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Anonymous Bloggers and Defamation: Balancing Interests on the Internet

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ANONYMOUS BLOGGERS AND DEFAMATION: BALANCING INTERESTS ON THE INTERNET

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Professors Reynolds, Volokh, and Solove have each commented on the relationship between libel law and the ever-growing "blogosphere." This comment agrees as well as disagrees with several points from other authors' opinions, as well as going further in arguing for the protection of libel plaintiffs facing defamatory comments from anonymous bloggers.

In his article, "Libel in the Blogosphere: Some Preliminary Thoughts,"[1] Glenn Harlan Reynolds comments on the lack of big-name libel suits against anonymous bloggers, and explains why blogging is its own culture and deserving of its own standards of review by the courts. He argues that such suits are rare because most bloggers do not have deep pockets, the threat of suit is frowned upon by the blogging community, "actual malice" is difficult to prove, and fast corrections of incorrect information are easier than in other mediums of communication.[2] In addition, he argues that blogs have "mutated" and become more commercial and journalistic in nature. Because of the changing nature of blogs, Reynolds argues that perhaps judicial review similar to that of slander is appropriate for blogging defamation suits. In addition, he argues that the plaintiff should be required to meet a high standard of proof for harm and that such comments must be taken in the context they are written because of the unique culture of blogging.[3]

While Reynolds calls for a far more deferential standard for bloggers, Daniel J. Solove, in his article "A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere," argues that bloggers should have greater accountability to their audiences.[4] He argues that "We see blogging as something that enhances the freedom of the little guy," but at the same

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1. Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157 (2006).

2. *Id.* at 1157–60.

3. *Id.* at 1166–67.

4. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195 (2006).

time warns against affording bloggers too much speech protection.[5] Even though it is argued that free speech enhances "individual autonomy," political discussion, and a free flow of ideas, Solove argues that privacy has the same goals and benefits and should be given greater deference.[6] Though recognizing the difficulty of fashioning a new balancing test to weigh the competing interests of privacy and free speech, Professor Solove argues that current laws regulating the Internet provide a form of immunity that may lead to irresponsibility and a lessening of privacy protection.[7]

Though Reynolds and Solove each discuss issues relating to blog defamation suits, this paper takes the discussion further and addresses the issue of the proper standard to be applied to revealing the identity of the anonymous blogger who faces allegations of defamation.[8]

As more and more people create personal websites and blogs, courts are more frequently asked to rule on questions related to the Internet boom. Specifically, an issue has arisen concerning what standard to apply in defamation suits brought against anonymous bloggers.[9] Courts have wrestled with producing an appropriate standard for revealing the identity of an anonymous blogger who posts allegedly defamatory material on a

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5. *Id.* at 1196.

6. *Id.* at 1198–99.

7. *Id.* at 1199–1200. In an earlier article, Professor Solove noted the difficulty in defining privacy and the concept of autonomy and thus the resulting problems in developing an appropriately protective standard. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 479 (2006) (arguing that the broad concept of privacy is "about everything, and therefore it appears to be nothing."). For a further examination of Professor Solove's views on the importance of privacy protections, see Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protection Against Disclosure*, 53 DUKE L. J. 967, 988–98 (2003).

8. The Supreme Court has affirmed in several cases that the First Amendment protects a speaker's choice to remain anonymous. *See* Talley v. California, 362 U.S. 60, 62 (1960); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995). Protection for anonymity has further been recognized on the Internet. *See* John Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

9. A claim for defamation involving an anonymous defendant has a unique procedure in that, before the trial, a hearing will be held to determine whether the identity of the defendant must be disclosed so that discovery can proceed. This Comment focuses on what standard courts should apply during such show of cause hearings to determine whether an anonymous defendant's identity should be revealed. For a thorough review of some of the recent case law and the issues it raises for the First Amendment as well as defamation claims, see Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 797 (2004); Lyrissa Barnett Lidsky & Thomas Cotter, *Authorship, Audiences, and Anonymous Speech* (Minn. Legal Stud. Research Paper No. 06-37, 2006), *available at* http://ssrn.com/abstract=925376 (providing guidance to legislatures and courts for regulating anonymous speakers as well as the rights of individuals to be free from defamatory comments and maintain privacy).

message board or website.[10] Recently, in *Doe v. Cahill*,[11] the Delaware Supreme Court created a strict standard that makes it extremely difficult for defamation victims to bring suit against anonymous bloggers. The standard created is far too sympathetic to anonymous bloggers and fails to address important issues facing victims of defamation.

In *Doe v. Cahill*, the plaintiff, a town council member, brought a defamation suit against the defendant for false comments made on the "Smyrna/Clayton Issues Blog," a website dedicated to a free-ranging discussion of local politics.[12] The lower court applied a "good faith" standard, which required that a plaintiff prove "(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."[13] Application of this standard in the lower court indicated that the plaintiffs had a good faith reason to require the identity of the blogger in the defamation suit. However, the Supreme Court of Delaware rejected the application of this standard, finding that "[the] 'good faith' standard is too easily satisfied to protect sufficiently a defendant's right to speak anonymously."[14]

The Delaware Supreme Court instead applied a summary judgment standard, which is far stricter than either the good faith standard applied by the lower court or the motion to dismiss intermediate standard applied by various other courts in Internet defamation suits.[15] The court held, "the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and

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10. For examples of recent tests applied to anonymous bloggers, see Rocker Mgmt. LLC v. John Does 1–20, No. 03-MC-33, 2003 WL 22149380 (N.D. Cal. 2003) (applying a totality of circumstances approach to plaintiff's request that defendant's identity be disclosed and deciding that the defendant's statements, when viewed in the context in which they were made, could only be seen as opinions and thus immune from defamation suits); Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (requiring plaintiff to notify defendant, set forth statements plaintiff believes to be actionable, and set forth evidence supporting each element of the cause of action with the court balancing the need for disclosure against the defendant's First Amendment right to speak anonymously); *In re* Subpoena Duces Tecum to America Online, Inc., No. 40570, 2000 WL 1210372 (Va. Cir. Ct. 2000), *rev'd on other grounds*, America Online, Inc. v. Anonymous Publicly Traded Co., 261 Va. 350 (Va. 2001) (applying a "good faith" standard and noting that the right to speak anonymously is not absolute).

11. 884 A.2d 451 (Del. 2005).

12. The John Doe defendant criticized Mr. Cahill's performance as a city councilman, calling him a "divisive impediment to any kind of cooperate movement" and further remarking on Mr. Cahill's unstable mental state and paranoia. *Id.* at 454, 457.

13. *Id.* at 454–55.

14. *Id.* at 458.

15. *See supra* note 10 for recent case law.

a defendant's right to exercise free speech anonymously."[16] The two-part standard requires a plaintiff to take reasonable efforts to notify the anonymous defendant and to present enough evidence to establish a *prima facie* case for each element of the claim.[17] However, this court ruled public figure plaintiffs are not required to provide evidence of actual malice, because that evidence is not within their control before they know the identity of the blogger.[18]

In making its ruling, the court did "not rely on the nature of the internet as a basis to justify . . . application of the legal standard," and made "no distinction between communications made on the internet and those made through other traditional forms of media."[19] Rather, the court noted that "[t]he internet is a unique democratizing medium unlike anything that has come before," and "[t]he advent of the internet dramatically changed the nature of public discourse . . . . [S]peakers can bypass mainstream media to speak directly" to the public.[20] In addition, the court ruled that information on the Internet is not as reliable as other mediums. It argues that blogs are often full of grammar and spelling problems, hyperbole, and vulgarities. Thus, the court argued that a reasonable person would not construe a blog as stating facts. The court applied this reasoning in *Cahill* and found that a reasonable person would not have assumed the blog statements were facts about the council member; therefore, the lower court decision was reversed.[21]

Several problems arise with the application of the standard created in *Cahill*, as well as with its characterization of the Internet and anonymous blogs. First, the standard is highly deferential to anonymous bloggers. Not only must the plaintiffs provide enough evidence to satisfy the summary judgment burden, but they must also deal with a characterization of the Internet that makes the task nearly impossible. The *Cahill* court focuses on the crude nature of the writings on the Internet as merely indicative of opinion. However, as the court notes itself, the Internet provides the ability to reach millions of people at the press of a button.[22] Although the ability to post anonymously on the Internet allows certain individuals to express their beliefs without fear of retaliation or discrimination, it also protects

16. *Cahill*, 884 A.3d at 460.
17. *Id.* at 460–61.
18. *Id.* at 464.
19. *Id.* at 465.
20. *Id.* at 455.
21. *Id.* at 466.
22. *Id.*

careless and irresponsible individuals from the threat of lawsuits for their false comments.

Most importantly, the *Cahill* court fails to look at the repercussions for those who fall victim to these online anonymous bloggers. For instance, employers who do background checks on possible future employees may discover blog information that is false. If employment decisions are based even in part on these bloggers' comments, victims suffer both emotional and economic losses.[23] More ominously, some defamatory postings involve off-line consequences even more harmful than humiliation or job loss. These defamatory postings, such as those falsely accusing plaintiffs of a crime or of engaging in an unpopular activity, may expose plaintiffs to charges of treason or even to threats of violence. For instance, if an individual is falsely accused of pedophilia, local residents may take the law into their own hands.[24] Doctors, who an anonymous blogger alleges perform illegal late-term abortions or abortions on minors without proper consent, may find it necessary to hire extra security or close their practice.[25] In today's post-9/11 world, allegations that an individual has ties to a terrorist organization may lead to unpleasant interactions with government officials or worse.[26]

Similarly, a second problem with the court's opinion centers on its characterization of blogs in general. The court indicated that, because of the misspellings, hyperbole, and general nature of blogs, a reasonable person would likely conclude that they only represent opinions.[27] This characterization seems to almost negate the need for a standard. If a plaintiff brings a defamation suit he is almost guaranteed to fail because

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23. For a discussion of employers' use of monitoring devices to review employee blogs and other webpostings, *see* Rafael Gely and Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1084–88 (2006) (discussing cases involving the termination of employees for their work and non-work posts on blogs).

24. *See, e.g.*, Associated Press, *Lawyer Accused in Stabbing Death of Neighbor; Father Allegedly Suspected Neighbor of Molesting his Young Daughter*, *available at* http://www.msnbc.com/id/14610951 (Sept. 1, 2006).

25. Pro-life activists have been known to justify violence against abortion providers in pursuit of their goal to stop abortions. *See* Planned Parenthood v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1154–56 (D. Or. 1999) (granting an injunction under Freedom of Access to Clinic Entrances Act prohibiting publication of defendant's website and poster with intent to threaten abortion providers). For a further discussion concerning the regulation of such harm advocacy speech, see S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1214–15 (2000).

26. *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program*, 81 NEW YORKER 106 (2005); *see also* Padilla v. Hanft, 126 S. Ct. 1649 (2006) (case of Jose Padilla, a United States citizen held for three years without charges as an "enemy combatant").

27. *Cahill*, 884 A.2d at 466.

the court has characterized personal blogs as difficult to interpret as fact by a reasonable person. In addition, it creates an impetus for an anonymous blogger to incorporate misspellings and vulgarities to mask statements and evade the summary judgment standard. Though the court holds "[w]e do not hold as a matter of law that statements made on a blog or in a chat room can never be defamatory," it seems to characterize blogs in such a way as to make it nearly impossible for plaintiffs to meet their burden.[28]

A third problem with the court's opinion is that it fails to provide a plausible judicial outlet for plaintiffs and, instead, implies that extrajudicial measures are more adequate. The court holds that, unlike other mediums, a plaintiff in a defamation suit involving the Internet has extrajudicial relief.[29] A victim may log on to the same blog or website and refute the comments made by the anonymous blogger. It held that "[t]he plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight."[30] However, the court seems to misstate the ease with which a defamation victim may create his own relief. Chances are slim that the victim will reach the same audience that has read the false statements.[31] It seems that a victim will find little solace in hoping that he has reached the audience that read the defamatory comments. The suggestion by the court seems to be a veiled attempt to justify the summary judgment standard by suggesting other means that a victim can utilize. A victim of defamation is more likely to want the identity of the person known to silence them from making further accusations. Instead, the court's suggestion will likely lead to a war of words on the Internet, with neither side having any motivation to end the retaliation. Tort law is meant to preserve parties from retaliating on their own, but this court seems to endorse personal retribution to some degree.

Finally, the court, though seemingly contradicting itself, holds that the Internet will not be distinguished from any other medium of communication;[32] however, the Internet is quite different than other mediums in its ease of access, permanence, and pervasiveness. Gossip through newspapers and even through people may take time, but it can take merely seconds on the Internet. A person can make a false statement out of anger and spite under the guise of anonymity much more easily than

28. *Cahill*, 884 A.2d at 467 n.78.
29. *Id.* at 464.
30. *Id.*
31. *Id.*
32. *Id.* at 465.

through other mediums of communication. Once those comments are made, their permanence increases their viability. Words are saved on pages, saved to personal computers, printed, and spread through e-mail.[33] One who falls victim to anonymous blogging has little ability to completely destroy the statements.[34] In addition, as the court notes, nothing controls what postings are permitted on the Internet, which leads to pervasive and unregulated comments.[35] The court finds no legal distinction between the Internet and classic mediums of communication while at the same time illustrating the multiple differences between them. The standard created in *Cahill* does not address the problems of ease of access, permanence, or pervasiveness of defamatory information on the Internet.

It is important not to silence communication on the Internet, but it is just as important not to silence victims of defamation. The standard created in *Doe v. Cahill* is strict and gives victims of anonymous blog defamation little grounds for recovery. The Internet is a different medium of communication and should not necessarily be judged on the grammar and spelling of the content, but on the written words. Defamation victims must have recourse against those anonymously making defamatory comments about them because of the relative permanence of postings on the Internet and the lack of regulation given to this medium of communication. Although legislative and administrative regulation of the Internet may be unnecessary, court oversight in the form of the protections provided by defamation suits appears necessary to provide an appropriate balance to the dueling rights presented by the case of anonymous bloggers.

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33. Orin S. Kerr, *Blog and the Legal Academy*, 84 WASH. U. L. REV. 1127 (2006).

34. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 927 (2006). *See* Google Cache feature, http://www.google.com/help/features.html ("Google takes a snapshot of each page examined as it crawls the web and caches these as a back up in case the original page is unavailable. If you click on the 'cached' link you will see the web page as it looked when we indexed it.").

35. *Cahill*, 884 A.2d at 465.