Court held, however, that the law did not pass "exacting scrutiny" because Ohio did not show its interest in protecting voters from false statements justified banning all use of anonymous election-related speech.³⁴

The Supreme Court first applied broad free-speech protections to online speakers in 1997 in *Reno v. ACLU*.³⁵ A federal district court in *ACLU of Georgia v. Miller*³⁶ then specifically applied anonymity protections to online speakers.³⁷ These rights developed mainly in response to the emergence of defamation suits against online posters.³⁸

B. Defamation and the Internet

Defamation is a common-law tort aimed at allowing a person to protect his or her reputation from false attacks.³⁹ Additionally, the defamatory statement must be published.⁴⁰ Public figures face greater difficulty than private persons

32. See *McIntyre*, 514 U.S. at 337-38 (noting McIntyre had printed pamphlets at home and some identified her as author).

33. See *id.* at 339 (describing Ohio Supreme Court decision). "The Ohio court believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters are 'reasonable' and 'nondiscriminatory.'" *Id.* at 340 (internal quotations omitted); see Boudin, *supra* note 23, at 2167 (explaining Ohio Supreme Court's decision concluding Ohio statute's narrowness distinguished it from *Talley*).

34. See *McIntyre*, 514 U.S. at 347, 357 (holding state cannot punish fraud through banning specific category of speech).

35. See 521 U.S. 844, 870 (1997). "[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.*; see Ryan M. Martin, Comments and Casenotes, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1225 (2007) (stating *Reno* "conclusively determined" free-speech rights extend to Internet); Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 535 (2002) (stating Internet speakers first received constitutional protection in *Reno*).

36. 977 F. Supp. 1228, 1232 (N.D. Ga. 1997).

37. See *id.* (ruling unconstitutional state law prohibiting speakers from falsely identifying themselves in online communications). The court cited *McIntyre*'s protection of anonymous speech in ruling the state law was a "presumptively invalid content-based restriction." *Id.*; see also Furman, *supra* note 7, at 243 (discussing online anonymity part of free-speech protections).

38. See Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster,"* 9 B.U. J. SCI. & TECH. L. 407, 410 (2003) (describing struggle to adapt defamation law to Internet).

39. See 19 AM. JUR. TRIALS 504 § 2 (1972). "An action for defamation is based on a violation of the fundamental right of an individual to enjoy a reputation unimpaired by false and defamatory attacks." *Id.*; see 32 MONIQUE C. M. LEAHY, CAUSES OF ACTION 2D 281 § 2 (2013) (describing "false and defamatory attacks" on Internet giving rise to defamation suits); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("[C]ommunication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

40. See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

in proving defamation.⁴¹ In either case, the truth of a statement is an absolute barrier to proving defamation.⁴²

The rise of the Internet during the past twenty years has led to the creation of an entirely new body of defamation cases involving online speech.⁴³ Courts applied traditional frameworks in some of the earliest online defamation cases involving statements made in chat rooms or posted on message boards.⁴⁴ Specifically, courts treated Internet service providers (ISPs) the same way it treated newspapers or other media publishers.⁴⁵ This line of reasoning reached a critical apex in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁴⁶ a case that within a year helped spark congressional action.⁴⁷

In *Stratton Oakmont, Inc.*, an anonymous poster on Money Talk, Inc.—a bulletin board hosted by an early ISP named Prodigy—accused investment bank Stratton Oakmont, Inc. of fraud and other criminal activities.⁴⁸ When it began providing Internet services in 1990, Prodigy billed itself as a “family

To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id.; see also RESTATEMENT (SECOND) OF TORTS § 577 (1977) (defining publication as “communication intentionally or by a negligent act” to third party).

41. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (announcing actual-malice standard public officials must prove to recover for defamation). Actual malice means the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280; see RESTATEMENT (SECOND) OF TORTS § 580A (1977) (explaining defamation against public official requires knowledge or reckless disregard of false and defamatory statement). But see RESTATEMENT (SECOND) OF TORTS § 580B (1977) (noting private citizen, unlike public figure, may recover for false and defamatory statement made negligently).

42. See *McCuddin v. Dickinson*, 300 N.W. 308, 309 (Iowa 1941) (“[T]ruth of the defamatory words is a complete defense.”); RESTATEMENT (SECOND) OF TORTS § 581A (1977) (“One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”).

43. See Jennifer O’Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs To Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 *FORDHAM L. REV.* 2745, 2746 (2002) (describing increasing amount of defamation cases involving anonymous online speakers); Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 *CASE W. RES. L. REV.* 235, 254 (1995) (noting as of publication date no online defamation cases filed in U.S. courts).

44. See Blumstein, *supra* note 38, at 410-11 (arguing courts initially struggled to analyze online defamation cases).

45. See *id.* (noting some courts analogized online postings to letters to newspaper editors).

46. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

47. See Blumstein, *supra* note 38, at 412 (describing *Stratton Oakmont* as partially motivating Communications Decency Act of 1996).

48. See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1 (summarizing statements from anonymous poster attacking Stratton Oakmont). Specifically, the anonymous poster called Stratton Oakmont a “cult of brokers who either lie for a living or get fired” and accused the bank and its president of committing “major criminal fraud” as part of the initial public offering of another company’s stock. *Id.*

oriented computer network” and pledged to exercise “editorial control” over the postings on its message boards.⁴⁹ This level of control proved difficult, as Prodigy had two million subscribers by 1995 who made 60,000 message-board posts each day.⁵⁰ Stratton Oakmont sued Prodigy for libel and moved for summary judgment, claiming Prodigy was the publisher of the defamatory remarks, and thus liable for them.⁵¹ A New York Supreme Court held that, due to its policy of controlling the content of its bulletin boards, Prodigy met the definition of publisher.⁵² The decision raised concerns that any effort by an ISP to control content could result in liability.⁵³

In part to remedy the decision in *Stratton Oakmont, Inc.*, Congress passed the Telecommunications Act of 1996, which shielded ISPs from liability in online defamation cases.⁵⁴ In practice, the law frequently left anonymous “John Does” as the only potential defendants in online defamation cases.⁵⁵ Plaintiffs filed these cases against anonymous posters to fight what came to be known to some as cybersmears.⁵⁶

Cybersmears are defamation cases generally filed against unknown defendants—listed in court papers as “John Doe”—for making derogatory posts online.⁵⁷ While frequently hyperbolic, the global and instantaneous reach of the Internet has caused much concern about the statements giving rise to cybersmears.⁵⁸ Corporations initially claimed to be the victims of most

49. *Id.* at *2 (describing how Prodigy distinguished itself from competition and compared itself to newspaper); see David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 232 (1996) (noting Prodigy “would not permit obscenity or insulting conduct on its bulletin boards”).

50. See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1, *3 (explaining why Prodigy’s argument of manual review of bulletin-board messages not feasible).

51. See Miranda, *supra* note 49, at 233-34 (explaining case against Prodigy viable only if court deemed it publisher of statements).

52. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, *1 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy as publisher of information on its sites). The court did imply, however, that ISPs not exercising the same degree of control as Prodigy would not be considered publishers and, therefore, not held liable for defamatory material appearing on those (or such) boards. See *id.* at *5. The court compared these ISPs to bookstores, libraries, and television network affiliates, which are similarly not held liable as publishers for defamation. See *id.*; see also Blumstein, *supra* note 38, at 412 (explaining Prodigy considered publisher because it retained editorial control over interactive websites).

53. See Miranda, *supra* note 49, at 235 (considering ISPs abandoning all protective measures leading to online “free-for-all”). The case itself ended when Stratton Oakmont agreed not to oppose Prodigy’s motion to reconsider the court’s decision after Prodigy publicly apologized for the statements. See *id.*

54. See Telecommunications Act of 1996 § 230, 47 U.S.C.A. § 230 (2012) (announcing ISPs not publishers of content posted by Internet user); Blumstein, *supra* note 38, at 412 (describing Congress’s motivation for passing law and its effects).

55. See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 871-72 (2000) (explaining law requires plaintiff to often sue anonymous originator of defamatory statement).

56. See Furman, *supra* note 7, at 214-15 (describing cybersmears).

57. See *id.* at 217-18. “These messages are usually brief and exaggerated, often consist entirely of hyperbole or sarcasm, and range in tone from insults and name-calling to sycophancy.” *Id.*

58. See *id.*; Wilson, *supra* note 35, at 535 (positing Internet postings can cause “tremendous damage”).

cybersmears, but individuals have increasingly filed suits in which they claim to be victimized.⁵⁹ A pair of 2008 cases—*Krinsky v. Doe 6*⁶⁰ and *Doe I v. Individuals*⁶¹—illustrate how corporations and individuals file defamation suits to combat cybersmears.⁶²

In *Krinsky*, the plaintiff—a former high-ranking executive for a publicly traded “global development drug service company” named Lisa Krinsky—sued ten anonymous defendants, “John Does,” for alleged defamatory postings on Yahoo; one “John Doe” challenged a subpoena that sought to identify him.⁶³ The statements at issue were insulting and vulgar.⁶⁴ The court ruled, however, that the posts fell “into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, constitute protected opinion under the First Amendment.”⁶⁵ One commentator noted the case illustrates a trend among courts to adapt “existing First Amendment protections for hyperbole, satire, and other ‘non-factual’ speech to protect the distinctive discourse of Internet message boards.”⁶⁶

In *Doe I v. Individuals*, the plaintiff, a Yale Law student labeled as Doe I, fared better in unmasking her online tormentors.⁶⁷ She was the subject of nearly 200 threads, most of which were sexually explicit, on an online message board catering to law students known as AutoAdmit.⁶⁸ The posts regarding Doe I began after someone posted a photograph of her, which was followed by a series of posts, some of which appeared to be posted by classmates,

59. See Furman, *supra* note 7, at 214 (defining cybersmear suits as ones brought by companies); Lidsky, *supra* note 3, at 1385 (noting “Goliath versus David paradigm may be shifting”).

60. 159 Cal. App. 4th 1154 (2008).

61. 561 F. Supp. 2d 249 (D. Conn. 2008).

62. See *Krinsky*, 159 Cal. App. 4th at 1159 (describing allegations against anonymous posters falsely suggested corporate officer engaged in fraud and criminality); *Doe I*, 561 F. Supp. 2d at 251-52 (describing anonymous posters’ personal attacks against two law students).

63. See *Krinsky*, 159 Cal. App. 4th at 1158-59 (outlining case’s procedural history).

64. See *id.* (quoting Doe 6 calling Krinsky and Krinsky’s colleagues “boobs, losers and crooks”). More offensively, Doe 6 posted a manager’s hypothetical “New Year’s resolutions” that the manager would reciprocate oral sex with Krinsky “even though she has fat thighs, a fake medical degree, ‘queefs’ and has poor feminine hygiene.” *Id.*

65. *Id.* at 1178. The court concluded the statements describing Krinsky and fellow executives as “boobs, losers and crooks” were “juvenile name-calling” that “cannot reasonably be read as stating actual facts,” making it immune from a defamation prosecution. See *id.* at 1176. Similarly, the court found the statements regarding the Krinsky’s colleague’s “New Year’s resolution” “unquestionably vulgar and insulting,” but not factual assertions. *Id.* at 1176-77. Despite accusing Krinsky of having a “fake medical degree,” the court ruled this should be read in the context of an earlier online discussion as to whether Krinsky was entitled to refer to herself as an “M.D.” because her medical degree came from Spartan Health Sciences University in the West Indies. *Id.* at 1177. The court concluded that “[n]o reasonable reader would have taken this post seriously.” *Id.*

66. Lidsky, *supra* note 3, at 1384.

67. See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 257 (D. Conn. 2008) (ruling “John Doe’s” right to speak anonymously did not outweigh Doe I’s interest in identification).

68. See *id.* at 251 (outlining factual basis of lawsuit).

expressing a desire to engage in sexual activity with her.⁶⁹ Within months, the posts became more vulgar, including allusions to rape.⁷⁰ After Doe I filed suit, the defendant, “John Doe,” posted that she “should be raped” and started a thread concerning another female Yale Law student called “[i]nfllicting emotional distress on cheerful girls named [Doe II].”⁷¹ The court ordered “John Doe” to be identified, finding that Doe I “has shown sufficient evidence supporting a prima facie case for libel.”⁷² But without a remedy requiring removal of such damaging posts from the Internet, such victories continue to ring hollow.⁷³

C. Development of Tests Dealing With Anonymous Internet Posters in the Context of Defamation Suits

Incidentally, the courts in *Krinsky* and *Doe I* both applied the same test in determining whether to identify the anonymous defendants.⁷⁴ Such consistency may reflect a growing consensus, though courts in different states have employed a multitude of tests in determining whether to identify anonymous Internet posters.⁷⁵ These tests range from the least stringent—known as the good-faith standard—to a four-part balancing test, which is considered to be the approach most protective of anonymous speech.⁷⁶ The Supreme Court has not weighed in on the matter to determine a uniform approach.⁷⁷

69. See *id.* (reporting photo caption as stating “[r]ate this HUGE breasted cheerful big tit girl from YLS”).

70. See *id.* (describing post stating Doe I “fantasized about being raped by her father”). Anonymous posters also stated Doe I had a sexually transmitted disease, abused heroin, and that her father was apparently involved in criminal activity. See *id.* One poster expressed hope that “she gets raped and dies.” *Id.*

71. See *Doe I*, 561 F. Supp. 2d at 252 (alteration in original) (noting Doe I brought suit with another female Yale Law student subjected to similar cybersmear).

72. *Id.* at 257.

73. See Lidsky, *supra* note 3, at 1389 (explaining Doe I and those similarly situated wanted ability to protect their online reputations). “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.” *Id.*

74. See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 256 (D. Conn. 2008) (finding prima facie test strikes best balance between defendant’s First Amendment rights and Doe I’s interests); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172 (2008) (adopting prima facie test as well).

75. See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (announcing summary judgment standard); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (describing prima facie standard); *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000) (employing good-faith standard), *rev’d on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). “The many federal district and state courts that have dealt with this issue have employed a variety of standards to benchmark whether an anonymous speaker’s identity should be revealed.” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011); see also Moore, *supra* note 13, at 473-81 (describing various approaches).

76. See Moore, *supra* note 13, at 473-81.

77. See *Varenti v. Gannett Co., Inc.*, 929 N.Y.S.2d 671, 675 (N.Y. Sup. Ct. 2011) (explaining Supreme Court has not announced controlling standard for determining disclosure of anonymous poster’s identity).

1. *The Earliest Approaches*

The least protective approach of anonymity is the so-called “good-faith” standard announced in *In re Subpoena Duces Tecum to America Online, Inc.*⁷⁸ The court in that case denied America Online’s request to quash a subpoena from an anonymous company that sought the identities of four subscribers it alleged posted defamatory comments about it.⁷⁹ The court held that a subpoena seeking the identity of an anonymous poster should be allowed:

(1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.⁸⁰

The court did not explain the meaning of the first part of the test—“satisfied by the pleadings or evidence supplied to that court”—but it does not appear to impose a substantial burden.⁸¹

2. *Dendrite, Cahill, and Greater Protections for Anonymity*

Within a year of *In re Subpoena Duces Tecum to America Online, Inc.*, the New Jersey Superior Court released a decision outlining the strongest protections for anonymous posters to date in *Dendrite International, Inc. v. Doe No. 3*.⁸² In that case, Dendrite International, Inc., a publicly-traded company providing computer services to the pharmaceutical and consumer package goods industries, sued for defamation and sought the identity of an unidentified defendant labeled “John Doe” who had made posts to a Yahoo message board about the company.⁸³ Specifically, Dendrite took issue with posts it said falsely

78. See 2000 WL 1210372, at *8; see also Moore, *supra* note 13, at 473 (describing good-faith as least exacting standard).

79. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at *1 (stating suit filed by anonymous publicly traded company against five “John Does”). The suit alleged the John Does made defamatory statements about the anonymous company in Internet chat rooms, which breached “fiduciary duties and contractual obligations owed” to the company. See *id.*

80. *Id.* at *8.

81. See Moore, *supra* note 13, at 474 (theorizing phrase does not require “substantive weighing” of plaintiff arguments).

82. See 775 A.2d 756, 772 (N.J. Super. Ct. App. Div. 2001) (refusing to order identification of anonymous poster critical of Dendrite’s pharmaceutical company); see also Moore, *supra* note 13, at 478 (calling *Dendrite* standard “most protective of the First Amendment”); Shaun B. Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 503 (2001) (describing *Dendrite*’s protection of anonymous speech “substantial procedural and substantive protection”).

83. See *Dendrite*, 775 A.2d at 761-62 (describing anonymous posts relating to reported accounting and

suggested the company was for sale but could not find a buyer.⁸⁴ The court created a four-part balancing test for identifying an anonymous poster that required: notice be provided to the anonymous poster or posters to give them an opportunity to oppose the move to identify them; the plaintiff must identify “the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech;” the plaintiff has stated a prima facie claim against the defendant; and even after stating a prima facie case, the court must balance the defendant’s right to anonymous speech under the First Amendment against the strength of the plaintiff’s prima facie case and “the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”⁸⁵ Commentators have cited *Dendrite* both approvingly and disapprovingly.⁸⁶ Despite some disagreement about its merits, *Dendrite* reflects one of the most popular approaches to identifying anonymous online posters in defamation cases.⁸⁷

Similar to *Dendrite* in terms of approach and popularity is *Doe v. Cahill*.⁸⁸ The plaintiff in *Cahill*, a city councilor named Patrick Cahill, sued for defamation and sought the identity of an unknown defendant labeled “John Doe” who posted anonymously that Cahill had “obvious mental deterioration,” “devoted all of his energy to being a divisive impediment to any kind of cooperative movement,” and “is as paranoid as everyone in the town thinks he is.”⁸⁹ The *Cahill* court said it adopted “a modified *Dendrite* standard;” specifically, this included the first and third components of the *Dendrite* test,

operational problems).

84. See *id.* at 763 (recounting poster’s statements about *Dendrite* and company’s assertion statements were false).

85. See *id.* at 760-61; see also Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 248 (2011) (explaining four-part test in *Dendrite*).

86. Compare Moore, *supra* note 13, at 483 (calling *Dendrite* “best approach”), with Vogel, *supra* note 14, at 808-09 (positing *Dendrite* “goes beyond what is necessary to satisfy the First Amendment”). “The Supreme Court has never interpreted the right as precluding discovery of the identity of a particular individual accused of illegal or actionable speech; indeed, the Court has recognized that common-law claims such as defamation are an essential balance to the right to speak anonymously.” Vogel, *supra* note 14, at 808-09.

87. See *In re Ind. Newspapers Inc.*, 963 N.E.2d 534, 551 (Ind. Ct. App. 2012) (describing *Dendrite* as one of two most common approaches to identifying anonymous posters); *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) (remarking case law still developing but coalesced around *Dendrite* test). “Some courts have adopted the *Dendrite* test wholesale, while other courts have adopted streamlined versions of the *Dendrite* test” *SaleHoo Group, Ltd.*, 722 F. Supp. 2d at 1214 (internal citations omitted).

88. See 884 A.2d 451, 451, 454 (Del. 2005) (declining to identify anonymous blogger in suit brought by elected city councilor); see also *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009) (adopting standard “closely” resembling summary judgment standard in *Cahill*); *In re Ind. Newspapers Inc.*, 963 N.E.2d at 551 (describing *Dendrite* and *Cahill* as similar and most common approaches); Gleicher, *supra* note 4, at 341-42 (describing *Cahill* as marking beginning of more individuals, instead of corporations, seeking “John Doe” subpoenas); Moore, *supra* note 13, at 477 (stating *Cahill* approach followed by “several other courts”).

89. See *Cahill*, 884 A.2d at 454 (describing two Internet postings from anonymous defendant, “John Doe,” as giving rise to defamation suit).

but not the second or fourth requirements.⁹⁰ The court referred to this modified test as a “‘summary judgment’ standard.”⁹¹ While the *Cahill* court shielded the anonymous poster’s identity and dismissed the suit, there was some consternation about the test articulated in the case, particularly because it provided less First Amendment protection in a case involving political speech than the *Dendrite* test afforded a nonpolitical speaker.⁹²

3. *In re* Anonymous Online Speakers

The Ninth Circuit’s 2011 opinion in *In re Anonymous Online Speakers* suggests courts may look at the type of speech involved in a case when deciding whether to order discovery that would reveal the identities of anonymous posters.⁹³ The case involved a multi-level marketing company called Quixtar accusing rival company Signature Management TEAM (TEAM) of orchestrating an online smear campaign against it.⁹⁴ Specifically, Quixtar alleged TEAM employees anonymously posted blogs that accused Quixtar of refusing to pay bonuses, violating the law, and secretly acknowledging its products were overpriced and unsellable.⁹⁵ As part of the discovery process, Quixtar sought to have a TEAM employee testify as to the identities of five of the bloggers, who were not themselves defendants in the case.⁹⁶ The trial court ordered the TEAM employee to identify three of the five posters.⁹⁷

The court did not adopt a test of its own but upheld a lower court order to identify the anonymous posters.⁹⁸ The court indicated that while the lower

90. See *id.* at 461 (describing reasons for differing with *Dendrite*). The court in *Cahill* stated *Dendrite*’s second requirement, “that the plaintiff set forth the exact defamatory statements, is subsumed in the summary judgment inquiry.” *Id.* *Dendrite*’s fourth requirement “that the trial court balance the defendant’s First Amendment rights against the strength of the plaintiff’s *prima facie* case is also unnecessary” because the “summary judgment test is itself the balance.” *Id.*

91. See *id.* at 457 (holding anonymous defendant becomes identified if case survives summary judgment motion).

92. See Martin, *supra* note 35, at 1238 (noting First Amendment requires greater protection for political speech). The *Cahill* court also ignored that public figures must show actual malice—a requirement for such persons to win a defamation claim—in order to succeed in unmasking an anonymous poster. See *id.* at 1242-43 (highlighting problems with *Cahill* decision); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding commercial speech shares some First Amendment protections with political speech). Political speech has always enjoyed greater protection than other types of speech. See *Va. State Board of Pharmacy*, 425 U.S. at 765.

93. See Mallory Allen, Note, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers*, 7 WASH. J.L. TECH. & ARTS 75, 80 (2011) (noting no consensus among courts in identifying anonymous internet posters); see also Crowther, *supra* note 5, at 460 (discussing new courts apply inconsistent standards).

94. See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1171 (9th Cir. 2011) (discussing background of case).

95. See *id.* at 1172.

96. See *id.*

97. See *id.*

98. See *In re Anonymous Online Speakers*, 661 F.3d at 1176-78 (“We leave to the district court the

court's use of the *Cahill* test did not constitute "clear error," it suggested the standards of *Cahill* are too exacting for a case involving purely commercial speech.⁹⁹ While the full implications of the case are still uncertain, the decision may signal a new willingness on the part of courts to relax standards in identifying anonymous posters, as another more recent Ninth Circuit case seems to signal.¹⁰⁰ One commentator went so far as to call the decision contrary to "the policies underlying the First Amendment and the anonymous-speech doctrine."¹⁰¹

D. Other Approaches and Potential Legislative Solutions Addressing the Issue

Illinois courts have uniquely handled such cases, eschewing the approaches previously discussed and identifying anonymous Internet posters through state discovery law.¹⁰² Illinois Supreme Court Rule 224 (Rule 224), which the court implemented to aid recovery for victims of industrial accidents, allows a potential plaintiff to determine who may be liable for his or her injuries before filing suit, enabling a judge to order an anonymous Internet poster identified before a plaintiff even files a defamation lawsuit.¹⁰³ In *Maxon v. Ottawa Publishing Co.*, which was the first case in which an Illinois court used Rule 224 in the context of online defamation, the court ordered a local newspaper to provide information identifying anonymous posters who accused the plaintiffs, a married couple named Donald and Janet Maxon, of bribing local officials to pass an ordinance allowing bed and breakfasts to operate in residential areas.¹⁰⁴ The court held that Rule 224 and state law requiring a petition to sufficiently state a cause of action provides enough protections for anonymous Internet

details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers.").

99. See *id.* at 1177 (describing *Cahill* approach more appropriate for cases involving political speech versus purely commercial speech).

100. See *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F. App'x 431, 432 (9th Cir. 2011) (ordering identity of anonymous posters revealed because no indication speech at issue not commercial); Allen, *supra* note 93, at 88 (suggesting *In re Anonymous Online* decision may indicate lowering bar to unmask anonymous bloggers).

101. See Crowther, *supra* note 5, at 460 (arguing court decision suggested anonymous speech less deserving of protection).

102. See *Maxon v. Ottawa Publ'g. Co.*, 929 N.E.2d 666, 669, 674 (Ill. App. Ct. 2010) (rejecting lower court's use of *Dendrite* and *Cahill* approaches in favor of state discovery rules); *Stone v. Paddock Publ'ns, Inc.*, 961 N.E.2d 380, 389 (Ill. App. Ct. 2011) (following *Maxon's* approach of using discovery laws); Sarah A. Smith, *Who Posted That? Anonymous Online Speech and the First Amendment*, 99 ILL. B.J. 194, 194 (2011) (discussing Illinois's use of "pre-suit discovery procedures to uncover the identities of anonymous online commenters").

103. See ILL. SUP. CT. R. 224 (explaining procedure to engage in discovery before suit filed). "A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." *Id.*; see Smith, *supra* note 102, at 195 (describing rule as "pre-litigation discovery tool" seeking "not monetary damages but information").

104. *Maxon*, 929 N.E.2d at 670 (describing Internet postings accusing Maxons of corruption); see Smith, *supra* note 102, at 196 (stating zoning change at issue in article related to Maxons' proposed bed and breakfast).

posters.¹⁰⁵ *Dendrite* and *Cahill* did not, according to the court, provide any further meaningful protections.¹⁰⁶

Courts in other jurisdictions have recently analyzed whether reporter-shield laws, which allow journalists to keep the names of their sources secret, are applicable to anonymous defendants in Internet defamation suits.¹⁰⁷ So far, however, courts do not appear inclined to extend the protections of such laws to anonymous Internet posters.¹⁰⁸ Indeed, the New Jersey Supreme Court noted in 2011 that while the state's shield law "is not limited to traditional news outlets like newspapers and magazines," it also "does not apply to every self-appointed newsperson."¹⁰⁹

E. CyberSLAPPs

CyberSLAPPs are the latest incarnation of SLAPPs, which are frivolous lawsuits masquerading as defamation cases brought against someone who speaks out on a matter of public concern.¹¹⁰ The goal of these suits is not to win a defamation verdict—because in reality no defamation exists—but to intimidate a critic into silence with the threat of a costly legal battle.¹¹¹ One judge in an early SLAPP suit noted, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."¹¹²

105. See *Maxon*, 929 N.E.2d at 673-74 (explaining procedures of Rule 224 and section 2-615 of Illinois Code of Civil Procedure). Rule 224 requires that the court hold a hearing to ensure the petition actually states facts giving rise to a defamation claim. See *id.* at 673. Illinois rules of civil procedure give the courts "a readily available mechanism to determine whether the petition sufficiently states a cause of action against the potential defendant . . ." *Id.* at 674; see 735 ILL. COMP. STAT. ANN. 5/2-615 (West 2014) (allowing for dismissal of legally insufficient claims); Smith, *supra* note 102, at 196 (explaining court found anonymous speakers adequately protected through state discovery and procedure laws).

106. See *Maxon*, 929 N.E.2d at 675. "We find that the requirements articulated in *Dendrite* and *Cahill* add nothing to the protections provided by our previous analysis of the jurisprudence of Rule 224 and section 2-615 of the Code." *Id.*

107. See *In re Ind. Newspapers Inc.*, 963 N.E.2d 534, 547 (Ind. Ct. App. 2012) (rejecting use of shield law); *Too Much Media, LLC v. Hale*, 20 A.3d 364, 383 (N.J. 2011) (deeming application of shield laws to Internet defamation suits realm of legislature).

108. See *In re Ind. Newspapers Inc.*, 963 N.E.2d at 547 (holding shield law meant to protect "person with editorial or reportorial functions"); *Too Much Media, LLC* 20 A.3d at 382. "[C]laimants must make a prima facie showing that (1) they have the requisite connection with news media, (2) they have the necessary purpose to gather or disseminate news, and (3) the materials subpoenaed were obtained in the ordinary course of pursuing professional newsgathering activities." *Too Much Media, LLC* 20 A.3d at 382.

109. *Too Much Media, LLC*, 20 A.3d at 368.

110. See Digital Media Law Project, *supra* note 9 (calling suits retaliation for "speaking out on a public issue or controversy"). Blog posts and comments, letters to the editor of newspapers, testimony at a government proceeding, or gathering signatures for a petition are all activities that lead to SLAPPs. See *id.* "SLAPPs are brought by corporations, developers, or government officials against individuals or community organizations that oppose their actions." *Id.*

111. See *id.* (asserting most SLAPPs would fail if fully litigated).

112. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992); see Richards, *supra* note 85, at 230 (discussing Judge Nicholas Colabella's approach in *Gordon*, one of first published opinions involving SLAPP).

CyberSLAPPs are filed by public figures or corporations against anonymous online posters and carry, along with the goal of silencing the poster, the additional goal of identifying them.¹¹³ Twenty-seven states, the District of Columbia, and Guam have enacted anti-SLAPP suits with another three states creating common-law anti-SLAPP equivalents.¹¹⁴ Anti-SLAPP laws allow defendants to bring motions to dismiss early in the litigation process, which a judge will grant if the suit is meritless and the speech at issue is a “matter of public concern.”¹¹⁵ Anti-SLAPP statutes can provide a useful framework for some anonymous defendants in certain defamation suits, providing a method for courts to dismiss truly frivolous cases before having to undertake an extensive analysis of whether to identify an anonymous poster.¹¹⁶

In an early suit involving online speech, California’s anti-SLAPP law proved useful in stopping a frivolous defamation lawsuit that a telecommunications company brought against anonymous Internet chat room posters who were critical of the company.¹¹⁷ The judge in *Global Telemedia International, Inc. v. Doe 1* employed a two-part test to determine whether the suit against two of the posters should be dismissed under the state’s anti-SLAPP law: was the speech “in connection with a public issue,” and are Global Telemedia’s claims

113. See Richards, *supra* note 85, at 228 (explaining pragmatic strategy of corporations fishing for potential defendants). “[T]he tactic has consequences, namely a very real threat to the time-honored tradition of anonymous speech.” *Id.* at 228-29; see also Digital Media Law Project, *supra* note 9 (describing CyberSLAPPs as “chilling free speech”).

114. See Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Summer 2011, at 1, 2-3, available at <http://www.rcfp.org/rcfp/order/docs/ANTISLAPP.pdf> (surveying prevalence of anti-SLAPP laws). The strength of anti-SLAPP laws varies considerably with the California statute explicitly extending protection to any Internet posting “made in connection with an issue of public interest.” *Id.* at 2. In contrast, Pennsylvania’s anti-SLAPP law “applies only to individuals petitioning the government about environmental issues.” *Id.*

115. See *id.* at 2 (explaining procedure of anti-SLAPP laws). In arguing whether the suit is meritless, the plaintiff maintains the “burden of showing a probability that he will prevail in the suit, meaning he must make more than allegations of harm and actually show that he has evidence that can result in a verdict in his favor.” *Id.*

116. See *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1261 (C.D. Cal. 2001) (dismissing under anti-SLAPP statute defamation lawsuit stemming from critical comments about company on Internet). The court found the Internet postings were a matter of public interest because Global Telemedia International was a publicly traded company that sought attention from news media to lure investors and its financial performance could potentially affect the market as a whole or, at least, its market sector. See *id.* at 1265. Further, the court found Global Telemedia International did not have a high likelihood of success because the speech at issue was hyperbolic and frequently opinion, making it immune from libel prosecution. See *id.* at 1266-69; see also Furman, *supra* note 7, at 245 (positing anti-SLAPP laws can protect anonymous speech from “frivolous, retaliatory litigants”); Orit Goldring & Antonia L. Hamblin, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. & EMP. L.J. 383, 412-15 (2003) (discussing reasoning in *Global Telemedia International*).

117. See *Global Telemedia Int’l, Inc.*, 132 F. Supp. 2d at 1263-64 (describing lawsuit and special motion to dismiss brought under anti-SLAPP law); see also Richards, *supra* note 85, at 235 (calling California anti-SLAPP law “particularly useful” for requiring quick disposition and halting discovery); Wilson, *supra* note 35, at 568 (recounting free-speech advocates calling *Global Telemedia International* ruling “significant victory”).

probable to succeed.¹¹⁸ The court dismissed the case after concluding discussions centering on stock prices of a publicly traded company are of public interest and the statements the company claimed were defamatory were largely opinion, making them immune from defamation claims.¹¹⁹

More recently, Senator John Kyl, an Arizona Republican, sought to extend protections against SLAPPs by proposing a bill in 2012 that would have created a federal anti-SLAPP law.¹²⁰ While it may have been a promising start, critics contended the bill was written too narrowly to have much impact on anonymous Internet posters, as it would have applied only to representatives of the news media.¹²¹ Regardless of its merits, the bill died in committee without coming to a vote when the 112th Congress adjourned in January 2013.¹²²

III. ANALYSIS

The speech-protective approaches of *Cahill* and *Dendrite* developed against a backdrop of fear that powerful corporations could co-opt the Internet in the

118. See *Global Telemedia Int'l, Inc.*, 132 F. Supp. 2d at 1265-66 (analyzing tests under anti-SLAPP law).

119. See *id.* at 1265-66, 1270 (describing court's reasoning to dismiss case under anti-SLAPP law). As to the first part of the test, the court concluded "a publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole." *Id.* at 1265. The court further concluded that Global Telemedia inserted itself into the public arena through numerous press releases it issued to tout its "good news" and attract investors. See *id.* In analyzing the second part of the anti-SLAPP test regarding whether the suit was likely to succeed, the court stated that "[g]iven the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company is run." *Id.* at 1270. The statements at issue included one of the defendants, Doe 1, calling the Global Telemedia's product roll out "slow or non-existent," while the other "John Doe" called the company a "sinking ship" and said investors will be "screwed out of [their] money." *Id.* at 1268-69. The court also expressed doubt that, even if the statements at issue were actionable, there was no correlation between such statements and the drop in Global Telemedia International's stock prices. See *id.* at 1270. That further indicates Global Telemedia's suit was not likely to succeed. See *id.* at 1270-71.

120. See Free Press Act of 2012, S. 3493, 112th Cong. § 2 (2012) (proposing protections for journalist and ISPs from SLAPP suits).

121. See Eric Goldman, *We Need Federal Anti-SLAPP Legislation, But Sen. Kyl's 'Free Press Act of 2012' Isn't the Answer (Yet)*, FORBES, Sept. 24, 2012, <http://www.forbes.com/sites/ericgoldman/2012/09/24/we-need-federal-anti-slapp-legislation-but-sen-kyls-free-press-act-of-2012%E2%80%B3-isnt-the-answer-yes/> (calling for stronger federal anti-SLAPP law than Senator Kyl proposed); Trevor Tim, *New Federal Anti-SLAPP Legislation Introduced: A Good Start*, ELECTRONIC FRONTIER FOUNDATION (Aug. 27, 2012), <http://www.eff.org/deeplinks/2012/08/new-federal-anti-slapp-legislation-introduced-good-start> (describing bill's shortcomings). "The provision only applies to 'a representative of the news media,' and may not include bloggers, citizens journalists or other commentators on the Internet who need this protection the most." Tim, *supra*.

122. See Free Press Act of 2012, S. 3493 (stating bill referred to Senate Judiciary Committee); Office of the Clerk of the U.S. House of Representatives, *When Does a Bill Become "Dead" or No Longer Open to Consideration?* Subheading to *Legislative FAQs*, <http://clerk.house.gov/legislative/legfaq.aspx> (last visited Oct. 12, 2014). "A bill may be introduced at any point during a two-year Congress. It will remain eligible for consideration throughout the duration of that Congress until the Congress ends or adjourns sine die." *Id.*

same way these corporations took control of other media forms.¹²³ The specter of these corporations using their legal muscle to intimidate and silence critics was among the greatest worries during the early years of widespread Internet usage.¹²⁴ The hopeful belief that the Internet could serve as a great equalizer and allow for truly democratic discourse made such fears particularly acute.¹²⁵ It is, therefore, not surprising that strongly protective approaches developed during this time.¹²⁶

Whether such approaches helped preserve the Internet's promise of speech equality remains to be seen, but it is clear that early fears about limiting Internet speech have gone largely unrealized.¹²⁷ Unencumbered anonymous speech on the Internet has, however, come at a cost.¹²⁸ Dispelling Internet rumors and hoaxes—some of which are defamatory—is exceedingly difficult.¹²⁹ Online anonymity serving as cover for “harassment, and even assault on the Internet,” however, is even more disturbing.¹³⁰ Such actionable speech shows that the breadth of online defamation cases is far broader than those early fears of powerful corporations or politicians targeting honest citizens.¹³¹

Perhaps such variety of cases accounts for the reason it at least appears in recent years that some courts scaled back protections for anonymous posters.¹³² The Ninth Circuit's discussion of anonymity protections based on the type of

123. See Lidsky, *supra* note 55, at 861 (describing online defamation suits as threatening to “reestablish existing hierarchies of power”). “[T]hese Internet defamation actions threaten not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora.” *Id.*

124. See *id.* at 861 (describing typical John Doe defendants as lacking resources to defend themselves or pay judgments). “There is some danger, therefore, that the growing popularity of the new Internet libel suits may chill more than defamatory falsehoods—it may also chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas.” *Id.* at 890.

125. See *id.* at 860 (calling Internet “powerful tool for equalizing imbalances” and “giving voice to the disenfranchised”).

126. See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (announcing speech-protective, summary judgment standard for revealing anonymous posters); *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (announcing speech-protective, prima facie standard for revealing anonymous posters); see also *In re Ind. Newspapers Inc.*, 963 N.E.2d 534, 551 (Ind. Ct. App. 2012) (describing *Dendrite* and *Cahill* as similar and most common approaches).

127. See Lidsky, *supra* note 3, at 1385 (stating “cyber civil liberties advocates” have ensured courts protect anonymous posters).

128. See Lidsky, *supra* note 55, at 884 (noting reckless or unscrupulous posters can “pollute the information stream with defamatory falsehoods”). Further, because defamatory statements on the Internet are easily repeated in various online forums, “the subsequent potential for harm [is] magnified,” which may result in a “greater impact than if it had appeared in print.” *Id.* at 884-85.

129. See *id.* at 885 (discussing difficulty of rooting out Internet rumors).

130. See Gleicher, *supra* note 4, at 324 (describing “dark side of anonymous online speech”).

131. See Lidsky, *supra* note 55, at 885. “Thus, to view the rise of John Doe libel suits as merely an attempt by powerful corporations to intimidate their critics into silence is to substitute metaphor for analysis and to suppress the fact that the ‘speech’ of ordinary John Does, both scrupulous and unscrupulous, has more power to affect corporate interests than ever before.” *Id.*

132. See Crowther, *supra* note 5, at 460 (fearing recent decisions diminish right to anonymous speech).

speech at issue and the discovery rules used in Illinois courts seem a far cry from the detailed tests and robust protections of *Cahill*, *Dendrite*, and their progeny.¹³³ Indeed, these more recent decisions alarm some commentators.¹³⁴ Those worries, however, may be overstated because courts following what appear to be less-protective approaches have not uniformly ordered disclosure of anonymous posters' identities.¹³⁵

In *Stone v. Paddock*, for example, a local elected official sued an anonymous poster who had verbally sparred with the official's underage son on a newspapers website.¹³⁶ The statements at issue in the case involved the poster possibly suggesting the official's son "solicits men for sex over the Internet."¹³⁷ Even applying Illinois discovery law in place of a more speech-protective approach, such as those in *Cahill* or *Dendrite*, the court ruled the anonymous poster's identity should not be revealed because the statements at issue did not constitute a factual assertion, a necessary condition to sustain a defamation claim.¹³⁸ Contrarily, courts following the most speech-protective approach have not uniformly barred disclosure.¹³⁹ Courts utilizing either approach seem to implicitly recognize that whether the speech at issue is itself actionable is the determinative factor in identifying anonymous posters.¹⁴⁰

The idea that similar and just results can be reached using alternate approaches cuts against adopting a one-size-fits-all standard for which many have advocated.¹⁴¹ It also suggests that the protections afforded through *Cahill*

133. See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (stating greatest protections reserved for anonymous political speech); *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666, 674 (Ill. App. Ct. 2010) (applying state discovery rules in determining whether to identify anonymous Internet poster).

134. See Crowther, *supra* note 5, at 460 (expressing concerns about Ninth Circuit's ruling in *In re Anonymous Online Speakers*); Smith, *supra* note 102, at 194 (arguing for greater speech protections through amendments to Illinois discovery rules).

135. See *Stone v. Paddock Publ'ns, Inc.*, 961 N.E.2d 380, 394 (Ill. App. Ct. 2011) (refusing to identify poster because plaintiff, Lisa Stone, did not state cause of defamation action).

136. See *id.* at 383-85 (describing verbal spat and noting identity of official's son known to other posters).

137. See *id.* at 393 (describing statement as suggesting official's son "willing" to meet men he met on Internet). Specifically, the statement at issue was: "Seems like you're very willing to invite a man you only know from the internet over to your house—have you done it before, or do they usually invite you to their house?" *Id.*

138. See *id.* at 392-93 (ruling statement did not constitute factual assertion). Further, even if the statement constituted a factual assertion, the court did not find a sexual connotation implicit in it, meaning it is "entitled to an innocent construction." *Id.* at 393.

139. See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 256 (D. Conn. 2008) (using *Dendrite* approach in ordering disclosure of anonymous poster's identity).

140. See *id.* (requiring plaintiff to establish prima facie defamation case before ordering anonymous poster identified); *Stone*, 961 N.E.2d at 394 (refusing to identify poster because Stone did not "allege facts sufficient to support a cause of action").

141. See Lidsky, *supra* note 3, at 1385 (calling for U.S. Supreme Court "to provide definitive guidance"); see also Gleicher, *supra* note 4, at 363-64 (proposing single standard for identifying anonymous defendants in defamation cases); Martin, *supra* note 35, at 1242-43 (advocating for separate uniform standards for political and nonpolitical speech).

and *Dendrite* are in excess of what is needed to protect the First Amendment.¹⁴² Courts should be wary of burdening the First Amendment with unnecessary new approaches, which may even have unforeseen consequences.¹⁴³

Michael S. Vogel, an attorney who represented *Dendrite International, Inc.* in *Dendrite International, Inc. v. Doe No. 3*, has argued persuasively against imposing new, judicially created tests.¹⁴⁴ Most significantly, Vogel argued that procedural rules, which do not vary significantly from state-to-state, already provide enough protections for anonymous posters.¹⁴⁵ An anonymous poster can oppose discovery of his or her identities through seeking to have a complaint dismissed or filing a motion for summary judgment.¹⁴⁶ Even if a court does order discovery identifying a poster, it can limit “under traditional, protective order grounds” how, as well as to whom, a poster’s identity will be revealed.¹⁴⁷ The very protections afforded through *Cahill*, *Dendrite*, and their progeny were already in existence before those rulings, making the imposition of new tests duplicative at best, and, at worst, an avenue for “anonymity to shield wrongdoing.”¹⁴⁸ Without a demonstrable compelling need, it is a mistake to impose new tests that the Supreme Court’s First Amendment jurisprudence does not require.¹⁴⁹

Protecting the right to speak anonymously is crucial, but defamatory speech—whether or not delivered anonymously—is not protected by the First

142. See Vogel, *supra* note 14, at 859 (calling appellate-court-imposed tests “unnecessary”).

143. See *id.* at 859 (encouraging courts to favor existing frameworks and proceed cautiously in creating new rules).

144. See *id.* at 801 (arguing “rush to apply new standards should be slowed”); see also *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001) (indicating Michael S. Vogel argued case on behalf of *Dendrite International*).

145. See Vogel, *supra* note 14, at 848. “Without reliance on any new or special rules to govern this kind of discovery request, ordinary rules of procedure provide a number of possible avenues for a defendant to oppose the discovery demand.” *Id.*

146. See *id.* at 848-51 (describing various ways existing procedural rules can protect anonymous posters’ identities). As to opposing discovery because the complaint should be dismissed, “[c]ourts have consistently permitted defendants to assert such opposition through counsel without revealing their identities.” *Id.* at 849. For summary judgment filed before the close of discovery, it would require a plaintiff to prove they have a “bona fide claim” before they are entitled to discovery of an anonymous poster’s identity. See *id.* at 849-51.

147. See *id.* at 851 (“[M]ost state procedure codes provide courts broad discretion to limit or condition discovery to protect a party from annoyance, embarrassment, oppression, or undue burden.”). In a case in which the anonymous poster turned out to be an employee of the plaintiff, for example, the court could “order the plaintiff not to take any extra-judicial action against the defendant pending either a judgment of liability or further order of the court.” *Id.* at 852. In other words, the plaintiff would have to prove its defamation case before taking action against the defendant, which would help assuage fears that such defamation suits are merely covers for retaliatory action. See *id.* Further, the court could limit who is allowed access to the discovery of the plaintiff’s identity, which would also limit the use of defamation cases as tools to identify and embarrass anonymous Internet posters. See *id.*

148. See *id.* at 855-56, 859 (calling new tests “unnecessary” and lamenting potential risks new approaches present for claimants).

149. See Vogel, *supra* note 14, at 837. “However, absent a First Amendment mandate to go beyond existing rules, courts should not do so without some clear evidence indicating that the existing rules are themselves somehow lacking.” *Id.*

Amendment.¹⁵⁰ The ability to bring successful online defamation suits may help improve the overall quality of Internet discourse.¹⁵¹ Defamation suits are not, however, the best vehicle to bring relief to the true victims of cybersmears.¹⁵² Instead of leaving cybersmear victims with merely monetary damages, or even declaratory judgments, Congress should consider passing a federal “takedown” law mandating removal of Internet materials that courts deem defamatory.¹⁵³

While existing protections are sufficient to deal with many online defamation cases involving anonymous speakers, anti-SLAPP laws are the best tool to protect anonymous posters from truly frivolous defamation suits aimed at retaliating for speaking out on matters of public concern.¹⁵⁴ Along with allowing for the filing of special motions to dismiss before any discovery would reveal the identity of an anonymous poster, anti-SLAPP laws have the additional virtue of providing enhanced protections for all-important political speech.¹⁵⁵ The nation’s patchwork of anti-SLAPP laws leaves much to be desired, however, with some states offering significantly more protection than others.¹⁵⁶ As such, Congress should pass a robust anti-SLAPP law that is stronger than Senator Kyl’s proposal and includes specific mention of Internet speakers.¹⁵⁷ Such a law will go a long way toward protecting the right to speak anonymously and helping the Internet reach its potential as a truly democratic medium of communication.¹⁵⁸

150. See Lidsky, *supra* note 55, at 865 (noting “potential benefits that defamation law may bring to Internet discourse”).

151. See *id.*

152. See Lidsky, *supra* note 3, at 1389-91 (calling lack of meaningful recourse “dispiriting” to victims of cybersmears).

153. See *id.* at 1389-90 (noting lack of “take down” statutes and “effective remedies” for cybersmear victims).

154. See *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2001) (dismissing defamation suit against anonymous posters through anti-SLAPP law); Furman, *supra* note 7, at 245 (positing anti-SLAPP laws can protect anonymous speech from “frivolous, retaliatory litigants”); Richards, *supra* note 85, at 254 (calling anti-SLAPP laws “critical tools” for fighting frivolous online defamation suits).

155. See Martin, *supra* note 35, at 1238 (“First Amendment requires more protection for political speech.”).

156. See Rasmussen, *supra* note 114, at 2-3 (noting state-by-state differences in anti-SLAPP law protections).

157. See Richards, *supra* note 85, at 256 (calling for federal anti-SLAPP law); Goldman, *supra* note 121 (calling for stronger federal anti-SLAPP law than Senator Kyl’s proposal). Specifically, a new proposal should not be limited solely to “representatives of the news media” and should apply to any “oral or written statement or other expression that is on a matter of public concern or that relates to a public official or figure.” Goldman, *supra* note 121.

158. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (holding First Amendment protects right to speak anonymously); Lidsky, *supra* note 55, at 860-61 (calling Internet “powerful tool” to equalize power imbalances and allow democratic participation in public discourse).

IV. CONCLUSION

The First Amendment demands protections for anonymous speakers, and the Supreme Court has protected this right multiple times. There is also no doubt the right to speak anonymously extends to online posters. Fashioning new tests to protect Internet speech is tempting, but ultimately ill advised. Existing procedural safeguards are sufficient in most defamation cases to protect anonymous online speakers from unfair identification. A right as sacred as free speech is protected most when it is least encumbered with regulation and judicial intrusion.

In the context of cybersmears, it is important to remember that speech is not protected merely because it is anonymous; defamation—whether anonymous or not—deserves no protection. Anonymous speakers in some online defamation cases are clearly undeserving of protection, and should not benefit from excessive protections not afforded anonymous speakers in other mediums. Many of the new tests simply incorporate existing procedural safeguards, which means these tests offer little real protection while resulting in a lack of uniformity across jurisdictions. For most online defamation cases, there is no need for new tests to ensure the guilty are punished and constitutional rights are protected.

As for cyberSLAPPS, new legislation is required. A strong federal law is necessary to protect against the exact types of abuses those who fashioned the new tests seemed to fear most: the corporate or political giant trampling the little guy's constitutional right to free speech. Anti-SLAPP laws are particularly effective at attacking these types of frivolous suits. The bill proposed in Congress in 2011, however, was cause only for tepid optimism, as it did not provide nearly enough protection for individual online speakers. The fact that Congress failed to pass even a relatively weak law is truly disheartening. A strong federal anti-SLAPP law will not only protect those most deserving, but it will also likely eviscerate the need for courts to embark on complex analyses and fashion unnecessary new tests. With sufficient protections for political speech, which is deserving of the greatest safeguards, the Internet could finally begin to live up to its promise as a truly democratic medium.

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