

HONEST TO BLOG: BALANCING THE INTERESTS OF
PUBLIC FIGURES AND ANONYMOUS BLOGGERS
IN DEFAMATION LAWSUITS

*"I'm a modern man, a man for the millennium. Digital and smoke free. A diversified multi-cultural, post-modern deconstruction that is anatomically and ecologically incorrect. I've been linked and downloaded, I've been inputted and outsourced, I know the upside of downsizing, I know the downside of upgrading. I'm a high-tech low-life. A cutting edge, state of the art, bi-coastal multi-tasker and I can give you a gigabyte in nanosecond."*¹

I. INTRODUCTION

The American Legal Tradition, even among its common law peers, elevates freedom of speech far beyond what would be acceptable in other parts of the western world.² This careful right, enshrined in the First Amendment of the United States' Constitution, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ³ Such protection is commonly justified by the need to protect content-based core political speech

1. *The Tonight Show with Jay Leno: The Modern Man* (NBC television broadcast Nov. 15, 2005) (presenting George Carlin performing comedic monologue caricaturizing, albeit accurately, popular conception of modern man circa 2005, reflective of average blogger). "I interface with my database, my database is in cyberspace, so I'm interactive, I'm hyperactive and from time to time I'm radioactive." *Id.*

2. See generally Guy E. Carmi, *Dignity versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 322-24 (2008) (noting that German "Dignity-based" Free Expression jurisprudence provides more constraining framework than American "Liberty-based" Free Expression jurisprudence for free speech). "Many commentators have noted that '[t]he United States stands alone, even among democracies, in the extraordinary degree to which its constitution protects freedom of speech and of the press.'" *Id.* at 339; see also Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1075-79 (2008) (noting scholastic comparative differences between American model of free speech from that of Canada, Germany, Japan, and the United Kingdom). In particular, the following observations were noted:

There may be a universal consensus that speech should be protected, but there is no universal agreement about the concrete application of that guarantee [R]eview of the United States, Canada, Germany, Japan, and the United Kingdom reveals vast differences . . . regarding the scope of the speech right, its theoretical basis, its priority vis-à-vis other, competing rights, and the institution that best serves as its guardian.

Id. at 1082.

3. U.S. CONST. amend. I.

so inherently fragile, yet vital to the functioning of the democratic process of the United States.⁴ Fragile free speech, which is viewed as being easily suppressed by a strong government, is protected by numerous doctrines developed by the Supreme Court, which were designed to defend free speech since the First Amendment's ratification on December 15, 1791.⁵ Modern free speech, however, suffers no such frailty thanks to the Internet.⁶

Post-Internet 2.0 free speech is most commonly represented by the blog, websites devoted almost solely to giving voice to a person's thoughts and beliefs using the Internet as the medium of free exchange.⁷ Blog authors ("bloggers") are as diverse as the subject matters they cover, which can include the news, music, politics, sports and travel.⁸ Over the past ten years, the number of blogs has grown from a "handful" to over one hundred and eighty-four million worldwide.⁹ Additionally, as blogs began to respond to one

4. *See id.*

5. *See Carmi, supra* note 2, at 342-45 (reviewing basis and evolution of American exceptionalism in area of Free Speech, including jurisprudential mechanisms developed from Warren Court to Burger Court, establishing different standards compared to rest of world in public figure defamation, fairness doctrine in public broadcasting, and hate speech). "Many Americans are probably unaware of the great disparities between the United States' and the Western world's treatment of speech." *Id.* at 344.

6. *See* Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1448-51 (2006) (recognizing Internet as mature technology with potential to serve numerous functions, including journalistic, to world-wide de-centralized audiences). "Because the Internet is no longer in its infancy . . . traditional defamation laws should apply to Internet bloggers." *Id.* at 1451. *But see Electronic Frontier Foundation, Bloggers' FAQ - Online Defamation Law*, <http://www.eff.org/issues/bloggers/legal/liability/defamation>, (last visited Oct. 31, 2009) (discussing rights available to Bloggers accused of Defamation and recent court decisions that have effect there on, and asserting that blogs and online free speech are fragile and require continued heightened protection afforded by Constitution in defamation).

7. *See* Technorati: State of the Blogosphere 2008, <http://technorati.com/blogging/state-of-the-blogosphere/>, (last visited Oct. 31, 2009) (identifying 'blogs' and 'blogging' as global mainstream phenomenon, and tracking growth of blogs as statistical measure of Internet use).

8. *See id.* (follow "Day 2: The What And Why of Blogging" hyperlink) (surveying bloggers for subject of their blogging and blogs, resulting in data suggesting that, on average, top subjects for blogging are: personal/lifestyle (54%), technology (46%), other (43%), news (42%), politics (35%), and music (31%).)

9. *See* Rebecca Blood, *Weblogs: A History and Perspective*, http://www.rebecca-blood.net/essays/weblog_history.html, (last visited Oct. 31, 2009) (noting origin of weblog community in 1998, tracing recent historical development into larger community, and evolution of blog form).

[W]eblogs had always included a mix of links, commentary, and personal notes, in the post-Blogger explosion increasing numbers of weblogs eschewed this focus on the web-at-large in favor of a sort of short-form journal. These blogs, often updated several times a day, were instead a record

another and join together in various communities, the interaction between blogs has increased exponentially into a widely dispersed community.¹⁰ Perhaps equally significant has been the general reception of blogging as an accepted medium, demonstrated by the adoption of blogging on various corporate websites, including those of large media companies.¹¹

As blogs continue to proliferate, diversify and become increasingly complex, the potential for tort suits, such as defamatory libel, increases.¹² The laws of tort and constitutionally based free speech were developed in the absence of the Internet, mostly to address the concerns of the more traditional news media outlets.¹³ As an ever-increasing number of citizen journalists continue to supplant blogs and other Internet-based social networks, courts are being challenged to apply legal standards developed for traditional media jurisprudence to blogs and bloggers.¹⁴ Recently, courts have had to

of the blogger's thoughts: Something noticed on the way to work, notes about the weekend, a quick reflection on some subject or another.

Id.; see also Technorati, *supra* note 7 (referencing Universal McCann Study of March 2008 counting 184 million blogs globally, 26.4 million of which are in the United States).

10. See *id.* (surveying blog growth trends, noting com Score Media Metrix, as of August 2008, recognized 77.7 million visitors to blogs within the US and of social networking sites, including Facebook.com which recognized 41.0 million total visitors and MySpace.com which recognized 75.1 million total visitors).

11. See *id.* (citing Bivings Group report stating 95% of top 100 US newspapers have reporter blogs, and noting trends of increased blog site visitor traffic, and posts on significant event days, such as posts tagged "Obama" during Democratic National Convention following August 28, 2008, and posts tagged "McCain" following John McCain's selection of Alaskan Governor, Sarah Palin, following August 29, 2008).

12. See S. Elizabeth Malloy, *Anonymous Blogging and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1187-88 (2006) (attributing rarity of large libel suits against anonymous bloggers to lack of deep pockets, blogger society norms discouraging libel suits, difficulty of proving "actual malice" and relative ease of correction for mistakes on online medium). *But see* Technorati, *supra* note 7 (noting increased corporate and business presence within blogging community, increased monetary investments within blogs, and growth of brands within blogosphere).

13. See Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1198-99 (2006) (asserting that direct application of law to Internet might yield unintended consequences, such as affording greater or lesser speech protection than was intended by drafters); see also Malloy, *supra* note 12, at 1188-89 (recognizing recent cases in Delaware and other states challenging Court to determine proper standard for application to anonymous blogging).

14. See *id.*; see also Solove, *supra* note 13, at 1195-97 (contrasting various types of bloggers by using example of two blogs with superficially similar characteristics, such as subject matter, fame, and visitor numbers, to illustrate differences and variety within blogosphere which provides different standards for regulation between blogs and traditional media). "We have a rather romantic vision of bloggers . . . [b]ut the average blogger isn't Eugene [Volokh], writer of the Volokh Conspiracy

determine the proper legal standard for public figure defamation and First Amendment protection for the blogosphere.¹⁵

This Comment, through a hypothetical lawsuit in which a public figure plaintiff alleges libel by an Internet blog, explores the issue of tort defamation by anonymous bloggers in connection with the legal challenge of balancing constitutional First Amendment protections, and the complicated regime of legal requirements developed pursuant to those standards.¹⁶ Section II provides background information on public-figure defamation and constitutional anonymity free speech protections.¹⁷

Section III is divided into three parts. Part A explores the intersection of First Amendment rights to anonymity in protection and defamation standards for public figures, and examines the problems that arise in discovery, service of process and other aspects of civil procedure, by applying the established legal standards for defamation to the hypothetical fact pattern.¹⁸ Part B assumes a plaintiff's ability to overcome defendant anonymity, and examines the challenges of proving the elements of defamation required against public figures when the standard is applied to the new Internet media blog-form.¹⁹ Finally, Part C investigates suggested solutions for the problem of establishing a successful libel case against an anonymous Internet-based defendant by a public figure plaintiff, including alternative legal claims, non-legal solutions and the weakening of defamation/anonymity protections.²⁰

Blog, [t]he . . . most common blogger is a teenage girl. Many blogs are more akin to diaries than news articles, op-ed columns, or scholarship." *Id.* at 1196-97.

15. See Solove, *supra* note 13, at 1199 (asserting "existing law lacks nimble ways to resolve disputes about speech and privacy on the Internet," resulting from bloggers generally being unable to afford costly lawsuits).

16. For a further discussion of the hypothetical presented to explore anonymous blogging and public figure defamation, see *infra* notes 120 to 126.

17. For a further discussion of the historical evolution of American anonymity in publishing and defamation jurisprudence, see *infra* notes 60 to 119.

18. For a further discussion of the problems arising from application of First Amendment anonymity protection and public figure defamation standards, see *infra* notes 127 to 163.

19. For a further discussion of the legal analysis of proving a public figure defamation case against an anonymous blog, see *infra* notes 164 to 184.

20. For a further discussion of possible solutions to the impasses provided by applying the strict standard of anonymity and the requirement of actual malice in public figure defamation, see *infra* notes 185 to 216.

II. BACKGROUND

A. The Blogosphere: The Proliferation of the Fourth Estate²¹

At its most basic level, a blog is a website “usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video.”²² Blogging has proven to be tremendously popular because of its flexibility in addressing a variety of subject matter, the ease of starting them through host websites and the potential mass audience for any given topic.²³ Given the mass appeal of blogging, it is unsurprising that the bloggers themselves are demographically diverse spanning a wide breadth of geography, age, educational level, income and race.²⁴ More recently, blogs have developed professional roles commonly used to increase a professional’s industry exposure, enhance resumes to potential employers and increase executive visibility.²⁵

The challenge of determining what rights and standards apply to blogs and bloggers first requires an analysis of the legal status of

21. See *Merriam-Webster Dictionary: ‘Fourth Estate,’* MERRIAM-WEBSTER, available at http://www.merriam-webster.com/dictionary/fourth_estate (last visited Oct. 31, 2009) (defining fourth estate to mean free press).

22. Technorati, *supra* note 7 (characterizing “blog” for purposes of identifying applicable websites in study, survey, and trend spotting).

A Blog (a contraction of term “Web log”) is a Web site, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Entries are commonly displayed in reverse-chronological order. The Blogosphere is a collective community of all blogs. Since all blogs are on Internet by definition, they may be seen as interconnected and socially networked. Discussions ‘in the Blogosphere’ have been used by the media as a gauge of public opinion on various issues.

Id.

23. See *id.* (follow “Day 2: The What And Why of Blogging” hyperlink) (reporting that 133 million blog records have been indexed by Technorati since 2002, and commenting that blogging topics have diverse range including personal/lifestyle, technology, news, politics, computers, music, film, travel, business, and travel update; and have diverse style, including sincere, conversational, humorous, motivational, snarky, and confrontational).

24. See *id.* (providing demographic breakdown of bloggers by geographic origin (U.S., European, and Asian), blog-type (Personal, Corporate, Professional, with and without Advertising), and gender (with statistical breakdowns of age, marital status, household income, education level, and average monthly unique visitors); and among Bloggers within United States, 57% are male, 42% are between 18 and 34, 56% are employed fulltime, and 74% are college graduates).

25. See *id.* (surveying professional uses for blogs as having positive impact resulting from benefits including increased industry exposure, posting resumes for potential employers, increasing executive visibility, promotional opportunities, change of profession or industry interests, or, in few cases, as alternative career path).

blogs.²⁶ This determination of the blogs' legal status depends in part on whether blogs are entitled to First Amendment authorship anonymity protection.²⁷ Moreover, the legal status of blogs (as either media source or non-media source) is important to the determination of whether, in defamation, blogs are held to the standard of established publications such as *The New York Times*, or to lesser standards of defamation.²⁸

1. *What are Blogs? (A Legal Question)*

Because blogs are a relatively recent innovation, courts have had difficulty in classifying them as either private writings or free press.²⁹ The classification of blogs is important in determining what standard applies to them in cases of defamation and free speech.³⁰ Further, because blogs may behave like a news source in function, there is a genuine debate regarding whether other jour-

26. See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 904-07 (2000), (discussing modern First Amendment doctrine with respect to free speech as device crafted "largely for the benefit of the institutional media, and these privileges are not entirely responsive to the chilling effect of defamation law on nonmedia defendants of the type targeted by the new Internet libel actions. Indeed it is not even certain what level of First Amendment protections, if any, the typical John Doe defendant would receive."); see also *id.* at 905-06 (exploring lack of distinction between Media/Nonmedia categorization that John Doe would receive, as "Internet users like John Doe defy the traditional distinction between media and nonmedia defendants. . . . [T]he Supreme Court traditionally has referred to only the institutional media—broadcasters, newspaper publishers, and so forth—as the "media" for First Amendment purposes. The question, then is whether nonmedia defendants like John Doe are entitled to the same level of First Amendment protection as media defendants.").

27. See Anne M. Macrander, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. Rev. 1075, 1095-96 (summarizing various courts' approaches to applying journalism shield laws to new media, generally refusing to categorize blogs and bloggers with respect to defamation law, often choosing to resolve question on different points of law). "While courts have been hesitant to affirmatively rule how bloggers fit into existing definitions of journalism, California in particular has been more willing to decide what criteria will not be used in shaping those definitions." *Id.* at 1097.

28. See *id.* at 1095-98 (asserting legal determination between bloggers and journalists as important question requiring binding judicial or legislative guidance, despite academic attempts to define); see also Lidsky, *supra* note 26, at 915-20 (spotting inadequacies of applying actual malice standard to John Doe defendants in corporate plaintiff suits for Internet libel, and highlighting duties of reporters and media to publish and report accurate information, which is paradigm that breaks down when applying situation to Internet John Doe's).

29. See Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, *Wisconsin Lawyer*, 79-MAR WIS. LAW. 8, 44 (stressing that blogs may not fit within current statutory and legal framework, including Supreme Court framework for public/private actors, Federal Election Commission guidelines, and Federal laws, including Communications Decency Act of 1996).

30. See Malloy, *supra* note 12, at 1188-90 (noting courts' reluctance to classify blogs in absence of any guiding principles, precedent for Internet, and statutory

nalistic protections, including shield laws and source-checking requirements, apply to bloggers.³¹ In practice, most courts have found relatively easy ways to sidestep the issue of classification.³²

In the past, when addressing new technologies of the time period, such as radio and television, courts have taken an approach that ignores the medium in favor of the content.³³ This approach, however, is not without problems as courts have traditionally had difficulty adapting “telegraph, radio, and television into the traditional . . . framework [of defamation law] because the technical workings initially confounded the legal community.”³⁴ In such cases, “the laws changed to focus on the impact of the transmitted speech and not the utilized medium when evaluating . . . claims.”³⁵ Such an approach disregards the medium entirely and focuses on the content, which provides a standardized approach for analysis of

guidelines, resulting in overly sympathetic standards to anonymous bloggers in defamation lawsuits from victim’s perspectives).

31. *See id.* at 1187 (underscoring disagreement among legal commentators regarding proper relationship between libel law and blogosphere); *see also* Macrander, *supra* note 27, at 1098 (2008) (accentuating debate among blogger and journalism communities in absence of court distinction between two groups, and noting attempts to distinguish by “obligation to tell the truth” or “fact checking” standards unjustifiable as both communities’ have failed to apply given standard). Referencing events like “Memogate” which resulted in resignation of CBS news anchor, Dan Rather, as failure to both blog and journalistic community. *Id.* *But see* Comment, *Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 HARV. L. REV. 996, 1004-07 (2007) (suggesting extension of traditional news media protections, including State Shield Laws, to blogging community is dependent on their function and importance to free flow of information and public interest, as opposed to strict definition, despite lack of formal editorial and attendant process); *see also* Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 79 TEMP. L. REV. 579, 585-89 (2005) (reviewing history of Fourth Estate protections evolved by Supreme Court and including theoretical bases for importance of Free Press).

32. *See* Macrander, *supra* note 27, at 1085-87 (noting recent focus by courts and legislatures on applying testimonial journalistic privileges to bloggers has been experimental and varied in standards, ranging from strict definitional standards to lenient and open application); *see also* Lidsky, *supra* note 26 (revealing several cases in which courts declined to address issue of blogging directly, instead resolving cases on less controversial issue).

33. *See* Troiano, *supra* note 6, at 1463-66 (commenting on previous difficulty experienced by historical courts attempting to integrate telegraph, radio, and television into traditional defamation framework, resulting in disparate defamation standards for similar defamatory content based in different media). Later courts would adapt by shifting focus of analysis to impact of defamatory content as opposed to medium of transmission. *See id.*

34. *Id.* at 1465 (discussing broad immunity established for Internet community in previous court decisions to focus on message instead of medium, establishing presumption of media-based non-defamation).

35. *Id.* (preferring message-focused defamation analysis as appropriate in cases to provide standardization instead of media-focused treatment of defamatory content).

defamatory content across different media. In contrast, this standard is difficult to implement in the Internet era, when the medium used allows defamatory content to proliferate by the hundreds of thousands as opposed to a more limited medium (such as television, in which broadcasts are generally limited in number and generally known).³⁶

Avoiding the issue of blog classification as news media or non-news media, while legally expedient, is unlikely to continue given the tremendous growth of blogs.³⁷ As additional cases in various jurisdictions develop increasingly disparate standards in the categorization of blogs, as either more or less similar to existing news media standards, it will become increasingly necessary for courts to develop a flexible (possibly consistent) legal framework to understand and determine the appropriate standard under the circumstances of each case, as opposed to a wholesale categorization of blogs through a single legal standard.³⁸

2. *Why are Blogs Important?*

Merriam-Webster's dictionary defines 'mass media' as "a medium of communications (as newspapers, radio, or television) that is designed to reach the mass of the people."³⁹ In subsequent years, Merriam-Webster may extend its definition to follow public usage of the word to include the Internet and blogging.⁴⁰ Blogging has

36. *See id.* at 1467-74 (summarizing difficulties applying traditional defamation approach to blogs, including scope limitations, confusion regarding holding blogs to journalistic standards and dangers of Internet blogging).

[I]t is likely that many bloggers will knowingly allow harmful, defamatory statements on their blogs in order to attract wide audiences. . . . [T]he trend in allowing broad immunity to Internet users and providers under the [Communications Decency Act of 1986] allows them to take advantage of all the burdens conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended

Id. at 1466-71 (internal quotations omitted).

37. *See* Lidsky, *supra* note 26, at 920-25 (mentioning recent court decision have added pressure to develop uniform standard for dealing with blogs in defamation cases); *see also* Technorati, *supra* note 7 (identifying trends increasing number of blogs within United States and their increased sophistication and incorporation within political and social commentary).

38. *See* Lidsky, *supra* note 26, at 944-45 (describing Supreme Court's piecemeal application of First Amendment, including anomalies created by defamation law and highlighting additional problems created by new Internet libel for First Amendment doctrine which require Supreme Court resolution).

39. *Merriam-Webster Dictionary: 'Mass Media,'* MERRIAM-WEBSTER, available at http://www.merriam-webster.com/dictionary/mass_media (last visited Oct. 31, 2009).

40. *See* Technorati, *supra* note 7 (recognizing increasing number of blogs and bloggers using sophisticated advertising tools and platforms to generate reader loy-

not only increased in popularity amongst the general populace, but has also met greater acceptance among highly educated and affluent individuals.⁴¹ Additionally, blogging is an act that is demographically diverse and is an increasingly global phenomenon continually gaining acceptance and authority.⁴²

Blogging is becoming a readily accepted and pervasive part of the Internet experience, such that many people and corporations view blogging as an opportunity to expand their Internet presence.⁴³ Far from being an eccentric Internet sub-culture, the blogosphere is being adapted by mainstream culture.⁴⁴ Further, blogs have been adopted in academia by professors and deans, in media by reporters as part of mainstream media websites, and in other corporate and professional areas.⁴⁵

B. The First Amendment

For centuries, American courts have struggled to define the limits of free speech in accordance with both the established laws and the political practicality.⁴⁶ Such complexity has resulted in a

ality, and general increase in investment, profitability, and time invested into blogging).

41. *See id.* (noting blogging popularity as pastime among those with higher education and significant income to invest in act of blogging).

42. *See id.* (showing varied distribution of bloggers by geographic distribution, including 48% in North America, 27% in Europe, 13% in Asia, and 7% in South America).

43. *See id.* (Follow “Day 1: Who Are the Bloggers?” Hyperlink). (recognizing characterization of blogs, that of total bloggers surveyed: 79% are personal, 12% are corporate and 46% are professional bloggers, with significant overlap between all three groups).

44. *See id.* (finding brand and corporate presence within blogosphere increased, owing primarily to vast potential for advertising and brand shaping opportunity among blogosphere audience, measuring as of August 2008 to be approximately 77.7 million unique visitors within United States); *see also Older, Wealthier Men Fuel Triple-Digit Growth of Political Blogs*, <http://www.marketingcharts.com/topics/blogs/older-wealthier-men-fuel-triple-digit-growth-of-political-blogs-6504/> (last visited Oct. 31, 2009) (tracking explosive growth trends among older, wealthier males during political seasons among political blogs, such as *Huffington Post.com* and *Politico.com*, which, in September 2008, logged 4.5 million and 2.4 million visitors respectively).

45. *See* Technorati, *supra* note 7. (perceiving growth of blogging in professional, corporate and academic areas, in supplement to majority of blogs which remain personal). Companies generally share the belief that it is important to reach out to bloggers to be brand advocates, and that generally, bloggers tend to be early adopters of new web applications. *See id.*

46. *See* David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L.R. 1837, 1891-95 (1987) (setting forth various philosophical bases for free speech applied by American courts, including utilitarian, democratic protection, and critical theory, all of which vastly differ from founding fathers’ original conception of free speech). “Americans very actively debate . . . how we should understand the intent of the

distinction among the type of protections offered to free speech, based on whether it was content or non-content based.⁴⁷ Additionally, besides the continual struggle to define the limits of freedom of speech, the impact of technology and socio-economic organization place pressure on courts and legislatures to redefine ancient rights in modern contexts.⁴⁸

The emergence of the Internet has had a tremendous impact on the right to free speech and the legal right to publish anonymously.⁴⁹ The Internet allows for an individual, named or anonymous, to publish material to the public at a significantly lower cost and to a larger potential audience than through traditional publishing.⁵⁰ The ability to self-publish on the Internet has magnified the effectiveness of anonymous authors' ability to spread their work through the populace, and to develop a social presence.⁵¹

Due to the prevalence of the Internet in modern American society, the legislatures and courts have attempted to adapt the legal system to free speech on the Internet in a variety of ways.⁵² Con-

Founders who wrote and ratified the 1787 Constitution [and] the 1791 Bill of Rights . . . It is [commonly believed] that the Founders aspired to this kind of long-term durability . . . It is, of course, nothing of the kind." *Id.* at 1839-40.

47. See Macrander, *supra* note 27, at 1086-89 (identifying different standards between protection for reporters and individual shield statutes among states, ranging from strict and specific to lenient and open, resulting in controversial and inconsistent application to blogs outside meaning of publication and news).

48. See *id.* at 1093-97 ("[Defamation] common law clashes almost fundamentally with Internet users' asserted 'First Amendment right to speak anonymously on Internet.'").

49. See Lidsky, *supra* note 26, at 857-61 (illustrating impact of free speech on Internet and anonymous publishing through hypothetical anonymous day trader who posts online accusations alleging fraud by company against its investors and difficulty of resulting lawsuit); see also Macrander, *supra* note 27, at 1093 (stating "[t]he current state of privacy law, even in the face of the asserted First Amendment right to speak anonymously, does not bode well for the bloggers and [i]nternet users who wish to publish under the cloak of [i]nternet anonymity . . . even given the judicial tools of a balancing test to determine parties' interests and a validly issued subpoena, the basic function and system of the Internet medium ensures that some users, however criminal, defamatory, or patriotic, nevertheless remain anonymous.").

50. See Lidsky, *supra* note 26, at 860-61 (stating "[t]he [i]nternet is . . . a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the [i]nternet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy.").

51. See *id.* at 862 (explaining "[i]n the real world, the author is separated from her audience by both space and time Internet communication lacks this formal distance.").

52. See Richards, *supra* note 46, at 1851-58 (identifying adaptations of original theory of Constitutional interpretation from Founders as differing from modern conceptions of free speech theory).

gress has passed a number of laws attempting to adapt and enforce a legal regime to the Internet, including the Electronic Communications Privacy Act of 1986 (hereinafter “ECPA”), the Communications Decency Act of 1996 (hereinafter “CDA”), and the PATRIOT Act.⁵³ As a result, Congress has both expanded and limited the rights of certain groups on the Internet.⁵⁴ The Freedom of Information Act has expanded the right to Internet speech and information.⁵⁵ In contrast, the ECPA, the CDA, and the PATRIOT Act have attempted limited Internet speech in favor of other government considerations.⁵⁶

1. *Anonymous Writing: An American Tradition*

The tradition of anonymity in American writing dates back to the founding fathers.⁵⁷ Thomas Paine published his famous pamphlet *Common Sense* anonymously, arguing for revolution against England.⁵⁸ James Madison, Alexander Hamilton and John Jay

53. See *Freedom of Information Act*, 5 U.S.C.A. § 552 (West 2009). See 47 U.S.C.A. § 230 (West 2009) (section of Communications Decency Act not invalidated by Supreme Court in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997)). See *Patriot Act*, Pub. L. No. 107-56 115 Stat 272 (2001).

54. See Troiano, *supra* note 6, at 1450 (recognizing Congressional motivation for signing CDA, which immunizes Internet service providers from third-party defamatory postings by its users, was to foster development of Internet). But see Lyrissa Barnett Lidsky and Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1547-48 (2007) (discussing Bipartisan Campaign Reform Act of 2002’s main purpose as closing loopholes left by Federal Election Campaign Act).

55. See *Freedom of Information Act*, § 552 (directing government agencies, subject to certain time frame and extraneous considerations, to make records available to public upon request).

56. See *Electronic Communications Privacy Act of 1986*, 18 U.S.C.A. § 2510 (West 2009). See 47 U.S.C.A. § 230 (section of Communications Decency Act not invalidated by Supreme Court in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997)). See *Patriot Act*, Pub. L. No. 107-56 115 Stat 272.

57. See Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 406-07 (2003) (reviewing history of anonymous speech in United States, referencing founding fathers’ reliance on anonymity in newspapers and pamphlets to develop grassroots support for American Revolution, with colorful pseudonyms including ‘Publius,’ ‘An American Citizen,’ ‘Marcus,’ and ‘Amerinicus.’); see also Lidsky & Cotter, *supra* note 54, at 1541-42 (presenting Supreme Court’s justifications in recent cases (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)) for anonymous speech rested first, in contributions of anonymous publishing to mankind, citing Federalist Papers and works of Mark Twain and George Elliot in example, and second, to protect authorial autonomy for controversial or unpopular thoughts).

58. See R.B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 874-75 (1994) (highlighting importance of anonymity for Thomas Paine’s writings and their effective contributions to revolutionary war); see also Ekstrand, *supra* note 57, at 406 (documenting tradition of historical anonymous publishing in United States from Founding Fathers to Civil War reporters).

assumed pseudonyms when authoring the Federalist Papers.⁵⁹ Given the historical significance, it is unsurprising that freedom of speech and the right to publish anonymously holds a uniquely revered place within American jurisprudence.⁶⁰

The Supreme Court has upheld the right to publish anonymously as supported by the First Amendment in *Talley v. California*.⁶¹ In *Talley*, the Court addressed the question of whether a Los Angeles city ordinance, restricting distribution of pamphlets failing to identify the distributing person, is offensive to the freedom of speech of the Fourteenth Amendment.⁶² The majority, drawing on the reasoning from *Lovell v. City of Griffin GA*⁶³, held that requiring self-identification on pamphlets would be overly burdensome so as to dilute the right to free speech.⁶⁴ The Court further noted that

59. See David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139, 154-55 (1996) (identifying numerous court references to anonymity of Federalist Papers in justifying right to publish anonymously).

60. See Ekstrand, *supra* note 57, at 407 (providing common justification for societal tolerance of anonymous speech to democratic processes). "It has long been argued that anonymous speech is essential to the democratic process because it is often the only way for unpopular views to be heard." *Id.*; see also Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 123-24 (1996) (characterizing court treatment of anonymity as speakers' rightful choice).

61. See *Talley v. California*, 362 U.S. 60, 64-66 (1962) (affirming right to anonymous speech as protected by First Amendment and noting certain required disclosures overly burden free speech).

62. See *id.* at 60-61 (presenting facts in case involving "whether the provisions of a Los Angeles City ordinance restricting distribution of handbills 'abridge the freedom of speech and of press secured against state invasion by the Fourteenth Amendment of the Constitution'" is valid). The ordinance in question provides that "[n]o person shall distribute any hand-bill in any place under circumstances, which does not have printed on the cover . . . the name and address of the following: (a) The person who printed, wrote, compiled or manufactured the same. (b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon." *Id.* at 61.

63. 303 U.S. 444 (1938) (holding that requirement of license for distribution of pamphlets and leaflets in public was unjustifiably burdensome upon free speech).

64. See *Talley*, 362 U.S. at 62-64 (referring to Court case in which ordinance that forbade any distribution of literature at any time or place in Griffin without license was held void and reasoning that requiring licenses would allow *de facto* censorship in pamphleteering, "historic weapons in the defense of liberty."). See *id.* at 64-65 (reviewing historical perspective for free speech in United States as developed from colonial era, during which British censorship laws sentenced persons to whipping, fining, and death for writing, printing or publishing seditious material).

the Talley ordinance failed to limit the prohibition to accepted areas of control, such as obscenity.⁶⁵

2. *Modern Protections for an Ancient Right*

The effect of the Internet on the increased potential for libelous tort places pressure on the traditional doctrine of the right to publish anonymously.⁶⁶ As a result, courts have taken divergent approaches to the issue of whether a plaintiff can uncover the identity of an anonymous defendant. The Justices of the Supreme Court have provided minimal guidance and as a result state and federal courts have crafted competing doctrines to address this issue. The Supreme Court, in *Reno v. ACLU*⁶⁷, characterized the Internet as a free speech zone.⁶⁸ In *Reno*, the Supreme Court, in analyzing the constitutionality of the CDA, held that the Internet is not held to the same standard of the media; a standard that holds anonymous publishing to be a long-recognized and unquestioned right.⁶⁹ Accordingly, modern court decisions have struggled with upholding the right to publish anonymously on the Internet.⁷⁰ However, the rise of citizen journalism and the Internet's increasing pervasiveness in everyday life has changed since *Reno* was decided in 1996, such that the decision to hold the Internet to a non-media standard may no longer be fitting.⁷¹ Additionally, the right to publish anonymously on the Internet places a court in a difficult position with respect to discovery and service of process, which largely presumes the ease in identifying John Doe defendants.⁷²

65. *See id.* at 63-64 (commenting on failure of drafters to limit ordinance to content that is "obscene or offensive to public morals or that advocates unlawful conduct," but is general ban of all handbills that fail to meet identification requirements).

66. *See* *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (indicating recognition by Court of Internet's ability to expand capacity to torts, including defamation, copyright infringement and trademark infringement).

67. 521 U.S. 844 (1997).

68. *See id.* at 847-48 (holding that Internet is not to be held to same degree of free speech protection as media companies).

69. *See id.* (explaining rationale for decision based on limited access to Internet's questionable material by accident by under-aged persons).

70. *See* *John Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (recognizing First Amendment protection of anonymity in publishing extends to Internet).

71. *See* Macrander, *supra* note 27, at 1098-1100 (detailing changes leading to comparison of bloggers and journalists in citizen journalism); *see generally* Technorati, *supra* note 7 (studying growing prevalence of news-themed and political-themed blogs in recent decades).

72. *See* *Seescandy.com*, 185 F.R.D. at 578 (observing that court recognizes difficulties posed by anonymous Internet defendants to traditional court functions, including limited restraining order issuance, service of process and discovery).

The Internet and the increased ability for anonymity have changed that presumption.⁷³

In *Columbia Insurance Company v. Seescandy.com*, a District Court in California addressed the question of whether a plaintiff may proceed to trial despite failure to provide adequate service to an anonymous defendant.⁷⁴ Columbia Insurance Company, owner of the Sees Candy trademark, attempted to bring suit for trademark infringement against an unknown entity which had registered the website URLs “seescandy.com” and “seescandys.com.”⁷⁵ Despite numerous attempts to trace the prospective defendant through Internet detective work and subpoena, Columbia was unable to adequately gather enough information to serve process upon the defendant.⁷⁶ The Court reasoned that allowing Internet anonymity would stifle plaintiffs’ ability to seek adequate remedy and, further, would heighten a defendant’s ability to commit Internet tort, including “defamation, copyright infringement, and trademark infringement, entirely on-line”⁷⁷ As a result, the Court established a multi-step process for plaintiffs to identify the defendant, establish a suit that could withstand a motion to dismiss and demonstrate that discovery would likely lead to the identity of these

73. *See id.* at 576-77 (ascertaining that certain remedies, including injunction, and discovery processes against anonymous Internet defendant would be largely ineffective or disallowed by current jurisprudential rules of civil procedure). “Traditionally, the default requirement in federal court is that the plaintiff must be able to identify the defendant sufficiently that a summons can be served on the defendant This requires that the plaintiff be able to ascertain the defendant’s name and address.” *Id.* at 577.

74. *See id.* at 575-76 (scrutinizing plaintiff, Columbia Insurance Company, for attempt to seek injunctive and damage relief against unknown person who registered trademarked domain names, traceable only through IP address, which requires additional cooperation from Internet Service Provider for discovery of defendant’s identity).

75. *See id.* at 576 (classifying domain names as “alphanumeric strings that are associated with particular IP addresses,” allowing easier access to particular website and often associated, in corporate branding with trademark or brand, but which can be done without any particular claim to intellectual property).

76. *See id.* at 576 (illustrating numerous unsuccessful plaintiff attempts to locate defendant through falsified, incomplete and periodically changing addresses and contact information).

77. *Id.* at 578.

defendants.⁷⁸ If these steps were met, then the court would allow an extension as opposed to dismissal of the case.⁷⁹

The right of anonymous publishing is not absolute, however, and under certain circumstances, a court will pierce this protection and require a defendant to disclose his or her identity.⁸⁰ However, American courts have been unable to agree what standard should be applied or what test is applicable to determine when anonymity should be overcome.⁸¹

The Virginia Circuit Court's decision, *In re Subpoena Duces Tecum to America Online* (hereinafter "*In re AOL*"), applied a good faith standard in cases where the interest of a plaintiff in overcoming anonymity must be balanced against the first amendment rights of the anonymous defendant in anonymity.⁸² Specifically, the Court noted that anonymous protection does not protect against bona fide defamatory statements and recognized the jurisprudential challenge presented by cyberspace, message boards and other Internet media.⁸³ However, the court further noted that the burden is on

78. *See id.* at 578-80 (identifying three limiting principals for determination of whether discovery of anonymous defendant should be granted: (1) "the plaintiff should identify the missing party with sufficient specificity that the Court can determine that the defendant is a real person or entity who could be sued in federal court;" (2) "the party should identify all previous steps taken to locate the elusive defendant;" and (3) "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss").

79. *See id.* at 580-81 (presenting grant by court to plaintiff of fourteen days from date of order to file appropriate forms for limited discovery for identity of plaintiff).

80. *See In Re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at *6-7 (Va. Cir. Ct. Jan., 31, 2000) (clarifying that right to speak anonymously is not absolute and subjecting right to good faith standard).

81. *See id.* at 5-6 (noting other courts, federal legislation, and recent Supreme Court cases have provided little guidance regarding determination of whether subpoena is oppressive).

82. *See id.* at 6 (describing question posed before court as whether extension of First Amendment right to anonymity to chat room and message board Internet communications should be granted). Regarding issuance of unreasonable or oppressive subpoenas, a court should order the ISP to provide information regarding identity when (1) "the court is satisfied by the pleadings or evidence supplied to that court," (2) "the party requesting the subpoena has a legitimate good faith basis to contend that it may be the victim of conduct actionable," and (3) "the subpoenaed identity information is centrally needed to advance that claim."). *See id.*

83. *See id.* at 7 ("Any defamatory statements made by one or more of the John Doe defendants would not be entitled to any First Amendment protection."). The court notes that using Internet message boards to release confidential insider information can cause damage that falls outside the scope of defamation, in addition to the existing tortious claims that arise from libelous activity on message boards. *See id.*

the plaintiff to prove a legitimate case; it refused to adopt a specific test for this determination.⁸⁴

The federal courts mirrored the approach taken by the *In re AOL* court in *Rocker Management LLC v. John Does 1 through 20* (hereinafter “*Rocker Management*”).⁸⁵ In this case a New Jersey Federal District Court addressed whether statements made on Yahoo! Inc. message boards and chat rooms by an anonymous poster named “harry3866” would provide grounds for the libeled Plaintiff, a New Jersey investment management firm, to overcome the anonymity.⁸⁶ The court, using the Seescandy test to move past a motion to quash, applied a totality of the circumstances test to determine the third prong of the test, whether the plaintiff has a genuine case that could survive a motion to dismiss.⁸⁷ Due to the lack of evidence available in the pre-discovery phase, the court held that the totality of the circumstances test allowed the court to consider the broad context in which the statements were made, the subject of the statements, their specific context, the likelihood of hyperbole and the context of the reader in interpretation.⁸⁸

Nevertheless, in *Doe v. Cahill*, the Delaware Supreme Court rejected the good faith standard of the New Jersey court in favor of a summary judgment standard.⁸⁹ In *Cahill*, the court enumerated the standard in Delaware for overcoming anonymity.⁹⁰ As such, the court held that the Plaintiff demonstrated that the case withstood a summary judgment standard.⁹¹ This summary judgment standard,

84. *See id.* at 7-8 (rejecting proposed test by plaintiff, AOL, as unnecessarily precedential for subpoena reasonability requiring first, prima facie claim of being victim of tortuous conduct, and second, subpoenaed information as important to claim).

85. *Rocker Mgmt. LLC v. John Does 1-20*, No. 03-MC-33, 2003 WL 22149380 (N.D. Cal. May 31, 2003).

86. *See id.* at 1 (describing statements posted as business libel, “threatening analysts who are bullish on certain stocks” and of spreading lies ‘about those stocks,’ in addition to insinuating Securities and Exchange Commission investigation against plaintiff.)

87. *See id.* at 1-2 (establishing application of totality of circumstances test in situations to determine whether particular statement is libelous).

88. *See id.* at 3 (concluding that complaint’s dismissal was result of failure of statement to be libelous in light of totality of circumstances, despite certain key facts, including identity of poster or given particular target audience, remaining unknown at time of decision).

89. 884 A.2d 451, 460 (Del. 2005) (rejecting good faith standard established by courts in other jurisdictions in favor of more stringent summary judgment standard).

90. *See id.* (specifying “less stringent” good faith standard “less capable” of screening out frivolous lawsuits).

91. *See id.* (explaining that summary judgment standard is necessary to balance plaintiff’s right to protect reputation against defendant’s right to exercise

which is higher than the good faith standard, requires that a plaintiff's case be able to overcome dismissal by the Fed. R. Civ. P. 12(b)(6) standard, which is a dismissal by "failure to state a claim upon which relief can be granted."⁹²

In *Cahill*, a local councilman brought suit against a John Doe, who posted statements over a two day period on a local state news Internet website alleging that Cahill suffered from "character flaws," had an "obvious mental deterioration," and that he "is as paranoid as everyone in the town thinks he is."⁹³ Cahill obtained John Doe's Internet Service Provider ("ISP") and Internet Protocol ("IP") address by court order, which would have allowed John Doe's identity to be subpoenaed.⁹⁴ Once informed, John Doe immediately filed a protective order with the court to prevent disclosure of his identity.⁹⁵ In applying the good faith standard for determining the disclosure of an anonymous defendant, the trial court held that the Cahill's could obtain John Doe's identity.⁹⁶ The superior court held that the application of the good faith standard was inadequate and applied a summary judgment standard, reason-

free speech, specifically adopting modified test from earlier New Jersey appellate court decision).

92. *See id.* at 460-61 (holding that overcoming summary judgment motion is required to force disclosure of anonymous defendant). The modified *Dendrite* test, adopted as the standard by the New Jersey court in *Cahill*, requires that a plaintiff: (1) "undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application," (2) "to set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech," and (3) "satisfy the *prima facie* or 'summary judgment standard.'" *See id.* at 460 (citing *Dendrite Intl., Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001)); *see also* FED R. CIV. P. 12(b)(6) (providing modern codification of demurer "failure to state a claim upon which relief can be granted . . .").

93. *See Cahill*, 884 A.2d at 454-55 (identifying statements posted on Internet blog sponsored by Delaware State News under alias "Proud Citizen," making disparaging comments about Councilman Cahill in negative comparisons to Mayo Schaeffer and alleging severe character defects).

94. *See id.* at 455 (classifying ISP generally, to be business organization providing service and connection to websites and persons wishing to design websites). IP addresses are specific number codes unique to Internet-able computers designed to allow identification of terminals. *Id.* Although IP addresses are unable to provide identity, most ISPs maintain identification records linked with IP addresses. *Id.*

95. *See id.* (rejecting trial judge's denial of Doe's motion for protective order and holding that good faith standard for requiring disclosure of anonymous plaintiff's identity was met).

96. *See id.* at 454-55 (explaining good faith standard requires: "(1) that they had a legitimate, good faith basis upon which to bring the underlying claim; (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source").

ing that the balance between the protecting free speech and that the act of preventing defamation lawsuits may chill free speech.⁹⁷ The summary judgment standard articulated by the Cahill court requires that a plaintiff: (1) undertake efforts to notify the anonymous poster that he or she is the subject of a subpoena or application for order of disclosure, and (2) satisfies a *prima facie* or summary judgment ruling by the court.⁹⁸

In addition to modifying the standard to overcome anonymity, the Delaware Supreme Court recognized that in the case of public figure defendants, providing *prima facie* proof without discovery, with respect to the actual malice standard, would be near impossible and held that it is not required to plead actual malice for defamation in overcoming a defendant's anonymity.⁹⁹ Having modified the test to reject Cahill's good faith standard in favor of a modified summary judgment standard, the Delaware Supreme Court reversed the judgment of the Superior Court of Delaware, finding that the statements made against Cahill did not constitute *prima facie* defamation.¹⁰⁰

One problem with applying First Amendment protections to anonymous publishing includes the difficulties in distinguishing between types of free speech; thus, often nuanced and cumbersome rights are applied, such as the difference between broadcasted and printed media.¹⁰¹ The legal standard applied to each type of speech is often difficult to determine because of the varied levels of protection afforded to different types.¹⁰²

97. *See id.* at 461 (articulating reasons for applying higher standard and rejecting both good faith standard and original four part summary judgment test from lower court).

98. *See id.* at 460-61 (providing requirements for summary judgment standard that differ from earlier *Dendrite* standard).

99. *See id.* at 464 (discussing difficulty for plaintiff as public figure to overcome summary judgment standard). "Without discovery of the defendant's identity, satisfying this element may be difficult, if not impossible. Consequently we do not hold that the public figure defamation plaintiff is required to produce evidence on this element of the claim." *Id.*

100. *See id.* at 467-68 (holding that statement made about Cahill would be unclear to third-party observer as fact, thus, cannot qualify as defamatory).

101. *See* Lidsky, *supra* note 54, at 1552-54 (distinguishing between media type source of defamation in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

102. *See id.* at 1555-58 (investigating relation between different types of speech and considering different levels of protection given to speech as result).

C. Defamation and the Internet

The right to free speech and free press, while not absolute, has been fairly well protected by courts when balanced against other compelling government interests, including protection from claims of defamation.¹⁰³ Defamation has traditionally been a very limited doctrine within the United States.¹⁰⁴ The Internet, in both expanding the reach and amplifying the resilience of a defamatory statement in effectiveness and viability, has challenged this limitation.¹⁰⁵

Like many common law doctrines, defamation in the United States is inherited from British common law and is subject to balancing against the First Amendment right to free speech and press.¹⁰⁶ Recognizing the importance of free speech and press to a democratic political system, the Supreme Court has enumerated a number of principles designed to curtail the reach of defamation.¹⁰⁷ One specific limiting principle articulated by the Supreme Court involves public figures. As articulated in *N.Y. Times v. Sullivan*, defamation against a public figure must involve “actual malice.”¹⁰⁸

1. *The N.Y. Times Standard Expanded: What is a Public Figure?*

In *N.Y. Times*, the Supreme Court held that in order for defamation to apply to a “public figure,” an additional requirement of “actual malice” is required in addition to the common law test.¹⁰⁹

103. *See id.* at 1577-79 (mentioning balancing required by First Amendment in traditional tort claims).

104. *See* Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 797 (2004) (identifying limitations of defamation doctrine when applied to United States Constitutional law system).

105. *See* Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L.R. 1127 (2006) (emphasizing tendency towards indestructibility of information online and potential reach to wide audiences). *See generally* Tien, *supra* note 60, at 173-82 (discussing various Supreme Court cases’ evolving standard for privacy, anonymity and subsequent application to Internet).

106. *See* Lidsky, *supra* note 54, at 1581-89 (examining historical role of anonymous free speech and balancing that against historical development in context of First Amendment assumptions).

107. *See id.* at 1548-52 (evaluating Supreme Court’s decision in *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), as attempt to recognize limits in applicability of free speech doctrine in certain areas, such as election law).

108. 376 U.S. 254, 280 (1964) (communicating that “constitutional guarantees require” showing of “actual malice”).

109. *See id.* at 279-80 (defining “actual malice” with regard to defamation as “knowledge that it was false or with reckless disregard of whether it was false or not”).

The Supreme Court defined actual malice as with knowledge of falsehood or “with reckless disregard” as to falsehood.¹¹⁰ The Supreme Court, in later cases, expanded the definition of “public figure” beyond its original meaning in *N.Y. Times*.¹¹¹

Courts continue to refine the application of the *N.Y. Times* standard for defining public figures.¹¹² Currently, “public figure” refers to anyone who willfully or intentionally places themselves into the public light, including sports casters, actors, and potentially blogs themselves.¹¹³ The justification commonly provided for holding public figures to a different standard in defamation is that public figures’ conscious exposure to public scrutiny, a characteristic unshared by non-public figures, creates an obligation for tolerance of a certain amount of negative commentary.¹¹⁴

2. *Actual Malice in the Virtual World*

As a doctrine, the “actual malice” standard has been much maligned by legal commentators and practitioners.¹¹⁵ The doc-

110. *See id.* at 267-68 (conveying other requirements of “libel per se” under Alabama law include words “tend[ing] to injure a person. . . in his reputation” or to “bring (him) into public contempt,” which extends to public officials if it injures public office, imputes misconduct, official integrity or breach of fiduciary trust).

111. *See id.* at 268 (referencing previous case discussion of public men as belonging to public in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), and citing founding father precedent for having public officials be tolerant of certain scrutiny, even rising to level of defamation); *see also* Curtis Publ’g v. Butts, 388 U.S. 130, 155 (1967) (extending definition of public persons to non-officials who may sue under same standard). “We consider and would hold that a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent” *Id.*

112. *See* Victoria Cioppettini, *Modern Difficulties in Resolving Old Problems: Does the Actual Malice Standard Apply to Celebrity Gossip Blogs?*, 19 SETON HALL J. SPORTS & ENT. L. 221, 227-30 (2009) (setting forth evolution of *N.Y. Times* standard and providing applications of more recent examples within entertainment industry, including Carol Burnett and Clint Eastwood).

113. *See N.Y. Times*, 376 U.S. at 279-80 (defining actual malice); *see also* Antony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 269-71 (2007) (examining effect of Internet in developing public figures generally and continuing with similar test for “public figure” determination).

114. *See* Cioppettini, *supra* note 112, at 227-28 (reviewing rationale behind Supreme Court’s decision to establish “actual malice” requirement); *see also* Ciolli, *supra* note 113, at 267-68 (quoting Eric Walker, *Defamation Law: Public Figures – Who are They?*, 45 BAYLOR L. REV. 955, 970 (1993)) (identifying test applied by lower courts regarding determination of “public figure” as whether plaintiff “voluntarily [rose] to the forefront of the public controversy”).

115. *See* Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 833 (2006) (“The public figure doctrine has become anachronism.”). *See generally* Nicole A Stafford, *Lose the Distinction: Internet Bloggers and First Amendment Protection of Libel Defendants – Citizen Journalism and the Supreme Court’s Murky Jurisprudence Blur the Line Between Media and Non-media Speakers*, 84 U. DET. MERCY L. REV. 597, 603 (2007) (“One court arguably

trine requiring distinction between media and non-media speakers, developed in the wake of *N.Y. Times v. Sullivan*, has created confusion among lower courts, especially with the rise of citizen journalism blogging.¹¹⁶

Attempted application of this standard to the virtual world of the Internet has challenged some basic assumptions which gave rise to the “actual malice” standard, leading some commentators to suggest that a new test is necessary.¹¹⁷ Many negative critiques of the “actual malice” standard include the uncertainty of application.¹¹⁸ While the original formulation by the Supreme Court held only media corporations to the actual malice standard, and by extension not to everyone else, the rise of blogs, some of which can be viewed as a hybrid between media companies and non-media companies in function, if not design, led to queries regarding the applicability of the “actual malice” standard to blogs.¹¹⁹

D. A Hypothetical Fact Pattern

Imagine the following situation: You are a local elected politician in your town, the very definition of a “public figure” according

overcompensated to meet First Amendment guarantees, and at least one court disregarded constitutional considerations in setting a standard for whether to unmask the anonymous defendant at the summary judgment stage.”).

116. See Stafford, *supra* note 115, at 604-05 (recognizing tendency among lower courts to create new and different standards for evaluating Internet defamation cases and taking note of differing trends in New Jersey, Pennsylvania and Delaware State courts). “Thus, state courts are setting forth widely varying constitutional protection when addressing motions to unveil the identity of anonymous defendant-speakers in Internet libel claims, suggesting both that Supreme Court guidance is required and that collapsing the media/non-media distinction is necessary to prevent a chilling effect on such speech.” *Id.*

117. See *id.* at 612 (advocating removal of media/non-media distinction from Internet defamation consideration). See generally Perzanowski, *supra* note 115, at 844-56 (promoting media access as rationale for whether test requires application of “actual malice” standard, utilizing media access and consequent change presented by Internet as challenge to assumptions made by Supreme Court regarding media).

118. See Stafford, *supra* note 115, at 606 (characterizing application of non-media categorization of “actual malice” standard to protect bloggers as misapplication of First Amendment doctrine).

119. See *id.* at 611 (asserting Supreme Court’s unintentional creation of media/non-media distinction in *N.Y. Times*, and subsequent cases, including *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997), make no distinction between Internet and other forms of publication). See Perzanowski, *supra* note 115, at 848-51 (finding that assumptions which led Supreme Court to develop “actual malice” standard do not apply to blogs or Internet, and that in recent Supreme Court cases Internet is significantly different from media to warrant application of standard). “Many-to-many communication is steadily displacing one-to-many communication central to the public figure doctrine. No technology embodies this trend better than the Internet.” *Id.* at 851.

to the *N.Y. Times* standard.¹²⁰ You have recently implemented legislation that is extremely unpopular with a segment of your constituency, many of whom are active members of various private organizations and are technologically savvy and Internet-capable.¹²¹ You are sitting in your office one day and you receive an e-mail from one of your younger staff interns. Upon clicking on the e-mailed link, you open a website that has an extremely scathing message about your recent actions.¹²² The editorial contains references to your meetings with questionable people, so-called “public comments made” and other events that did not occur, all seeming to imply that you are incompetent.¹²³ Further, additional comments made in a section below the editorial are similarly defamatory, and seem to indicate that many people in the public have read this editorial and taken time to respond.¹²⁴ Shortly afterwards, you receive concerned and alarmed e-mails from many members of the local community, demanding accountability for your actions and threats to pull support from you as a result of this editorial.¹²⁵ You would like to sue for defamation, to either force an injunction to pull the website or receive damages against the John Doe, but you have very little information about the John Doe beyond the posting.¹²⁶ What do you have to prove before a Court to subpoena the identity of the anonymous writer and can you, a “public figure,” successfully sue for defamation?

III. ANALYSIS

This section focuses on the problems that “public figure” plaintiffs face when trying to bring a successful defamation lawsuit against an anonymous blogger, particularly the difficulty in over-

120. *See Doe v. Cahill*, 884 A.2d 451, 454-55 (mentioning similar legal scenario for Councilman Cahill as provided in this fact pattern); *see also* *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (establishing standard for public figures presupposed in this scenario).

121. *See Cahill*, 884 A.2d at 454 (portraying similar scenario).

122. *See id.* (observing similarity of message posted, alleging character defect and incompetence).

123. *See id.* (comparing differences between hypothetical and *Cahill*, defamation is clearly false in this hypothetical, although author’s anonymity continues to belie questions of whether falsehood was libeled knowingly or with reckless disregard).

124. *See id.* at 454 (involving similar reputational damage to Councilman Cahill).

125. *See Cioppettini, supra* note 112, at 226-27 (conveying that requirement of defamation is “harm caused by the publication. Such statements may cause injury to one’s personal reputation, but either injury suffices for defamation recovery.”).

126. *See id.* (reviewing basic requirements for tortious defamation and additional requirement posed by “actual malice” for “public figure” plaintiffs).

coming: (1) anonymity to determine “actual malice;” and (2) First Amendment protection to free speech.¹²⁷ In other words, the protections of the First Amendment and requirements for public figure defamation, when left unmodified, combine to form an absolute shield, effectively immunizing anonymous blogger defendants in defamation lawsuits by “public figure” plaintiffs.¹²⁸

Additionally, even if a “public figure” plaintiff was to successfully overcome John Doe’s First Amendment anonymity through subpoena, the evidentiary requirements to prove “actual malice” are significant.¹²⁹ Further, unlike large media company operations, formal editing processes, company employees and paper trails are not available as similar evidence against blogs.¹³⁰ This section will explore the possible solutions explored by courts and scholars regarding this problem.¹³¹

A. Overcoming Anonymity

A defamation lawsuit by a “public figure” plaintiff is unlikely to overcome an anonymous defendant’s anonymity in discovery because a determination regarding “actual malice” is usually made through evidence that is not available until after discovery, thereby tying a Gordian knot.¹³²

127. See generally Lidsky, *supra* note 26, at 888-904 (isolating problems that arise when attempting to apply First Amendment anonymity protections to public persons).

128. See Cahill, 884 A.2d at 457-58, 464 (addressing interaction of two doctrines to necessitate creation of loophole for “public figure” plaintiffs).

129. See Stafford, *supra* note 115, at 606-07 (expressing challenges to bring suit against blogger whom there is no fact-check and for whom proof of “actual malice” is not easily available). See Malloy, *supra* note 12, at 1191-92 (explaining that although “actual malice” is not required to be proven in subpoena of anonymous defendant’s identity, it is still presumable standard that “public figure” plaintiffs must meet before court to successfully sue for defamation).

130. See *Protecting the New Media*, *supra* note 31, at 1005-07 (noting most bloggers lack fact checking mechanisms and oversight that larger traditional media companies have). But see Macrander, *supra* note 31, at 1098 (arguing that source-checking difference between journalists and bloggers is largely illusory, as both remain fallible in terms of actually functioning as prevention of false publishing, citing CBS Dan Rather example); see also Troiano, *supra* note 6, at 1472-75 (suggesting that bloggers and journalists carry out same function in presenting news and that bloggers review of their own sites and incentive to publish trustworthy information serve editorial and publisher oversight functions).

131. For a full discussion of solutions explored by courts in addressing problems of defining media, see *infra* notes 189-216 and accompanying text.

132. For a full discussion of the problematic interaction between defamation and First Amendment anonymity in this specific situation, see *supra* notes 133-163 and accompanying text. See *Merriam-Webster Dictionary: ‘Gordian Knot,’* MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/Gordian&20knot> (last visited Oct. 31, 2009) (defining Gordian knot as “an intricate prob-

1. *Traditional First Amendment Rights and Writer's Anonymity*

The right to publish anonymously in the United States is presumed.¹³³ Therefore, to overcome anonymity through compulsory discovery, a plaintiff is required to present a case and, depending on the court, may be held to a variety of standards.¹³⁴ Two competing court-developed standards to overcome anonymity developed: (1) good faith, and (2) summary judgment.¹³⁵

The good faith standard, applied in *In re AOL*, allows anonymity to overcome a legitimate good faith basis if: (1) the information sought is directly and materially related to the claim, and (2) the information is unable to be obtained from another source.¹³⁶ In the hypothetical, the plaintiff would likely be able to track down the IP address and ISP of the individual posting on the message board.¹³⁷ If a plaintiff approached the court to request a subpoena for the IP owner's identity, such a request would be granted if the plaintiff could demonstrate a good faith legitimate basis for defamation and the exhaustion of other methods of investigation.¹³⁸ Although the removal of the actual malice requirement would only be for purposes of discovering identity, demonstrating a case for defamation under the good faith standard is easier than the alternative summary judgment or actual malice standards.¹³⁹

lem[.]” derived from Alexander the Great’s solution to a knot incapable of being untied by cutting through it with a sword.)

133. *See Cahill*, 884 A.2d at 455-56 (portraying right to publish anonymously in United States presumed under First and Fourteenth Amendments).

134. *See id.* at 458-60 (noting different standards of good faith and summary judgment under which scenario has been decided in lower and state courts).

135. *See In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *7-8 (Va. Cir. Ct. Jan. 31, 2000) (identifying good faith standard for lawsuit, citing varying standards required for prima facie case establishment). *But see Cahill*, 884 A.2d at 463-64 (identifying modified summary judgment standard).

136. *See Cahill*, 884 A.2d at 455 (providing commonly applied good faith standard under which claim brought).

137. *See id.* at 460-62 (providing likely reaction when seeking ISP and IP address from Councilman Cahill example).

138. *See In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at *7 (identifying good faith test and requirement to demonstrate “a legitimate basis to believe that it may have *bona fide* claims against the John Does before compliance with the *subpoena duces tecum* is ordered. . . . What is sufficient to plead a *prima facie* case varies from state to state. . . . This Court is unwilling to establish any precedent that would support an argument that judges of one state could be required to determine the sufficiency of pleading from another state when ruling on matters such as the [granting of the subpoena for discovery of identity motion.]”).

139. *See Cahill*, 884 A.2d at 463 (recognizing summary judgment standard provides harsher standards for plaintiffs than good faith standard).

Under the summary judgment standard, the hypothetical plaintiff would have to demonstrate that the defamation suit would survive a motion for summary judgment, an exceedingly difficult standard for public plaintiffs who must also prove actual malice.¹⁴⁰ Even if the removal of the actual malice requirement was presumed, demonstrating a case for defamation that would survive summary judgment in the absence of the defendant's identity would be exceedingly difficult.¹⁴¹

Using the summary judgment standard may prove too strong a shield for a defendant against a legitimate plaintiff.¹⁴² Thus, using the summary judgment standard articulated in *Rocker* in conjunction with defamation law suit requirements, a John Doe blogger could make horrific allegations about a public figure which would fall short of the per se defamation, and, as a result, be protected.¹⁴³ Further, under an actual malice subjective standard where there is lack of knowledge of the defendant, a defamation suit could fail summary judgment, and halt the further discovery required to develop a case.¹⁴⁴

2. *Traditional Defamation Applied*

In defamation cases, a plaintiff typically must establish that "(1) the defendant made a defamatory statement; (2) concerning the plaintiff; (3) the statement was published; and (4) a third party would understand the character of the communication as defamatory."¹⁴⁵ Further, public figure plaintiffs must establish that the

140. *See id.* at 464-65 (listing requirements under Delaware law to pass summary judgment standard and noting difficulty for proving actual malice, element beyond plaintiff's control and ability to investigate from anonymous defendant).

141. *See Malloy, supra* note 12, at 1188-89 (noting difficulty of standard in light of court's decision to remove actual malice from elements required, as result of court's misperception of blogs and type of damage sustained by defamation).

142. *See id.* at 1190-93 (claiming that perception of court regarding situation in terms of damage from Internet defamation, nature of blogs and mischaracterizing extra-judicial measures as accurate remedy effectively disenfranchising plaintiff from claiming required damages).

143. *See Rocker Mgmt. v. John Does 1 Through 20*, No. 03-MC-33, 2003 WL 22149380, at *1-3 (N.D. Cal. May 31, 2003) (providing example of message board posting which injured reputation of investment company through falsifying reports of securities investigation and analyst misconduct that California District Court found not to rise to level of defamation).

144. *See Malloy, supra* note 12, at 1190 (noting court's deference to anonymous bloggers, taking point with court's failure to see repercussions of decision, which has potential to damage, for example, employment reputation in case of background checks, vigilantism in case of alleged crimes, and government investigation in case of alleged illegal or terrorist connections).

145. *See Cahill*, 884 A.2d at 463 (outlining elements of defamation according to Delaware law).

statement is false, and that the defendant made the statement with actual malice.¹⁴⁶ The ability to prove defamation goes to both the summary judgment and the good faith standard in securing a subpoena compelling discovery of the defendant's identity.¹⁴⁷

In reference to the hypothetical, setting aside the requirement of proving that the plaintiff is a public figure, and thus covered by the *N.Y. Times* standard, the requirement for actual malice for defamation suits against public figures poses significant difficulty for the hypothetical plaintiff.¹⁴⁸ One difficulty includes the requirement that the alleged defamatory statement was made with either: (1) knowledge of its falsity, or (2) reckless disregard for its truth.¹⁴⁹

If a defendant's identity is unknown, numerous scholars have noted that it is extremely difficult to prove a defendant's statement was made with either knowledge of its falsity or reckless disregard for its truth.¹⁵⁰ In many cases regarding allegedly defamatory statements, the plaintiff is forced to proceed to court without discovery or knowledge of: (1) the libeler's identity, (2) the full context in which the statement is made, and (3) circumstantial evidence regarding the anonymous defendant's state of mind at the time.¹⁵¹

146. *See* *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (establishing actual malice standard for public figure plaintiffs to recover on theory of defamation); *see also Cahill*, 884 A.2d at 463 (outlining additional requirements, in addition to discussion of necessary damages, for successful defamation suits in Delaware).

147. *See Cahill*, 884 A.2d at 463 (discussing damages required under theory of defamation in order to claim relief in Delaware).

148. *See id.* at 463-64 (addressing problems hypothetical plaintiff will face).

149. *See id.* (highlighting requirements faced by hypothetical plaintiff for defamation without actual malice). "Given that the plaintiff will have easy access to proof of five of the six elements of a defamation claim, it is not overly burdensome to require the plaintiff to submit a verified complaint or affidavits to substantiate that claim." *Id.*

150. *See generally* Cioppettini, *supra* note 112, at 241-46 (identifying four problems associated with bringing lawsuit against anonymous blogger). "[T]he veil of an anonymity on the Internet; the Communications Decency Act's (CDA) heightened protection standards; a blogger's lack of legal responsibility for postings of third parties on his websites; and the inability to 'unmask' a blogger." *Id.* at 241-42. Of the four listed problems, the inability to "unmask a blogger" directly pertains to this discussion. *See id.* at 246-47 (noting lack of accountability with respect to anonymity or responsibility to postings creates barrier to successful lawsuit).

151. *See* Malloy, *supra* note 12, at 1189-90 (noting example in *Cahill*, which resulted in decision without knowledge of libeler); *see also* Lidsky, *supra* note 54, at 1555-56 (discussing significance of proceeding to court from anonymous position, positing experience of Recording Industry Association of America and attempt to track and initiate lawsuits against online copyright infringers).

3. *Tying the Gordian Knot: John Doe's Refuge*

The protection given to defendants by the First Amendment and the *N.Y. Times* standard provides a significant barrier for a plaintiff to overcome.¹⁵² Although courts acknowledge that the First Amendment does not protect defamation and that anonymity can be overcome by satisfying either the good faith or summary judgment standards, the effect of both doctrines applied together insulates a defendant against a plaintiff's attempts at discovery.¹⁵³

The actual malice standard, as applied subjectively to the totality of the circumstances based on the position of the defendant, may be difficult to achieve without knowing the defendant's identity.¹⁵⁴ Although courts, including the Delaware Supreme Court in *Cahill*, hold that public figure defamation plaintiffs do not need to produce evidence of actual malice to satisfy the summary judgment standard for discovery purposes, the insubstantial information plaintiffs hold may not be sufficient, without the identity of the poster or intended target audience, to rise to the level of defamation.¹⁵⁵ Hypothetically, if the court in *Cahill* knew John Doe was a political rival for Councilman, a position establishing a strong show-

152. See *Cahill*, 884 A.2d at 458-60 (discussing requirements and procedures for meeting elements of defamation to *prima facie* level required by court against anonymous libeler); see also Macrander, *supra* note 27, at 1085-87 (identifying types of barriers that dual protection provides and current trends for application of those barriers before various courts of law).

153. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *7 (Va. Cir. Ct. Jan. 31, 2000) (stating "[a]ny defamatory statements made by one or more of the John Doe defendants would not be entitled to any First Amendment protection"); see also *Cahill*, 884 A.2d at 458-60 (providing history of different tests used by courts to determine when anonymity can be overcome). See generally Tien, *supra* note 60, at 147-54 (summarizing potential harm caused by allowing anonymity to harass various minority groups, inability to redress harm adequately, social deterrence cost, and intangible cost to Internet viability as medium).

154. See *Cahill*, 884 A.2d at 466-68 (recognizing inability of plaintiff to supply anything other than allegedly defamatory statement, leading court to only analyze statement and subsequent replies in absence of context).

155. See *id.* at 464 (recognizing extreme difficulty proving actual malice before court from plaintiff prior to discovery of defendant's identity and holding that lesser standard is required for public figure plaintiffs). The court held that:

"[A] public figure plaintiff must plead the first five elements and offer *prima facie* proof on each of the five elements to create a genuine issue of material fact requiring trial. In other words, a public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control."

Id.

ing of knowledge of falsity and intent, the court may have been willing to entertain the summary judgment standard.¹⁵⁶

When comparing the actual malice standard for defamation to the good faith standard for overcoming anonymity, the material requirements of good faith turn on the definition of a legitimate good faith basis as viewed by a judge.¹⁵⁷ The first requirement, that the plaintiff have a legitimate, good faith basis upon which to bring the underlying claim, if taken to mean a standard less than that of establishing a prima facie case, still must identify the standard required to prove good faith.¹⁵⁸ Setting this standard too low will allow plaintiffs to seek defendant's identities without significant cost, potentially enabling plaintiffs to target comparatively poorer defendant bloggers, thus realizing a chilling effect on free speech.¹⁵⁹

If a court applied the actual malice standard to a plaintiff seeking to subpoena the identity of an anonymous blogger, it would result in a near total impasse, yielding full protection for an anonymous defendant to commit libel; however, it is unlikely that a court would select that option as opposed to the good faith or summary judgment standards.¹⁶⁰ A potential public figure plaintiff, when deciding whether or not to pursue a lawsuit, must decide whether a prima facie defamation case has been developed to warrant pierc-

156. See generally Lidsky & Cotter, *supra* note 54, at 1559-63 (identifying informational value of authorial identity to speech context; therefore, speech provided is valued regarding credibility and personal trademark). Further, it is stated that:

Anonymous speech persists despite fact that it is, on average, less valuable than non anonymous speech to speech consumers (audiences) who often use speaker identity as an indication of a work's likely truthfulness, artistic value, or intellectual merit. Without attribution, audiences must necessarily rely on other indicia, which can be less reliable than speaker identity.

Id. at 1559.

157. See Ekstrand, *supra* note 60, at 423-25 (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999)) (demonstrating varied nature of good faith standard as applied in *Seescandy.com*). Thus, at the very least one is required to attempt to contact an anonymous defendant to effect service of process; however, this is applied to different standards. See *id.* (noting differing standards in *Doe v. 2TheMart*, 140 F.Supp.2d 1088, 1095-96 (W.D. Wash. 2001), *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6-7 (Va. Cir. Ct. Jan. 31, 2000), and *Am. Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377, 385 (Va. 2001)).

158. See *id.* at 425-26 (outlining second and third requirements under good faith standard: that information could not be obtained from another source, and that identifying information sought was directly and materially related to claim).

159. See Lidsky, *supra* note 26, at 888-91 (anticipating chilling effect in cyberspace caused by setting low standard for allowing plaintiffs to pierce anonymity).

160. For a further discussion of results to applying pure standards of First Amendment anonymity and actual malice standard, see *supra* notes 46-102.

ing anonymity.¹⁶¹ In addition to this balancing, the plaintiff must also engage in a cost-benefit analysis to weigh whether the cost of a lawsuit and the possibility of winning damages from an anonymous defendant, with potentially shallow pockets, is worth the cost of a lawsuit.¹⁶² In the end, the uncertainty of standards, litigation costs, and limited potential remedies effectively shields anonymous defendants.¹⁶³

B. Proving Defamation

Even assuming a public figure plaintiff was able to overcome the burdens of First Amendment protection for anonymity, thereby piercing anonymity protections and allowing discovery of a defendant's identity, a successful defamation lawsuit would require a plaintiff to establish that a defendant acted with actual malice, the standard set by the Supreme Court in *N.Y. Times*.¹⁶⁴ The standard evolved for protecting the freedom of the press, and provides two immediate problems: (1) do blogs receive the same standard that the press and other traditional news media receives; and (2) if so, how does the public figure defamatory standard provide a means of bringing successful lawsuits against blogs, which admittedly do not function in the same way that traditional news media companies do?¹⁶⁵ The problem can be reduced to two issues: (1) the applicable legal standard, and (2) evidentiary issues.

161. See Lidsky, *supra* note 26, at 890-91 (noting potential factors going into deciding whether to initiate lawsuit as plaintiff against anonymous defendant).

162. See *id.* at 890-92 (discussing that high cost of libel litigation, for both plaintiff and defendant, weighs against defendant due to realistic cost limitations of parties). Thus, it is stated that:

This new class of nonmedia defendants are unlikely to have enough money even to defend against a libel action, much less satisfy a judgment. Thus, wealthy plaintiffs can successfully use threat of a libel action to punish the defendant for her speech, regardless of the ultimate outcome of the libel action.

Id. at 891.

163. See Perzanowski, *supra* note 115, at 851-54 (noting that many-to-many communications multiply number of parties involved in potential lawsuit, differing from one-to-many communication paradigm of previous media companies).

164. See *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005) (noting that although actual malice is not required for piercing anonymity, requirement is not removed from proving public figure defamation); see also Garry, *supra* note 31, at 597-99 (reviewing standards posed by libel law with respect to First Amendment).

165. See Macrander, *supra* note 27, at 1095-97 (examining treatment of blogs by courts with respect to standard held to and treatment received). “[F]inding a place for new media inside existing law is all the more necessary because of new media’s rising influence in general society.” *Id.*

1. *Problems of Legal Standard: Bloggers as News Media*

The Constitution distinguishes freedom of the press and freedom of speech within the First Amendment, implying that a different standard is applied to each.¹⁶⁶ If blogs are considered press, then the freedoms given may include an arguably heightened protection against suits for defamation.¹⁶⁷ Conversely, if blogs are considered speech, then the freedoms given may include a lesser level of speech protection.¹⁶⁸ Additionally, the dissimilarity and variety amongst blogs may enable only certain blogs to qualify as media.¹⁶⁹ In this situation, courts would be required to determine appropriate standards and tests to determine the protections given to a specific blog.¹⁷⁰

Courts have generally avoided questions that determine the legal status of blogs, usually attempting to side-step the issue by using another analysis.¹⁷¹ In *Jarvik v. CIA*, the court resolved the question of whether the plaintiff, a self-identified journalist operating a personal blog, may appeal from a denial of a fee waiver request under the Freedom of Information Act by addressing the issue of the requirement for fee waiver as opposed to the question of journalism's standards for bloggers.¹⁷²

166. See Richards, *supra* note 46, at 1857-60 (discussing whether to accept denotative or connotative contextual reading of Constitution, tending to result in different interpretations for specific phrases).

167. See generally Troiano, *supra* note 6, at 1451-60 (exploring idea that blogs pose threat to existing media due to speed of publication, ability to network, and encouragement of legislation granting immunity under certain circumstances).

168. See *id.* at 1471-73 (citing *Apple Computer, Inc. v. Doe*, 2005 WL 578641 (Cal. Sup. Mar. 11, 2005)) (discussing whether bloggers are journalists in both function and in legal definition).

169. See *Protecting the New Media*, *supra* note 31, at 1005-07 (recognizing although bloggers and journalists function similarly in bringing newsworthy items to wider audiences, bloggers lack certain aspects that have been considered vital for media function, including sense of professional responsibility, regulation, and formal editorial processes).

170. See *id.* at 996-98 (assessing likelihood of finding journalistic protection for bloggers, determining that from practice perspective, it will be determined in court by statutory construction). "Although a blogger has little chance of prevailing under a shield law protecting only 'newspapers,' most shield laws include definitional language that leaves open the question whether bloggers are covered." *Id.* at 1002.

171. See Macrander, *supra* note 27, at 1096 (noting avoidance of issue by various courts). "The question of whether blogs and bloggers can, or should be, considered journalistic remains unresolved, and mostly un-debated in the law." *Id.*

172. See *id.* (citing *Jarvik v. CIA*, 494 F. Supp. 2d 67, 67-69 (D. D.C. 2007)) (recognizing court evaded question by finding that plaintiff did not meet pleading requirements for fee waiver).

2. *Problems of Proof: Do Blogs Fact Check?*

Aside from questions regarding the appropriate legal standard, the differences between operating blogs and operating traditional news media companies makes the application of actual malice difficult.¹⁷³ In previous cases, traditional news media companies have a variety of protective operational checks, including fact checking, editorial review, editorial control and business planning.¹⁷⁴ Blogs, unlike traditional news media sources, tend to be smaller operations lacking the same resources to devote to such controls.¹⁷⁵ This leads to a two-fold problem: (1) from an evidentiary point, it is difficult to find evidence through discovery to support or deny a claim of actual malice; and (2) it is questionable whether it is fair to hold bloggers to the standards developed to control larger media companies.¹⁷⁶

With respect to the evidentiary question, blogs tend to be smaller operations, funded minimally, and whose “publishing” schedule is not conducive to structured fact-checking and other established media mechanisms.¹⁷⁷ Proving actual malice is largely a state-of-mind issue; requiring that at the time the statement was made, the author had knowledge of its falsity or acted with reckless

173. See Troiano, *supra* note 6, at 1471-74 (discussing increasing similarity that blogs and traditional news companies share with respect to their function, including recent cases in which plaintiff argued for bloggers to have rights traditionally belonging to journalists); see also Ciolli, *supra* note 113, at 255-57 (describing “blogging revolution” as inherently affecting journalism, politics, business, and academia). Blogs may be defined by: (1) chronological function, (2) diary function, and (3) amateur journalist function. See *id.* at 259-60 (discussing possible definitions for blogs). Of the three definitions, amateur journalist is the most limited and comes closest to the justification, as alternatives to mainstream news sources, to having similar protection. See *id.* (expressing methods of classifying blogs and protection).

174. See *Protecting the New Media*, *supra* note 31, at 1005-08 (noting rationale behind journalistic protection, including shield laws, generates similar rationale for application to bloggers if bloggers serve similar functions in society).

175. See *id.* (discussing bloggers acting as pseudo-self-regulating organizations to mitigate threats to accuracy from lack of formal editing process, ease of entry into blogosphere, low transparency, and partisanship).

176. See Macrander, *supra* note 27, at 1096-97 (citing *Apple Computer, Inc. v. Doe*, 2005 WL 578641 (Cal. Sup. Mar. 11, 2005)) (identifying California Superior Court’s refusal to divide “shield laws” to cover distinction between “legitimate” and “illegitimate” news, holding that this function should be left to market place and not to court).

177. See *id.* (noting differences in operation of blogs and traditional media); see also Ciolli, *supra* note 113, at 277 (identifying treatment of blogs as limited purpose public figures would raise cost of blogging, causing potential chilling effect for traditionally low cost activity with mass participation).

disregard to its truth.¹⁷⁸ Without the elaborate system of fact-checking and editorial oversight, it is difficult to prove that a blogger would have known of a falsehood.¹⁷⁹ With respect to the reckless disregard to falsity, however, it could be argued that the lack of fact-checking mechanisms for blogs is analogous to reckless disregard of truthfulness.¹⁸⁰ However, this raises the question of whether blogs should be held to the same standard as large media companies.¹⁸¹

With respect to the question of fairness, holding blogs and bloggers to a standard developed for the purpose of holding larger media companies accountable for their actions has yet to be fully justified, despite significant discussion among scholars.¹⁸² Requiring blogs to meet the standard of media companies with significantly more resources and a highly vested interest in maintaining professional standards as reporters, is unfair if the standard for reckless disregard for truthfulness requires costly checking systems.¹⁸³ Additionally, holding the entire blogosphere, which is diverse and includes media-focused and non-media focused blogs, to a single standard may not yield fair results.¹⁸⁴

178. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-81 (1964) (defining actual malice standard for public figure defamation).

179. See Stafford, *supra* note 115, at 612-14 (noting bizarre result of providing greater protection to media professionals than everyday bloggers as result of media/non-media distinction if blogs are held to non-media standard, noting that lower courts would turn to “factors that should not be considered in granting or denying First Amendment protection, such as the size of the publication, its nature and scope, its audience and circulation.”).

180. See Troiano, *supra* note 6, at 1472-75 (discussing that although blogs lack formal mechanisms for fact-checking, presence of this function suggests that this standard for actual malice should be included).

181. See Stafford, *supra* note 115, at 599-600 (tracing development of early blogging into citizen journalism and noting certain prominent academic higher institutions of journalism beginning to offer courses in blogging). “Today, blogs are both grassroots and corporate operations. . . . A number of mainstream media institutions have gotten into the business of maintaining blogs . . . includ[ing] ABC, FOX News, MSNBC and The Wall Street Journal.” *Id.*

182. See Cioppettini, *supra* note 112, at 247-48 (noting many blogging pieces can be more traditionally classified as “op/ed” pieces of traditional media than news sources of traditional media, and therefore, protected to some degree as opinion).

183. See Perzanowski, *supra* note 115, at 847-48 (discussing public figure doctrine, among others, as product of old media companies, and noting that requiring bloggers to conform to this standard may yield unfair results. “As a result of their use of one-to-many communication, the media shared a number of common traits. First, they were relatively few in number Second, traditional media defendants exerted considerable influence over the content of public debate.” *Id.* at 849).

184. See *id.* at 851-54 (distinguishing Internet media many-to-many model from old media one-to-many model in assumptions used by courts to propagate standards for defamation); see also Solove, *supra* note 13, at 1195-98 (noting differ-

C. Untying the Gordian Knot: Resolving Anonymity and Defamation

Given the complexity of conflicting standards in free speech and defamation, it is not surprising that various courts have avoided resolution of the issue in the absence of guiding precedent from the United States Supreme Court.¹⁸⁵ Several courts have suggested resolutions that effectively avoid the legal need to solve this Gordian knot.¹⁸⁶ Another alternative is to implement or employ non-defamation theories to pursue the tortfeasor, such as negligent injury to reputation or economic loss.¹⁸⁷ A third alternative is to weaken either the rules regarding anonymity, defamation or both, when confronted with this specific situation of a public figure plaintiff bringing suit against an anonymous defendant blogger.¹⁸⁸

1. *Hiding the Gordian Knot: Non-Legal Resolution to Defamation*

As previously mentioned, several judges have suggested alternative, non-legal remedies.¹⁸⁹ Some legal commentators proposed dealing with third parties through independent investigations to attain the name of John Doe defendants without resorting to subpoena prior to discovery.¹⁹⁰ Other legal commentators have recommended countering or retaliating against defamatory state-

ent kinds of blogs existing within same genre of blog, which may require different standards if media journalistic function-approach is used).

185. For a further discussion of methods courts have used to avoid resolving the issue, see *supra* notes 66-102 and accompanying text.

186. See *Doe v. Cahill*, 884 A.2d 451, 465-66 (Del. 2005) (noting extra-judiciary options for remedy to this kind of injury, including replying online to allegedly defamatory statement).

187. See generally Travis M. Wheeler, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103, 1103-06 (2006) (suggesting non-defamation theory of negligent injury to reputation as means for recovery when defamation theory is unhelpful or inapplicable).

188. See Lidsky & Cotter, *supra* note 54, at 1594-98 (citing *Cahill*, 884 A.2d at 454-67) (recommending that modification of standard as balance between anonymous speech right in torts cases is required, similar to calculation in *Cahill*, but not necessarily to same result).

189. See *Cahill*, 884 A.2d at 464 (stating that extra-judicial relief is available to wronged plaintiff; and providing that Internet allows plaintiff to respond to anonymous defendant in kind online). “[The plaintiff can respond to his libeler on the Internet, and] can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight.” *Id.*

190. See *Columbia Ins. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (suggesting implicitly in discussion of factors, to consider under good faith test, that attempts to discover and contact client are necessary for any standard, and stressing that this action is requirement of any kind of due diligence prior to legal recourse).

ments by replying on the same message boards and websites to correct the fact and limit or minimize damage.¹⁹¹

Although these suggestions are helpful, they tend to understate or mischaracterize the damage caused by online defamation.¹⁹² In many cases, these remedies are unhelpful to recoup the losses to reputation sustained.¹⁹³ Furthermore, engaging in discussions with defamatory tortfeasors may spur additional defamation or lend credibility to postings by responding in kind.¹⁹⁴

2. *Avoiding the Gordian Knot: Negligent Injury to Reputation and the Economic Loss Rule as a Non-Defamation Solution*

A second alternative to resolve the issue of contrary standards for defamation' and free speech' is to pursue additional forms of legal recourse other than through defamation theory.¹⁹⁵ In general, the two kinds of damage often experienced by public figure plaintiffs are reputational and economic.¹⁹⁶ In the case of reputational damage, a public figure plaintiff may attempt to pursue damages and restitution through a negligent injury to reputation theory, should there also be tangible economic loss.¹⁹⁷

In situations of reputational damage, applying a negligence theory rather than one of defamation shifts the burden/focus, therefore requiring the traditional negligence analysis.¹⁹⁸ Of the

191. See *Cahill*, 884 A.2d at 464 (noting that ability to respond in kind on Internet as instant form of mitigation for reputational damage made on Internet blog or chat room).

192. See Malloy, *supra* note 12, at 1191-92 (citing *Cahill*, 884 A.2d. at 460-66) (suggesting that Court's misunderstanding of type of damage caused by online defamation and by blogs as whole cannot be fixed adequately by redressing concerns on similar forum).

193. See *id.* at 1191 (noting Court characterization of harm suffered as understated, as victims of online anonymous bloggers suffer harm that has long term repercussions, involving job loss and humiliation, and in extreme circumstances, making plaintiff target by certain interested groups).

194. See Perzanowski, *supra* note 115, at 863-64 (reviewing how significance of plaintiff or defendant self-help requires analysis of access to relevant audience in repairing or correcting any damage to their reputation, which may prove to be very difficult).

195. See Wheeler, *supra* note 187, at 1103-04 (providing overview concept of negligent injury to reputation as alternative to defamation, focusing on scenarios where economic damage is not suffered along with reputation damage).

196. See *id.* at 1104-05 (noting introductory cases which explain concept of injury to reputation and economic loss, highlighting lack of general agreement on negligent injury to reputation tort would be allowed in any given jurisdiction).

197. See *Cahill*, 884 A.2d at 454-55 (noting scenario where loss would be purely reputational, when politician suffering from libel-like activity falls short of libelous).

198. See Wheeler, *supra* note 187, at 1113-14 (citing *Ross v. Gallant, Farrow & Co.*, 551 P.2d 79, (Ariz. Ct. App. 1976)) (explaining doctrine of negligent injury to

elements of negligence required, a potential plaintiff may have difficulty demonstrating damages, especially in the event of pure reputational harm.¹⁹⁹ Even if a court were to accept this theory, in cases of pure reputational damage, quantification of harm (and therefore determining an adequate remedy) may be difficult.²⁰⁰

While alternative theories would allow the plaintiff to recover against a defendant, they require a *prima facie* showing similar to that of a negligence case to overcome anonymity protections of Internet defendants.²⁰¹ Because traditional proof of negligence requires a showing of breach of duty, requisite factual and legal causation, and damages, potential plaintiffs may have difficulty demonstrating these elements before a court.²⁰² Unlike the actual malice requirements of public plaintiff defamation, these elements do not require a requisite mental showing.²⁰³

3. *Cutting the Gordian Knot: Removing the Actual Malice Requirement*

A third alternative to solving the problem of convergent standards between defamation and free speech theory is to weaken one or both with respect to this particular problem.²⁰⁴ In the long term, this is the most practical solution, as it requires a rebalancing of the two competing interests in a way that sets an appropriate standard and, more importantly, a procedure for resolution.²⁰⁵

reputation as mechanism that allows circumvention of defamation doctrine, but requires traditional application of negligence rules, including duty).

199. *See id.* at 1118-22 (discussing application of economic loss rule, which serves as limiting component to recovering damages in tort that generally provides ill-defined damages, is based in either faux contract or in limited duty analysis).

200. *See id.* at 1123-34 (noting difficulty in applying economic loss rule as limitation due to difficulty of quantifiable damages, and historically unclear and diverse application by courts).

201. *See Cahill*, 884 A.2d at 463-64 (discussing requirements of summary judgment standard as requiring *prima facie* showing of underlying tort); *see also* Wheeler, *supra* note 187, at 1104-05 (explaining, in this case, requirement of *prima facie* showing of breach of duty, requisite causation, and damages).

202. *See Cahill*, 884 A.2d at 463-64 (discussing requirements of summary judgment standard as requiring *prima facie* showing of underlying tort and difficulty at doing this)

203. *Compare* Wheeler, *supra* note 187, at 1104-05 (noting requirements of negligent injury to reputation), *with Cahill*, 884 A.2d at 463-64 (identifying requirements of defamation of public figures, including actual malice requirement of knowingly false or reckless disregard for truth).

204. *See* Lidsky & Cotter, *supra* note 54, at 1598-1602 (proposing ideal standard, comprising of “1. Notice to the Anonymous Speaker,” “2. Applying a Qualified Privilege to Speak Anonymously,” “3. Overcoming the Privilege,” and “4. Balancing Harms.”).

205. *See id.* at 1590-1592 (suggesting that in case of low value speech, including commercially motivated speech, it would be possible to implement state of Mandatory disclosure). The mandatory state approach, while applicable in certain

This solution was implemented in *Cahill*, in which the Delaware Supreme Court removed the actual malice requirement for defamation with respect to public figure plaintiffs.²⁰⁶

Removing the actual malice requirement for public figure plaintiffs is a seemingly elegant solution that compliments the theory that blogs and the Internet should be held to a different standard than traditional media companies.²⁰⁷ If the blogosphere is held to a non-media standard, then proof of defamation where a blog is a defendant may not require the level of defamation to reach levels of actual malice.²⁰⁸ If actual malice is no longer the standard, then a potential plaintiff must only present prima facie elements of defamation, which are primarily under the plaintiff's control, to the court to remove anonymity.²⁰⁹

This seemingly elegant solution, however, has implications for the First Amendment right of anonymity which serve to weaken it when applied to the Internet blogosphere.²¹⁰ By holding the blogosphere to a different standard than traditional media companies, this approach advocates a return to media-based rather than content-based defamation for analyzing defamation against the same class of plaintiff. Theoretically, this would allow for the same statement published anonymously in a newspaper to have protection from identity discovery, whereas the same statement published on an online blog would allow discovery of the anonymous author.²¹¹

instances of defamatory speech motivated by commercial interest, is not likely to cover certain speech against political public figures, which could be covered under a core political free speech theory, or that of speech that has economic ramifications, but are not purely commercial. *See id. at 1589-92* (discussing special privilege for political, literary, artistic or other core speech).

206. *See Cahill*, 884 A.2d at 464 (removing actual malice standard for purposes of overcoming anonymity in pre-discovery phase).

207. *See Malloy, supra* note 12, at 1192-93 (highlighting contradiction in reasoning by recent Courts that Internet was found to be no different than any other medium, but that it is functionally extremely different).

208. *See Stafford, supra* 115 at 612-15 (noting that Supreme Court initially did not consider media/non-media standard, and that application of actual malice standard to blogs would not necessarily deplete free press clause of independent significance or provide differing standards of defamation to similar statements by media source).

209. *See Cahill*, 884 A.2d at 464 (recognizing that if defamation of public figures no longer requires actual malice, then standard is removed from both piercing anonymity and from proving case of defamation at trial).

210. *See Stafford, supra* note 115, at 603-05 (proposing elimination of media/non-media distinction due to confusion amongst lower courts in application).

211. *See id. at 605-12* (noting that even if consistent standard were applied across American jurisdictions, this standard of applying differing level of protection to non-media compared to media forms is inconsistent with Supreme Court conception of testing defamation).

In other words, a double standard posed by a media-focused approach would result.²¹²

Additionally, some scholars posit that, although the most sophisticated and simple approach to resolving the tangled knot, the new standard that evolves is incorrect.²¹³ The assertion is that removing the actual malice element would provide too much protection to anonymous online bloggers against public figure plaintiffs seeking discovery of their identity, and could result in the chilling of free speech on the Internet.²¹⁴

Conversely, some scholars contend that, despite this new standard, anonymous bloggers still would have too much protection in committing defamation.²¹⁵ The Internet's ability to convey cheap and widespread messages necessitate that defamed persons should equally have access to inexpensive and efficient means of seeking recourse against libelers.²¹⁶

IV. CONCLUSION

As the blogosphere continues to expand and perform a significant role within people's lives as part of an ever increasing and evolving set of accessible mediums, the potential for Internet-based defamatory tort increases.²¹⁷ In conjunction with the First Amendment free speech right to publish anonymously, situations in which courts must handle public figure plaintiffs and anonymous defend-

212. *See id.* at 613-15 (discussing impracticability of current standard in conflict with First Amendment).

213. *See* Lidsky & Cotter, *supra* note 54, at 1598-1602 (proposing new standard for overcoming anonymity which requires notification, identifying qualified privilege as presumption to be overcome, and balancing harms in deciding damages); *see also* Perzanowski, *supra* note 117, at 861-65 (proposing relative access test as replacement for actual malice standard based on plaintiff's ability to access corrective counter speech to determine application of actual malice); *see also* Lidsky, *supra* note 26, at 888-91 (noting ease of threatening libel suit, which are difficult to win but easy to file, and that majority of defendants will be non-media defendants with limited means to defend).

214. *See* Stafford, *supra* note 115, at 604-05 (noting chilling effect of speech if standard for either defamation or anonymity protection is set too low, and that guidance should be established by Supreme Court).

215. *See* Malloy, *supra* note 12, at 1187-88 (discussing shifting purpose and focus of blogs over time necessitates redressed standard for blogosphere, in light of new commercial and corporate character in blogs).

216. *See generally* Tien, *supra* note 60, at 146-51 (recognizing that injuries perpetrated on Internet in personal harm, redressing harm, and social deterrence can be decreased by utilizing anonymity as defense, but also recognizing relative ease with which defamatory harm is committed online).

217. *See id.* at 117-21 (noting how vital anonymity is to Internet, but recognizing role that negative anonymous Internet actions play, including defamation or offensive speech and harassment).

ants are likely to increase.²¹⁸ In the short term, courts may avoid resolving issues of competing standards by deciding cases on other issues.²¹⁹ In the long term, the frequency of this issue and the trans-border nature of Internet blogs will require consistent treatment at the federal and state level.²²⁰

The Internet's growth provides opportunities to commit defamatory tort, and magnifies the damage potential of an individual.²²¹ Unlike non-Internet defamation, which requires active solicitation of an audience, the Internet has lowered the transaction cost to information proliferation.²²² In an increasingly information sensitive world, the potential to create both reputation and tangible damage with defamatory comments on message boards, websites, and blogs from the safety of a pseudonym is tremendous.²²³

As previously illustrated, even without the Gordian knot that displays the clashing standards between defamation and the First Amendment, applying traditional defamation analysis to blogs still has its challenges.²²⁴ Because the law has yet to adapt older standards to apply in the relatively new and different system of the Internet blogosphere, lower courts are often left without guidance in searching for an appropriate balance between the defendants' interests in the First Amendment right to anonymity and the plaintiffs' interests in recovering for defamation.²²⁵ If lawsuits by public

218. See Technorati, *supra* note 7 (tracking trends in growth of blogging as sustainable growth from both human resources and financial perspective); see also Ciolli, *supra* note 113, at 261 (noting growth in blogs in both formal and informal sense, as it pertains to self-titled blogging communities and websites in general).

219. For a further discussion of methods adopted by court to sidestep issue, see *supra* notes 66-102.

220. See Lidsky & Cottery, *supra* note 54, at 1598-1602 (discussing proposals to establish single standard for defamation and anonymous speech).

221. See Tien, *supra* note 60, at 151-53 (observing that Internet speech lowers barriers to entry as opposed to increased spread, noting that it allows for "cheap speech" without any form of quality control).

222. See *id.* at 152 ("Online speakers are amateurs, unrestrained by the need to placate advertisers or readers, or by any sense of journalistic or editorial discretion or ethics. Thus, Internet messaging is viewed as potentially more irresponsible . . .").

223. See *id.* at 180-82 (recognizing reputational interest among online community has far more reaching implications than mere Internet identity, and that anonymity can protect against abuses and harassment which are relatively easy to commit).

224. For a further discussion of the methods adopted by court to sidestep the issue, see *supra* notes 66-102.

225. See Malloy, *supra* note 12, at 1187-89 (discussing disagreement between legal commentators regarding proper standard for protection in defamation and anonymity, and noting inability to properly balance interests in absence of clearer understanding of blogs and new media).

figure plaintiffs against anonymous defendants have any hope to achieve consistent standards and application, a binding decision must be reached to decide the proper approach from the various standards and tests.²²⁶

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226. See Stafford, *supra* note 115, at 604-05 (suggesting need for binding precedent and coherent standards in area of defamation and First Amendment protections).

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