

The Man Behind the Mask: Defamed Without a Remedy

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I. INTRODUCTION

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.¹

The above quote from Justice Powell's opinion in *Gertz v. Robert Welch, Inc.* articulates what may be an obvious and tautological proposition: if defamers are immune, the defamed are without a remedy. However,

1. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (citations omitted).

the current state of internet defamation law often does result in a “sacrifice of the competing value served by the law of defamation,” and subsequently does leave the defamed without a remedy.²

The Communications Decency Act of 1996 (CDA) has created an environment where defamed individuals are left with a limited or non-existent opportunity to litigate their claims due to the immunity and/or the anonymity of their defamer.³ The relatively free and unregulated internet, due in part to legislation like the CDA, has given users vast new opportunities to express ideas, however, this freedom has come with costs.⁴

Consider the following example: Oliver, an owner of a small donut shop, has been defamed on a Yahoo! Internet message board. Who is Oliver’s defamer? An anonymous person who posted under the pseudonym or screen-name “The Count of Cristo.” Oliver seeks judicial redress for the harm caused by The Count’s false statement; however, he encounters a barrier: the anonymity of his masked defamer. Oliver can (1) file a John Doe defamation action and hope that upon discovery he can satisfy the uncertain and ambiguous elements necessary to compel Yahoo!’s disclosure of The Count’s identifying information;⁵ (2) attempt to compel disclosure under state procedural rules, for example, under a rule like Illinois Supreme Court Rule 224;⁶ (3) embark on a likely futile search, expending his own resources, to track down the identity of his anonymous assailant outside the court system; or (4) join the ranks of those small business owners and private persons defamed and injured by unknown attackers who are left without an opportunity to adjudicate their claim.⁷

This Comment considers the goals of defamation law, the necessity of preserving free speech on the internet, and the legal remedies available for individuals like Oliver. Additionally, it will make some suggestions as to what forms of regulation (or lack of regulation) might strike the most reasonable balance between the current law under the CDA and the traditional

2. See *id.* at 341; see also Roger M. Rosen & Charles B. Rosenberg, *Suing Anonymous Defendants for Internet Defamation*, L.A. LAWYER, Oct. 2001, at 19, 19 (offering an account of the difficulties a prospective plaintiff and her lawyer will face in pursuing an internet defamation claim).

3. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (creating a situation where an individual with an otherwise legitimate claim was left without compensation because the only available defendant was granted immunity through section 230 of the Communications Decency Act).

4. See 41 U.S.C. § 230 (2011) (praising the freedom of expression that unregulated internet has provided).

5. *E.g.*, *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. 2001).

6. *E.g.*, *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666, 673 (Ill. App. Ct. 2010).

7. *E.g.*, *Zeran*, 129 F.3d at 332. Arguably, Oliver’s situation is similar to *Zeran*’s predicament; the plaintiff has a legitimate claim, but no defendant. See *id.*

right of the defamed to seek compensation for the injury to their reputation.⁸

This Comment seeks to show that section 230 of the CDA (Section 230) is both overly broad and unnecessary as a means to achieve many of its proposed goals.⁹ It strips plaintiffs of a meaningful opportunity to litigate legitimate claims while creating an unsupported distinction between internet defamation and all other kinds of defamation.¹⁰ Section 230 of the Communications Decency Act was an ill-advised alteration of defamation law that should be repealed. More important, it can be repealed without chilling the most desirable kind of speech: “political speech.”¹¹

II. BACKGROUND

A. COMMON LAW AND DEFAMATION

An analysis of the current shortcomings of internet defamation law requires an understanding of the historical goals and structure of the law of defamation.

The Restatement (Second) of Torts provides the following concise definition of defamation: “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹² The Restatement also sets out the traditional elements of an action in defamation: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”¹³

8. As with any common law tort, defamation laws do and will vary across jurisdictions; however, some generalizations can be made and the Restatement (Second) of Torts helps in summarizing those generalizations. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

9. 41 U.S.C. § 230 (2011) (indicating that although the Communications Decency Act is a huge piece of legislation targeted at “cleaning up” the internet, Section 230 is one small part of that legislation).

10. See, e.g., *Zeran*, 129 F.3d 327. *Zeran* is illuminating because had AOL been a print magazine or newspaper, *Zeran* would have succeeded in a claim against AOL; *Zeran* had no case because the statement was made online, not because the claim was frivolous. *Id.*

11. Essentially, political speech (the kind of speech that is celebrated in the anonymous *Federalist Papers*) is already receiving significant protections through state statutes and constitutional interpretation. See *infra* Part V.

12. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

13. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

The law of defamation, like many laws, can be seen as a balancing act.¹⁴ Effective defamation laws are implemented to strike a balance between the First Amendment speech rights of the speaker and the rights of the defamed to protect their reputation and to be compensated for injuries to it.¹⁵ Section 230 of the CDA eliminates this balance and has resulted in a legal paradigm where First Amendment speech rights are almost absolutely protected, regardless of the type of speech, at a significant cost to the defamed.¹⁶

These black letter rules become much more transparent when described within an example; the Restatement (Second) of Torts uses the following illustration: “A advertises in a newspaper that B, a nurse, uses and recommends to her patients the use of a certain brand of whiskey for medicinal purposes. If a substantial number of respectable persons in the community regard this use of whiskey as discreditable, A has defamed B.”¹⁷ This hypothetical, of course, is operating on the presumption that B does not use whiskey for medicinal purposes.¹⁸ If B did use this particular brand of whiskey for medicinal purposes, A could raise a defense of truth to B’s action in defamation.¹⁹

Once it has been established that an individual may have a cause of action in defamation, the prospective plaintiff must determine whom to sue. It should be noted, in the words of Professor Rodney Smolla: “The term ‘publication’ is technical, and does not in any sense refer to printing or mass dissemination; rather, it applies to both slander and libel cases, and refers to any form of defamatory communication to a third party, whether written or oral or through gestures, symbols, or another means.”²⁰ A publisher, therefore, is the speaker or author of the defamatory conduct.²¹ Another relevant group of persons potentially liable are republishers: entities that publish the

14. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (using the language of “balance” between the “press and the individuals”).

15. See RODNEY SMOLLA, *LAW OF DEFAMATION* § 1:1 (2d ed. 2011) (beginning the introductory paragraphs of perhaps the most influential treatise on defamation with a focus on this important distinction).

16. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

17. RESTATEMENT (SECOND) OF TORTS § 559 (1977). The authors of the Restatement (Second) of Torts indicate that this example was taken from *Peck v. Tribune Co.*, 214 U.S. 185 (1909). In *Peck*, the plaintiff was a woman whose portrait was published in a newspaper alongside a statement that as a nurse she recommended a particular brand of whiskey to her patients. *Id.* at 188. The plaintiff contended she was not a nurse and that she abstained from the use of alcohol. *Id.* Justice Holmes wrote the opinion that held that the newspaper was liable to the plaintiff for the publication of her portrait alongside a false statement. *Id.* at 190.

18. *Id.*

19. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

20. SMOLLA, *supra* note 15, § 4:78.

21. *Id.*

defamatory content again.²² At common law, a republisher is liable for the defamatory statements they publish as if they themselves were the original publisher.²³ This is of particular importance in the case of internet defamation where the only known or accessible party may be the website on which the defamatory statements were posted.²⁴ Distributors are a third group of persons potentially liable in defamation.²⁵ Distributors are persons who disseminate the defamatory material through something like a bookstore, “the post office,” or “by a phone.”²⁶ A distributor, unlike a publisher or republisher, is typically liable for his distribution of defamatory content only if “he knows or has reason to know of its defamatory character.”²⁷ The distributors and publishers of defamatory statements deserve particular notice because it is often only because of their ability to publish and distribute that a defamatory statement ever becomes damaging at all.²⁸ An individual making false statements about another causes no harm if the statements never reach another’s ears. For example, if A stands alone in the desert and screams false things about B, and no person ever hears them, no damage is done to B’s reputation. It is based upon this simple truism that publishers, traditionally, face liability for publication of defamatory statements.²⁹

How does the common law parlance of defamation apply to the example of Oliver and The Count? The Count is the original publisher or author of the defamatory speech, and Yahoogole is the republisher, and possibly the

22. *Id.* The several categories of publishers seem straightforward on their face, but it is their applicability to internet speech that is unique and critical to this debate.

23. *See* *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (“[A] person who repeats a defamatory statement is generally liable as the one who first utters it . . .”); *Condit v. Dunne*, 317 F. Supp. 2d 344, 363 (S.D.N.Y. 2004); SMOLLA, *supra* note 15, § 4:87 (“Each republication is a new tort subjecting the repeater to liability independent of the original publisher . . .”).

24. *See infra* Part IV.

25. Whether or not an internet site can be liable as a distributor has become a significant source of debate surrounding the CDA, with the answer, so far, being in the negative. *See Barrett v. Rosenthal*, 146 P.3d 510, 519 (Cal. 2006).

26. SMOLLA, *supra* note 15, § 4:92. *See Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852 (1984) (applying the distributor/publisher distinction as set out in the Restatement (Second) of Torts); *Barrett*, 146 P.3d at 519 (interpreting the applicability of CDA immunity to the distributor/publisher distinction).

27. RESTATEMENT (SECOND) OF TORTS § 581 (1977). The court in *Barrett* provided an articulation of the policy rationale for the publisher/republisher distinction. *See Barrett*, 146 P.3d at 517. “The distinction is a practical one. Publishers are ordinarily aware of the content of their copy. It is not reasonable, however, to expect distributors to be familiar with the particulars of every publication they offer for sale. Therefore, only a distributor who is aware of defamatory content shares liability with the publisher.” *Id.* at 517 n.8.

28. RESTATEMENT (SECOND) OF TORTS § 581 (1977) (suggesting the fact that they are a proximate cause of harm to the plaintiff is the reason for their liability in the first place).

29. *See Barrett*, 146 P.3d at 517 (providing the rationale for publisher liability).

distributor, of the defamatory statement.³⁰ Thus, under the common law, Oliver has a cause of action against both the original publisher (The Count) and Yahoo! (the republisher).³¹

B. INTERNET DEFAMATION BEFORE THE COMMUNICATIONS DECENCY ACT

There were instances of internet defamation that arose before the enactment of the CDA. The most often cited example of this is a case that, in large part, motivated the creation of Section 230.³² In *Stratton v. Prodigy*, Stratton sued a computer network (Prodigy) for its publication of libelous statements.³³ The New York state court, applying the distributor/publisher analysis to the issue, determined that Prodigy was a publisher and therefore was liable to Stratton for its publication of the defamatory content.³⁴ Prodigy had edited the defamatory content that was posted to its message board.³⁵ It was because of this editorial alteration that the court held Prodigy to be a publisher.³⁶ *Stratton* is significant in understanding the CDA because it represents a state of internet law where the defamed was afforded a meaningful opportunity to obtain a remedy for the injury to his reputation.³⁷

Thus, prior to passage of the Communications Decency Act, at least the *Stratton* court saw it fit to analyze internet defamation under the same rubric that governs all other forms of defamation.³⁸ However, the CDA brought a swift end to internet defamation as it was treated in *Stratton*.³⁹

30. See, e.g., *id.* (discussing the importance of the distributor/publisher distinction in an internet defamation suit).

31. See *id.*

32. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *3 (N.Y. Sup. Ct. May 26, 1995); David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 376 (2010).

33. *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *3.

34. *Id.* at *3.

35. *Id.* at *2. The “editorial” input of the publisher remains significant even after the enactment of the CDA because an interactive computer service (ICS) can be liable if it is also an information content provider (ICP). See 47 U.S.C. § 230 (2011). However, where the line between ICS and ICP lies is an altogether separate and complex question that the CDA sheds little light on. See 47 USC § 230 (2011). Put differently, if substantial alteration of content occurs, an otherwise immune party can be liable as the original speaker or author of a defamatory statement. *Id.*

36. *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *11.

37. *Id.*

38. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (explaining common law defamation in summary form).

39. See S. REP. NO. 104-230, at 435 (1996) (Conf. Rep.) (indicating the express intent of Congress to overrule *Stratton*).

C. THE COMMUNICATIONS DECENCY ACT

In 1997, Congress passed the Communications Decency Act (CDA).⁴⁰ While the CDA does many things, for the purposes of this Comment, the focus will remain on the structure and import of Section 230.⁴¹ The CDA does not use the common law terminology described above but, instead, defines the relevant terms within the statute itself.⁴²

For the purposes of this Comment, there are two terms within the CDA itself that are particularly relevant: interactive computer service and information content provider.⁴³ The CDA defines an interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁴⁴ It should be noted that this term is not universally used, and there are several terms, often ambiguous, that are used to describe the internet site that “publishes” or “hosts” the defamatory content. The most common misnomer is Internet Service Provider (ISP).⁴⁵ Despite the various other meanings of the word, courts regularly refer to interactive computer services as “the ISP.”⁴⁶ The CDA also defines an information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁴⁷

The salient aspect of Section 230 of the CDA is its treatment of interactive computer services.⁴⁸ The CDA provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁹ In

40. See 47 U.S.C. § 230 (2011). See also The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ104.104.pdf (the public law version demonstrates the breadth of the entire act).

41. 47 U.S.C. § 230 (2011).

42. *Id.* § 230(f).

43. See *id.* § 230.

44. *Id.* § 230(f)(2).

45. See *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001) (misusing the term ISP to refer to Yahoo, the third party website that provided the message board where the defamatory content was posted).

46. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (speaking about the CDA as it applies to ISPs).

47. 47 U.S.C. § 230(f)(3) (indicating that should liability be imposed on an ICS for its ‘editorial work’ (as in *Stratton*), it would occur under this section).

48. *Id.* § 230(f).

49. *Id.* § 230(c)(1).

light of the discussion above, it becomes immediately clear that this legislation marks a stark contrast from traditional defamation law.⁵⁰

D. INTERPRETING THE COMMUNICATIONS DECENCY ACT

1. *Zeran v. America Online, Inc.*

Just what the strength of Section 230 would be was not immediately known.⁵¹ Yet, some opinions, particularly the Fourth Circuit's in *Zeran v. America Online, Inc.*, made clear that Section 230 immunity would be broad and essentially absolute.⁵²

In *Zeran*, an anonymous person posted on an AOL message board a false advertisement for t-shirts that featured "offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City."⁵³ The anonymous post further indicated that those interested should contact "Ken" at Zeran's phone number.⁵⁴ After receiving countless hate calls and threats, Zeran sued AOL.⁵⁵

The district court accepted AOL's contention that Section 230 of the Communications Decency Act provided a defense and granted judgment on the pleadings in favor of AOL.⁵⁶ On appeal to the Fourth Circuit, the court held that Section 230 grants "broad immunity" to publishers and that AOL could not be held liable as a publisher.⁵⁷ In response to Zeran's argument that AOL could still be held liable under a *Stratton* analysis as a distributor,⁵⁸ the Fourth Circuit held that Section 230 grants to AOL, and other interactive computer services, distributor immunity as well as publisher immunity.⁵⁹ The court noted that imposing distributor liability would result in an atmosphere where interactive computer services would be reluctant to screen offensive or defamatory material for fear it would subject them to liability, which would be contrary to the legislature's goals in passing the

50. David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 173 (1997) (discussing the various ways a person can and often does seek recourse in a defamation action and how the CDA has changed that).

51. See S. REP. NO. 104-230, at 435 (1996) (Conf. Rep.) (providing some indication of the intended effect of the Communications Decency Act). See also 47 U.S.C. § 230(f) (2011) (the act itself also gives some idea of what its effect would be).

52. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

53. *Id.* at 329.

54. *Id.*

55. *Id.*

56. *Id.* at 330.

57. *Zeran*, 129 F.3d at 331.

58. *Id.* at 332.

59. *Id.* at 333.

CDA.⁶⁰ Essentially, *Zeran* set forth a precedent of CDA interpretation that resulted in total immunity for interactive computer services. Put differently, after *Zeran*, it became clear that those who are defamed online could no longer pursue publishers and distributors as defendants, not because they are publishers and distributors, but merely because they publish or distribute on the internet.⁶¹

The court in *Zeran*, likely realizing the dramatic implications of the CDA and its holding, made the following statement: “None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability.”⁶² Apparently, the court had forgotten that in a footnote, just a page prior, they had indicated, “*Zeran* maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users.”⁶³ Thus, *Zeran* was left without remedy.⁶⁴ His allegations, taken as true, constituted a cause of action in defamation.⁶⁵ However, without a defendant, due to immunity and anonymity, *Zeran* was left out in the cold.⁶⁶

III. OPTIONS FOR THE DEFAMED

What recourse can a defamed person like Oliver or *Zeran* seek when Yahoo! or AOL is immune from liability? As the court in *Zeran* noted, the original poster of the defamatory content remains liable. The conclusion seems simple: the plaintiff will just file suit against that person. However, as was the case in *Zeran*, sometimes that person’s identity is not or cannot be known.⁶⁷

60. *Id.* (discussing how chilled “cleaning up” action stems from a fear of becoming liable as an information content provider).

61. The action of Congress in passing the CDA, together with the *Zeran* court’s interpretation, constituted a total reversal of the *Stratton* treatment of internet defamation. See *Zeran*, 129 F.3d at 333; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *3 (N.Y. Sup. Ct. May 26, 1995).

62. *Zeran*, 129 F.3d at 330.

63. *Id.* at 329 n.1.

64. *Id.* at 335 (affirming the trial court’s judgment and eliminating liability for the only accessible defendant, thus, stripping *Zeran* of his only opportunity to recover).

65. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (indicating that the statements made in a case like *Zeran*’s are almost textbook defamation).

66. A similar issue was addressed in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), where a defamatory statement, the “Drudge Report,” prompted Sidney Blumenthal to file suit against AOL and the report’s author, Matt Drudge. Blumenthal argued that both Drudge and AOL were liable because they were both publishers of the defamatory statements. *Id.* at 49. Acknowledging that under a traditional analysis Blumenthal may be correct, the court noted that because of the passage of section 230 of the CDA, his argument had “been rendered irrelevant by Congress.” *Id.*

67. See *Zeran*, 129 F.3d at 329.

A. JOHN DOE DEFAMATION ACTION

One option available to persons defamed online by an anonymous poster/speaker is a John Doe lawsuit.⁶⁸ This is a less than simple mechanism by which to determine the identity of one's defamer. Additionally, this complex tool does not always prove fruitful.⁶⁹ Upon initiating a lawsuit against a John Doe defendant, the plaintiff must seek authorization from the court to serve a third party subpoena on the immune internet site (interactive computer service) where the content was posted.⁷⁰ Simple though the procedure sounds, in practice, the plaintiff faces enormous hurdles.⁷¹ Several barriers to the plaintiff's success in disclosing John Doe's identity may arise: (1) the court may find that the plaintiff does not satisfy the procedural requirements necessary to compel discovery, (2) the internet publisher may file a motion to quash the subpoena, or (3) the identifying information may no longer exist.⁷²

Dendrite International, Inc. v. Doe, which has received considerable scholarly commentary, sets forth a standard by which a John Doe defendant's identity can be disclosed.⁷³ In *Dendrite*, a plaintiff filed a John Doe defamation suit with the hopes of compelling disclosure of John Doe's identity.⁷⁴ Dendrite attempted to compel Yahoo to honor a subpoena in order to determine the identity of his defamer. Both the trial court and the New Jersey Superior Court denied Dendrite's request.⁷⁵

The *Dendrite* court set forth a five-part test by which courts should consider the merit of a plaintiff's request to compel disclosure of an unknown defendant.⁷⁶ The court held that when a plaintiff makes a request of this kind, (1) the plaintiff must provide notice to the anonymous posters and provide them an opportunity to oppose the disclosure request; (2) the plaintiff must set out the statements that allegedly constitute defamatory speech; (3) the plaintiff must establish a prima facie case against the anonymous

68. See Rosen & Rosenberg, *supra* note 2, at 19 (describing the process of pursuing such a John Doe lawsuit).

69. See *id.* (discussing the harsh reality that a John Doe lawsuit is no easy venture).

70. See *id.*

71. See *id.*

72. See *id.* at 19-20; Zeran, 129 F.3d at 329 (suggesting there was no identifying information because AOL had not retained any information which might have led to identification of Zeran's defamer).

73. *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). See, e.g., Lyrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?* 50 B.C. L. REV 1373 (2009); Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405 (2003).

74. See *Dendrite Int'l, Inc.*, 775 A.2d at 759.

75. *Id.*

76. *Id.* at 760.

person(s); (4) the plaintiff must set forth evidence to support each element of the cause of action; and (5) the court must balance the anonymous defendant's free speech rights against the strength of the plaintiff's claim.⁷⁷

In applying its test and evaluating the merit of a similar test applied by the trial court, the New Jersey Superior Court held that Dendrite failed to meet the requirements necessary to compel disclosure of the defendant's identity.⁷⁸ The net result under the New Jersey state court's analysis is that a plaintiff is left without a meaningful opportunity to litigate his claim merely because the defamatory statements were posted online. Had the statements been printed in a newspaper, Dendrite would have been able to file suit against the paper as well as the anonymous speaker and would have been able to compel disclosure without the myriad of hoops the *Dendrite* court imposed.⁷⁹

Doe v. Cahill, a Delaware Supreme Court case, exemplifies the confusion that surrounds unmasking standards.⁸⁰ In *Cahill*, the plaintiff sought to serve process on his unknown John Doe defamer and so "sought to compel the disclosure of his identity from a third party that had the information."⁸¹ The trial court applied a good faith standard to Cahill's discovery request. The good faith standard required: "(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."⁸² Applying this standard, the trial court ordered Comcast, the third party, to disclose John Doe's identity.⁸³ On appeal, John Doe contested the order to compel disclosure of his identity, which resulted in the Delaware Supreme Court formulating its own standard for disclosure of John Doe defendants' identities.⁸⁴ The Supreme Court of Delaware essentially adopted the *Dendrite* test, recognizing it as a summary judgment standard, where a plaintiff must plead facts and present sufficient evidence to survive a summary judgment analysis.⁸⁵ The court developed this heightened standard out of a fear that a

77. *Id.* (providing a more detailed account of these steps).

78. *See id.* at 772.

79. Salzano v. North Jersey Media Grp., Inc., 993 A.2d 778 (N.J. 2008).

80. Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 864 (2010).

81. *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005).

82. *Id.* at 455.

83. *Id.* (ordering disclosure after denying John Doe's motion for a protective order).

84. *Id.* at 460 (modeling its standard on the *Dendrite* standard).

85. *See id.* at 465 (citing *Dendrite* and announcing that it will use it in creating a standard).

suit without merit might strip an anonymous defendant of the constitutional protections he is due: the supposed right to remain anonymous.⁸⁶

The *Dendrite/Cahill* test, or summary judgment standard, is a very high burden for plaintiffs to meet. The plaintiff must plead and prove their case before they even know the identity of their defamer.⁸⁷ The plaintiff in *Cahill*, like the plaintiffs in *Dendrite* and *Zeran*, was ultimately left without a defendant and with no meaningful opportunity to cure the injury to his reputation.

B. ILLINOIS SUPREME COURT RULE 224

Another option potentially available to those defamed by anonymous persons is through a mechanism like Illinois Supreme Court Rule 224 (Rule 224). Rule 224 sets forth that “[a] person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.”⁸⁸ Additionally, the rule states:

The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery.⁸⁹

The words of Illinois Supreme Court Rule 224 alone are not very helpful in determining the standard by which disclosure of identity will be compelled. In *Maxon v. Ottawa Publishing Co.*, the Illinois Appellate Court for the Third District interpreted Rule 224.⁹⁰ In *Maxon*, several anonymous users of MyWebTimes.com posted statements allegedly defaming the Maxons for their involvement in Ottawa’s Planning Commission.⁹¹ The trial court adopted the *Dendrite/Cahill* test to “balance the rights of a person not to be defamed with the first-amendment free-speech rights of anony-

86. See *Cahill*, 884 A.2d at 458. Whether, and to what extent, such a right actually exists is an unsettled matter. See *infra* Part IV.

87. See *Cahill*, 884 A.2d at 458.

88. Ill. Sup. Ct. R. 224 § (A)(1)(i) (2011).

89. *Id.* § (A)(1)(ii).

90. *Maxon v. Ottawa Publ’g. Co.*, 929 N.E.2d 666, 673 (Ill. App. Ct. 3d Dist. 2010) (quoting the trial court: “[i]n so doing, the court noted that no Illinois case law addressed the question of what degree of analysis was required to grant a Rule 224 petition seeking the identity of anonymous Internet posters alleged to have committed the tort of defamation”).

91. *Id.* at 670.

mous posters.”⁹² Applying that test, the court held that the Maxons could not satisfy a summary judgment standard.⁹³ On appeal, Rule 224 received a vastly different interpretation. The Third District Appellate Court set forth a four-part analysis of Rule 224, which significantly relaxes the *Dendrite/Cahill* standard.⁹⁴ The court held:

Thus, where a trial court must rule upon a petition to disclose the identity of any anonymous potential defamation defendant pursuant to Rule 224, the court must insure that the petition: (1) is verified; (2) states with particularity facts that would establish a cause of action for defamation; (3) seeks only the identity of the potential defendant and no other information necessary to establish the cause of action of defamation; and (4) is subjected to a hearing at which the court determines that the petition sufficiently states a cause of action for defamation against the unnamed potential defendant, i.e., the unidentified person is one who is responsible in damages to the petitioner.⁹⁵

The court added (in words that seem to address the *Dendrite* court) that those who hold concerns for protection against frivolous disclosure requests, or “fishing,” forget that “trial courts have a readily available mechanism to determine whether the petition sufficiently states a cause of action against the potential defendant in section 2-615 of the Code of Civil Procedure.”⁹⁶ Section 2-615 is referred to as Illinois’s motion to dismiss for deficiencies in the pleadings.⁹⁷

The *Maxon* court bolstered its opinion by establishing its view that “it is overly broad to assert that anonymous speech, in and of itself, warrants constitutional protection.”⁹⁸ The Third District reversed the trial court and remanded the case, finding that *Dendrite/Cahill* added unnecessary additional requirements to the standard it developed stating multiple times “that

92. *Id.* at 672.

93. *Id.* (reasoning that the context of the postings rendered them “nonactionable opinions as a matter of law”).

94. *Maxon*, 929 N.E.2d at 673.

95. *Id.*

96. *Id.* at 673-74.

97. See 735 ILL. COMP. STAT. 5/2-615 (2011).

98. See *Maxon*, 929 N.E.2d at 674-75. The court stated, after considering each of the Supreme Court’s anonymous speech cases, “[w]e find nothing in these cases to support the proposition that anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than the private individual who has a cause of action against him for defamation.” *Id.*

there is no constitutional right to defame.”⁹⁹ The court additionally noted, contrary to the trial court’s holding, that the Maxons had stated a cause of action for defamation.¹⁰⁰

The standard set forth in *Maxon* is a dramatic shift from the one stated in *Dendrite* and *Cahill*.¹⁰¹ The Third District Appellate Court in Illinois established a position that courts can develop a viable system for compelled disclosure that is less damaging to plaintiffs.

IV. ANONYMITY

Much of the discussion among courts regarding the protection of the anonymous posters involves the blanket assertion that there is a constitutionally granted right to anonymous speech buried within the First Amendment.¹⁰² It is not debated that the Supreme Court has discussed a right to anonymous speech.¹⁰³ However, there is a question as to how broad or narrow that right is or, perhaps better stated, whether there exists an actual right to anonymity at all. The Supreme Court had occasion to evaluate a “right to anonymity” in the following cases.¹⁰⁴

In *Talley v. California*, the Supreme Court held unconstitutional a Los Angeles ordinance requiring that no handbill could be distributed without the name of “[t]he person who printed, wrote, compiled or manufactured the same.”¹⁰⁵ The handbills, it should be noted, were of a political nature, as they sought to promote a boycott of employers that did not provide equal employment opportunities for minorities.¹⁰⁶ The Court held the ordinance

99. *Id.* at 675. The crux of this point is that even if we are to assume there exists a constitutional right to remain anonymous, the anonymity right must be balanced alongside the truth that there is no right to defame. *See id.*

100. *See id.* (disagreeing with the trial court, and holding that the statements were actionable because they could be construed as statements of fact).

101. *See Maxon*, 929 N.E.2d at 672 (noting that its holding represented a diversion from the *Dendrite/Cahill* standards).

102. *Id.*

103. *See* *Watchtower Bible & Tract Soc’y, Inc. v. Village of Straton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

104. *See* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Watchtower Bible & Tract Soc’y, Inc.*, 536 U.S. 150; *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

105. *Talley v. California*, 362 U.S. 60, 61 (1960).

106. The Court gave the following description of the handbills in question: The handbills urged readers to help the organization carry on a boycott against certain merchants and businessmen, whose names were given, on the ground that, as one set of handbills said, they carried products of “manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals.” There also appeared a blank, which,

unconstitutional because a “fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”¹⁰⁷

Though the majority opinion seems, at least on some level, to have established a right to anonymity, Justice Clark, in dissent, wrote to remind us that there is no such constitutional right.¹⁰⁸ Justice Clark wrote, “[t]he Constitution says nothing about freedom of anonymous speech.”¹⁰⁹ Justice Clark’s dissenting opinion then went on to cite two Supreme Court cases and *thirty* state laws that required identification of speakers.¹¹⁰ Plainly stated, in the eyes of Justice Clark, the rationale for the invalidation of the Los Angeles ordinance could not rest upon a right to anonymous speech because there is no such right.¹¹¹

In a later anonymous speech case, *McIntyre v. Ohio Elections Commission*, the Supreme Court invalidated an Ohio law that prohibited anonymous campaign literature.¹¹² It articulated its decision as one that addressed the question of “whether and to what extent the First Amendment’s protection of anonymity encompasses documents intended to influence the electoral process.”¹¹³ In light of the nature of that question and the fact that core political speech was at issue, the Court applied “exacting scrutiny” to the Ohio law.¹¹⁴ It was through this narrow lens that the Supreme Court furthered the right to anonymity. The Court implied in its conclusion that the supposed right does not encompass fraudulent or defamatory speech.¹¹⁵ The Court suggested this when it said: “Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech.”¹¹⁶ *McIntyre*, like *Talley*, made some

if signed, would request enrollment of the signer as a “member of National Consumers Mobilization,” and which was preceded by a statement that “I believe that every man should have an equal opportunity for employment no matter what his race [sic] religion, or place of birth.”

Id.

107. *Id.* at 65.

108. *Id.* at 70 (Clark, J., dissenting) (“I stand second to none in supporting Talley’s right of free speech—but not his freedom of anonymity.”).

109. *Id.*

110. *See Talley*, 362 U.S. at 61 (Clark, J., dissenting) (citing *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288 (1913); *United States v. Harriss*, 347 U.S. 612, 625 (1954)). Justice Clark noted that “[t]hirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections. E.g.: Kan.G.S.1949, s 25-1714; M.S.A. s 211.08; Page’s Ohio R.C. s 3599.09; Purdon’s Pa.Stat.Ann., Title 25, s 3546.” *Talley*, 362 U.S. at 70 n.2 (Clark, J., dissenting).

111. *See Talley*, 362 U.S. at 71.

112. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 336 (1995).

113. *Id.* at 344.

114. *Id.* at 347.

115. *Id.*

116. *Id.* at 357. The Court made this same point earlier in the opinion, stating:

suggestion that there is a right to anonymous speech; however, insofar as the Court in these cases explicated an anonymity right, it did so narrowly.

In *Buckley v. American Constitutional Law Foundation*, the Supreme Court evaluated the extent of a right to anonymity for a third time.¹¹⁷ In *Buckley*, the Supreme Court agreed with the Court of Appeals for the Tenth Circuit in invalidating a Colorado law, which required persons circulating initiative-petitions to wear name badges.¹¹⁸ The Supreme Court in *Buckley*, like it had done in *McIntyre*, articulated its holdings in terms of the negative effect on political speech: “[i]n sum, we conclude . . . that Colorado’s current badge requirement discourages participation in the petition circulation process by forcing name identification without sufficient cause.”¹¹⁹ The majority, dissent, and concurrence were all in agreement that the name badge requirement of the Colorado law was unconstitutional. It should be noted that each opinion supporting this position placed great emphasis on the fact that “core political speech” was the type of speech at issue.¹²⁰ The *Buckley* court did recognize a right to anonymity; however, that right was narrowly articulated as one that relates to “core political speech.”¹²¹

One of the Court’s more recent forays into the realm of anonymous speech was *Watchtower Bible & Tract Society, Inc.*¹²² In *Watchtower*, the Supreme Court held unconstitutional an Ohio village ordinance that prohib-

The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify § 3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley*. As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

McIntyre, 514 U.S. at 344. The Court seems to imply that had the Ohio statute been narrowly tailored to publications of a defamatory nature, the right of anonymity would not be applicable. *Id.* at 344.

117. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999).

118. *Id.* at 190.

119. *Id.* at 200. See *McIntyre*, 514 U.S. at 344.

120. Justice Ginsburg’s majority opinion noted that the law in question was declared invalid because it was “restrictive of political speech.” *Buckley*, 525 U.S. at 186. Justice Thomas wrote, in concurrence, that the badge law was unconstitutional because it restricted “core political speech.” *Id.* at 206 (Thomas, J., concurring). Justice O’Connor, concurring in part and dissenting in part, noted, “[r]equiring petition circulators to reveal their names while circulating a petition directly regulates the core political speech of petition circulation.” *Id.* at 217 (O’Connor, J., concurring). For that reason, the name badge requirement “should be subject to, and fails, strict scrutiny.” *Id.*

121. *Buckley*, 525 U.S. at 186.

122. *Watchtower Bible & Tract Soc’y, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

ited anonymous door-to-door advocacy.¹²³ The Court's analysis of anonymous speech was short and conclusory.¹²⁴ However, the Court did give some consideration to the fact that some door-to-door advocates would not be able to advocate anonymously when it struck down the ordinance.¹²⁵

In *Citizens United v. Federal Elections Commission*, the Supreme Court disclaimed a broad "right to anonymity."¹²⁶ *Citizens United* addressed the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA).¹²⁷ The BCRA, in Section 441(b), prohibited "corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a date."¹²⁸ The Court held that the BCRA constituted an "outright ban, backed by criminal sanctions."¹²⁹ Additionally, the Court held, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion."¹³⁰ The Court places heavy emphasis on the political nature of the speech, calling it "indispensable."¹³¹ It is in this context that the Court evaluated the constitutionality of the disclosure requirement set forth by the BCRA.¹³²

"Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that '____ is responsible for the content of this advertising.'"¹³³ The *Citizens United*

123. *Id.* at 155 (summarizing the ordinance, "[s]ection 116.01 prohibits 'canvassers' and others from 'going in and upon' private residential property for the purpose of promoting any 'cause' without first having obtained a permit pursuant to § 116.03").

124. *See id.* at 166-67. The Court's limited analysis of anonymous speech is due in part to the fact that the court focused more on the reprehensibility of the all-out restriction of unregistered door-to-door canvassers, as opposed to the narrow issue of disclosure of their identity. *Id.*

125. *See id.* at 166.

126. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

127. *See id.* at 880.

128. *Id.* at 879.

129. *Id.* at 897.

130. *Id.* at 899.

131. *Citizens United*, 130 S. Ct. at 904.

132. *Id.*

133. *See id.* at 913-14. There are additional elements to the disclosure: The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. 2 U.S.C. § 441d(d)(2). It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or web site address) of the person or group that funded the advertisement.

Id. at 914.

Court considered the constitutionality of that section.¹³⁴ The Court considered the disclosure requirements in a manner that seemed to refute the notion of a right to anonymity, stating, “[d]isclaimer and disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.”¹³⁵ Effectively, *Citizens United* stands for the proposition that corporations and unions can provide funding for “electioneering communications”; however, that right, as protected by the First Amendment, does not include a right to remain anonymous.¹³⁶ What is particularly telling about the Court’s treatment of disclosure and anonymity in *Citizens United* is that the speech at issue was of the most political kind—that which pertains to voting.¹³⁷ Yet, the Court did not find that corporations and unions held an anonymity right, which, by implication, suggests no anonymity right exists.

It should be noted, Justice Thomas, in dissent, did not agree with the Court’s treatment of the disclosure requirement of the BCRA.¹³⁸ Justice Thomas plainly stated, “Congress may not abridge the ‘right to anonymous speech.’”¹³⁹ Justice Thomas’s opinion seems to rest on his reading of *McIntyre v. Ohio Elections Commission* and the effect of the disclosure requirement, because some donors allegedly “were blacklisted, threatened, or otherwise targeted for retaliation.”¹⁴⁰ Justice Thomas’s understanding that there exists a right to anonymity caused him to conclude that the Court’s opinion “will ultimately prove as misguided (and ill fated).”¹⁴¹

Despite Justice Thomas’s interpretation in his impassioned dissent, the Court did not recognize a right to anonymity in *Citizens United*. Importantly, the Court did not even begin with an analysis that recognized such a right.¹⁴²

134. *Citizens United*, 130 S. Ct. at 913 (analyzing the issue, the majority, concurrence, and dissent each offered an equally lengthy analysis viewing the disclosure as constitutional, with the exception of Justice Thomas in dissent).

135. *Id.* at 914. The language the Court used is a reference to the *McConnell v. Federal Election Commission* case, which was overruled by *Citizens United*. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003). Perhaps, there is an argument to be made here that there cannot be an anonymity right that protects online defamers because it would not prevent them from speaking: they have already spoken. *Id.*

136. *See id.* at 914 (the Court all but stated this by suggesting that the free speech right is only infringed when someone is “prevented” from speaking).

137. If any kind of speech can be called political, it is that which pertains to the process or action of partaking in government: in particular, voting.

138. *See id.* at 980 (Thomas, J., dissenting).

139. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 980 (2010) (Thomas, J., dissenting) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 276 (2003)).

140. *Id.* at 980 (Thomas, J., dissenting).

141. *Id.*

142. *See Citizens United*, 130 S. Ct. at 913. Ostensibly, if there were an anonymity right even potentially implicated, the highest court in the land would have discussed it in its

The Supreme Court gave a more telling analysis to the right of anonymity in a relatively recent anonymity case, *Doe v. Reed*.¹⁴³ In Washington State, a procedure was available for voters to challenge law by referendum. “Roughly four percent of Washington voters must sign a petition to place such a referendum on the ballot.”¹⁴⁴ Copies of the petitions, including the names and addresses of those who signed the petition, were available to private persons upon request.¹⁴⁵ The Supreme Court in *Reed* analyzed the broad question: “whether disclosure of referendum petitions in general,” would violate the First Amendment.¹⁴⁶ The Court, in no uncertain terms, held that “disclosure . . . would not violate the First Amendment with respect to referendum petitions in general.”¹⁴⁷

Justice Stevens, in concurrence, refuted the position that the First Amendment contains a right to anonymity: “[O]ur decision in *McIntyre* posited no such freewheeling right. The Constitution protects ‘freedom of speech.’ The right, however, is the right to speak, not the right to speak without being fined or the right to speak anonymously.”¹⁴⁸ Thus, *Reed* represents a clear example in which the Court was challenged by a group of plaintiffs asserting a right to anonymity, and the Court expressly held that there was no such general right to anonymity.¹⁴⁹

The Supreme Court’s treatment of a “right to anonymity” is admittedly unclear.¹⁵⁰ Some opinions seem to plainly state a right to anonymity, while others seem to firmly disclaim that right.¹⁵¹ Similarly, there is great dissonance between the individual Justices’ analyses of the supposed right within many of the cases.

Although the Supreme Court cannot be said to hold a well-defined position regarding a right to anonymity, it can be said, in so far as there is a right, it is narrow and applies only to “core political speech.” In part, this can be demonstrated by the examples the Court returns to time and again as

majority opinion; instead, it was only a single dissenting judge that found it applicable. *Id.* at 980 (Thomas, J., dissenting).

143. See *Doe v. Reed*, 130 S. Ct. 2811 (2010).

144. *Id.* at 2815.

145. *Id.*

146. *Id.*

147. *Reed*, 130 S. Ct. at 2821.

148. *Id.* at 2831 (Stevens, J., concurring) (citation omitted).

149. *Id.* at 2821 (Stevens, J., concurring).

150. There are several cases, none of which explicate any clear rule regarding anonymity. Each case seems narrowly focused within a specific set of facts. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); *Reed*, 130 S. Ct. 2811; *Watchtower Bible & Tract Soc’y, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

151. See *Reed*, 130 S. Ct. 2811; *Citizens United*, 130 S. Ct. 876; *Watchtower*, 536 U.S. 150; *Buckley*, 525 U.S. 182; *McIntyre*, 514 U.S. 334; *Talley*, 362 U.S. 60.

evidence of the importance of anonymous speech. One example of the Court's use of historical reference is found in *McIntyre v. Ohio Elections Commission*, where the court stated:

That tradition is most famously embodied in the *Federalist Papers*, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery.¹⁵²

The import of the Court's position is simply that the *Federalist Papers* are perhaps the premier example of political speech.¹⁵³ Thus, the Court, both in its language and its implied reasoning, suggested that the motivating factor for protecting an individual's anonymity is informed by the importance of the type of the speech.¹⁵⁴

It would be stretching the words of the Supreme Court in its few anonymous speech cases to say it held that a right to anonymity exists; however, it would be still a greater stretch to announce that such a right exists regardless of the type of speech at issue. If the few anonymous speech cases the Court has considered can be cited for any general proposition, perhaps it can be said that anonymity is never a constitutionally protected right unless political speech is at issue.¹⁵⁵

152. *McIntyre*, 514 U.S. at 343 n.6 (citation omitted).

153. Hamilton expressed in the introduction to the *Federalist Papers* their significance: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world." THE FEDERALIST No. 1 (Alexander Hamilton), available at http://thomas.loc.gov/home/histdox/fed_01.html.

154. See *McIntyre*, 514 U.S. at 343.

155. See *Reed*, 130 S. Ct. 2811; *Citizens United*, 130 S. Ct. 876; *Watchtower*, 536 U.S. 150; *Buckley*, 525 U.S. 182; *McIntyre*, 514 U.S. 334; *Talley*, 362 U.S. 60.

V. POLITICAL SPEECH

The notion that all speech is not the same is not new to discussions of defamation. In perhaps the Supreme Court's best known defamation case, *New York Times Co. v. Sullivan*, the Supreme Court set forth a separate (higher) standard of protection for certain types of defamation, namely those that concern public officials.¹⁵⁶ In *Sullivan*, the Court held:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹⁵⁷

What the Court refers to, as "a privilege for criticism of official conduct," is a marked distinction from the clear alternative: treating every defamatory statement the same.¹⁵⁸ The Court quoted the trial court's characterization of the defamatory statements at issue, where they were treated as libelous per se. When a statement is libelous per se, "the law . . . implies legal injury from the bare fact of publication itself[,] . . . falsity and malice are presumed[,] . . . general damages need not be alleged or proved but are presumed[, and] . . . punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown."¹⁵⁹

The *Sullivan* Court moved away from this standard and bolstered the First Amendment protection of the defendant's statements. Why? Because of the nature of the speech: what it was and, more important, what it sought to accomplish. The Court offers its conception of what the defendant's speech did: "It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."¹⁶⁰ The Court, in no uncertain terms, asserted that some kinds of speech (in this case, speech that critiqued a public figure) are more valuable and thus have a stronger claim to First Amendment protections.¹⁶¹

Thus, *New York Times Co. v. Sullivan* set forth the critical distinction between defamatory speech that is directed at a public official and all other

156. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

157. *Id.* at 279-80.

158. *Id.*

159. *Id.* at 262.

160. *Id.* at 266.

161. See *Sullivan*, 376 U.S. at 266.

kinds of defamatory speech. The *Sullivan* Court saw it as an imperative that politically motivated speech deserve great protection, for it is political speech that advances society and the union, and it does so in a manner distinct from all other kinds of speech.¹⁶²

Some states have sought additional protection for politically motivated speech. Some states, like Illinois and California, have enacted what are referred to as Anti-SLAPP statutes.¹⁶³ These statutes were passed in response to what those states' legislatures saw as an unnecessary increase in litigation to chill political speech.¹⁶⁴ Essentially, a person's actions "in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome."¹⁶⁵ With this simple legislation, the ability of a person to "chill" political speech through the filing of a lawsuit is all but eliminated.¹⁶⁶

The *Sullivan* opinion and Anti-SLAPP statutes are salient because, if taken with the above interpretation of the Court's treatment of anonymity, they support the proposition that political speech is (or at least can be with state legislation) entitled to significant protection without Section 230 of the

162. *Id.* at 265. The Supreme Court discussed the importance of speech in *Roth v. United States*, quoting:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Roth v. United States, 354 U.S. 476, 486 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (Worthington Chauncey Ford ed., Library of Congress 1904) (1774), available at <http://memory.loc.gov/ammem/amlaw/lwjclink.html>).

163. See 735 ILL. COMP. STAT. 110/5 (2011); CAL. CODE CIV. PROC. § 425.16 (2012).

164. The Illinois Act states the policy for its enactment:

There has been a disturbing increase in lawsuits termed "Strategic Lawsuits Against Public Participation" in government or "SLAPPs" as they are popularly called. The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

735 ILL. COMP. STAT. 110/5 (2011).

165. 735 ILL. COMP. STAT. 110/15 (2011).

166. See *Sandholm v. Kuecker*, 942 N.E.2d 544, 575 (Ill. App. Ct. 2010).

CDA. The CDA is merely adding unnecessary burdens by protecting not only political speech but also speech that is less deserving of protection.¹⁶⁷

VI. THE PROBLEM: RESTATED

If this Comment has established that there is no broad right to anonymity and that a publisher “is not free to publish with impunity everything and anything it desires to publish,” what does this mean for the use and effectiveness of the Communications Decency Act?¹⁶⁸ Simply stated, as suggested above, the Communications Decency Act (CDA) is overly broad. If the legislative intent imbedded in the statute in Part (b) of Section 230 is the goal that the statute seeks to effectuate, Section 230 is not only satisfying those goals, but it is doing more than that: it is doing too much.

Section 230 sets forth the policy that drives its enactment in Part (b) of that section:

It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.¹⁶⁹

The laudable goals that Section 230(b) of the CDA purports to attain do not include protection of a defamer like The Count or the defamer in *Zeran*.¹⁷⁰ In fact, one commentator has noted, the goal of the CDA (as its name suggests) is really about “encourag[ing] interactive computer services to stomp

167. The distinction is between the anonymous speech offered by *Zeran*’s defamer and the anonymous speech that gave us the *Federalist Papers*.

168. See *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972).

169. 47 U.S.C. § 230(b) (2011).

170. See *supra* Part II.D.1.

out smut on the Internet.”¹⁷¹ If this analysis is correct, the assertion that Section 230 was put in place to permit persons like The Count or Zeran’s defamer to speak freely with anonymity is facially invalid.¹⁷² If the CDA is about cleaning up the internet, providing broad protections for false and damaging statements on the internet seems to run counter to that very principle.¹⁷³

Defamation is a carefully built and studied puzzle, one that the courts struggle with every day. The complex area of law has developed from tongue removal (its first penalty) to a vast and increasingly complicated area of legal practice.¹⁷⁴ The CDA constitutes an overtly swift and unduly broad change to a slowly and cautiously developed area of the common law.¹⁷⁵

VII. SOME OUTSIDE PERSPECTIVE

While, to a significant degree, a true solution to the shortcomings of Section 230 of the CDA is beyond the scope of a comment, some account of possible solutions is necessary.

Much of the debate of Section 230 of the Communications Decency Act centers on the *Zeran* court’s treatment of distributor liability. Simply stated, the court in *Zeran* held that distributors, as a subset of publishers, are entitled to immunity under Section 230 of the Communications Decency Act.¹⁷⁶ Essentially, the *Zeran* court held that regardless of AOL’s knowledge or wrong, the CDA granted them total immunity, leaving Zeran without recourse.¹⁷⁷ Many commentators see the downfall of Section 230 in

171. Sheridan, *supra* note 50, at 170.

172. It doesn’t seem too much to assume that false statements poking fun at the Oklahoma City bombings amount to “smut” on most moral scales. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

173. Sheridan, *supra* note 50, at 172.

174. *See* SMOLLA, *supra* note 15, § 1:2. Smolla provides an account of the first defamation remedy:

Centuries ago the remedy for defamation was to cut out the offender’s tongue. This barbaric pre-13th century remedy gave way to the jurisdiction of the ecclesiastical courts, which treated slander as a spiritual offense, punishing the sin with appropriate penance. The sinner would be wrapped in a white shroud and required to kneel in public, holding a lighted candle and acknowledging his false witness before the priest and parish wardens, begging the pardon of God and the injured party.

Id. (footnotes omitted).

175. *See* Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5th 169 § 5 (2000).

176. *See Zeran*, 129 F.3d at 333.

177. *Id.*

the *Zeran* court's interpretation of the CDA, not the CDA itself.¹⁷⁸ Particularly, this attack focuses on the total elimination of distributor liability.¹⁷⁹ This criticism essentially relies on the fact that distributors (like publishers) are as culpable as the speaker and that distributors (like publishers) are the ones that make the defamatory statement damaging.¹⁸⁰ This understanding of defamation law is the law everywhere, except where the CDA is king: the internet.

However, the criticism is broader than a grumble with the publisher/distributor distinction; many commentators struggle with finding a rationale for the asymmetry Section 230 of the Communications Decency Act creates between traditional print media and the internet.¹⁸¹ In other words, under the CDA, there is a unique immunity granted for publishers and distributors in only one of the many media for speech.

At risk of overstating the obvious, note that the CDA grants not a privilege, not a heightened burden of proof, but immunity. If, in *Zeran v. America Online, Inc.*, AOL had been a newspaper, *Zeran* could have sued the newspaper and his defamer (assuming he could identify him or wanted to).¹⁸² Yet, after the enactment of the CDA and the interpretation of it by the *Zeran* court, the internet has its own law of defamation distinct from that which applies to every other medium for communication.¹⁸³ As one commentator has noted: "there is every possibility of the common law tort of

178. See Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 473 (2004); Sheridan, *supra* note 50, at 170. This is not to say that the *Zeran* holding is exclusively criticized, for that would be far from an accurate portrayal of its treatment. It is praised as well as criticized. See Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647 (2000).

179. See Lee, *supra* note 178, at 473; Sheridan, *supra* note 50, at 170; Neil Fried, *Dodging the Communications Decency Act when Analyzing Libel Liability of Online Services: Lunney v. Prodigy Treats Service Provider like Common Carrier*, 1 COLUM. SCI. & TECH. L. REV. 38 (1999).

180. See SMOLLA, *supra* note 15, § 4:78. Smolla states: "on the quaint homespun logic that '[t]alebearers are as bad as talemakers,' each repetition of a defamatory statement by a new person constitutes a new publication, rendering the repeater liable for that new publication." *Id.*; see *Zeran*, 129 F.3d at 333.

181. See Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1483 (2006).

182. That *Zeran* might not have even tried to sue the original perpetrator of all his problems is not as odd as it first seems. Assuming *Zeran* does not know the identity of his defamer or the depth of his pockets, most lawyers may advise their client to pursue only AOL. See Marc A. Lavaia, *Defamation by Proxy: Can the Internet Provide a Shield from Liability?*, ROBINSONBROG.COM, <http://www.robinsonbrog.com/CM/Articles/Articles13.html> (last visited Feb. 12, 2012).

183. See *Zeran*, 129 F.3d at 333 (holding that the plaintiff's claim failed, arguably only for the reason that it was internet defamation).

defamation dying an unnatural death in the near future. The known definitions and concepts in relation to the publisher, qualified privilege, publication, anonymous defamer, slander, or place of defamation have undergone a tremendous change.¹⁸⁴

Another criticism of the Communications Decency Act addresses not the CDA itself but a related matter: disclosure standards in John Doe defamation actions. Because internet defamers often post under pseudonyms, for example “The Count,” the plaintiff may not be able to simply serve their defamer with a complaint and summons.¹⁸⁵ Thus, as discussed above in Part III,¹⁸⁶ the defamed plaintiff may choose to bring a John Doe defamation action to compel disclosure of the person’s identity.¹⁸⁷ While an interactive computer service such as AOL (to use the language of the CDA) may offer the identity without hesitation, this is not the only possible reaction. As was seen in the *Dendrite* case, the interactive computer service (ICS), or the anonymous defamer, may try to challenge the subpoena.¹⁸⁸

To simplify this complex area of the law, there are three likely results stemming from the issuance of a subpoena to disclose the identity of a John Doe defamer: (1) the ICS will comply and give up the identity of the alleged defamer;¹⁸⁹ (2) the ICS will give notice to the anonymous defamer in order to provide them an opportunity to quash the subpoena;¹⁹⁰ or (3) the ICS will flatly refuse, leaving the court to weigh the competing interests of the alleged defamer and the allegedly defamed.¹⁹¹ It is this third scenario

184. See Mohd Altaf Hussein Ahangar, *Mohd Altaf Hussain Ahangar on Defamation in the Cyber Age: The Emerging Trends*, 2010 EMERGING ISSUES 5375 (2010).

185. Professor Smolla refers to the use of pseudonyms as communication “conducted behind the facade of screen-names.” SMOLLA, *supra* note 15, § 4:86:50.

186. See *supra* part III.A and note 50.

187. See SMOLLA, *supra* note 15, § 4:86:50.

188. See *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

189. See SMOLLA, *supra* note 15, § 4:86:50. This is the opposite of the *Zeran* case. For if AOL had simply disclosed the identity of the defamer, the plaintiff would have had at least one meaningful opportunity to seek a remedy. However, in *Zeran*’s case, even AOL’s willingness to disclose would have been fruitless because, as the court noted, “*Zeran* maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 n.1 (4th Cir. 1997).

190. This scenario, while possible, is made less likely by the lack of an incentive on the part of the ICS. Because Section 230 provides blanket immunity for someone like AOL, the ICS (AOL) has no interest in helping the plaintiff find a defendant. If the ICS chooses to do nothing, there is no legal consequence to them. In fact, the limited interest an ICS has is arguably limited to its consumer/client, furthering the argument that the ICS is unlikely to give up the name of the anonymous defamer. 47 U.S.C. § 230 (West 2011).

191. This is the scenario that *Zeran* was left in, the scenario that led to *Dendrite International, Inc. v. Doe*, and the leading disclosure standard. See *Zeran*, 129 F.3d at 329; *Dendrite Int’l, Inc.*, 775 A.2d 756.

that has prompted considerable scholarly commentary.¹⁹² The discussion centers on the disclosure standards, as set forth above in Part III, where the *Dendrite/Cahill* test was considered.¹⁹³ Some courts rely on the higher *Dendrite* summary judgment standard, whereas Illinois, under its Rule 224, applies a considerably lower motion to dismiss standard.¹⁹⁴ For those who have critiqued the *Dendrite* disclosure standard, or other standards, much of the criticism rests on the inconsistency and confusion among the multiple standards and jurisdictions.¹⁹⁵ Because there is such great divide in the interpretation of the disclosure standard to be used, there is an added confusion and uncertainty for litigants who may therefore be hesitant to pursue a John Doe defamation action in the first place.¹⁹⁶

VIII. THE SOLUTIONS

Although every hypothesized solution to the problems caused by Section 230 of the Communications Decency Act holds merit, the following two solutions best comport with the common law of defamation. This Comment attempts to show that the new and ever-growing medium of the internet is not deserving of, nor does it require, a new body of defamation law. Constitutional interpretation of anonymity rights and a relaxed disclosure standard (like Illinois's Rule 224) can serve to fairly balance the right of free speech and the right of a defamed plaintiff to be made whole.

The motion to dismiss standard, as exemplified by Illinois Supreme Court Rule 224, is the disclosure standard that best effectuates a balance between the rights of the alleged defamer and the allegedly defamed.¹⁹⁷ As

192. See Jennifer O'Brien, *Putting a Face to a Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 *FORDHAM L. REV.* 2745 (2002); Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 *B.C. L. REV.* 833 (2010).

193. See *supra* Part III.A.

194. See *Dendrite Int'l, Inc.*, 775 A.2d 756; *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005); *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666, 673 (3d Cir. 2010).

195. See Lyrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?* 50 *B.C. L. REV.* 1373 (2009); Courtney T. Shilling, *Unmasking Online Assailants: When Should an Anonymous Online Poster Be Exposed for Defamatory Content?* (April 2011) (unpublished manuscript) (on file with Chicago-Kent College of Law), available at http://works.bepress.com/courtney_shillington/1/ (last visited Feb 12, 2012). The confusion and complexity amongst the many standards is great. For example, Shilling contends that there is a greater distinction between the *Dendrite* and *Cahill* tests than was suggested here, ultimately suggesting that there are four not three disclosure standards. *Id.* However, one thing remains constant: critics agree that uniformity is desirable. *Id.*

196. See Lavaia, *supra* note 182.

197. It should be noted that Illinois, with Supreme Court Rule 224, is not the only jurisdiction to apply such a standard. See Shilling, *supra* note 195.

discussed above and as the *Maxon* court stated, trial courts have mechanisms in place that are more than sufficient to ensure that frivolous unmasking requests do not succeed—namely, the motion to dismiss.¹⁹⁸ To require, as the *Dendrite*¹⁹⁹ and *Cahill*²⁰⁰ courts did, that a plaintiff be able to show facts and evidence sufficient to survive summary judgment is an exceedingly high burden.²⁰¹ At such an early stage in the litigation, where the plaintiff does not even know the identity of their defamer, it is unlikely, perhaps impossible, for a plaintiff to have the necessary facts and evidence to survive summary judgment.²⁰² The Illinois Supreme Court Rule 224, or motion to dismiss standard, is the best of those adopted by the courts because it provides plaintiffs with a meaningful opportunity to litigate their claims.²⁰³ To succeed in a defamation action is difficult, to say the least. Raising the discovery barriers even higher, under a test like the *Dendrite* test, merely because the speech was made on the internet is simply unnecessary.²⁰⁴

Additionally, the notion that there is a balance to be struck between a speaker's anonymity right and the right of plaintiffs to litigate their claims is unsupported.²⁰⁵ This Comment has attempted to establish that there is no broad right to anonymity.²⁰⁶ While the Supreme Court has recognized some narrow anonymity rights, they apply only in the context of political speech.²⁰⁷ Additionally, the narrow scope of the anonymity right should be considered together with the *Maxon* court's repeated reminder "that there is no constitutional right to defame."²⁰⁸

So, what does this mean for the CDA? Simply stated, Section 230 of the Communications Decency Act is not the most effective way to achieve the goals of Congress. The speech that is in greatest need of protection—

198. See *Maxon*, 929 N.E.2d at 673.

199. See *Dendrite Int'l, Inc.*, 775 A.2d at 759.

200. See *Doe v. Cahill*, 884 A.2d 451, 454 (2005).

201. See *Dendrite Int'l, Inc.*, 775 A.2d at 772; *Cahill*, 884 A.2d at 468 (holdings by both courts found the plaintiff's claims insufficient to meet the high unmasking burden).

202. See *Dendrite Int'l, Inc.*, 775 A.2d at 772. *Dendrite* should be distinguished from a lower standard, like that in *Maxon*, where the chances of success for a plaintiff are significantly higher. See *Maxon*, 929 N.E.2d at 716.

203. See *Maxon*, 929 N.E.2d at 716.

204. See *Rosen & Rosenberg*, *supra* note 2.

205. See *supra* Part IV and note 103.

206. See *supra* Part IV and note 118.

207. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).

208. *Maxon*, 929 N.E.2d at 675.

political speech—is already protected.²⁰⁹ First Amendment case law like *New York Times Co. v. Sullivan*²¹⁰ and *McIntyre v. Ohio Elections Commission*²¹¹ together with state protections, like Anti-SLAPP statutes, have provided broad and powerful protections for political speech. Section 230 of the CDA is not doing much to protect an already heavily protected class of speech. However, Section 230 of the CDA does have a great impact. What the CDA does is two-fold: it treats internet publishers differently than print publishers merely because they are on the internet, and it protects and immunizes a less deserving kind of speech. Speech that targets private persons becomes protected—speech like that directed at Zeran or Oliver (our fictional donut shop owner). Because “political” speech is already significantly protected, the protections offered by the CDA offer the most significant change to “private defamation” (defamation which targets private persons and small businesses). Those private persons who have been defamed on the internet are less likely to succeed in a legitimate defamation action, simply because the statements were made online—this is Section 230’s downfall.²¹²

Because it protects private defamation, or non-political defamatory speech, Section 230 of the Communications Decency Act should be repealed. It has little effect beyond creating an undue asymmetry between internet and all other kinds of defamation and burdening legitimate defamation claims. Section 230 of the CDA should be repealed to allow victims of defamation to pursue, as defendants, the publishers, distributors, and republishers of defamatory content in the same way a person defamed through any other medium can. Although there may be some fears of a chilling effect on speech, political speech is in no great danger. Congress, the Supreme Court, and the states have spent considerable effort ensuring the freedom to speak politically will not be abridged.²¹³

IX. CONCLUSION

Section 230 of the Communications Decency Act is a congressional overstep. Section 230’s goals are laudable, but its language, application, and interpretation are overly broad. In attempt to “clean up the internet” and bolster what are already significant protections, it has failed. Section 230 completely ignores a complex common law history and subsequently un-

209. This is not to say that “political” speech is absolutely protected, but that it is entitled to far greater protections than other kinds of speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

210. *Sullivan*, 376 U.S. 254.

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

212. *See Rosen & Rosenberg, supra note 2.*

213. *See supra* Part V.

ravels the careful balancing act that is defamation law. The First Amendment may well be the most important of our freedoms and the one that needs most vigorous protection. However, the First Amendment has been carefully balanced alongside plaintiffs' interests in the careful construction of the law of defamation. The complex and functioning system of defamation law should not be rewritten every time a new forum for speech is born.²¹⁴

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214. If it is the case that the right of a person to seek compensation for injury to reputation is no longer valued by our society, a new consideration arises. If free speech is more valuable than a right to cure injury to one's reputation, perhaps the CDA can be considered a step in the right direction, one that should apply to not just the internet. Perhaps the CDA is not a step away from traditional defamation law but a step towards no defamation law. Perhaps, in the words of Justice Powell in *Gertz v. Robert Welch, Inc.*, we should protect communications with a "total sacrifice" of the competing value of defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Whether such a step is a wise one is certainly beyond the scope of this Comment, and likely beyond the scope of Congress's intent in passing Section 230. Yet, that is perhaps where the argument should next turn.

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