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SILENCING JOHN DOE: DEFAMATION & DISCOURSE IN CYBERSPACE

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ABSTRACT

John Doe has become a popular defamation defendant as corporations and their officers bring defamation suits for statements made about them in Internet discussion fora. These new suits are not even arguably about recovering money damages but instead are brought for symbolic reasons—some worthy, some not so worthy. If the only consequence of these suits were that Internet users were held accountable for their speech, the suits would be an unalloyed good. However, these suits threaten to suppress legitimate criticism along with intentional and reckless falsehoods, and existing First Amendment law doctrines are not responsive to the threat these suits pose to Internet discourse. Although the constitutional privilege for opinion holds promise as a solution to this problem, the Supreme Court's jurisprudence provides little assurance that the privilege can protect the "robust, uninhibited, and wide-open nature" of Internet discourse without giving Internet speakers free license to harm the reputation of

† Associate Professor of Law, University of Florida College of Law. I owe a debt of gratitude to numerous people who helped me throughout the process of writing this Article: Amy Mashburn, Elizabeth Lear, Howard Lidsky, Rick Matasar, Max Stearns, Chris Slobogin, Chris Hansen, Ann Beeson, Megan Gray, and Rebecca Newton Clarke. Special thanks go to David A. Anderson and Ron Krotoszynski, Jr., for reading the draft quickly and making incisive comments at critical stages of its development and to my research assistant Robert Lancaster for his extraordinary dedication in the final stages of the process. My other research assistants, Christopher Vallandingham and Susan Wynn, also provided great research support. Finally, I would like to thank all of the lawyers and parties involved in the new Internet libel cases who were kind enough to share their stories and their documents with me.

others. Therefore, this Article attempts to articulate a theory that justifies protecting John Doe and suggests the steps courts should take to adapt the existing opinion privilege to the unique context of cyberspace.

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INTRODUCTION

> [T]he poisonous atmosphere of the easy lie can infect and degrade a whole society.[1]

> [T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[2]

John Doe is a day trader.[3] Trading stocks is a hobby bordering on an obsession, and, like many other day traders, John Doe likes to exchange information about stocks via online message boards.[4] But as Doe recently learned, free speech on the Internet may not be as free as he thought. After posting a scathing message accusing Net Company of defrauding its investors and accusing its CEO of being a liar and a cheat, John Doe found himself a defendant in a libel suit.[5]

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1. Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Stewart, J., concurring).

2. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (opinion of the court by Judge Learned Hand), *aff'd*, 326 U.S. 1 (1945).

3. *See* CHRISTOPHER A. FARRELL, DAY TRADE ONLINE 2, 14 (1999) (defining day trading as "the practice of buying and selling stocks over the Internet for quick profits" and estimating that by the year 2000 there will be 10 million individual accounts online).

4. *See* Matthew Heimer, *Herd on the Net*, BRILL'S CONTENT (May 1999) <http://www.brillscontent.com/columns/moneypress_0599.html> (on file with the *Duke Law Journal*) (discussing the influence and popularity of Internet financial bulletin boards, including *Raging Bull*, *Silicon Investor*, and *Yahoo! Finance*). Ordinarily, users like John Doe post to message boards devoted solely to discussion of a particular corporation (the *Net Company* message board, for example). *See, e.g.*, Michael Moss, *CEO Exposes, Sues Anonymous Online Critics*, WALL ST. J., July 7, 1999, at B1 (noting that *Yahoo!* "has several thousand [financial message] boards, each dedicated to a single company").

This Article uses the term "message board" synonymously with "computer bulletin board," which at least one author has defined as "a computerized version of a cork and pin board on which users can post, read, and respond to messages." Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 238 (1995). This Article draws no distinction in this discussion between boards that are available via the Internet and those that are available only to subscribers of a particular commercial online service. *See id.* at 243-46 (examining the differences between Internet-supported boards and those run by commercial online services).

5. *See generally* Rebecca Landwehr, *Companies Battle Libel on the Web*, DENV. BUS. J., Oct. 9, 1998, at A3 (anticipating "a flurry of court actions" over libelous statements posted in Internet chat rooms); Steve Woodward, *Three Corporations Go to Court to Fight Internet Falsehoods*, SEATTLE TIMES, Nov. 1, 1998, at B5 ("John Doe may be the most wanted person in cyberspace. Corporations everywhere . . . are tracking him down in lawsuits that allege sins ranging from interference with business relationships to defamation to breach of fiduciary duty.").

This hypothetical case, *Net Company v. John Doe*, is typical of a rapidly expanding new category of Internet libel suits.[6] One of the

6. This Article refers to these as "Internet" libel suits for consistency of reference even though some suits may involve statements posted on bulletin boards available only through commercial service providers. *See* ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996) ("The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks."), *aff'd*, 521 U.S. 844 (1997). For a discussion of the history and technological features of the Internet, see, for example, David P. Miranda, *Defamation in Cyberspace:* Stratton Oakmont, Inc. v. Prodigy Services Co., 5 ALB. L.J. SCI. & TECH. 229, 229-32 (1996); Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 FLA. L. REV. 247, 251-53 (1995).

In the typical case, plaintiffs sue an unknown "John Doe" defendant for defamation and then subpoena John Doe's Internet service provider ("ISP") to uncover his identity. *See, e.g.*, Complaint, HealthSouth Corp. v. Krum, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998) (alleging that John Doe, later discovered to be Peter Krum, posted that HealthSouth Corporation and its CEO were engaging in fraudulent behavior and that the CEO's wife was having an adulterous affair) (on file with the *Duke Law Journal*); *see also* Bob Cook, *Down and Dirty: PhyCor and Other Companies Sue Anonymous Message Posters for Internet Mudslinging*, MOD. PHYSICIAN, June 1, 1999, at 30 ("By suing defendants called John Does, a company or an aggrieved person can convince a judge to issue a subpoena forcing an Internet service provider to turn over the e-mail addresses and identities of the message posters.").

Although many of these cases have not yet made their way into reported decisions, I shall list them here by party names for ease of reference. *See* American Eco Corp. v. John Doe, *discussed in American Eco Wins Libel Suit Against Internet Critic*, NAT'L POST, Dec. 15, 1998, at C2 (reporting that a corporation and its former executive were awarded $8.325 million against an unknown John Doe); Americare Health Scan v. Technical Chem. & Prods., Inc., *discussed in Americare Health Scan Files Libel Suit Against TCPI and Individuals over Anonymous Yahoo! Postings*, BUS. WIRE, June 18, 1999, *available in* LEXIS, News Library, BWIRE File; BioShield Tech., Inc. v. John Does # 1-3, *discussed in* INVESTOR RELATIONS BUSINESS, Sept. 20, 1999; Carnegie Int'l v. John Does # 1-3, *discussed in* Adam H. Fleischer & S. William Grimes, *What a Tangled Web: The New Legal Liabilities Created by the Internet*, MEALEY'S LITIG. REP., Sept. 16, 1999; Cohr, Inc. v. John Doe, *discussed in* Greg Miller, *Firm Accuses Former Executive of Defamation on the Internet*, L.A. TIMES, Nov. 5, 1998, at C1 [hereinafter Miller, *Firm Accuses Former Executive*] (discussing a suit by a corporation that publicly accused its former president of being behind "John Doe's" allegedly defamatory postings); Harbor Florida Bancshares, Inc. v. John Doe, *discussed in Harbor Florida Sues Internet User over Takeover Rumor*, FIN. POST, July 28, 1999, at C2 (noting that a corporation sued an anonymous John Doe "for posting false rumors of the company's imminent takeover"); HealthSouth Corp. v. Landry, No. 455485M (Dist. Ct. La. 1999.) (alleging defamation of the corporation and the president of the surgery division, Pat Foster); Hitsgalore.com v. John Does, *discussed in* Don Benson, *Hitsgalore.com Searches for New Life After Setbacks*, BUS. PRESS, June 7, 1999, at 7 (press release) [hereinafter Benson, *Hitsgalore.com*] (noting that Hitsgalore.com "announced plans to file a lawsuit against anonymous posters on the Raging Bull and Silicon Investor online message boards" for allegedly false and defamatory postings); Hvide v. John Does 1 through 8, No. 99-22831 CA 01 (Fla. Cir. Ct. 1999) (on file with the *Duke Law Journal*); Image Guided Technologies v. Surfin Rat, *discussed in* Karen Auge, *Firm Tries to Find 'Net 'Surfin Rat',* DENV. POST, Mar. 22, 1999, at B1 (alleging that John Does posted defamatory statements on *Yahoo! Finance* board); Itex Corp. v. John Does # 1-100, *discussed in* Woodward, *supra* note 5, at B5 (alleging that John Does posted defamatory statements on a *Yahoo! Finance* board); Medphone Corp. v. DeNigris, No. 92-3785 (D.N.J. 1993) (involving a Prodigy subscriber who posted that Medphone Corporation "appears to be a fraud" on a *Money Talk* bulletin board); Melvine v. Doe, No. 21942 (Va. Cir. Ct., June 24, 1999), *discussed in* MULTIMEDIA & WEB STRATEGIST, Aug. 1999; PacifiCorp v. John Doe, *discussed in* Woodward, *supra* note 5, at B5 (noting that the plaintiff filed a $1 million suit

most striking features of these new cases is that, unlike most libel suits,[7] they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment.[8] Why, then, do plain-

against John Doe for misappropriating insider information and posting it on a *Yahoo! Finance* board); Phoenix Int'l, Ltd. v. John Does, *discussed in* Randal, *supra*; Bochan v. La Fontaine, (E.D. Va. May 26, 1999), *discussed in* Behnam Dayanim, *Jurisdiction and Online Tortfeasors; Out-of-State Defendants Beware*, THE TEXAS LAW., Sept. 13, 1999, at 37; PhyCor v. John Does, *discussed in* Cook, *supra*, at 30; Philip Servs. Corp. v. John Does # 1-12, *discussed in* Peter Kuitenbrouwer, *Philip Drops Internet Suit: Too Broke to Continue*, NAT'L POST, Jan. 15, 1999, at C8 (noting that the plaintiff corporation had dropped its defamation suit against the John Does because the plaintiff was "too broke" to pursue it); Southern Pacific Funding Corp. v. John Does, *discussed in* Woodward, *supra* note 5, at B5 (alleging John Does posted defamatory statements on *Yahoo! Finance* board); Sykes Enterprises v. John Doe, *discussed in Tampa Bay Area*, TAMPA TRIB., Aug. 24, 1999, at Business & Finance 1 (alleging that a possible employee was using a website to defame the company and one of its customers); Technical Chem. and Prods., Inc. v. John Does 1-10, Case No. 99004548 (Fla. Cir. Ct. 1999) (alleging that John Does used a *Yahoo!* message board to accuse a corporation and its officers of fraudulent and criminal activity) (on file with the *Duke Law Journal*); Wade Cook Fin. Corp. v. John Does # 1-10, *discussed in Washington State Senate First in the Nation to Seek to Remedy Anonymous Internet Slander*, PR NEWSWIRE, Apr. 16, 1999, at 1 (same); Xircom Inc. v. John Doe, *discussed in* Laura Randal, *Web Anonymity Suits Face Obstacles*, NEWSBYTES, July 26, 1999.

Stratton Oakmont, Inc. v. Prodigy Services, Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) held that an ISP could be liable as the publisher of defamatory statements posted by an unknown user on its financial bulletin board. *See id*. at *12. Although *Stratton Oakmont* involved facts similar to those in the cases discussed above, this Article argues that it does not fall into the same category as these new cases because the identity of the anonymous poster was never revealed and because the decision in the case focused only on the liability of the ISP. *See id.* In the new Internet libel cases, plaintiffs sue only the anonymous poster of the allegedly defamatory statements.

7. Defamation consists of two torts: libel and slander. Libel ordinarily refers to written defamation, slander to oral defamation. *See* BRUCE W. SANFORD, LIBEL AND PRIVACY § 4.2, at 97 n.8 (2d ed. 1991 & Supp. 1999); *infra* notes 80-84 and accompanying text. Most of the new John Doe cases should involve libel rather than slander because of the ability of online defamation to reach a mass audience. *See* David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 91 (1993). *But see* R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet*, *in* 18TH ANNUAL INSTITUTE ON COMPUTER LAW 693, 708 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-507, 1998) (observing that no opinion has explicitly addressed the issue and that the answer may vary according to jurisdiction).

8. Although the plaintiffs who bring Internet defamation suits often request money damages, these plaintiffs will rarely have any realistic hope of obtaining money damages. *See* Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1645 n.16 (1995) (observing that many of those who post abusive messages are "young users just learning their computer skills, who have little or no financial capability to pay damages imposed by a legal judgment"); Tom Gibb, *Internet Attacks Bring Man Charges, Suit, Suspension*, PITTSBURGH POST-GAZETTE, Nov. 8, 1998, at B3 (quoting Duquesne University Law School's Professor Kenneth Hirsch, who believes that the lawsuit is less about money than about "terroriz[ing] other people who might be inclined to do the same" thing). This feature is not unique to this new generation of Internet defamation actions. Defamation suits are often driven by "emotion, rather than money," since defamation actions may be the only avenue available to vindicate a plaintiff's damaged reputation. SANFORD, *supra*

tiffs, many of whom are wealthy corporations, choose to sue relatively impecunious John Does? The goals of this new breed of libel action are largely symbolic,[9] the primary goal being to silence John Doe and others like him.[10] This feature, standing alone, does not distinguish these new Internet libel cases from more traditional ones.[11] All libel suits are at least partially about silencing the defendant,[12] and from the standpoint of traditional First Amendment law, there is no harm in silencing knowingly or recklessly false statements of fact, for these statements have no value to public discourse.[13]

What is unique about these new Internet suits is the threat they pose to the new realm of discourse that has sprung up on the Internet. The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to "publish" their views on matters of public concern.[14] The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public

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note 7, § 13.1, at 609 (2d ed. 1991 & Supp. 1996-1). For further discussion of why plaintiffs choose to sue relatively impecunious John Does, see *infra* Part I.D.

9. This is not to say that the plaintiffs do not have financial motives, just that they do not hope to recover money damages. Often the suits are part of a concerted public relations campaign aimed to improve the corporation's image. For further discussion of this point, see *infra* Part I.D.

10. David Osborne, a libel defendant sued by U-Haul after he described his moving experiences on his *U-Hell* website, stated, "[U-Haul] ha[s] plenty of money. We do not. . . . If we back down, ... [i]t would be liek [sic] telling any other company with huge amounts of money that the easiest way to deal with a disgruntled customer is to threaten them into silence." David Osborne, *The U-Hell Website*, (visited June 1, 1999) <http://coyotes.org/~consumer/uhell/lawsuit.html> (on file with the *Duke Law Journal*).

11. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 1-2 (1996) (discussing the increased use of defamation and other suits to punish citizens for speaking out on matters of public concern). The suits discussed by Pring and Canan differ from the suits I discuss here because a SLAPP (i.e., a Strategic Lawsuit Against Public Participation) refers only to suits based on "communications made to influence a governmental action." *Id*. at 8. They are similar to the suits discussed here in the sense that both are brought primarily to silence defendants for speaking out. *See id*. at x (labeling SLAPPs as just "one subset of intimidation litigation"); *see also* Joseph W. Beatty, Note, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Professors Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85 (1997); Geoffrey Paul Huling, Note, *Tired of Being Slapped Around: States Take Action Against Lawsuits Designed to Intimidate and Harass*, 25 RUTGERS L.J. 401 (1994).

12. *See* Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 462 ("The defendant's solvency is probably not central to the decision to sue because the plaintiff's reputation is at issue and thus an apology or a small recovery may vindicate the plaintiff.").

13. *See infra* Part II.D.

14. *See infra* Part II.B.

discourse.[15] In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy.[16] Yet, suits like the hypothetical John Doe suit discussed above threaten to reestablish existing hierarchies of power, as powerful corporate Goliaths sue their critics for speaking their minds. Defendants like John Doe typically lack the resources necessary to defend against a defamation action, much less the resources to satisfy a judgment. Thus, these Internet defamation actions threaten not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora.

Although one might intuitively expect the First Amendment[17] to prevent powerful plaintiffs from silencing their critics,[18] the First Amendment extends only limited protections in such circumstances. Beginning with the landmark decision of *New York Times Co. v. Sullivan*,[19] the Supreme Court grafted numerous constitutional limitations onto the structure of the defamation tort. But *Sullivan* and much of its progeny involved an individual plaintiff (often a public official or public figure) challenging statements made by a relatively powerful media defendant.[20] The First Amendment jurisprudence that devel-

15. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 91 (1948) (arguing that "[t]he unabridged freedom of public discussion is the rock on which our government stands").

16. *See infra* Part II.B.

17. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I; *see also* Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment).

18. *See* John B. Attanasio, *Foreword: The Economic Contingency of Legal Rights?*, 39 ST. LOUIS U. L.J. 1163, 1164 (1995) ("Undergirding First Amendment constriction of defamation actions has been the economics of a typical defamation action: normally, an individual plaintiff has sued a large, corporate media entity.").

19. 376 U.S. 254 (1964). Prior to 1964, defamatory statements were outside the scope of the First Amendment's protection. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (including defamation within the category of unprotected speech).

20. Although most libel suits are brought against the media, the "power" of the media vis-à-vis the plaintiff should not be overstated. Most libel plaintiffs are educated and prominent members of their communities. *See* Randall P. Bezanson et al., *The Economics of Libel*, *in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 21, 23 (Everette E. Dennis & Eli M. Noam eds., 1989). Although *Sullivan* involved a relatively powerful media defendant, the jury's verdict in the case was $3 million, an enormous sum in 1964. *See* ANTHONY LEWIS, MAKE NO LAW 14 (1991). By the time the Supreme Court decided the case, libel actions threatened to silence media reporting on the civil rights movement. *See Sullivan*, 376 U.S at 277-78 (noting that, under state libel actions, newspapers could be faced with such large judgments that "those who would give voice to public criticism" would be effectively silenced). *Sullivan* also involved several nonmedia defendants in addition to the *New York Times*, and the logic of the decision ap-

oped was therefore responsive to the culture of the institutional press[21] and its need to deliver information quickly without risking crippling liability for minor mistakes of fact.[22]

It is little wonder that this same jurisprudence may not be responsive to the emerging institutional culture—or, more appropriately, cultures[23]—of the Internet. Although Internet communications are almost invariably "written" communications, they lack the formal characteristics of written communications in the "real world."[24] In the real world, the author is separated from her audience by both space and time, and this separation interposes a formal distance between author and audience, a distance reinforced by the conventions of written communication. Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed.[25] Indeed, in many fora, speed takes precedence over all other values, including

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plied equally to them all. *Sullivan* held that a public official may not recover for defamatory statements about his conduct while in office absent a showing that the defendant published the defamatory statements with actual malice, i.e., knowledge or reckless disregard of their falsity. *See id.* at 279-80. Nonetheless, a recurring issue since *Sullivan* has been whether nonmedia speakers receive the same protection as media speakers, suggesting that the prime concern of the First Amendment is protection of the media. *See infra* Part II.C and sources cited therein; *see also, e.g.*, Katherine W. Pownell, Comment, *Defamation and the Nonmedia Speaker*, 41 FED. COMM. L.J. 195, 197-98 (1988) (noting that, although most lower courts have extended constitutional protections to nonmedia defendants when the plaintiff is a public figure or public official, the picture is less clear when the plaintiff is a private figure).

21. In other words, one might argue that defamation has been adapted to the demands of "print culture" rather than "Net culture." *See* M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1684 (1995) ("Computer networks, interactive machines, new modes of visual communication, and hypertext expand individual and group opportunities for working with information and, in the process, build an environment that contrasts significantly with 'print culture.'"). The adaptation of First Amendment doctrine to print culture is logical, since "most libel suits involve the mass media, usually newspapers." RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS 27 (1987).

22. *See generally* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 579-83 (1991) (arguing that freedom of speech is necessary to protect the wide dissemination of important information to the public).

23. This Article discusses only the culture of the financial bulletin boards. Different discussion fora have different cultures, even on the Internet. As my friend and former student Rebecca Newton Clarke has pointed out, the discussion group *alt.sewing* has completely different conventions governing the range of appropriate comments than does the discussion group discussion group *alt.sex*. It is important for courts to take account of these varying conventions in determining whether a statement is defamatory, since these conventions aid one in determining how any particular comment is to be interpreted. *See infra* notes 226-29 and accompanying text.

24. *See infra* Part II.B.

25. *See* Ian C. Ballon, *The Law of the Internet: Developing a Framework for Making New Law*, *in* FIRST ANNUAL INTERNET LAW INSTITUTE 11, 17-18 (PLI Patent, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-482, 1997).

cyberspace, millions of people worldwide can gain access to it.[32] Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again.[33] The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie."[34] The problem for libel law,[35] then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse. This Article attempts to solve this problem and, in the pro-

32. *See* Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1154 (1996) ("In cyberspace, the power to defame is unprecedented.").

33. The extraordinary persistence of certain Internet rumors illustrates this point. *See* Hadley, *supra* note 31, at 495 (discussing a "bizarre hoax that flooded thousands of e-mail boxes" and misattributed a graduation speech to Kurt Vonnegut). An Internet rumor that the clothing designer Tommy Hilfiger had insulted African-Americans during an interview on Oprah Winfrey's show reached millions of people, despite the fact that Hilfiger never appeared on the show, much less made the remarks attributed to him. *See Designer Hilfiger Disputes Net Rumors of Racism*, USA TODAY TECH. REP. (visited Jan. 21, 2000) <http://www.usatoday.com/life/cyber/tech/cta109.htm> (on file with the *Duke Law Journal*). Furthermore, the rumor persisted long after it had been refuted, and even now many Internet users may not know that it has been debunked.

34. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974); *accord* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971) (plurality opinion) ("[I]t is the rare case where the denial overtakes the original charge.").

35. A product disparagement action (also known as an action for injurious falsehood) is very similar to a libel action. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 962-63 (5th ed. 1984) (explaining that the tort of injurious falsehood is known by many other names, including "slander of goods" and "trade libel"); RESTATEMENT (SECOND) OF TORTS § 623A (1977) [hereinafter RESTATEMENT] (using the term "injurious falsehood"). The *Restatement* states that an action for "injurious falsehood" arises when a speaker "publishes a false statement harmful to the interests of another" that causes pecuniary losses to the other and the speaker (a) "intends for publication of the statement to result in harm . . . or either recognizes or should recognize that it is likely to do so," and (b) the speaker "knows that the statement is false or acts in reckless disregard of its truth or falsity." RESTATEMENT, *supra*, § 623A; *accord* KEETON ET AL., *supra*, § 128, at 964 (noting the difficulties of distinguishing between "personal defamation of the plaintiff on the one hand and disparagement of his property on the other"); Lisa Magee Arent, *A Matter of "'Governing' Importance": Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 IND. L.J. 441, 445 (1992) (arguing that the same constitutional standards should be applied to both business defamation and product disparagement actions); Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 904 (1989) (noting that business defamation actions are designed to protect reputation, whereas disparagement (or injurious falsehood) actions protect only economic interests). Although the analysis offered in this Article responds specifically to libel actions, it should be equally applicable to product disparagement actions.

cess, to assess the proper role for defamation law in "civilizing" discourse in cyberspace.

Part I examines a perplexing feature of the new Internet libel suits: why do plaintiffs wish to sue John Doe when they can have no hope of recovery? As this part argues, plaintiffs find bringing suit worthwhile because of the distinctive nature of libel actions, which allows plaintiffs to pursue symbolic goals regardless of any monetary award. Yet, while it might be tempting to characterize all of these new suits as Internet SLAPPs (i.e., Strategic Lawsuits Against Public Participation)[36] brought by plaintiffs solely to harass and to silence their critics, this characterization ignores the power that the Internet gives irresponsible speakers to damage the reputations of their targets and underestimates the potential benefits that defamation law may bring to Internet discourse.

Part II argues that, despite the potential benefit, strict application of existing law threatens to chill unduly the ordinary John Does who frequent online discussion fora and, by doing so, threatens the Internet's promise as a medium for revitalizing the "marketplace of ideas"[37] metaphor that lies at the heart of First Amendment theory. Part II appraises John Doe's contribution to public discourse and concludes that it warrants substantial, though not unlimited, First Amendment "breathing space" to guarantee its survival.

Existing First Amendment protections, however, are inadequate to prevent corporations from intimidating John Doe into silence, at least so long as these protections do not recognize the unique culture of the Internet message boards. Part III therefore contends that the constitutional privilege for nonfactual expression (the "opinion privilege") may be a viable defense against the use of defamation law to silence John Doe, but only if courts are willing to adapt the privilege to the unique social context of cyberspace. The Article concludes with a plea for the Supreme Court to remedy the deficits in its defamation jurisprudence and gives practical guidance to lower courts that wish to protect John Doe in the likely event that this plea goes unheeded.

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36. For a discussion of SLAPPs, see *supra* note 11.

37. *See infra* notes 195-203 and accompanying text (discussing the origins and significance of the phrase).

I. SUING JOHN DOE

It is easy to portray the recent rash of libel actions against Internet users[38] as David versus Goliath battles, or even perhaps as Internet SLAPP suits, used by big corporations to intimidate their critics into silence. After all, these suits almost inevitably involve wealthy and powerful plaintiffs suing anonymous individuals for speaking out on matters of public interest. However, upon closer examination, this characterization is too facile to capture the complex issues raised by these new suits.

A. HealthSouth v. Krum *and the New Internet Libel Cases*

Consider the case of *HealthSouth Corp. v. John Doe*,[39] which later became *HealthSouth Corp. v. Krum*.[40] There could hardly be a less sympathetic John Doe defendant than Peter Krum. Peter Krum was a disgruntled former employee of HealthSouth,[41] a publicly traded corporation that operates rehabilitative health care facilities.[42] Posting under the name "I AM DIRK DIGGLER," a reference to

38. In addition to the John Doe suits that are the focus of this Article, libel suits also have arisen over "gripe sites"—sites in which customers, students, former employees, business associates, and others vent their grievances on a website. *See, e.g.*, Eric Bailey, *California and the West: Feud with Officer Pursued Online*, L.A. TIMES, Feb. 17, 1999, at A3 (discussing a suit brought by a police officer against a woman who, having been jailed for speeding, later posted allegedly defamatory statements on a website); Kathleen Parrish, *Teacher Sues Boy, Parents*, ALLENTOWN MORNING CALL, Nov. 6, 1998, at B1 (discussing a defamation suit brought by a teacher against a student and his parents for derogatory remarks posted on the student's website); Robert Trigaux, *Web Sites Aid Let Consumers Publicly Vent Gripes Against Companies*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 2, 1999, *available in* LEXIS, News Library, KRTBUS File (discussing a suit brought by U-Haul against a disgruntled customer who complained about U-Haul on a website). The *U-Hell Website* details U-Haul's lawsuit against *U-Hell*'s creator. *See* Osborne, *supra* note 10.

Yet, other libel suits arise when someone appropriates a plaintiff's online identity and posts hostile messages to others. *See* Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557, 559 (N.Y. App. Div. 1998) (involving a Boy Scout who sued after "John Doe 1" posted a "'vile and obscene' e-mail message in the name of the plaintiff"); Jay Croft, *Lawsuit Alleges Cyberlibel*, ATLANTA CONST., Apr. 5, 1999, at B1 (stating that plaintiff Ronald Attkisson filed suit against a former employee, Scott Gerstein, who had created a "bogus profile to make . . . postings" on *Yahoo!* message boards that would be attributed to the plaintiff). These "appropriation of identity" suits present a set of concerns different from the ones I shall be discussing above, since the only possible motivation of the defendant was to harm the person whose identity was appropriated.

39. *See HealthSouth Files Libel Suit for Statements Made on Web*, SUNDAY PATRIOT-NEWS, Nov. 1, 1998, at B5 [hereinafter *HealthSouth Files Libel Suit*].

40. Complaint, HealthSouth Corp. v. Krum, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998).

41. *See* Cook, *supra* note 6.

42. *See* Complaint ¶ 6, *HealthSouth Corp.*

the well-endowed porn star in the 1997 movie *Boogie Nights*,[43] Krum verbally savaged HealthSouth, its CEO Richard Scrushy, and even Scrushy's wife, Leslie, on a *Yahoo! Finance* message board dedicated to discussion of the corporation.[44] Krum's postings ranged from relatively innocuous statements about HealthSouth's "self-serving" management[45] to accusations that Richard Scrushy was "bilking . . . [M]edicare reimbursement."[46] The most egregious postings by Krum were those that discussed, in salacious detail, an affair "I AM DIRK DIGGLER" was allegedly having with Leslie Scrushy.[47] Krum, for example, wrote, "I am dirk diggler and I have what [Richard] Scrushy wants. Too bad I keep giving it to his new wife . . . [and] [a]s for those of you who disapprove of my crowing about sexual liasons [sic] with Dick's wife, lighten up. I'm practicing safe sex."[48] Krum seemed to relent from his vicious attacks at one point, stating that he would be "'toning down'"[49] his statements because he "felt blessed" that his wife was expecting.[50] Yet, just a week later, Krum was back to his old tricks,[51] which ultimately prompted HealthSouth to sue for libel and commercial disparagement and Richard and Leslie Scrushy to sue for libel and intentional infliction of emotional distress.[52]

There is no real question that the statements at issue in *Krum* were at least facially defamatory. A defamatory statement is a false statement that harms or tends to harm[53] an individual's reputation in

43. Plaintiff's complaint alleged that Krum "purposely chose[] as his screen name 'I AM DIRK DIGGLER,' thereby intending to reflect the persona of a violent, amoral, and sexually aggressive drug addict from the recent and popular movie 'Boogie Nights.'" *Id.* ¶ 10. An alternative explanation might be that Krum chose that screen-name to imply that he was similarly well-endowed.

44. *See id*. ¶¶ 3-4.

45. *Id*. ¶ 13.

46. *Id.*

47. *See id.*

48. *Id.*

49. *See* Gibb, *supra* note 8.

50. *Id.*

51. *See id.*

52. *See id.*

53. *See* RESTATEMENT, *supra* note 35, § 559 cmt. d ("To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect."). The abstract nature of this inquiry into the "tendencies" of words is related to the defamation doctrine of presumed damages. *See* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 751 (1984) (criticizing the doctrine of presumed damages); Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 6 n.20 (1996) (explaining that, under the doctrine of presumed damages, "[i]f the court finds that the statement [has] the *tendency* to harm reputation, the plaintiff may recover

the eyes of his community.[54] Accusations of dishonesty, criminality, and adultery are prototypical defamatory statements.[55] The real issue raised by the case is what the plaintiffs hoped to gain by suing "I AM DIRK DIGGLER." HealthSouth operates almost two thousand rehabilitation centers in the United States,[56] Australia, and the United Kingdom, with recent annual revenues in the billions.[57] Its CEO, Richard Scrushy, makes $13 million a year.[58] Even before *Yahoo!* revealed Krum's identity, the plaintiffs could have had no expectation that "I AM DIRK DIGGLER" would have the resources necessary to satisfy a defamation judgment. As it turned out, Krum was a food-service worker at Penn State University, who lost his job (and his annual salary of $35,000) once the plaintiffs filed their suit.[59] Thus, even if one concedes, as one must, that Peter Krum was an embittered and malicious former employee engaged in what might be thought of as a new form of industrial sabotage, it is not entirely clear what HealthSouth stood to gain by suing him.

B. The Practical Effect of Section 230 of the Communications Decency Act

Obviously, plaintiffs would prefer to sue defendants with deeper pockets than John Does typically have. Indeed, the first generation of Internet libel actions sought to impose liability on Internet service providers ("ISPs") for defamatory messages posted by their subscribers.[60] ISPs are logical targets for defamation suits. Suing the ISP frees

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substantial damages without any proof whatsoever of actual harm"). *See generally* KEETON ET AL., *supra* note 35, § 111, at 774, 780-83 (providing examples of statements that have been found either defamatory or nondefamatory, based on "whether the words are reasonably capable of a particular interpretation").

54. *See* RESTATEMENT, *supra* note 35, § 559 (defining a defamatory statement as one that "harm[s] the reputation of another [so] as to lower him in the estimation of the community or . . . deter[s] third persons from associating or dealing with him").

55. *See* SANFORD, *supra* note 7, § 4.13, at 132.11 to 132.14 (2d ed. 1991) (listing "red flag" words likely to trigger defamation suits).

56. *See* Gibb, *supra* note 8 (1800 centers); *HealthSouth Files Libel Suit*, *supra* note 39 (2000 centers).

57. *See* Gibb, *supra* note 8 ($2.8 billion); *HealthSouth Files Libel Suit*, *supra* note 39 ($3 billion).

58. *See* Oliver August, *WorldCom Chief Gets Pounds 10M for MCI Deal*, TIMES (London), Apr. 25, 1998, at 27.

59. *See* Moss, *supra* note 4.

60. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *Stratton Oakmont* was not the first Internet libel action, but it was the first decision that posed any realistic threat of imposing liability on ISPs based on content posted by third parties. The facts of *Stratton Oakmont* are almost identical to the facts of the John Doe suits dis-

cussed above. Stratton Oakmont, a securities investment firm, and its president, Daniel Porush, sued for libel after an unknown user of a financial bulletin board made vague accusations that the plaintiffs had committed criminal and fraudulent acts in connection with an initial public stock offering. *See id.* at *1 (alleging that the poster defamed plaintiff by alleging that the IPO was a "major criminal fraud" and a "100% criminal fraud," that the president of Stratton Oakmont was "soon to be proven criminal," and that the firm was a "cult of brokers who either lie for a living or get fired"). The John Doe in *Stratton Oakmont* evidently used a former employee's access code to post the message. *See* Robert B. Charles & Jacob H. Zamansky, *Liability for Online Libel After* Stratton Oakmont, Inc. v. Prodigy Services Co., 28 CONN. L. REV. 1173, 1189 n.68 (1996).

Despite the factual similarities, however, the *Stratton Oakmont* decision teaches little about how to resolve the John Doe cases. The key issue in *Stratton Oakmont*, which was decided on a motion for partial summary judgment, was whether Prodigy was a "publisher" or a "distributor" for purposes of defamation liability. *See Stratton Oakmont*, 1995 WL 323710, at *1. A second issue was whether its bulletin board moderator, who was also a defendant in the suit, was its agent for purposes of defamation liability. *See id.* "Publisher" and "distributor" are terms of art in defamation law. At common law, a publisher would be strictly liable not only for originating a defamatory statement but also for repeating or otherwise republishing a third party's defamatory statements. *See* RESTATEMENT, *supra* note 35, § 578. A distributor, on the other hand, would be liable only for "distributing" the defamatory communications of third parties if the distributor knew or had reason to know of the defamatory content. *See id.* § 581 ("[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."). The reason for the distinction was simple. Publishers, like newspapers and broadcasters, have complete editorial control over the material they publish, and therefore it is fair to hold them liable for it. Distributors, such as bookstores, libraries, and newsstands, have no practical ability to monitor every publication they distribute, and it is therefore unfair to impose liability absent notice of defamatory content and some type of fault. *See generally id.* § 581 cmts. d, e, f & g. Because the facts of *Stratton Oakmont* suggested at most negligence on the part of the ISP, the plaintiff needed the court to treat the ISP as a publisher in order to have any hope of recovery. But the problem for the *Stratton Oakmont* court, and for the two other courts that had dealt with the issue, was that ISPs do not fit neatly into defamation's traditional categories. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (holding that an ISP that exercised no editorial control over the online newsletter in which the allegedly defamatory statements appeared should not be held liable as the "publisher" of the defamatory statement). *See generally* RESTATEMENT, *supra* note 35, § 581 cmts. d, e, f & g (describing news dealers, bookstores, libraries, telegraph companies, and radio and television broadcasters as those capable of transmitting defamatory material); SANFORD, *supra* note 7, § 2.4, at 48.14 (2d ed. 1991) (acknowledging the difficulty of distinguishing between the "'publisher/republisher/distributor/common carrier' designation"); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace*," 55 U. PITT. L. REV. 993, 1001 (1994) (noting the difficulty of applying traditional analogies to resolve Internet defamation cases). Some ISPs exercise a fair amount of editorial control, others exercise almost none, and still others exercise control in only some fora. The *Stratton Oakmont* court therefore deemed it appropriate to examine the degree of editorial control exercised by Prodigy in the case at hand rather than to adopt a categorical rule for ISPs. Applying this approach, the court found that Prodigy should be treated as a publisher rather than as a distributor. *See Stratton Oakmont*, 1995 WL 323710, at *5. Unlike other ISPs, which do not purport to exercise control over the content they provide to subscribers, Prodigy explicitly marketed itself as a "'family oriented' computer service" based at least in part on its policy of censoring bulletin board messages for offensive content. *Id.* Moreover, the court stressed, Prodigy not only used screening software to delete offensive messages; it also "created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes." *Id.* The court therefore held that, although ISPs should normally be categorized as distributors, Prodigy's "own policies, technology and staffing decisions . . . have altered the scenario and mandated the finding that it is a publisher." *Id.*

plaintiffs from having to discover the identity of the person who posted the message, and ISPs have plenty of money to satisfy defamation judgments.[61] Moreover, ISPs have at least some of the characteristics of a traditional publisher, including, in some cases, the ability to edit content supplied by a third party. Logical or not, Congress largely foreclosed access to these deep-pocket defendants when it passed section 230 of the Communications Decency Act ("CDA").[62] Subsection 230(c)(1) provides that "[n]o provider or user of an interactive computer service[63] shall be treated as the publisher or speaker of any information provided by another information content pro-

61. *See* 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, 174-75 (1997) (listing "the most significant players in the game [as] AOL, a publicly owned company with a market value of $6.5 million; Prodigy . . . ; and Microsoft Network, which is owned by Microsoft Corp., a company with a market value of $148 billion"). In addition to guaranteeing a deep-pocket defendant, any judgment the plaintiffs received would have signaled ISPs to control carefully the contents posted on their message boards.

62. 47 U.S.C. § 230 (Supp. III 1999). The CDA is Title V (§§ 501-09) of the Telecommunications Act of 1996. *See* Act of Feb. 8, 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.). Section 230 was at least partially a response to the perceived threat to Internet discourse posed by the first generation of Internet libel suits, and more specifically to the threat posed by *Stratton Oakmont*, which is discussed more extensively *supra* note 60. The problem with the *Stratton Oakmont* decision (at least as some members of Congress saw it) was that it protects ISPs that take no steps to curb offensive or defamatory content, and it penalizes ISPs like Prodigy that try to curb offensive and defamatory content but fail. *See* H.R. CONF. REP. NO. 104-458, at 194 (1996), *reprinted in* 1996 U.S.S.C.A.N. 124, 207-08 (suggesting that the CDA was meant to overturn the *Stratton Oakmont* decision). Based on a formalistic application of defamation law, the *Stratton Oakmont* decision makes sense. Increased editorial control brings with it the responsibility to monitor for defamatory content, and therefore it is fair to impose liability on those ISPs that, like Prodigy, choose to exercise editorial control. Of course, this reasoning ignores the fact that an ISP that has the same ability to exercise editorial control as Prodigy but chooses not to will be treated as a distributor. Presumably, as the court noted, the benefit Prodigy receives from customers who choose its service because it exercises editorial control offsets the detriment of being treated as a publisher for defamation purposes. *See, e.g.*, Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1115-33 (1996) (suggesting that in the wake of the *Stratton Oakmont* decision, ISPs should "abdicate responsibility" to avoid liability). *But see* Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1073 (1997) ("[I]f on-line services heed the commentators' warnings and stop exerting editorial control over their on-line services, the general public's refusal to tolerate disorganized virtual environments will lead to stagnation, which ultimately can devastate the on-line services industry.").

63. The CDA of 1996 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." 47 U.S.C. § 230(e)(2) (Supp. III 1999). America Online, CompuServe, and Prodigy, which operate bulletin boards, are typical examples.

vider."[64] Despite the broad wording of subsection (c)(1), the title of the subsection (c) suggests that its purpose is to protect "Good Samaritans," as the Act dubbed them,[65] by shielding them from liability when they attempt to censor offensive material[66] on the Internet.

Both the title of the Act and its legislative history suggest that Congress meant to establish a policy that ISPs would not be subject to liability as "publishers" of content posted by third parties just because they exercise a limited degree of editorial control over content.[67] But court decisions interpreting subsection 230(c) have broadened its ambit far beyond merely protecting "Good Samaritan" editorial control. As interpreted, section 230 gives ISPs complete immunity from liability for defamatory content initiated by third parties, even if the ISP consciously decides to republish the defamatory content.[68] The practi-

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64. *Id.* § 230(c)(1). Subsection 230(c)(2) further provided as follows:

> No provider or user of an interactive computer service shall be held liable on account of—
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> >
> > (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to materials described in paragraph (1).

65. Subsection (c) is entitled "Protection for 'good samaritan' blocking and screening of offensive material." *Id.* § 230(c).

66. *See id.*

67. A logical corollary might be that ISPs should get the benefit of the more beneficial distributor standard. *See* James B. Speta, *Internet Theology*, 2 GREEN BAG 2d 227, 230-31 (1999) ("[T]he [CDA] and legislative history can be read to limit [section 230(c)(1)'s] exemption to Internet service providers that do no more than provide access services (*i.e.,* dumb pipes) . . . ."). *But see* Luftman, *supra* note 62, at 1074 n.22 (noting that the language of the Act "does not address restrictions on access to libelous material" and that the focus of the Act was to protect screening for sexual materials). Unfortunately, this interpretation has not held sway.

68. In *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), for example, the court ruled that Congress had expressly granted immunity to ISPs, including those "aggressive[ly] . . . making available content prepared by others." *Id.* at 52. And in *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998), a district court held that ISPs are immune from defamation liability under the CDA for failing to remove defamatory content posted by a third party, even after the ISP has been notified of the defamatory content. *See id.* at 1137. In *Doe v. America Online, Inc.*, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997), the plaintiffs asserted a variety of claims against AOL for failing to prevent its service from being used to market child pornography, even after AOL was "on notice" of the criminal use of its services. *See id*. at *1. The pornographic materials at issue contained images of the minor plaintiff taken when he was only 11 years old. *See id.* at *2-3. Although the plaintiffs sought to hold AOL liable as a distributor rather than as a publisher, the Florida circuit court followed *Zeran* in holding that all of plaintiff's claims were barred by section 230 of the CDA. *See id.* at *4 ("[T]o hold AOL liable for negligently 'distributing' . . . chat room statements, as Doe seeks, would treat AOL as the 'publisher or speaker' of those statements in

cal effect of these interpretations of section 230 of the CDA is to leave Internet defamation victims with no deep pocket to sue. The defamed plaintiff can no longer sue the intermediary who republished a defamatory communication. Instead, the plaintiff must go to the source and sue the person who originated the defamatory communication, even if that person is an unknown John Doe.

C. The Nonmonetary Benefits of Libel Actions

Thus, one answer to the question of why sue John Doe is that he is the only person left to sue.[69] But this is an inadequate answer. Most tort actions will never be pursued if it is clear that the potential defendant lacks the resources to satisfy a judgment.[70] Most plaintiffs do not have the money to litigate based on principle,[71] and, even in contingency-fee cases most plaintiffs' attorneys realize that 33% (the typical contingency fee) of zero is still zero.[72]

The sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money.[73] If they were, the tremendous obstacles to recovery would almost certainly make plaintiffs (and their lawyers) conclude that the game was not worth the candle. Defamation plaintiffs often find their suits derailed at the very early stages, with never so much as a mention of the First

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violation of section 230."). The appellate court agreed with the trial court's analysis. *See* Doe v. America Online, Inc. 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998) (holding that the CDA immunized AOL from being held liable as a "distributor" of child pornography), *rev. granted*, 729 So. 2d 390 (Fla. 1999).

69. *See* Greg Miller, *"John Doe" Suits Threaten Internet Users' Anonymity*, L.A. TIMES, June 14, 1999, at A1 ("Companies that file the 'John Doe' suits say the tactic is one of their few weapons against what they consider digital defamation.").

70. Whence arises the adage that I learned in law school: "You can't get blood from a turnip."

71. *See* BEZANSON ET AL., *supra* note 21, at 69 (stating that 73% of libel plaintiffs use a contingency fee arrangement to pursue their libel actions).

72. As one group of researchers noted, many conventional analyses of legal problems rest on three assumptions:

> [F]irst, that parties to a dispute are motivated chiefly by money; second, that the parties' actions are based on economically rational decisions about financial risks, costs, and benefits of recovery in litigation; and third, that negotiation and litigation are governed by an economic calculus shaped by the doctrines and rules of liability within the formal legal system.

Bezanson et al., *supra* note 20, at 21. Libel litigation often defies the "conventional expectations of economic rationality." *Id*. at 22.

73. Or, rather, they are not really about recovering money damages, which is a different issue. *See infra* notes 103-09 and accompanying text.

Amendment.[74] The common law elements of defamation,[75] which have been set for centuries,[76] remain "filled with technicalities and traps for the unwary."[77] A plaintiff must begin her suit by proving, at a minimum,[78] that the defendant made a defamatory communication about the plaintiff to a third party.[79] What she must prove next depends on whether the communication was communicated orally or whether it was written. If the defamation was oral (i.e., slanderous), the plaintiff will have to prove that the defendant's slander caused her economic or pecuniary loss, unless the slanderous allegation falls into one of the four narrowly defined categories of slander per se.[80] If the defamation was written (i.e., libelous), the plaintiff ordinarily does not have to prove that it caused her any economic loss, unless the defamatory meaning was not obvious from the statement itself.[81] Even if a plain-

74. *See* MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 196 (5th ed. 1995) (noting that, because many defamation cases are defeated by state law defenses, federal law issues are never raised).

75. It is important to note that defamation is a tort and that therefore states may vary in defining it. For an example of an unusual state variation, see the Illinois "innocent construction" rule, discussed in *Barter v. Wilson*, 512 N.E.2d 816, 818-20 (Ill. App. Ct. 1987). I attempt here to give merely a thumbnail sketch of the typical obstacles a defamation plaintiff must face in order to recover.

76. *See* BEZANSON ET AL., *supra* note 21, at 1 (noting that libel "is largely judge-made (or common law) in origin"). For a history of defamation, see generally R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

77. David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1285 (1942).

78. *See* ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 2.1, at 63 (2d ed. 1994) ("It was once standard operating procedure to begin a discussion of the law of defamation by stating the elements of a cause of action for libel and slander. That is no longer easy, not since the Supreme Court 'constitutionalized' the torts.").

79. *See* RESTATEMENT, *supra* note 35, § 558 (listing the elements as modified by constitutional law); DON R. PEMBER, MASS MEDIA LAW 147 (2d ed. 1981) (listing the common law elements). At common law, the defendant was strictly liable for publishing defamatory statements, and the falsity of the underlying statement was presumed. *See* KEETON ET AL., *supra* note 35, § 116, at 839. Today, the First Amendment requires plaintiffs to prove fault and falsity in almost all cases. *See infra* notes 85-94 and accompanying text.

80. Defamatory communications causing pecuniary harm constitute "special harm." *See* RESTATEMENT, *supra* note 35, § 575 cmt. b (defining special harm as "the loss of something having economic or pecuniary value"). The plaintiff must prove special damages unless the oral communication was "slanderous per se," that is to say, unless it consisted of (1) allegations that the plaintiff had engaged in criminal behavior, (2) allegations that the plaintiff had contracted a "loathsome disease," (3) allegations that would injure the plaintiff in his "trade, business, profession, or office," or (4) allegations that the plaintiff was unchaste, although this category traditionally applied only to female plaintiffs. SACK & BARON, *supra* note 78, § 2.7.2, at 129-30.

81. *See* FRANKLIN & ANDERSON, *supra* note 74, at 218 (noting that some states do not require proof of special damages if a statement is libelous, but that others states require plaintiffs to prove special damages if the defamatory meaning is not obvious on the face of the statement). A statement that is defamatory on its face is deemed "libelous per se." For an explana-

tiff is able to prove the elements of her case, she must still overcome a host of common law privileges designed to protect reports of government meetings,[82] job recommendations,[83] and other types of speech deemed worthy of extra protection from defamation liability.[84]

In the unlikely event that the plaintiff makes it past the high barriers posed by tort law, First Amendment obstacles will prove almost insurmountable.[85] What these obstacles are depends on a number of factors: the identity of the plaintiff, the identity of the defendant, and the type of speech at issue.[86] Public officials and public figures must prove that the defendant's statements were false and that they were made intentionally or with reckless disregard of their falsity, at least where the speech at issue deals with a matter of public concern.[87] Private figures face a different set of requirements. Private figures suing for speech on a matter of public concern must prove falsity[88] and neg-

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tion of the differences between slander and libel and the confusion engendered by the terms libel per se and slander per se, see SACK & BARON, *supra* note 78, § 2.7.3, at 132-33.

82. The "fair and accurate report" privilege and its justifications are discussed extensively in *Medico v. Time Inc.*, 643 F.2d 134 (3d Cir. 1981). *See generally* DAVID A. ELDER, THE FAIR REPORT PRIVILEGE (1988) (explaining the rationale, requirements, and applicability of the fair report privilege).

83. A version of this privilege is codified in the California Civil Code, which provides:

> A privileged publication or broadcast is one made . . . . [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) *who is requested by the person interested to give the information*.

CAL. CIV. CODE § 47(c) (West 2000) (emphasis added).

84. *See* BEZANSON ET AL., *supra* note 21, at 1-2 ("The [common law] privileges were designed to protect expression in settings of special importance . . . ."). *See generally* FRANKLIN & ANDERSON, *supra* note 74, at 221-24 (discussing the common law privileges).

85. I refer here to the First Amendment to the United States Constitution, but it is important to note that state constitutional law may also impose limits on defamation actions. *See, e.g.*, West v. Thomson Newspapers, 872 P.2d 999, 1015 (Utah 1994) (construing Article I, Section 15 of the Utah Constitution as giving a state constitutional right to express one's opinion, thereby "circumscrib[ing] the reach of state defamation law"); *see also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES ¶ 5.06 (1993) (surveying cases in which state constitutional provisions for freedom of expression were invoked to defend defamation actions); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984) (arguing that states should first decide whether state law is violated before looking to federal law).

86. *See* Rodney A. Smolla, Dun & Bradstreet*,* Hepps*, and* Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1547, 1567-70 (1987); *see also* SACK & BARON, *supra* note 78, § 2 at 63 (noting that "the jurisdiction whose law applies" is also a crucial factor in determining the requirements for a cause of action).

87. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 726 (1964).

88. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986).

ligence (at least) on the part of the defendant in order to recover.[89] Private figures suing for speech on private matters may not face any First Amendment hurdles,[90] but the Supreme Court's decisions make at least one thing clear: truly private figure/private concern cases are likely to be few and far between.[91] As if these obstacles were not enough, a host of other constitutional privileges for hyperbole,[92] satire,[93] and the like stand as independent obstacles to recovery.[94]

Empirical studies confirm that the practical effect of these labyrinthine doctrines is to make it almost impossible for any plaintiff to succeed in a defamation action.[95] Statistics show that only 13% of plaintiffs ultimately prevail in libel litigation,[96] and, as one commentator has observed, the few plaintiffs who do prevail owe more to good fortune than "to their virtue, their skill, or the justice of their cause."[97] However, even these grim statistics do not indicate that it is always economically irrational to sue for defamation; after all, defamation

89. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The Court has never decided whether the *Gertz* requirements apply to nonmedia defendants. As a practical matter, many private plaintiffs will still choose to prove actual malice in order to obtain presumed and punitive damages. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 502 (1991).

90. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760-61 (1985) (plurality) (holding that private plaintiffs may recover presumed and punitive damages without proof of actual malice). Justice White noted in his concurrence that "[i]t must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this." *Id*. at 774 (White, J., concurring). The Supreme Court, however, never explicitly adopted this position.

91. *See, e.g.*, *id.* at 775 (Brennan, J., dissenting) (suggesting that the lack of a consensus in the plurality opinion indicates that the case should be restricted to its rather peculiar facts).

92. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 1-2 (1990); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 264-65 (1974); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 6 (1970); *infra* Part III.A-B.

93. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 46-47 (1988) (holding that public officials cannot recover damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature without a showing of actual malice).

94. *See, e.g.*, *Milkovich*, 497 U.S. at 20 (1990) (reading the Court's prior cases as providing constitutional protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" (quoting *Falwell*, 485 U.S. at 50)).

95. *See* BEZANSON ET AL., *supra* note 21, at 3, 239-40 (concluding, after analyzing almost every reported defamation case decided between 1974 and 1984 and conducting surveys of libel plaintiffs and libel defendants, that "[t]hose who bring suit confront a frustrating obstacle course, and they almost always lose").

96. *See id.* at 119. The figure for public figure corporations was even more grim: they succeeded in just 5% of cases. *See id*. A similar study of cases decided between January 1976 and mid-June 1979 suggested that in suits against nonmedia defendants, plaintiffs prevailed in only 12% of cases, and against media defendants in only 5%. *See* Franklin, *supra* note 12, at 476.

97. SACK & BARON, *supra* note 78, at xxix (from Sack's preface to the first edition).

verdicts reach millions of dollars,[98] which may be large enough to make it worthwhile to gamble on a large recovery.[99]

But the slim chance of a damages award does not explain why plaintiffs sue in most defamation cases,[100] and it certainly cannot explain why plaintiffs sue in Internet libel cases. Instead, what the evidence suggests is that libel plaintiffs often sue because they believe that the social and psychological benefits of suing make it worthwhile, even if they never recover a money judgment from the defamer.[101] Plaintiffs often seek vindication, and bringing suit provides a means—perhaps the only means available—to announce to the world that the defendants' statements were false.[102] On the other hand, plaintiffs may be seeking an even simpler goal: they may just want the defamation to stop, and a defamation suit is the only legal tool available to accomplish this goal. Thus, to say that the new Internet libel suits are brought for symbolic goals is not necessarily pejorative, particularly when a symbolic victory is the only kind available.

D. Why Corporations Sue John Doe

This symbolic aspect of bringing a defamation action is particularly evident in the John Doe cases, although corporate plaintiffs may be seeking a symbolic victory partially for financial reasons.[103] Many of these actions appear to be brought as merely one tool in a concerted public relations campaign. Corporations often issue press re-

98. *See* FRANKLIN & ANDERSON, *supra* note 74, at 340 (asserting that an examination of libel cases from the 1980s reveals that the median jury award was $200,000, but the average award was $1.5 million).

99. *See* Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167, 1167-68 (1995) (arguing that, while individual plaintiffs may sue for emotional or psychological reasons, corporations usually bring libel suits for business reasons).

100. *See* BEZANSON ET AL., *supra* note 21, at 28 ("The role money plays in plaintiffs' decision to sue for libel is complex. . . . [I]t does not appear to be the case that most libel plaintiffs see their suit principally as an opportunity to profit at the expense of the media.").

101. *See id.* at 162 (concluding that libel plaintiffs believe that they win by suing, because "[t]he act of suing, itself, represents a public and official form of response and denial, legitimating the plaintiff's claim of falsity"); *see also* David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1208 (1995) ("One of the things that distinguishes defamation litigation from most commercial litigation is the extent to which noneconomic motives (i.e., motives other than to receive compensation for economic loss caused by the alleged breach of duty) are operative.").

102. In traditional libel suits, plaintiffs' primary goals in bringing suit include restoring reputation, correcting what plaintiffs view as falsity, and exacting vengeance. *See* Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985).

103. *See* Redlich, *supra* note 99, at 1168.

leases announcing their decision to sue those who post on financial bulletin boards,[104] even though doing so gives more widespread publicity to the defendants' remarks than they received at the time they were posted.[105] The tendency to publicize the decision to file suit may be partly a function of the economic motivations that drive corporate plaintiffs to sue. Although corporations that sue John Doe may never recover money damages, they may still deem it economically rational to sue the pseudonymous posters who make negative statements about them on financial message boards. Corporate plaintiffs are at least partly motivated by the fear that negative statements on financial bulletin boards will drive down their stock price.[106] The stock market trades on information, and negative information shifts stock prices very quickly.[107] Hence, corporations must act quickly to offset the potentially negative effects of defamatory messages by offering an alternative version of events.[108] Indeed, failure to respond may itself be deemed an admission that the negative statements are true. Suing John Doe, as it turns out, is good for business to the extent that it

104. *See, e.g.*, *Americare Health Scan Files Libel Suit Against TCPI and Individuals over Anonymous Yahoo! Postings*, *supra* note 6 (reporting the filing of a libel suit based on unsubstantiated allegations of personal and professional wrongdoing); *Business Wire Files Suit for Fraud & Trademark Violations*, BUS. WIRE, Apr. 26, 1999, *available in* LEXIS, News Library, BWIRE File (reporting on a lawsuit alleging that three individuals used *Business Wire*'s press release distribution service to publicize a fraudulent investment opportunity); Technical Chemicals & Products, Inc., *Technical Chemicals & Products Files Defamation Lawsuit Against On-Line Posters* (visited Feb. 10, 2000) <http://www.businesswire.com/webbox/bw.031799/190761222.htm> (on file with the *Duke Law Journal*).

105. It is for this reason that lawyers traditionally have cautioned plaintiffs that pursuing an action for defamation may cause more harm than good, since it republishes the allegedly libelous statements to a different audience. *See, e.g.*, Redlich, *supra* note 99, at 1176 (advising corporations contemplating suing for defamation to consider the harm that may arise from republishing the defamatory statements).

106. *See* Moss, *supra* note 4 (discussing HealthSouth's attempt to sue anonymous detractors on its *Yahoo!* message board for defamation).

107. According to the efficient capital market hypothesis, new information about a security will immediately be reflected in its market price, and "any change in a security's price must be the result of new and unforeseen information (either about the security or the state of the world generally)." WILLIAM A. KLEIN & JOHN C. COFFEE, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 392 (6th ed. 1996); *see also* Redlich, *supra* note 99, at 1169:

> Of particular importance to a publicly held corporation is a defamation's impact upon financial markets. A defamation may lead to a dramatic drop in the market value of a company's stock. Moreover, since corporate transactions are often directly dependent on stock values, the consequential impact of a drop in share values can be enormous.

108. *See* Redlich, *supra* note 99, at 1170 (observing that corporations may engage in "media campaigns" to refute defamatory accusations).

sends a message to shareholders that the corporation is stable and strong.[109]

It may be no coincidence, then, that some corporations decide to bring suit for Internet libel when they are already taking a beating in the market for unrelated reasons. The chronology of Hitsgalore.com's decision to file a libel action,[110] for example, seems somewhat suspect. Hitsgalore.com, Inc., is an Internet company that provides a "business-to-business Web portal and search engine."[111] In 1998, Hitsgalore.com had a reported revenue of less than $10,000.[112] In March of 1999,[113] Hitsgalore.com entered a "reverse merger"[114] with another company to become a publicly traded over-the-counter ("OTC") security on the *OTC Bulletin Board*.[115] The move was a stunning success. Due to investor enchantment with Internet stocks,[116] the market

109. These suits may be part of a broader trend. *See* Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309, 310 (1993) ("Business entities have become increasingly inclined in recent years to institute litigation as a means of vindicating corporate reputation or economic interests when false statements have been made about their products, services, or commercial activities.").

110. *See* Complaint, Hitsgalore.com, Inc. v. Shell, No. 99-1387-CIV-T-26C (M.D. Fla. filed June 1999) (on file with the *Duke Law Journal*).

111. Benson, *Hitsgalore.com*, *supra* note 6; *see also* Complaint ¶ 6, *Hitsgalore.com*, No. 99-1387-CIV-T-26C:

> HITSGALORE is currently engaged in the business of an Internet, business-to-business search engine, and provides a searchable database for businesses bringing people ("hits") to their Internet websites. . . . The Company derives revenues from, *inter alia*, the sale of sponsorships, keyword bid and rank rights, audio banners, advertising and local city editions.

112. See Jeff Leeds, *Net Firm's Stock Plunges on News of Fraud Probe Regulation: Reports Surface That Hitsgalore.com's Founder Failed to Disclose, in SEC Filings, His Earlier Troubles at Another Firm*, L.A. TIMES, May 12, 1999, at C1. Another source put the company's reported revenue for 1998 at $20,000 and noted that its reported revenue in March of 1999 was $243,981. *See Hits Keep on Coming*, BUS. PRESS, Apr. 12, 1999, at 8.

113. The date of the "reverse merger" is contested. Plaintiff's complaint alleges that it took place in March, *see* Complaint ¶ 25, *Hitsgalore.com*, No. 99-1387-CIV-T-26C, but newspaper accounts placed it in February, *see* Don Benson, *Hits Just Keep Coming for Beleaguered Net Ventures; Fallout over Past Fraud Allegations Spurs Lawsuit, Poisons Stock Deal*, BUS. PRESS/CAL., May 24, 1999, at 2 [hereinafter Benson, *Hits Just Keep Coming*]; *Hitsgalore.com Asserts Recent Class Action Lawsuits Based on False and Misleading Bloomberg Report*, BUS. WIRE, June 16, 1999, *available in* LEXIS, News Library, BWIRE File; Leeds, *supra* note 112.

114. The company became publicly traded through a reverse merger with Systems Communication, Inc., in which that company acquired all of its stock. *See* Don Benson, *'Net Search Engine Locates Favor Among OTC Investors*, BUS. PRESS, Mar. 29, 1999, at 2.

115. *See* Complaint ¶ 29, *Hitsgalore.com*, No. 99-1387-CIV-T-26C; Leeds, *supra* note 112, at C1. Hitsgalore.com's common stock trades on the *OTC Bulletin Board* as "HITT." *See id.* ("The OTC Bulletin Board is a regulated quotation service that displays real-time quotes, last-sale prices, and volume information in over-the-counter securities (OTC) securities."). *See generally* KLEIN & COFFEE, *supra* note 107, at 382-92 (describing the NASDAQ and the OTC market).

116. *See* Robert Sobel, *Mania Milestones: Forget the Internet IPOs, What About Radish Oil Bubble?*, BARRON'S, Feb. 22, 1999, at 19 (discussing investor fascination with Internet stocks).

value of Hitsgalore.com leapt from $53 million to $1 billion in less than three months.[117] In March the stock was trading at $2.38.[118] By May 10, 1999, the stock was trading at $20.69 per share.[119] Hoping to capitalize on this tremendous success, the company announced plans to launch a nationwide advertising campaign.[120] But on May 11, the Cinderella story took an unhappy turn. *Bloomberg News* reported, apparently truthfully, that a principal shareholder and "founder" of Hitsgalore.com had had a run-in with the Federal Trade Commission ("FTC") over false and deceptive promises he had made to customers of an earlier Internet firm with which he was involved.[121] The report also implied, perhaps incorrectly,[122] that Hitsgalore.com improperly failed to disclose the FTC case to the Securities and Exchange Commission ("SEC").[123]

In the wake of the report, Hitsgalore.com's stock price cratered.[124] The bad press continued, and lawyers began announcing

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117. *See* Leeds, *supra* note 112, at C1.

118. *See* Benson, *Hitsgalore.com*, *supra* note 6.

119. *See id.*

120. *See* Don Benson, *Net Firm Hits Airwaves to Boost Value*, BUS. PRESS, May 10, 1999, at 1 (reporting that Hitsgalore.com announced the advertising campaign in the first week of May); *Hitsgalore.com to Launch National Radio Campaign on June 1, 1999*, BUS. WIRE, May 27, 1999, *available in* LEXIS, News Library, BWIRE File (reporting the launch of a national radio advertising campaign by Hitsgalore.com). Its stock price plummeted on May 12, 1999. *See* Leeds, *supra* note 112.

121. *See* Complaint ¶¶ 30-31, Hitsgalore.com, Inc. v. Shell, No. 99-1387-CIV-T-26C (M.D. Fla. filed June 1999). The plaintiffs conceded that the FTC had entered a default judgment in a civil lawsuit against a shareholder of the "pre-merger" company, Hitsgalore.com. *See id.* ¶ 21. The judgment ordered the shareholder to pay $613,110 in damages for "failing to refund money to customers and . . . misleading investors about the potential return on investment (the 'FTC Civil Action')." *Id.* Evidently, the shareholder, Dorian Reed, had also been convicted of wire fraud in 1992. *See Hitsgalore.com Seeks to Clarify May 27 Bloomberg Article*, BUS. WIRE, May 27, 1999, *available in* LEXIS, News Library, BWIRE File (explaining that the information regarding Mr. Reed's past conviction was obtained from a voluntary disclosure in the company's 10-K filing).

122. Plaintiff contends that Hitsgalore.com was not "legally required" to disclose the existence of the FTC action because the shareholder was not "an executive officer, director, significant employee, promoter, or control person," and because the civil action was not within the category of a "reportable event" under federal securities laws. Complaint ¶¶ 22-24, *Hitsgalore.com*, No. 99-1387-CIV-T-26C. In a company press release, however, the shareholder was listed as a "director" and the "largest shareholder" of Hitsgalore.com, Inc., the company formed by Hitsgalore.com's merger with a Florida corporation in March of 1999. *See Hitsgalore.com Announces Resignation of Dorian Reed*, BUS. WIRE, May 13, 1999, *available in* LEXIS, News Library, BWIRE File. The company also conceded that the shareholder had "developed much of the technology behind the website." *Id.*

123. *See* Complaint ¶¶ 31-32, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

124. The stock price fell from its high of $20.69 to close the week of May 10 at $7.09. *See* Benson, *Hits Just Keep on Coming*, *supra* note 113; *see also* Complaint ¶ 1, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

plans to pursue class action lawsuits against Hitsgalore.com on behalf of angry shareholders.[125] Discussions of the company on the *Raging Bull* and *Silicon Investor* bulletin boards also took a negative turn.[126] Many message posters saw Hitsgalore.com as a "scam," and many reviled its officers as "crooks," "criminals," and "con men."[127] One poster, "Mr. Pink," stated that "[t]hese crooks belong in Jail!", and he even dared Hitsgalore.com to sue him: "No disclaimer, this is not opinion but a fact and if company doesn't like it, please sue Him; discovery will be a treat!"[128]

Hitsgalore.com obliged "Mr. Pink" by promptly suing him and one hundred other John Doe defendants (although, notably, the company chose to identify only one defendant by name and only four by their "screen names").[129] The $20-million suit included claims for libel, tortious interference, and a civil conspiracy to defame the plaintiff in order to unlawfully drive Hitsgalore.com's stock price "into a downward spiral" and thus to enable the defendants to profit by selling the common stock short.[130] And, in addition to the $20 million that plaintiff asked for in compensation for the 75% drop in its stock price, the plaintiff also sought removal of the allegedly defamatory postings from the message boards and an injunction against further postings of that nature.[131]

A company's decision to sue when it finds itself in a position similar to Hitsgalore.com makes some degree of financial sense. By announcing its decision to file suit, the company appears to respond aggressively to the Internet rumor-mongers who revel in reports of its demise. Bringing suit sends a message to shareholders and potential

125. *See* Complaint ¶ 1, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

126. *See id.*

127. *See id.* ¶¶ 39-43. Apparently some posters began calling Hitsgalore.com "scam" prior to the publication of the *Bloomberg News* article, *see id.*, but there is no indication that these posts affected the stock price. I am indebted to a "John Doe" for bringing this to my attention.

128. *See id.* ¶ 1.

129. *See id.* Hitsgalore.com finally sued Bloomberg and David Evans, the reporter, for libel almost a year later. *See Hitsgalore.com Files Libel Lawsuit Against Bloomberg, L.P., and David Evans*, BUS. WIRE, Apr. 28, 2000, *available in* LEXIS, News Library, BWIRE File. The original suit against Janice Shell and the Doe defendants was dismissed. *See* Telephone Interview with Daniel J. Becka, Esq., Counsel for Hitsgalore.com, Inc. (June 12, 2000).

At least three class action suits were filed in federal district court in California.

130. *See* Complaint ¶ 64, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

131. *See id.* ¶ 57. Granting this request would almost certainly violate the First Amendment. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that any system of prior restraint bears a heavy presumption against its constitutionality); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 698 (1931) (same).

investors that they should not believe all the negative information they hear about the company; it quells rumors and takes the focus away from the negative press the company has been receiving—whether true or untrue. Even if the company ultimately decides not to pursue its action past filing a complaint, it may have won a symbolic victory simply by suing John Doe.

Suing John Doe may also be a victory if it silences John Doe.[132] Although "silencing" ordinarily has a pejorative connotation,[133] it is perfectly legitimate for plaintiffs to seek to stop an onslaught of offensive and damaging untruths. Indeed, silencing John Doe may be one of the chief motivations behind the new Internet libel actions. Armed with subpoenas, plaintiffs often are able to discover the real identity of the John Doe who has attacked them in an Internet discussion forum.[134] The mere fact of being uncovered may itself be enough

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132. *See Technical Chemicals & Products Files Defamation Lawsuit Against On-Line Posters*, BUS. WIRE, Mar. 17, 1999, *available in* LEXIS, News Library, BWIRE File ("Through this lawsuit, TCPI is hoping to identify the individuals using the following screen names to affect a judgment for the defamation made by these posters as well as do its part to prevent this kind of Internet slander from happening to other legitimate companies.").

133. *See, e.g.*, Robert Jensen & Elvia R. Arriola, *Feminism and Free Expression: Silence and Voice*, *in* FREEING THE FIRST AMENDMENT 195, 199 (David S. Allen & Robert Jensen eds., 1995) (discussing the relationship between silencing and oppression).

134. *See* Cook, *supra* note 6, at 30; Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 COMPUTER LAW. 18, 21 (1998) (noting that one can uncover an Internet user's identity by "obtaining a subpoena pursuant to a 'John Doe' lawsuit"). *But see* Rancho Publications v. Superior Court, 81 Cal. Rptr. 2d 274, 276-78 (1999) (quashing a subpoena seeking the names of anonymous advertisers who had criticized a community hospital and holding that the hospital had failed to show a compelling need for the names sufficient to overcome a qualified immunity grounded in the speech and privacy provisions of the United States and California constitutions).

This Article does not address the procedural rules that allow John Doe's identity to be revealed. The new cases suggest that it is a relatively simple matter for plaintiffs to uncover the John Doe's identity by filing an action against John Doe and obtaining a subpoena to have the ISP turn over John Doe's name and address. Although suits against Doe defendants are common, the Federal Rules of Civil Procedure do not specifically address what procedure plaintiffs should follow in suing John Doe and discovering John Doe's identity. *See* Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 914 (1996) ("Despite widespread use of Doe pleading, the Federal Rules of Civil Procedure undermine it. Unlike most state court systems, the Federal Rules do not expressly provide for any form of fictitious name parties . . . ."). Professor Rice has offered cogent criticism of this omission in the Federal Rules of Civil Procedure. Even though some state rules may address the problem or courts may work out their own solution, *see id.* at 896 n.39 (giving examples), there is a pressing need for resolution of the uncertainty surrounding the procedure for suing unknown defendants. As an example of one court's approach, see *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995) (noting that ordinarily "it is impermissible to name fictitious parties as defendants," but that "an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery" (citation omitted)).

to stop the alleged defamer from posting further messages.[135] Suing may be particularly effective in stopping an onslaught of damaging messages being posted by corporate insiders,[136] since the fear of losing their jobs may make "inside agitators" tread more cautiously in the online environment.[137] This strategy may not always be successful, of course. Some John Doe defendants have begun to fight these subpoenas with their own subpoenas seeking to uncover embarrassing information about the company,[138] and at least one John Doe seems to have escalated his remarks once the plaintiffs tried to uncover his identity.[139] Nevertheless, removing the cloak of anonymity from John Doe defendants is likely also to remove their sense that anything goes, and the mere threat of being revealed may be enough to force a defendant to temper his remarks in the future.

Even silencing the defendant may not go far enough for some plaintiffs. Corporate plaintiffs, like individual plaintiffs, will sometimes insist that the defendant publicly atone for posting defamatory falsehoods, and, as *Krum* illustrates, this goal can be attained even without a formal trial. HealthSouth not only sued Peter Krum but also sought criminal harassment and stalking charges against him.[140] According to court records, the abashed Krum apparently had never realized that his words might have consequences.[141] Krum made no effort to contest the suit, but instead agreed to sign an apology, pay $50 a month to a charity of the plaintiffs' choice for a period of four years, and to perform three hours of community service every week for two

135. In the *HealthSouth* case, for example, HealthSouth subpoenaed *Yahoo!* to reveal the "true identity" of "I AM DIRK DIGGLER." *See* Moss, *supra* note 4 (noting that HealthSouth's attorney subpoenaed *Yahoo!* and obtained records for about 20 of the board's more than 300 anonymous posters). Once it was publicly revealed that "I AM DIRK DIGGLER" was really Peter Krum, a food services employee at Penn State, Krum's defamatory postings ceased. *See* Cook, *supra* note 6, at 30.

136. *See, e.g.*, *Web Site Abandoned After Newspaper Files Lawsuit*, DES MOINES REG., July 20, 1998, at Metro Bus. 4 [hereinafter *Web Site Abandoned*] (discussing how the *Orange County Register* forced a gossip website to shut down after obtaining the real identity of the website operator from AOL). AOL's *Rules of User Conduct* provide: "America Online generally does not pre-screen, monitor, or edit the content posted by users of communications services, chat rooms, message boards, newsgroups, software libraries, or other interactive services that may be available on or through this site." *AOL.COM Rules of User Conduct* (visited Feb. 17, 2000) <http://www.aol.com/copyright/rules.html> (on file with the *Duke Law Journal*).

137. *See Web Site Abandoned*, *supra* note 136.

138. *See* Cook, *supra* note 6, at 30.

139. *See id.*

140. *See* Moss, *supra* note 4.

141. *See id.*

years.[142] The fact that Richard Scrushy, who makes $13 million a year, deemed it necessary to exact this modest monetary fine on a defendant who now works as a fry cook making $22,000 a year[143] suggests that the suit was not about the money but about the principle at stake: the plaintiffs must have thought it worthwhile to score at least a symbolic victory over the likes of Peter Krum.

E. David vs. Goliath?

It is tempting to portray the new Internet libel suits as David versus Goliath battles, pitting ordinary John Does against powerful corporate interests out to intimidate their critics into silence. This image is bolstered by the fact that libel suits are hard to win but easy to bring.[144] Many corporate plaintiffs that sue for Internet libel seek to send a message to the public that they will pursue aggressively anyone who criticizes them online, and these plaintiffs seem to be using libel law to squelch not just defamatory falsehoods but legitimate criticism as well (a topic this Article discusses in the next part).[145] But to focus only on the obvious power differential between corporate plaintiffs and John Doe defendants is to ignore the real harm Internet libel can cause.

As a rule, corporate plaintiffs have more power and wealth in the "real world" than any anonymous John Doe could hope to have, and in the real world that power and wealth translates into corporations' having the ability to be heard. Corporations often will be able to conduct expensive media campaigns to influence favorable coverages,

142. *See* Cook, *supra* note 6, at 30 ("As part of the settlement, [Krum] had to sign a three-page mea culpa stating his messages were 'thoughtless lies.'").

143. *See id.*

144. First, the threat of being sued is enough to chill many John Does, and libel law makes it easy to use the tort to threaten one's critics. Although plaintiffs rarely prevail in libel trials, plaintiffs will find it easy to sue for libel any time they come in for harsh criticism. Indeed, the ease with which plaintiffs can sue for libel explains why libel actions are the most common type of SLAPP. *See* PRING & CANAN, *supra* note 11, at 217. Defamation's anomalous doctrine of presumed harm allows plaintiffs to sue for defamation without ever having to prove that a defendant's statements caused any actual harm to the plaintiff's reputation. *See* RESTATEMENT, *supra* note 35, § 559 cmt. d; *see also* Anderson, *supra* note 53, at 749-51 (discussing illogical consequences of the doctrine of presumed harm and advocating its abolition); Lidsky, *supra* note 53, at 44-45 (advocating abolition of the doctrine of presumed harm). The justification for the rule—that harm to reputation "occurs in ways that are too subtle to prove"—makes some degree of sense, but the practical effect is to make defamation a potent weapon for harassing one's critics. DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 714-15 (1st ed. 1989); *see also* 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.30, at 468 (1956).

145. *See infra* notes 169-93 and accompanying text.

and corporate CEOs can use traditional media outlets to communicate with the public.

But the Internet helps equalize power imbalances in the real world by giving anonymous John Does like "I AM DIRK DIGGLER,"[146] "Mr. Pink,"[147] or "HiSiCat"[148] a meaningful opportunity to be heard. In the online world, every John Doe is potentially a publisher, capable of transmitting messages instantaneously to millions of readers. More significantly, the Internet allows John Doe to target a message to an audience with common interests and concerns, the very audience likely to be most receptive to his comments. Thus, for example, a John Doe who wishes to discuss the management and future prospects of a company in which he has just invested can find a bulletin board dedicated to the use of like-minded shareholders. Moreover, John Doe's online comments can have real-world effects. While the financial bulletin boards ordinarily give notice to subscribers that the messages posted are merely the opinions of the author and that they should not be relied on to trade,[149] people do, of course, use them to trade.[150] If John Doe is a scrupulous critic of a particular corporation and its CEO, the Internet is a powerful tool for him to begin a dialogue about the corporation and to convey his criticisms to a receptive audience.[151]

If John Doe is unscrupulous or merely reckless, however, he can use the power the Internet gives him to inflict serious harm on the corporation. He can pollute the information stream with defamatory falsehoods, which may in turn influence other investors to question the corporation's credibility or financial health.[152] Moreover, once the defamatory information enters the information stream, it may have a greater impact than if it had appeared in print. Because the defamatory statements can be copied and posted in other Internet discussion

146. *See* Complaint ¶ 10, HealthSouth Corp. v. Krum, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998) (on file with the *Duke Law Journal*).

147. *See* Complaint ¶ 10, Hitsgalore.com, Inc. v. Shell, No. 99-1387-CIV-T-26C (M.D. Fla. filed June 1999) (on file with the *Duke Law Journal*).

148. *See* Complaint ¶ 5, Technical Chems. and Prods., Inc. v. John Does 1-10, No. 99-4548 (Fla. Cir. Ct. 1999) (on file with the *Duke Law Journal*).

149. *See Yahoo! Finance Message Boards: Business and Finance>Stocks>Healthcare>Healthcare Facilities>HRC (HealthSouth Corp.)* (visited Aug. 18, 1999) <http://messages.yahoo.com/bbs?action=topics&board=7076888&sid=7076888&type=r>.

150. *See* Cook, *supra* note 6, at 30 (noting that day traders often use message boards to guess which stocks to buy or sell).

151. *See infra* Part II.B.

152. *See generally* Cella & Stark, *supra* note 30, at 793-832 (discussing the potential for abuse by con artists of those who conduct investment activities over the Internet).

fora, both the potential audience and the subsequent potential for harm are magnified. And, as the persistence of Internet hoaxes demonstrates,[153] once a rumor takes hold in cyberspace, it may be almost impossible to root out. Thus, to view the rise of John Doe libel suits as merely an attempt by powerful corporations to intimidate their critics into silence is to substitute metaphor for analysis and to suppress the fact that the "speech" of ordinary John Does, both scrupulous and unscrupulous, has more power to affect corporate interests than ever before.

F. Benefits of Civilizing Cyberspace

To view these libel suits as no more than attempts to silence John Doe also ignores the potential contribution of defamation law to cyberspace discourse. The Internet has often been compared to the Wild West, a frontier society free from the stifling conventions of civilization, and some have even argued that defamation law is an unnecessary anachronism in this new society.[154] A strong argument can be made, however, that Internet discourse could benefit from the civilizing influence of defamation law.

"[A] civilized society," as David Anderson has written, "cannot refuse to protect reputation,"[155] but it is worthwhile to explore why this is so. By protecting reputation, defamation law safeguards the dignity of citizens.[156] Defamation law therefore reflects liberal society's "basic concept of the essential dignity and worth of every human being."[157] Even if this were the only contribution of defamation law, policymakers might justifiably conclude that defamation law is necessary to mediate interactions between "netizens" in order to preserve individual dignity.[158] Yet, as Robert Post has shown, defamation law

153. *See supra* note 33.

154. *See, e.g.*, MIKE GODWIN, CYBER RIGHTS 77 (1998).

155. Anderson, *supra* note 89, at 490.

156. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)):

> We would not lightly require the State to abandon [compensating defamed individuals because] the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

157. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

158. The protection of the "dignity and worth of every human being," however, cannot explain why defamation law should protect corporate reputation, since corporations possess only financial interests in their reputations. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 740-41 (1986) [hereinafter Post, *Social Foundations*]. My analysis here obviously owes a debt to Professor Post's seminal article,

exists not merely to validate the dignitary interests of individual plaintiffs; defamation law also helps to make meaningful discourse possible.[159] Defamation law has a civilizing influence on public discourse: it gives society a means for announcing that certain speech has crossed the bounds of propriety.[160]

This civilizing influence could benefit Internet discourse in at least two ways. First, to the extent that the prospect of being verbally "attacked" deters some citizens from participating in Internet discourse, application of defamation law can help to ensure that Internet discourse remain open to all.[161] Second, defamation law might help to cure the largest single threat to meaningful discourse in cyberspace: incoherence. Precisely because the Internet makes every person a publisher, the volume of information available is enormous. Furthermore, since much of the information is "published" by unknown John Does, it is difficult to evaluate its credibility.[162] Even the participants on financial bulletin boards complain of this problem. The people who use the boards not only seek the experience of discussing the stock market or particular companies with like-minded individuals; they also seek information that would enable them to evaluate a particular company. But because most users post messages pseudony-

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which demonstrated convincingly that much of the modern incoherence of defamation law stems from the fact that it is designed to protect three very different conceptions of reputation: reputation as property, reputation as honor, and reputation as dignity. *See id*. at 693; *see also* Ronald Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 590-98 (1997) (discussing reputation as a fundamental property interest).

159. My version of Post's argument cannot do justice to the rich nuances of his analysis. Those who wish to explore further should read ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

160. *See* Post, *Social Foundations*, *supra* note 158, at 713.

161. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 638-39 (1990) [hereinafter Post, *Constitutional Concept*] (observing that "words that are deeply uncivil 'by their very utterance inflict injury'" and that the "dignitary torts . . . carry the strong sense of a defendant having used 'words as instruments of aggression and personal assault'" (citations omitted)).

162. This Article makes an extended version of this argument. *See infra* notes 329-32, 461-70 and accompanying text. The Supreme Court has recognized the principle suggested here in its Fourth Amendment jurisprudence and has offered a "totality of the circumstances" test to determine whether information provided by anonymous informants is credible enough to support a finding of probable cause. *See* Illinois v. Gates, 462 U.S. 213, 234 (1983) (observing that a "totality of the circumstances analysis . . . permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip"); *see also* McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 348 n.11 (1994) ("'Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing . . . . They can evaluate its anonymity along with its message, as long as they are permitted . . . to read that message.'" (quoting New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974))).

mously, it becomes difficult (though not impossible) to evaluate the reliability of the information. Thus, participants criticize those who post inane messages or those who they suspect are "bashers"—people who post negative messages trying to drive the stock price down so that they can profit from selling short. Some bulletin board participants even laud corporations for bringing defamation suits against other bulletin board participants,[163] indicating their recognition that some curb on abusive or meaningless speech is necessary if meaningful discussion is to occur. One bulletin board service, *Raging Bull*, offers participants a nonlegal means of ridding the information stream of unwanted flotsam: it offers a button that allows users to block the messages of other users whose comments are inane, useless, or merely annoying.[164]

Defamation law has the potential to curb the excesses of Internet discourse and to make Internet discourse not just more civil but more rational as well. It is important to note, moreover, that defamation law can serve these functions regardless of whether plaintiffs actually pursue their lawsuits all the way to judgment. Consider again the case of *HealthSouth v. Krum*.[165] The result of that case sent a powerful message to other users of the *Yahoo!* financial message boards on which Krum posted his retraction. That message—that users should not rely on anonymity to shield them from being sued if they post abusive and untrue messages—is one that has positive implications for Internet discourse. The quality of speech is improved when speakers realize that their speech has consequences.[166]

II. CHILLING JOHN DOE

If the only effect of these new Internet libel suits were to send a message to Internet users that they are accountable for their speech,

163. *See, e.g.*, *SI: Stocktalk: Five Dollars and Under: Hitsgalore.com (HITT), Reply # 4549* (visited Feb. 10, 2000) <http://www.siliconinvestor.com/stocktalk/msg.gsp?msgid=1167440> (posting by "Boris Badenuff") (chastising others that are "bashing a legitimate company") (on file with the *Duke Law Journal*).

164. *See* Heimer, *supra* note 4, at 53.

165. *See supra* notes 39-52 and accompanying text.

166. *See* W. John Moore, *Taming Cyberspace*, 24 NAT'L J. 745, 746 (1992) ("Like Wyatt Earp arriving in Dodge City, law and order has come to cyberspace."). Other alternatives to defamation law include a "right of reply," although it is not clear how effective this remedy would be given the potential of the original message to be republished instantly in numerous discussion fora. *See* Hadley, *supra* note 31, at 478; *see also* Walter Pincus, *The Internet Paradox: Libel, Slander & The First Amendment in Cyberspace*, 2 GREEN BAG 2d 279, 286-89 (1999) (discussing alternatives to libel law).

these suits might well be an unalloyed good. It might still be worth questioning whether plaintiffs should be allowed to use the legal system to pursue symbolic goals,[167] but the secondary benefits of the suits might be enough to overcome this objection.[168] The problem, however, is that these new suits threaten to make Internet users *too* accountable for their speech, thereby threatening to suppress legitimate criticism along with intentional falsehoods. Although existing law has a number of doctrines available to combat the chill of defamation law, these doctrines are ill suited to the unique context of cyberspace.

A. The Chill in Cyberspace

Much ink has been spilled on the chilling effect,[169] but the basic idea is a simple one. "The very essence of a chilling effect," as Professor Frederick Schauer has observed, "is an act of deterrence."[170] Defamation law legitimately seeks to deter individuals from communicating defamatory falsehoods; the problem arises, for First Amendment purposes when defamation law "overdeters"—that is, when it deters speech that is truthful or nondefamatory—for such speech occupies a "preferred position" in the constitutional hierarchy of values.[171] In other words, the chilling effect occurs when defamation law encourages prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.[172] Although commentators and the Supreme Court have been preoccupied principally with the chilling effect of defamation law on the mass me-

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167. *See* Boies, *supra* note 101, at 1210:

> Lawsuits do not exist to provide discovery for its own sake (or to provide grist for publicity mills), to punish criticism (fair or unfair) by imposing the expense and disruption of litigations, or even to provide an outlet for somebody's dissatisfaction with criticism. Lawsuits are to vindicate a legal right.

168. *See* Post, *Social Foundations*, *supra* note 158, at 693 (discussing how libel actions serve community values).

169. Although the threat of "chilling" free speech is invoked talismanically as an argument against various First Amendment restrictions, there are relatively few sustained and systematic treatments of the "chilling effect." The most notable exception is Frederick Schauer's *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978) [hereinafter Schauer, *Fear, Risk and the First Amendment*].

170. *Id.* at 689.

171. *See id*. at 693 ("[I]f a common-law sanction aimed at punishing the publication of defamatory factual falsehood causes the suppression of truth or opinion, chilling effect reasoning is again applicable.").

172. *See id*. ("Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should.").

dia,[173] chilling-effect arguments have particular resonance in cases involving "nonmedia"[174] defendants like those typically sued in the new Internet libel cases.

First, these new libel suits may chill simply by threatening to reveal the identities of those who speak their minds online. As noted previously, corporate plaintiffs easily can make out a prima facie libel claim any time they receive harsh criticism online. Once a complaint is filed, it is a simple matter to get a subpoena to force the ISP to divulge the anonymous defendant's identity.[175] As more and more suits are filed, many Internet users will come to recognize the ease with which their online anonymity can be stripped simply by the filing of a libel action, and they will censor themselves accordingly. Such self-censorship is salutary to the extent that it makes Internet users more temperate and more cautious about making unsupported factual assertions.[176] Indeed, the widespread use of pseudonyms online is re-

173. *See, e.g.*, Anderson, *supra* note 89, at 513-16 (discussing the chilling effect of litigation costs on mass media); Bezanson et al., *supra* note 20, at 22 (same); Boies, *supra* note 101, at 1208-09 (same); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 711 (1994) [hereinafter Shiffrin, *Politics of the Mass Media*] (same); *cf.* Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 933-34 (1978) (asserting that, since plaintiffs will rarely bring defamation actions against "those with little resources causing little damage," nonmedia defendants have similar economic interests and levels of legal sophistication to those of media defendants and that therefore "the nature of the legal standards governing liability makes little difference"). The literature on the chilling effect of SLAPPs is useful because these suits are typically brought against nonmedia defendants. *See generally* PRING & CANAN, *supra* note 11, at 214-15 (noting that the majority of defendants are individuals who are "not regularly involved in political action" but who are motivated by the plaintiff's actions).

For Supreme Court cases discussing the chilling effect of defamation suits on mass media defendants, see Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

174. To call them nonmedia defendants is something of a misnomer, since the Internet is the ultimate medium of mass communication. *See infra* notes 262-73 and accompanying text.

175. *See supra* note 134.

176. *See* Branscomb, *supra* note 8, at 1675-76 (arguing that anonymity should not be used as a shield for "abusive posters"); *see also* McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 382 (Scalia, J., dissenting) (arguing that a state law requiring authors of election-related materials to identify themselves would foster "a civil and dignified level of campaign debate").

sponsible for many of the abuses perpetrated by Internet speakers.[177] But revelation of identity has negative consequences as well—it may subject the user to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.[178] There is some danger, therefore, that the growing popularity of the new Internet libel suits may chill more than defamatory falsehoods—it may also chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas.[179]

The high cost of libel litigation is another source of the chilling effect of libel suits. Media defendants identify litigation costs as a primary source of the chilling effect,[180] and these costs will fall even more heavily on the nonmedia defendants[181] who are the targets of the

177. *See* Branscomb, *supra* note 8, at 1675-76.

178. *See* Lee Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 OR. L. REV. 117, 123-25 (1996). In *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997), a federal district court held that a Georgia law violated the First Amendment by requiring senders of electronic communications to identify themselves. *See id*. at 1233.

179. *See* Tien, *supra* note 178, at 144 ("[C]ompelled revelation of speaker identity has serious costs for speech."). The solution that I advocate in this Article does little to alleviate the chill that flows solely from having one's identity revealed. What this Article seeks to curb is the far more serious chill that results from being forced to defend against a meritless action, and the Article provides a theory for defendants to use in order to have such actions dismissed at a very early stage of litigation. Moreover, a defendant might be able to use the solution that I advocate here and still maintain his anonymity. In at least one case, for example, the ACLU filed an amicus brief recommending, *inter alia*, that the court resolve the question of whether a defendant's speech constituted constitutionally protected opinion prior to ordering disclosure of the defendant's identity. *See* Brief of Amicus Curiae American Civil Liberties Union and American Civil Liberties Union of Florida, Hvide v. John Does 1 through 8 (Fla. Cir. Ct. 1999) (No. 99-2831 CA 01) (on file with the *Duke Law Journal*). The author assisted the ACLU as cooperating counsel in drafting the amicus brief, which was filed in February 2000. *See id*.

180. *See* Anderson, *supra* note 89, at 516 (noting that the actual malice rule tends to further increase defense costs); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1789 (1998) ("[I]t is now clear that chill on speakers comes not just from fear of damage awards, but also from concern about the costs of litigation." (footnote omitted)); Schauer, *Fear, Risk and the First Amendment*, *supra* note 169, at 700 ("[T]here is a heavy price to pay for simply being in a position to have to explain, or defend.").

181. The chilling effect is not confined to the Internet context. Note, for example, the debate aroused when McDonald's chose to sue two penniless pamphleteers who had criticized the company. *See* JOHN VIDAL, MCLIBEL: BURGER CULTURE ON TRIAL (1997). Although the McDonald's case involved English rather than American libel law, many of the same issues are presented in the new Internet libel cases.

The use of libel suits by corporations to harass their online critics is consistent with evidence that corporations have used libel suits to punish those who petition the government to adopt or reject measures that threaten the corporation's interests. *See, e.g.*, PRING & CANAN, *supra* note 11, at 37-39 (giving an example of a suit brought by a developer against residents

new Internet libel cases. This new class of nonmedia defendants are unlikely to have enough money even to defend against a libel action, much less to satisfy a judgment. Thus, wealthy plaintiffs can successfully use the threat of a libel action to punish the defendant for her speech, regardless of the ultimate outcome of the libel action. As a case in point, consider *U-Haul International, Inc. v. Osborne*.[182] John Osborne and his roommate, Glenda Woodrum, rented a U-Haul to move from Florida to Georgia.[183] Not only did the truck break down numerous times, turning an eight-hour trip into a twenty-seven-hour trip,[184] but U-Haul also tried to make them pay the costs of fixing the truck.[185] Whatever the merits of U-Haul's argument, Osborne was understandably upset about this episode. He first complained to U-Haul's customer service department and then to the Better Business Bureau.[186] When neither of these avenues gave him satisfaction, Osborne decided to use the Internet to express his displeasure. Osborne developed a website entitled *The U-Hell Website: Misadventures in Moving* as a forum to tell his own story and to let other disgruntled U-Haul customers tell theirs.[187]

After an initial round of legal correspondence, U-Haul promptly sued Osborne and Woodrum for libel and trademark infringement. U-Haul did not sue them in Georgia, where they lived. U-Haul instead chose to sue them in Arizona,[188] arguing by analogy to tradi-

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who had petitioned the city to reject the developer's plan to build condominiums on a parcel of municipal-use land).

182. No. CIV 98-0366 (D. Ariz. 1998). This case is not technically a John Doe case because Osborne's name appeared on the website on which the allegedly libelous statements were posted, but it does present similar issues. U-Haul also threatened to sue at least one other individual who created an independent U-Haul "gripe site." *See infra* note 187.

183. *See* David Segal & Caroline E. Mayer, *Sites for Sore Customers*, WASH. POST, Mar. 28, 1999, at A1.

184. *See id.*

185. *See* Trigaux, *supra* note 38.

186. *See* Defendant's Motion to Dismiss at 4, *Osborne*, No. CIV 98-0366.

187. *See id.* Osborne's was not the only such site. Marc Becker, whose site was called *U-Haul Makes Moving Miserable*, was also threatened with litigation by U-Haul. *See* Letter from Rod S. Berman of Jeffer, Mangels, Butler & Marmaro LLP, Attorney for U-Haul, to Marc Becker, Author of the *U-Haul Makes Moving Miserable* website (Mar. 23, 1998) (on file with the *Duke Law Journal*); E-mail Interview with Marc Becker (July 1, 1999). Mr. Becker promptly sought to remove from his website the graphics that U-Haul alleged were infringing on its trademark. *See* Letter from Marc Becker to Rod S. Berman (Mar. 31, 1998) (on file with the *Duke Law Journal*). The attorney for U-Haul then requested that Mr. Becker "cease and desist from any use of the U-Haul mark as a meta tag in [Becker's] website." Letter from Rod S. Berman to Marc Becker (July 2, 1998) (on file with the *Duke Law Journal*). Mr. Becker's website can be found at <http://falcon.cc.ukans.edu/~marc/uhaul>.

188. *See* Segal & Mayer, *supra* note 183. The corporate headquarters of U-Haul are located in Arizona. *See* Complaint ¶ 5, *Osborne*, No. CIV 98-0366.

tional defamation law that Osborne had "published" his website in Arizona because it was available to be downloaded by Internet users there.[189] But suing Osborne and Woodrum in Arizona was also a strategic means of trying to force them to capitulate to U-Haul's demands. As Osborne said, U-Haul knew that "we ha[d] no way to travel [to Arizona] to defend ourselves. [T]he apparent aim there [was] to prevent us from answering their charges, so that they [would] win a default judgment against us. . . . They want[ed] us quiet."[190] Luckily for the defendants in this case, the ACLU of Arizona and the Electronic Frontier Foundation came to their rescue by providing them with free legal assistance.[191] As a result, the Arizona suit was dismissed, although U-Haul is currently threatening to pursue the action in Georgia.[192]

Not all defendants are as lucky or as tenacious as Osborne and Woodrum, and many would choose to forego speaking in the future to avoid the hassle and expense of libel litigation. The great jurist Learned Hand once wrote that, "short of sickness and death," he dreaded nothing more than being involved in a lawsuit.[193] If this is true for the great jurist, how much more dread and anxiety must the prospect of being sued pose for the targets of the new Internet libel actions?[194]

B. John Doe and First Amendment Theory

As argued in Section II.E, the new libel suits can be valuable to the extent that they deter malicious falsehoods. Thus, before lamenting the chill that defamation actions will have on the John Does who frequent financial message boards, it is worthwhile to explore whether their speech is worthy of First Amendment protection.

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189. It is still not entirely clear what type of online conduct justifies a court in exercising jurisdiction in an Internet libel case. For a good discussion of jurisdictional issues in Internet libel cases, see generally George & Hemphill, *supra* note 7.

190. *See* John Osborne, *U-Haul Is Suing Us* (visited Feb. 24, 2000) <http//www.coyotes.org/~consumer/uhell/lawsuit.html> (on file with the *Duke Law Journal*).

191. *See id.*

192. *See* Segal & Mayer, *supra* note 183.

193. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS: 1921–22, at 89, 105 (James N. Rosenberg et al. eds., 1926).

194. A credible counterargument is that, since the defendants have "nothing to lose," they will not be chilled by the prospect of defamation liability. *See* Hadley, *supra* note 31, at 505 ("If the chance of recovery is nominal once inside the courtroom, there seems almost no reason to avoid being as vicious as possible in cyberspace."). This point will undoubtedly hold true for some Internet users, but even defendants of modest means have "something to lose" from being sued, as the above discussion illustrates.

It is easy to get lost in the hype surrounding the Internet in answering this question. Scholars have touted the Internet as the living embodiment of the "marketplace of ideas" metaphor that lies at the heart of First Amendment theory. This idealized vision of Internet discourse contrasts rather sharply with the reality of the financial message boards. Discourse on the boards bears more resemblance to informal gossip than to rational deliberation, and the culture of the boards fosters, as one commentator put it, "disinformation, rumors and garbage."[195] Yet, extending "breathing space" to this type of speech may be necessary if the Internet is to fulfill its promise of giving ordinary John Does a meaningful role in public discourse.

1. *The New Marketplace of Ideas.* From a First Amendment scholar's perspective,[196] the fascination of the Internet lies in its potential for realizing the concept of public discourse at the heart of the Supreme Court's First Amendment jurisprudence.[197] The dominant First Amendment metaphor for describing public discourse is the "marketplace of ideas."[198] The marketplace of ideas is a sphere of discourse in which citizens can come together free from government interference or intervention[199] to discuss a diverse array

195. *Reliable Sources: Are 24-Hour TV and the Internet Helping People Understand Wall Street, or Is There Too Much Bull in the Bull Market?* (CNN television broadcast, July 31, 1999), transcript available in LEXIS, Transcripts File. When asked by Howard Kurtz whether he thought that the Internet fostered "disinformation, rumors, [and] garbage," Jim Cramer responded that "there's been disinformation, rumors and garbage . . . for many, many years. It's got a new form in some of it on the Net . . . . You've never had as much information at your fingertips." *Id.*

196. For scholarship on the First Amendment implications of the Internet, see Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1 (1995); Sanford & Lorenger, *supra* note 32; Symposium, *In Search of a New Paradigm*, 104 YALE L.J. 1613 (1994).

197. Professor Robert C. Post convincingly and elaborately elucidates this concept of public discourse. *See* Post, *Constitutional Concept*, *supra* note 161, at 633 (demonstrating that "the ambition of constitutional law [is] to create a distinct realm of public discourse independent of the norms of any particular community").

198. This metaphor first made its way into First Amendment jurisprudence in Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."). *See generally* FRANKLIN & ANDERSON, *supra* note 74, at 10 (identifying use of the metaphor in Milton's *Areopagitica* and in the writings of John Stuart Mill).

199. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("'[A] central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas.'" (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978))).

of ideas and opinions.[200] Ideally, the process of interacting in the marketplace of ideas not only fosters the "search for truth";[201] it also enables citizens to transcend their differences in order to forge consensus on issues of public concern, or, as Professor Robert C. Post eloquently puts it, "to speak to one another across the boundaries of divergent cultures."[202] Public consensus, in turn, is an essential precondition of democratic self-government.[203]

This, at least, is the First Amendment ideal. As a practical matter, however, many citizens are barred from meaningful participation in public discourse by financial or status inequalities, and a relatively small number of powerful speakers dominate the marketplace of ideas.[204] But the Internet promises to eliminate structural and financial barriers to meaningful public discourse, thereby making public discourse more democratic and inclusive, less subject to the control of powerful speakers, and, at least potentially, richer and more nuanced. It therefore promises to make the marketplace of ideas more than just a hollow aspiration.[205]

One of the most significant ways in which the Internet promises to change the nature of public discourse is by allowing more participants to engage in public discussion and debate.[206] The Internet gives

200. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) (observing that the First Amendment assumes that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

201. Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 272 (1978).

202. Post, *Constitutional Concept*, *supra* note 161, at 634.

203. *See id*. at 634-40; *see also* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); MEIKLEJOHN, *supra* note 15, at 26-27 ("When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones . . . .").

204. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 58 (1993) (noting financial restrictions on access to broadcasting); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) (observing that the power to control both the content and availability of information rests in a relatively few private hands); Owen Fiss, *Why the State?*, 100 HARV. L. REV 781, 787-88 (1987) (same); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995) ("The perfect 'marketplace of ideas' is one where all ideas, not just the popular or well-funded ones, are accessible to all. To the extent this ideal isn't achieved, the promise of the First Amendment is only imperfectly realized.").

205. *See* Fred H. Cate, Comment, *Law in Cyberspace*, 39 HOW. L.J. 565, 578 (1996) ("The 'marketplace' metaphor, however worthy, has had little meaning in the physical world, where the ability to reach large audiences is controlled by a handful of major media corporations.").

206. *See, e.g.*, ACLU v. Reno, 31 F. Supp. 2d 473, 481-82 (E.D. Pa. 1999) ("Approximately 70.2 million people of all ages use the Internet in the United States alone.").

citizens inexpensive access[207] to a medium of mass communication and therefore transforms every citizen into a potential "publisher" of information for First Amendment purposes.[208] "[F]reedom of the press," as one court noted, "is [no longer] limited to those who own one."[209] The Internet enables speakers to bypass commercial publishers and editors and to speak directly "to an audience larger and more diverse than any the Framers could have imagined."[210] Although it may be an overstatement to say that the speech of ordinary John Does "compete[s] equally with the speech of mainstream speakers in the marketplace of ideas,"[211] it is certainly true that ordinary John Does need no longer win approval of the mainstream media in order to be heard[212] and that Internet discourse is more broadly inclusive than real-world discourse.[213]

But the Internet not only removes barriers to speaking; it also removes barriers to being heard. In a now well-known *New Yorker* cartoon, a picture of a dog typing at a computer reads, "On the Internet nobody knows you're a dog."[214] The cartoon pithily encapsulates

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207. This access is inexpensive, but not free. Many citizens will still be effectively excluded from public debate because they cannot afford the technology necessary to use the Internet, and still others will be barred from the debate by a lack of technical know-how. *See* Volokh, *supra* note 204, at 1807 (noting that "poor listeners" may be "shut out" from some of the benefits of the Internet). Even conceding these problems, however, the Internet certainly gives ordinary citizens more access than they had previously to an avenue of mass communication. *See id*. at 1806-07; *see also* M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335, 336 (finding that the First Amendment has not been very concerned about "the inability of an individual to employ a particular medium [of communication] because of a lack of education or economic resources").

208. *See* GODWIN, *supra* note 154, at 14 (describing widespread capacity to be a "content producer" as creating a revolution of "radical pluralism"); Ballon, *Law of the Internet*, *supra* note 25, at 20 (same); Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 431 (1993) ("The network provides the facilities for individuals to distribute their messages efficiently and cheaply, both widely and narrowly, to large groups as well as small."); Sanford & Lorenger, *supra* note 32, at 1141 ("[T]he Internet is capable of maintaining an unlimited number of information sources, thereby eliminating concerns about 'scarcity' that currently plague the broadcast media."); *see also* David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335, 339-40 (1995).

209. *Reno*, 31 F. Supp. 2d at 476 (entering a preliminary injunction against the enforcement of 47 U.S.C. § 231, a provision of the Child Online Protection Act).

210. *Id.*; *see also* Sanford & Lorenger, *supra* note 32, at 1141 (noting that "the Internet has no 'gatekeepers'—no publishers or editors controlling the distribution of information").

211. *Reno*, 31 F. Supp. 2d at 476.

212. *See* Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 437 (1998) (observing that the Internet liberates "the 'marketplace of ideas' from the institutional dominance of publishers, distributors, broadcast media, and other traditional gate-keepers of speech").

213. *See* Volokh, *supra* note 204, at 1807.

214. Peter Steiner, NEW YORKER, July 5, 1993, at 61 (cartoon).

one of the chief attractions of online anonymity.[215] Many participants in cyberspace discussions employ pseudonymous identities, and, even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes. For good or ill, therefore, the audience must evaluate the speaker's ideas based on her words alone.[216] This unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real-world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity, and age, which allow elite speakers to dominate real-world discourse.[217]

The Internet also challenges existing hierarchies of power that permeate public discourse by making it harder for powerful speakers to control the interpretation of public events.[218] The mainstream media no longer have the power to exclusively define what is "news,"[219]

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215. For discussion of the dark side of online anonymity, see Tien, *supra* note 178, at 150-51.

216. *See* Post, *Constitutional Concept*, *supra* note 161, at 640 ("In most circumstances we attend as carefully to the social status of a speaker, and to the social context of her words, as we do to the bare content of her communication.").

217. *See* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1108-09 (1993). Some commentators also wisely point to the dangers that the Internet poses to minority groups. For example, the Internet has become a forum for bigots of all types to come together to reinforce their antisocial beliefs. *See* JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 486-87 (1999) (discussing the use of the Internet by hate groups); Volokh, *supra* note 204, at 1834 (noting that the "shift of control to listeners" may make it easier for them to remain closed-minded because they will select only information that confirms their existing prejudices).

218. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 402 (1974) (White, J., dissenting) (noting "the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few"); Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 582 (1984) (reviewing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983)) ("[T]hose willing and able to pay have the ability to spread their messages."); Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 407-08 (1994) (describing the tools that policymakers use to manipulate traditional media); *see also* Robert M. O'Neill, *The* Drudge *Case: A Look at Issues in Cyberspace Defamation*, 73 WASH. L. REV. 623, 624-25 (1998) (observing that journalistic standards for deciding what to publish seem to be lower in cyberspace).

219. The extraordinary success of Internet "journalist" Matt Drudge demonstrates this point. *The Drudge Report*, Matt Drudge's website, aims to provide political gossip to its subscribers and visitors. *See* Roger Bull, *Online and Loving It*, FLA. TIMES UNION, Feb. 27, 1998, at D1. Many subscribers are themselves members of the mainstream press and political insiders. *See* David McClintick, *Town Crier for the New Age*, BRILL'S CONTENT (Nov. 1998), <http://www.brillscontent.com/features/cryer_1198.html> (on file with the *Duke Law Journal*). Drudge gathers information for his report using two computers, one telephone, a police scanner, and a television, and he publishes the information from his studio apartment. Drudge lays claim to "scooping" the mainstream press on the presidential impeachment scandal. *See* Howard Kurtz, *Clinton Scoop So Hot It Melted: Newsweek Editors Held off in Scandal Story*, WASH. POST, Jan. 22, 1998, at C1 ("[W]ord of [*Newsweek*]'s suppressed scoop leaked out through an increasingly familiar route: Matt Drudge's Internet gossip column."). While *Newsweek* debated

and governments, particularly authoritarian governments, have less power to control public discourse[220] by controlling the information their citizens receive.[221] Wealthy and powerful private speakers may similarly find it more difficult to impose their agendas by manipulating media coverage. By changing the locus of control of public discourse, the Internet may therefore contribute to the development of an informed citizenry capable of deciding its collective fate.

A more subtle benefit of the Internet to public discourse is its potential for making public discourse richer and more nuanced. The more speakers who engage in public debate, the more perspectives that will be brought to bear on public problems. And beyond simply allowing more people to speak, the Internet also gives people more topics about which to speak.[222] The Internet allows people to transcend the limits of geography in order to find those with similar interests, and no topic is too obscure to generate Internet discussion. Moreover, speakers are able to experiment with controversial or unpopular ideas online, thereby making Internet debate more free-

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whether it was ethical to divulge Monica Lewinsky's name before she had been indicted by Ken Starr, Drudge preempted the debate by publishing the story on his website. *See* Howard Kurtz, *Out There; It's 10 Past Monica, America, Do You Know Where Matt Drudge Is?*, WASH. POST, Mar. 28, 1999, at F1. What the incident tellingly illustrates is the challenge that "journalists" like Drudge present to the ability of the mainstream media to decide what issues are appropriate for public debate. I have previously criticized this incident as indicating that concern for individual privacy receives few rewards in the marketplace of ideas. *See* Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 181 (1998). *The Drudge Report* appears at <http://www.drudgereport.com/>.

220. *See* Salbu, *supra* note 29, at 436 (noting that, by making original government documents available, the Internet offers "an alternative to filtered information"); Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL'Y J. 361, 384 (1997) (observing that "[t]here is concern [in China] that Internet technology is weakening the Chinese Communist Party's control over people").

221. In authoritarian governments, this takes the form of direct control of the mass media; in democracies, governments ensure that their "spin" is put on public events described in the mainstream media. When citizens have access to the Internet, however, they have access to information coming from beyond their country's borders and hence beyond the control of their leaders. By making it impossible for governments or private entities to control what information the public receives, the Internet may therefore aid in the formation of an informed citizenry. *See* Sanford & Lorenger, *supra* note 32, at 1143 (highlighting the importance of global computer networks in conveying information to the outside world about the use of Chinese troops to suppress protest in Tiananmen Square in 1989).

222. *See* Branscomb, *supra* note 8, at 1640 ("[W]e now have within our grasp a technology designed to bring together like-minded individuals, regardless of where they live, work, or play, to engage in the creation of a new type of democratic community: a community unbounded by geographical, temporal, or other physical barriers."); Volokh, *supra* note 204, at 1833 (noting that, although a "greater diversity of available speech need not lead to diversification of what is actually consumed," it nonetheless serves "those people whose tastes differ from the majority's").

ranging and expansive than real-world debate. Thus, the number and type of discussions in which citizens engage are bound to expand, and, as they do, the nature of public discourse is likely to change as well.[223]

2. *Chaos in the Marketplace?* This high theory contrasts rather markedly with the nature of actual discourse on the boards. A primary justification for protecting the marketplace of ideas from governmental interference is that competition of ideas in the marketplace fosters the search for truth. Indeed, this justification was the underpinning of Justice Holmes's famous defense of the "free trade in ideas," in which he argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[224] If the speech of anonymous John Does in cyberspace fosters the search for truth, it is largely by accident. As anyone who has spent time perusing the financial message boards knows, board discussions are no model of rational deliberation and informed debate. Idle speculation, unintelligible musing, and "off-topic" trivia predominate over serious financial discussion, and many of the participants appear to lack financial sophistication. The operative principle is speed rather than accuracy, and the idea seems to be that users should present whatever tidbits of rumor or speculation they can and the audience can sort it out.[225]

Discourse on financial message boards resembles informal gossip[226] more than it does formal written conversation. Indeed, Sissela Bok's observations about the informal character of gossip form a use-

223. As Professor Volokh has observed, the Internet brings us closer to realizing the idealized premises of First Amendment doctrine than do print and broadcast media. *See* Volokh, *supra* note 204, at 1847.

224. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* ALEXANDER BICKEL, THE MORALITY OF CONSENT 71 (1975); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (questioning whether the marketplace theory fosters the search for truth).

225. *See, e.g.*, Ballon, *supra* note 25, at 16 ("Time, rather than content, often is the commodity being marketed in cyberspace."); Heimer, *supra* note 4, at 54 (discussing how *Raging Bull* and most other investment-related boards rely on the readers' ability to collectively address unfounded claims or other inappropriate posts).

226. Gossip is defined by Sissela Bok as "informal personal communication about other people who are absent or treated as absent." SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 91 (1982); *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 333 (1983) (defining gossip as "the exchange of personal information about character, habits and lifestyles").

ful point of comparison.[227] Like gossip, discourse on the boards "lacks formal rules setting forth who may speak and in what manner, and with what limitations from the point of view of accuracy and reliability."[228] Discourse on the boards is, like gossip, highly "spontaneous," and it "relies more on humor and guesswork" than it does on rational argumentation. Also like gossip, it is a form of discourse that forces the audience to take an active role in gleaning the valuable bits of information from the great mass of chaff.[229]

Nevertheless, the boards are not useless as a source of information.[230] If one "lurks"[231] around long enough on a message board, observing the ongoing, rambunctious, and often disjointed dialogue over a period of time, one can become adept at judging the credibility of individual participants based on the quality and tone of a participant's remarks and the interaction between that participant and others.[232] Often, too, one goes to the financial boards to get a "feel" for what is being said about the corporation rather than to gather actual facts; what is important is the general tenor of the discussion, rather than any particular factual assertion.[233]

Thus, even if the financial message boards do not further the search for truth in a direct and efficient manner, they do allow those interested in a particular corporation to gather information that may not be supplied by traditional media outlets.[234] The message boards may even help to remedy the "'chronic tilt [that] distorts mainstream

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227. *See* BOK, *supra* note 226, at 91; *see also* Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (1994) ("In some sense, cyberspace communication is very speech-like. People speak informally.").

228. *See* BOK, *supra* note 226, at 91.

229. *See* JACK LEVIN & ARNOLD ARLUKE, GOSSIP: THE INSIDE SCOOP (1987). As a book on online etiquette admonishes newcomers to Internet message boards, "Don't assume that posted information is correct, and don't spread it around if you have any questions at all about it." VIRGINIA SHEA, NETIQUETTE 67 (1994).

230. *See* Moss, *supra* note 4 ("Serious investors find merit in the boards. . . . 'Looking at and monitoring the boards is something a prudent analyst has to do.'" (quoting Howard Capek, a stock analyst at Warburg Dillon Read, New York)).

231. SHEA, *supra* note 229, at 6 ("'Lurking' is reading the discussion group correspondence without actually participating . . . . Lurking gives you an idea of who the participants are and what the tone of the discussion is.").

232. In this respect, too, board discussions are like informal spoken conversations in the "real world." One must still "consider the source"; it is just that evaluating source credibility is more difficult in the online environment.

233. *See* Heimer, *supra* note 4, at 53 (advising that the quality of the information varies greatly and that one should not "bet the farm on a message-board tip"); Moss, *supra* note 4 (noting that the message boards let participants vent their feelings).

234. *See, e.g.*, Moss, *supra* note 4 (observing that "[s]erious investors find merit in the boards").

media coverage of grave, persisting, and pervasive abuses of corporate power.'"[235] This is not to say that the speech of anonymous John Does is as important a source of financial information as, say, the *Wall Street Journal* or CNBC.[236] The typical John Doe is not a financial journalist, and the boards are often cluttered with pointless ramblings.[237] Yet, to the extent that participants in online discussions learn more information about a corporation through a message board, it is still a valuable, albeit flawed, source of specialized financial information.

From a First Amendment perspective, the financial message boards contribute to the marketplace of ideas by encouraging citizens to participate in public decisionmaking. The financial message boards exercise a powerful democratizing effect on public discourse about the publicly held corporations that shape citizens' daily lives. Publicly held corporations exercise tremendous influence in American society: they influence "what we buy, where we work . . . which diseases we cure, [and] much, much more."[238] At a minimum, therefore, the boards provide an avenue for citizens to converse with one another and to seek consensus about topics that affect their lives. But the boards also serve as a kind of informal education for investors and noninvestors alike about the behavior of a particular corporation, about the workings of the stock market,[239] and about economic matters in general.

By providing a forum for discussion of financial matters and by contributing to citizens' store of knowledge about such matters, the boards help to shape public opinion.[240] But the boards also help citi-

235. Shiffrin, *Politics of the Mass Media*, *supra* note 173, at 711 (quoting Morton Mintz, a *Washington Post* reporter). Professor Shiffrin also notes that libel laws often "discourage aggressive media reporting" because "[c]orporations often have the resources and the will to bring a lawsuit." *Id.*

236. *See* FARRELL, *supra* note 3, at 217 ("CNBC . . . is the leader in providing up-to-the-minute news on the financial markets.").

237. *See, e.g.*, *supra* notes 47-52 and accompanying text.

238. ROBERT A.G. MONKS & NELL MINOW, POWER AND ACCOUNTABILITY 4 (1991).

239. The extraordinary growth in the number of individual investors in the stock market, which is itself attributable to the Internet to a large degree, has spurred the success of the financial message boards. *See* FARRELL, *supra* note 2, at 2 ("In the matter of a few short years, the Internet has changed the very landscape of investing . . . . Trading stocks has never been cheaper or more accessible.").

240. Thus, even if discourse on the message boards contributes only marginally to the "search for truth," it promotes "participation in decision making by all members of society." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970). Alexander Meiklejohn is perhaps most famously associated with the philosophy that the First Amendment protects speech essential to "democratic self-governance," and many of Meiklejohn's argu-

zens to transform public opinion into action.[241] The more citizens know about economic matters, the more likely they are to make informed voting decisions. More significantly, the boards provide an important "back channel" for individual shareholders to convey their feelings to the corporations in a market largely dominated by institutional shareholders,[242] especially since, as noted above, many CEOs closely follow what is said about their corporation on the financial message boards.[243] Even if the "buzz" on the boards does not directly influence corporate decisionmaking, it may influence decisions indirectly. And, if the boards have even a tiny impact on corporate behavior, they have broad social ramifications not limited to the participants in online discussions. Indeed, it is the worry that message

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ments, when taken out of context, would support extending broad First Amendment protection to discourse in cyberspace. *See* MEIKLEJOHN, *supra* note 15, *passim*. Meiklejohn argued, for example, that the First Amendment's "primary purpose" is to guarantee "that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them." *Id.* at 88-89. This argument supports the provision of broad First Amendment protection to speech on message boards. Financial message boards, for example, deal with issues of corporate behavior and corporate decisionmaking that have ramifications beyond the financial self-interest of shareholders. And certainly most message boards deal, if only tangentially at times, with "issues which bear upon our common life." *Id.* Meiklejohn, however, did not envision a fully participatory model of discourse. For him, the appropriate model of discourse was "the traditional American town meeting," a forum that regulates the speech of participants to attain particular goals. *Id.* at 22. "What is essential," wrote Meiklejohn, "is not that everyone shall speak, but that everything worth saying shall be said." *Id.* at 25. *But see* Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109, 1117 (1993) (criticizing Meiklejohn's "town meeting model" because "it reflects an insufficiently radical conception of the reach of self-determination").

241. Some commentators even seem to contend that raising citizens' awareness of economic affairs and the behavior of corporations has the potential to generate more social and economic reform than participation in overtly political discourse. *See* James A. Fanto, *Investor Education, Securities Disclosure, and the Creation and Enforcement of Corporate Governance and Firm Norms*, 48 CATH. U. L. REV. 15, 33-34 (1998) ("Without dramatizing the issue, there are political and ideological implications in failing to instruct people about the consequences of their ownership of property and in encouraging them to view such ownership in a limited way."); Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 81 (1997).

242. *See* MONKS & MINOW, *supra* note 238, at 181 ("Institutional shareholders now hold the majority of common stock.").

243. *See* Rebecca Buckman, *Gumshoe Game on the Internet: Companies Hire Private Eyes to Unmask Online Detractors*, WALL ST. J., July 27, 1999, at B1:

> With an explosion of online corporate chat by investors, more companies are hiring private eyes to track down people posting anonymous messages they don't like. Though the freewheeling banter is frequently off-base, companies fret that investors may believe—or trade stock on—what they see posted on a Web site or a stock-message board.

See also Moss, *supra* note 4.

245. *See* Buckman, *supra* note 243.

boards will transform opinion into action that prompts many companies to hire others to monitor what is being said about them on the web, to hire private investigators to track down online detractors,[245] and even to sue anonymous John Does for libel.

Any argument that message boards further First Amendment values must, of necessity, concede that much of the conversation on the boards is cryptic, uninformed, and inane.[246] But "uninhibited, robust, and wide-open debate"[247] will often be cryptic, uninformed, and inane, especially when such debate is not restricted to educated elites but is expanded to include ordinary John Does. Thus, to concede this point does not detract from the importance of the boards as an outlet for ordinary citizens to discuss corporate behavior, to vent frustrations, and to have some small measure of input into corporate decisions that affect not only their own lives but those of their fellow citizens.

3. *The Pitfalls of Participatory Public Discourse.* A central premise of First Amendment theory in the twentieth century has been that truth is best gathered "out of a multitude of tongues,"[248] and the Internet promises, if nothing else, to put this theory to the test. Already there are indicators that the "new" public discourse will look quite different from the old. As the financial message boards demonstrate, a financial discourse that includes ordinary John Does looks quite different from a discourse dominated by Wall Street analysts.[249] Discourse on the boards is lively and engaging, providing "the masses" with a highly accessible source of information and education about the stock market. The boards give ordinary citizens an opportunity to become active participants in an ongoing dialogue about economic affairs and, in the process, allow them to transform the way business is done.[250]

But fostering a more participatory public discourse may come at a high cost. Speech from a "multitude of tongues" may lead to truth,

246. *See supra* notes 161-64 and accompanying text.

247. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

248. United States v. Associated Press, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945). The Supreme Court cited this language with approval in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

249. *See* Moss, *supra* note 4 ("Until the Internet came along, the traffic in opinion about stocks and bonds was largely—and for the most part calmly—controlled by Wall Street analysts.").

250. *See id.*

but it may also lead to the Tower of Babel.[251] And the level of discourse on the financial message boards also suggests that fostering unmediated participation may make public discourse not only less rational and less civil; it also runs the risk of making public discourse meaningless. A discourse that has no necessary anchor in truth has no value to anyone but the speaker,[252] and the participatory nature of Internet discourse threatens to engulf its value as discourse.

The problem, therefore, is to strike a balance between free speech and the preservation of civility. If the goal of making public discourse more participatory and ultimately more democratic is to be realized, the speech of ordinary John Does merits a very wide expanse of "breathing space,"[253] wider than it currently receives. First Amendment doctrine therefore cannot hold ordinary John Does to the standards of professional journalists with regard to factual accuracy, because part of what gives the Internet such widespread appeal is the fact that it allows ordinary citizens to have *informal* conversations about issues of public concern. Although any approach to the problems posed by the new Internet libel actions must respond to the unique culture of the message boards, the law cannot allow that culture to degenerate into a realm where anything goes, where any embittered and malicious speaker can lash out randomly at innocent targets. Although many of the new libel plaintiffs are powerful corporate Goliaths suing to punish and to deter their critics, some are not. Some are simply responding in the only way available to prevent aggressively uncivil speech, the sole purpose of which is to cause emotional and financial harm. Hence, any solution to the problems posed by

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251. In the Tower of Babel account, the people of the earth began to build a tower "whose top may reach unto heaven." *Genesis* 11:4 (King James). When God saw the tower, he said:

> Behold the people is one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do. Go to, let us go down, and there confound their language, that they may not understand one another's speech.

Id. 11:6-7 (King James). The next verses reveal the aftermath:

> [T]he Lord scattered [the people] abroad from thence upon the face of all the earth: and they left off to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth: and from thence did the Lord scatter them abroad upon the face of the earth.

Id. 11:8-9 (King James).

252. My thanks to Professor David A. Anderson for bringing this point home to me.

253. New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive . . . ." (citation and internal quotation omitted)); *see also* Cate, *supra* note 196, at 15 (discussing rationales for extending a "breathing space" around constitutionally protected speech). For further discussion, see *infra* Part II.C-D.

these new suits must be tuned finely enough to distinguish incivility that must be tolerated for the good of public discourse from incivility that destroys public discourse.[254]

C. John Doe and First Amendment Doctrine

One might intuitively expect such a solution to come from the First Amendment. Since 1964, the First Amendment has been attuned to the danger that plaintiffs will use the threat of libel lawsuits to intimidate their critics.[255] Existing First Amendment doctrine, however, provides only a limited response to the problems posed by the new Internet libel suits.

First Amendment doctrine, for example, has little to say about the chilling effect that the mere threat of being sued imposes on defendants of modest means.[256] Although some courts have indicated that the First Amendment requires judges to take an active role in dismissing libel cases at an early stage, it is not a constitutional requirement.[257] Indeed, as Professor Susan Gilles has noted, the first set of constitutional protections often will not come into play until the summary judgment stage,[258] which may be too late to protect the de-

254. *See generally* POST, *supra* note 159, at 119-78 (discussing the nature of, and difficulties inherent in, the concept of public discourse).

255. *See Sullivan*, 376 U.S. at 279 (expressing fear that "would-be critics of official conduct may be deterred from voicing their criticisms, even though it is believed to be true and even though it is in fact true" because of the risk of a libel suit).

256. Existing First Amendment doctrine currently provides defendants no protection from having their anonymity stripped away once a libel action is filed, although one might argue that the First Amendment right to speak anonymously should be extended to provide such protection. In *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1994), the Supreme Court recognized that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment." *Id.* at 342. Two district courts have extended the right to speak anonymously to the Internet context. *See* ACLU v. Miller, 977 F. Supp. 1228, 1232 (N.D. Ga. 1997) (stating that a Georgia "statute's prohibition of internet transmissions which 'falsely identify' the sender constitute[d] a presumptively invalid content-based restriction"); ACLU v Johnson, 4 F. Supp.2d 1029, 1033 (D.N.M. 1998) (striking down a statute that prohibited "people from communicating and accessing information anonymously").

257. *See* Gilles, *supra* note 180, at 1768-69 ("Thus, at the front end of a law suit no First Amendment procedural protections have been granted.").

258. *See id*. at 1771 ("Summary judgment then is the site of the first set of procedural accommodations granted to libel defendants."); *see also id.* at 1780-81 ("[M]uch of the cost of defending a libel suit has already been incurred by the time the first constitutional protection, an enhanced summary judgment standard, kicks in."). Gilles does not consider the constitutional privilege for statements that do not imply an assertion of fact (opinion statements), which courts traditionally have applied to screen cases out at an earlier stage. *See infra*

fendant from incurring substantial costs in defending himself, even if the case is frivolous.

More to the point, the Supreme Court crafted the constitutional privileges largely for the benefit of the institutional media, and these privileges are not entirely responsive to the chilling effect of defamation law on nonmedia defendants of the type targeted by the new Internet libel actions. Indeed, it is not even certain what level of First Amendment protection, if any, the typical John Doe defendant would receive.[259] The typical John Doe case involves a publicly held corporation suing a defendant over statements posted on a financial message board dedicated to discussion of the company's prospects and management—indeed, of anything that might affect its stock price.[260] With respect to the level of constitutional protection that John Doe will receive, the Supreme Court's decisions make clear that courts must resolve at least three questions: (1) Is John Doe entitled to the same level of constitutional protection as a media defendant? (2) Is the corporate plaintiff a public figure? and (3) Is the speech at issue of public concern? In the typical case, the answer to all three questions should probably be yes, which means that John Doe should receive the maximum level of First Amendment protection from defamation liability.[261] But even if John Doe receives the maximum level of First Amendment protection, it is not clear that corporate plaintiffs will be barred from using defamation law as a tool for silencing their critics.

1. *The Media/Nonmedia Distinction (or Lack Thereof).* Internet users like John Doe defy the traditional distinction between media and nonmedia defendants.[262] One of the defining characteristics of the media is their ability to reach a mass audience. Although one might argue, therefore, that the typical John Doe is a media defendant, the

259. Obviously, the precise level of protection will vary with the facts of each individual case. *See* Smolla, *supra* note 86, at 1572 (providing a chart of the possible permutations of plaintiff status (public official, public figure, or private figure), defendant status (media versus nonmedia), and type of speech (a matter of public concern versus a matter not of public concern)).

260. *See supra* note 6 (citing cases).

261. Defamation law, however, is so complex that it is almost impossible to state even the most basic proposition with certainty. Even for those relatively rare Internet users who have the resources to defend against a defamation action and who contemplate in advance whether their postings will subject them to liability, the inability to predict with any certainty what level of constitutional protection they will receive may itself have a chilling effect. *See* SANFORD, *supra* note 7, § 7.4, at 314 (2d ed. 1991 & Supp. 1999) (opining that "uncertainty can kill protected commentary as effectively as the bluntest censorship").

262. *See* Hadley, *supra* note 31, at 487 (arguing that "most speakers on the Internet could not properly be described as the 'press'").

Supreme Court traditionally has referred to only the institutional media—broadcasters, newspaper publishers, and so forth—as the "media" for First Amendment purposes.[263] The question, then, is whether nonmedia defendants like John Doe are entitled to the same level of First Amendment protection as media defendants. The Supreme Court has studiously avoided providing a definitive resolution to this question,[264] but the "best educated guess"[265] of most commentators[266] (and, more importantly, of most lower courts[267]) is that nonmedia de-

263. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (applying the standard analysis for media defendants to a newspaper publisher); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (same); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (limiting the Court's First Amendment discussion to publishers and broadcasters).

264. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), involved both media and nonmedia defendants, and the holding of the case, that public official plaintiffs must prove actual malice with convincing clarity in order to recover for defamation, seemed to apply equally to both classes of defendants. *See id.* at 285-86. Nonetheless, the Supreme Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), noted that the issue of whether the actual malice standard applied to nonmedia defendants was still open. *See id.* at 134 n.16. *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), further complicated matters because it repeatedly referred to the fact that the defendants were members of the media. *See id.* at 347. In *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court seemed ready to resolve the issue; although the Court did not address the media/nonmedia distinction directly, a majority of Justices indicated their willingness to reject it. *See id.* at 758-62 (plurality). Nonetheless, in both *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court went out of its way to assert that the issue was not in fact resolved. *See Milkovich*, 497 U.S. at 11 n.5. ("In *Hepps* the Court reserved judgment on cases involving nonmedia defendants . . . and accordingly we do the same."); *Hepps*, 475 U.S. at 779 n.4 ("Nor do we need to consider what standards would apply if the plaintiff sues a nonmedia defendant.").

265. The phrase is Professor Smolla's. *See* Smolla, *supra* note 86, at 1564.

266. *See, e.g.*, *id.*; *see also Developments in the Law—The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1616 n.50 (1998) (arguing that, "[a]lthough guilty of giving mixed signals," the Supreme Court has "confirmed the irrelevance of the media/nonmedia distinction . . . ."); Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) ("With few exceptions, constitutionalized defamation law applies the same principles to a libel in the *New York Times* as it does to a slander over the back fence."); Hadley, *supra* note 31, at 487 (assuming that the distinction makes no difference); Francis M. Dougherty, Annotation, *Defamation: Application of* New York Times *and Related Standards to Nonmedia Defendants*, 38 A.L.R.4th 1114 (1981).

Numerous commentators have questioned whether the distinction is viable. *See, e.g.*, SACK & BARON, *supra* note 78, § 5.6.1, at 311 ("A press/nonpress distinction remains unjustified and unlikely."); Smolla, *supra* note 86, at 1564 (arguing that a media/nonmedia distinction is unsound and that, although the court has vacillated as to whether such a distinction exists, "[t]he best educated guess . . . is that the Court will ultimately reject the media/nonmedia distinction"); Anne Benaroya, Note, Philadelphia Newspapers v. Hepps *Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268, 1270 (1990) (arguing "that the defamation defendant's status as part of the institutional media should have no bearing on whether, and to what degree, the defendant should receive constitutional protection").

267. *See* John B. McCrory & Robert C. Bernius, *Constitutional Privilege in Libel Law*, *in* 1 COMMUNICATIONS LAW 7, 464-73 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-398, 1994). McCrory and Bernius note that lower courts gener-

fendants should receive the same level of protection from defamation liability as media defendants. A media/nonmedia distinction would draw unsound and unworkable status distinctions among speakers, and, as the Supreme Court has recognized in a poignant but now obsolete metaphor, the "lonely pamphleteer's" contribution to public debate can be just as important as that of the most powerful media speaker.[268] Moreover, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[269] at least six Justices seemed to reject the media/nonmedia distinction,[270] although the case was decided on other grounds.[271] Since that time, the Supreme Court has gone out of its way to state that this issue remains unresolved,[272] but it seems fair to conclude (or at least to hope) that the "increasing convergence of what might be labeled 'media' and 'nonmedia'"[273] speakers makes it unlikely that the Supreme Court will extend less First Amendment protection to Internet users than it has extended to traditional media defendants.

2. *Corporations as Public Figures.* The second determinant of the level of First Amendment protection that John Doe will receive is the public figure status[274] of the new class of Internet defamation

ally require public figures or public officials to prove actual malice, regardless of whether the defendant is a media defendant or nonmedia defendant. *See id.* at 465-71 (collecting cases). There is some disagreement amongst the lower courts as to what standard applies when a private figure plaintiff sues a nonmedia defendant, although many lower courts appear to extend nonmedia defendants the benefits of *Gertz* when the speech involves a matter of public concern. *See id*. at 472-77 (collecting cases). Whether the defendant is media or nonmedia is likely to have some bearing on whether the speech is of public concern. *See* Robert E. Drechsel, *Defining "Public Concern" in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1, 14 (1990) (observing that lower courts "consider the forum of the libel [i.e., whether it is disseminated by a mass medium] to be an important factor" in determining whether a defendant's statement was of public concern).

268. *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

269. 472 U.S. 749 (1985).

270. *See id*. at 783-84 (Brennan, J., dissenting) ("[A]t least six Members of this Court . . . agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.").

271. *See id*. at 764 (plurality) (holding, in a plurality opinion written by Justice Powell, that, in cases involving private figure plaintiffs and matters of private concern, states may award presumed and punitive damages in defamation cases, even absent a showing of actual malice).

272. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 n.5 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986).

273. *Dun & Bradstreet*, 472 U.S. at 782 n.7 (Brennan, J., dissenting).

274. Under federal law, the determination of whether a plaintiff is a public figure is a question of law. *See* Kassel v. Gannett Co., 875 F.2d 935, 939 (1st Cir. 1989) (citing cases).

plaintiffs.[275] The distinction between public and private figures is an important one because a public figure plaintiff must prove that the defendant acted with actual malice in order to recover for defamation.[276] Although this distinction is important, the Supreme Court has given only limited guidance on how to distinguish public from private figures, especially when the plaintiff is a corporation.[277] A strong argument can be made that the typical corporate plaintiff in a John Doe libel case will be a public figure. The typical plaintiff is a publicly held corporation listed on a national stock exchange; a publicly held corporation by definition avails itself of the capital markets to raise funds from investors.[278] Regardless of how such corporations should be treated generally,[279] it is fair to conclude that a

275. *See, e.g.*, Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976) (observing that distinguishing between public figures and private figures "is much like trying to nail a jellyfish to the wall"), *aff'd*, 580 F.2d 859 (5th Cir. 1978); SANFORD, *supra* note 7, § 7.3.1 (2d ed. 1991) (criticizing the public figure test as "a failure"). On the difficulty of applying the public figure doctrine to corporate plaintiffs, see Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982); John Hilbert, Note, *A Criticism of the* Gertz *Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 SAN DIEGO L. REV. 721 (1981); Douglas E. Lee, Note, *Public Interest, Public Figures, and the Corporate Defamation Plaintiff:* Jadwin v. Minneapolis Star and Tribune, 81 NW. U. L. REV. 318 (1987).

276. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967), the Supreme Court held that public figures must prove actual malice.

277. *See* Redlich, *supra* note 99, at 117 ("The analysis is rendered even more difficult where the plaintiff is a corporation, given the absence of a clear analytic framework, let alone authoritative guidance from the Supreme Court."); *see also* SANFORD, *supra* note 7, § 7.7, at 354.5 (2d ed. 1991) ("[T]he Supreme Court has yet to address squarely the constitutional status of defamation suits in which the plaintiff is not a human being."). *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), for example, involved a corporate plaintiff, but the Court did not discuss its status as a public or private figure.

278. A few courts have concluded that a business listed on a national stock exchange should be treated automatically as a public figure. *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (observing that a corporation "is certainly a public figure with respect to issues involving its offering of securities to the public" and also that its "role in society is such that it is a figure generally in the public eye"); American Benefit Life Ins. Co. v. McIntyre, 375 So. 2d 239, 242 (Ala. 1979) (concluding that a corporation is a public figure because the "power and influence of such a business over society cannot be ignored"). *But see* Silver Screen Management Servs., Inc. v. Forbes, Inc., 19 Media L. Rep. (BNA) 1744, 1745 n.1 (N.Y. Sup. Ct. 1991) (stating that not "all businesses which make public offerings . . . are subject to the 'higher' constitutional privilege for public figures").

279. Even publicly held corporations are not invariably treated as public figures, at least by most courts. *See* FRANKLIN & ANDERSON, *supra* note 74, at 311 (citing cases indicating that "[t]he overwhelming majority of courts have concluded that the fact of incorporation alone does not make the plaintiff a public figure"). In Minnesota, however, corporations are public figures as a matter of law. *See* Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 487 (Minn. 1985). Other courts have held that corporate plaintiffs must prove actual malice, regardless of whether the plaintiff is a public figure, because the state interest in protecting corporate reputation is weaker than that in protecting individual reputation. *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976).

corporation should be treated as a public figure when the alleged defamation appears in a forum dedicated to discussion of the corporation's management and operation and is reasonably related to that subject.[280]

Although courts have developed a variety of tests for determining whether a corporation is a limited-purpose public figure,[281] the two most important determinants of public figure status are those set forth in the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*:[282] (1) whether the plaintiff has access to channels of effective communication to rebut the defamatory falsehood;[283] and (2) whether the plaintiff voluntarily assumed a prominent role in a public controversy and the attendant risk of enhanced public scrutiny that accompanies it.[284] Both of these factors cut in favor of treating the typical corporate plaintiff in the new Internet libel actions as a public figure. The typical publicly held corporation will have a great deal of access to effective channels of communication.[285] The corporation can post an authoritative rebuttal to any defamatory message on the financial

280. There are three categories of public figures: (1) involuntary public figures, (2) all-purpose public figures, and (3) limited-purpose public figures. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974). To the extent that the corporation's name is a "household name," it should probably be treated as an all-purpose public figure. *See* Redlich, *supra* note 98, at 1172. In the text, I argue that the typical corporate plaintiff in a John Doe case will be at least a limited-purpose public figure. *Cf.* Lynn B. Oberlander, *Corporate Plaintiffs: Public or Private Figures?*, 16 COMM. LAW. 1, 1 (1998) ("It would be reasonable to postulate that . . . corporations should always be considered public figures or, more narrowly, limited purpose public figures if the alleged defamation concerns their business."). Obviously, some cases also will involve private figures; it is hard to imagine, for example, that the wife of a CEO of a publicly held corporation would be treated as a public figure when she did nothing to inject herself into any public event.

281. *See, e.g.*, Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993); National Life Ins. Co. v. Phillips Publ'g, Inc., 793 F. Supp. 627, 635 (D. Md. 1992) (setting out a five-factor test). Professor Smolla has identified at least nine factors that influence the outcome of the limited-purpose public figure determination. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.09[4] (1997).

282. 418 U.S. 323 (1974).

283. *See id.* at 345 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.").

284. *See id.* at 344-45. The normative argument underlying this factor—that public figures assume the risk of being defamed by participating in public controversies—is questionable. It is also questionable whether this factor has much relevance to corporate defamation cases. *See, e.g.*, *Martin Marietta*, 417 F. Supp. at 955 ("It makes no sense to apply these standards to a corporation, which, regardless of its activities, never has a private life to lose.").

285. *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 258 (1998) ("Corporations invariably will possess both the economic incentive and resources to express their views effectively and persuasively.").

message board on which the message first appeared.[286] The corporation can also issue press releases to counteract any defamatory statements, and many publicly held corporations can even finance intensive media campaigns to rehabilitate a damaged corporate reputation.

Although the corporation's access to "self-help"[287] remedies for defamation suggests that it should be treated as a public figure, it is somewhat harder to argue in the typical John Doe case that the corporate plaintiff "thrust [it]self to the forefront of [a] particular public controvers[y]."[288] The "public controversy"[289] at issue ordinarily will be a topic that affects the corporation's stock price: it may be as diffuse a subject as the overall financial health of the corporation or as specific as a particular venture on which the company has embarked or a particular corporate decision. The problem with applying this analysis to the John Doe cases is that they do not tend to involve a "controversy"[290] but rather a subject of discussion.[291]

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286. Several commentators have argued that all participants in Internet discussion fora should be treated as public figures, because the Internet gives a defamed party the ability to rebut the allegedly defamatory statement relatively quickly. *See* GODWIN, *supra* note 154, at 82 (arguing in support of his "access to self-help" argument that, "[i]f some bozo writes one hundred lines of false statement and innuendo about your sex life or personal habits, you can write five hundred lines of point-by-point refutation"); Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 237 (1995) (arguing that "libel plaintiffs who have been defamed by bulletin board speech and who have both access to the bulletin board on which the defamatory material appeared and a history of participating on the bulletin board are functionally equivalent to public figures"). Although corporations have the same access to this remedy as other Internet users, the corporation has more credibility and authority in rebutting the defamatory statement than will the typical victim of defamation.

287. *Gertz*, 418 U.S at 344 n.9.

288. *Id.* at 345. This Article's ultimate analysis does not hinge on whether the corporation is a public or private figure. If I am correct that the actual malice standard applied to public figures provides insufficient protection to John Doe, the argument is even stronger with regard to the negligence standard applied to private figures.

289. A "public controversy" is one that has ramifications for more than just the parties involved. *See* Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1544 (4th Cir. 1994). Typically, the public controversy "must have existed prior to the [publication of the defamatory] statements." *See, e.g.*, Worldnet Software Co. v. Gannett Satellite Info. Network, Inc., 702 N.E.2d 149, 155 (Ohio Ct. App. 1997).

290. *See* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980) (defining "public controversy" as "not simply a matter of interest to the public," but as "a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way"); Gannett Co. v. Re, 496 A.2d 553, 556 (Del. 1985) (defining a public controversy as "'a dispute . . . between sides holding opposite views'" (quoting *The American Heritage Dictionary of the English Language*)). Indeed, Robert Sack and Sandra Baron have criticized courts that rigidly adhere to the requirement that there be a particular controversy, arguing that the more important factor is whether the plaintiff voluntarily involved itself in a public issue. *See* SACK & BARON, *supra* note 78, § 5.6.2.2, at 316.

Despite the lack of a true "controversy," the justifications for treating a publicly held corporation as a public figure for purposes of Internet discussions of its financial well-being are compelling.[292] All corporations have an interest in convincing the public of their financial well-being,[293] but publicly held corporations are more likely to "invite attention and comment"[294] on their business dealings and affairs by their affirmative acts. Publicly held corporations must make an affirmative decision to "take the company public" in order to solicit money from investors. In making the decision to "go public," the corporation seeks and often obtains national attention.[295] The corporation also voluntarily submits itself both to extensive legal regulation (including public disclosure requirements)[296] and to a degree of public scrutiny[297] in order to obtain "the special benefits conferred by the corporate structure."[298] Moreover, corporations have a vested interest

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291. *See* SACK & BARON, *supra* note 78, § 5.3.8, at 274-75 (observing courts have found that "the public nature of a corporation's business does not necessarily render it a public figure absent a preexisting "controversy" about the entity or its products or services, irrespective of whether the entity is offering goods or services to the public, is publicly owned, or is in a regulated industry" (footnote omitted)).

292. *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348-49 (S.D.N.Y. 1977) (holding that a large publicly held company is a public figure and that information concerning such a company's financial status should be communicated as freely as other public issues); Fotochrome, Inc. v. New York Herald Tribune, Inc., 305 N.Y.S.2d 168, 172 (N.Y. Sup. Ct. 1969) ("There is no less interest in, nor less of a need for information concerning, the stock market in general or the successes, failures or manipulations of specific corporations in which thousands of people have invested their personal fortunes, than there is in basketball, football, crime or public health."); SACK & BARON, *supra* note 78, § 5.3.8, at 273 (arguing that "[d]ecisions holding that any *publicly held* corporation is a public figure for purposes of commentary about its corporate affairs are persuasive").

293. However, this does not automatically turn corporations into public figures. *See* Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993) (noting that it is impossible to conclude from corporate status alone that corporations have "thrust themselves into the public eye").

294. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

295. *See, e.g.*, *Snead*, 998 F.2d at 1329 (suggesting that the notoriety of a corporation is a relevant factor in determining whether it is a public figure).

296. *See, e.g.*, 15 U.S.C. § 78m (1994); 17 C.F.R. §§ 229.401-.404 (1999).

297. *See* SACK & BARRON, *supra* note 78, § 5.3.8, at 274. The degree of media scrutiny has intensified in the last few years with the development of television networks devoted to the coverage of business issues. *See* Mark J. Loewenstein, *Reflections on Executive Compensation and a Modest Proposal for (Further) Reform*, 50 SMU L. REV. 201, 201 (1996) (noting that "highly-paid CEOs attract media attention"); Edward D. Rogers, *Striking the Wrong Balance: Constituency Statutes and Corporate Governance*, 21 PEPP. L. REV. 777, 799 (1994) (arguing that "public scrutiny" of "corporate decisional processes" is minimal compared to the scrutiny given to government decisionmaking); *see also* ROBERT LAMB ET AL., BUSINESS, MEDIA, AND THE LAW: THE TROUBLED CONFLUENCE 27 (1980) (lamenting that "most business people have been slow or reluctant to develop the instinct for the camera angle and the newsmaking stunt that their counterparts in politics and sports have acquired").

in fostering discussion of their stock valuation amongst investors and potential investors who frequent financial message boards. Many corporations even monitor board discussions, and they may sometimes take an active role in shaping the discussion to their benefit.[299] Given that Internet message boards are dedicated to discussion of business activities voluntarily undertaken by corporations, courts should ordinarily treat corporations as having assumed the risk of hard-hitting debate and criticism of their activities.

3. *Public Concern and Financial Discourse.* The last determinant of the level of protection John Doe's speech will receive is whether the speech deals with a matter of public concern or a matter of only private concern. The Supreme Court grants extensive First Amendment protection from defamation claims only to "speech on matters of public concern."[300] If this Article is correct in predicting that many plaintiffs in the new John Doe libel cases will be public figures, it follows almost automatically that the cases will also involve matters of public concern.[301] Even if the plaintiff is a private figure,

298. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 661 (1990). These include "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." *Id.* at 658-59. The Court also noted that "[t]hese state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Id.* at 659 (quoting FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

299. *See* Moss, *supra* note 4.

300. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 749 (1985) (plurality). The Supreme Court has "long recognized that not all speech is of equal First Amendment importance." *Id*. at 758. Speech involving matters of purely private concern receives little, if any, First Amendment protection. *See id.* at 749. Even speech involving matters of public concern does not receive the highest level of protection unless it also involves a public figure plaintiff. *Compare* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350-51 (1974) (holding that, while a private figure plaintiff involved in a matter of public concern may not recover punitive damages absent a showing of actual malice, that plaintiff may recover for actual injury upon a showing of *negligence*), *with* New York Times Co. v. Sullivan, 376 U.S. 254, 283-84 (1964) (affirming that public officials must prove actual malice in order to recover against critics of their official conduct).

301. The Supreme Court's cases make it clear that establishing the existence of a "public controversy" is more difficult than establishing the existence of a "matter of public concern." *See* Drechsel, *supra* note 267, at 16 (explaining that "courts appear to be holding that defamatory expression about a public figure or public official is inherently a matter of public concern"); *see also, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (finding no controversy sufficient to make a public figure of a scientist who was publicly criticized by a Senator, despite the fact that the subject of the criticism was of general public concern); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (finding no controversy and pointing out that individuals should not lose the ability to sue for defamation simply because of their presence in court); Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1197 (9th Cir. 1989) (expressing "doubt that it is possible to have speech about a public figure" that is "not of public concern").

however, defendants like John Doe should still receive a high degree of First Amendment protection because their speech will typically involve matters of public concern.

Discussion of the financial health of a publicly held company listed on a national stock exchange would certainly be a matter of public concern if it appeared in the *Wall Street Journal*, a *Bloomberg News* report, or a CNBC broadcast.[302] Yet, the very same discussion may not be of public concern when it occurs on a financial bulletin board in cyberspace. Whether speech deals with a matter of public concern is not judged by its subject matter alone, but by its "content, form and context."[303] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[304] for example, the Supreme Court deemed a report about the financial health of a corporation to be of only private concern,[305] although the facts and the reasoning of the case suggest that matters of truly private concern should be rare. Dun & Bradstreet, a credit reporting service, erroneously reported to five of its subscribers that a corporation was bankrupt; however, the five subscribers who received the report were contractually bound not to reveal the contents to anyone else.[306] The Court upheld a jury award in favor of the defamed corporation for $50,000 in presumed damages and $300,000 in punitive damages,[307] even though the corporation failed to show that Dun & Bradstreet published the report with actual malice.[308] Although the Supreme Court did not spell out the practical implications of the decision, the reasoning suggests that the state's strong interest in protecting the reputations of private figures might well justify imposing strict liability on defamation involving issues of private concern, and indeed this interpretation has persuaded many commentators that defendants receive no special constitutional protections in this type of case.

The new John Doe cases, however, are distinguishable from *Dun & Bradstreet* on a number of grounds. A key factor in the Court's decision in *Dun & Bradstreet* was that the credit report at issue involved

302. Although "[s]peech about commercial or economic matters" takes a back seat to political speech in the First Amendment hierarchy, the Supreme Court has nonetheless acknowledged that economic speech is "an important part of our public discourse." *Dun & Bradstreet*, 472 U.S. at 787 (Brennan, J., dissenting).

303. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

304. 472 U.S. 749 (1985) (plurality).

305. *See id.* at 762 (plurality); *id.* at 764 (Burger, C.J., concurring); *id*. at 773 (White, J., concurring).

306. *See id.* at 751 (plurality).

307. *See id.* at 752, 763.

308. *See id.* at 763.

"speech solely in the individual interest of the speaker and its specific business audience."[309] Almost by definition, the credit report could not contribute to "the free flow of commercial information" because the "audience" for the speech consisted of only five paid subscribers who were contractually bound not to disseminate the information more widely.[310] A second factor that the Court emphasized was that the report merited no "special protection" due to its "hardy" nature.[311] Because credit reporting agencies like Dun & Bradstreet have a powerful market incentive both to continue publishing credit reports and to verify the accuracy of such reports, the Court thought it unlikely that imposing defamation liability for false reports would unduly chill credit reporting agencies from producing them.[312]

Neither of these factors is present in the typical John Doe case. In contrast to the speech at issue in *Dun & Bradstreet*, the John Doe cases involve speech that contributes, albeit modestly,[313] to the free flow of financial information and that is particularly susceptible to being chilled by libel suits. First, unlike the credit report in *Dun & Bradstreet*, messages posted on financial bulletin boards reach a large national and even international audience. Of course, one might still argue that, regardless of the *size* of the audience, most of those who follow the message board for a particular corporation will be investors or potential investors who have self-interested motives for following the discussion. However, this argument overstates the extent to which the message boards involve speech that is "solely in the individual interest of the speaker and [his] specific business audience."[314] As argued in Section II.C, publicly held corporations play a vital role in shaping both the United States economy and the lives of ordinary citizens.[315] The financial message boards can be a useful source of information about the financial health of publicly held corporations, and they can provide an informal education to investors and nonin-

309. *Id*. at 762.

310. *Id*. Justice Brennan was probably correct in stating that this peculiar feature of the *Dun & Bradstreet* case was the key factor in the plurality's determination that the defendant's speech was only of private concern, since by the terms of the contract the speech could not affect the flow of commercial information generally. *See id.* at 786 n.12. (Brennan, J., dissenting) (theorizing that "it may well be that this element of confidentiality is crucial to the outcome" of Justice Powell's plurality opinion).

311. *Id*. at 762.

312. *See id*. at 762-63.

313. *See supra* notes 234-39 and accompanying text.

314. *Dun & Bradstreet*, 472 U.S. at 762.

315. *See supra* notes 274-99 and accompanying text.

vestors alike about financial matters more generally. But most significantly, the boards allow ordinary citizens to participate, however marginally, in corporate decisionmaking, and they enhance the ability of citizens to make informed decisions on matters of economic policy. To the extent, therefore, that discourse on the boards affects corporate decisionmaking or even political decisions on economic matters, it has the potential to affect all citizens. The powerful democratizing effect of the boards gives corporations a reason to fear them, but it also justifies treating discourse on the board as involving a matter of public concern.

The threat libel suits pose to John Does who contribute to financial message boards bolsters the argument for treating such discussions as a matter of public concern. Unlike the credit report at issue in *Dun & Bradstreet*, the speech of individual posters to Internet discussion boards is not likely to be especially "hardy." Although a shareholder of a corporation may have some financial self-interest in following discussion of the corporation on a financial bulletin board, the shareholder has no financial interest in contributing to the discussion (unless, perhaps, she is planning to try to "hype" the stock to drive up its price, behavior which in some cases is illegal).[316] Because John Doe has no financial incentive to speak, he likely will find it easier to engage in self-censorship than to risk being sued for libel. Being sued is not a risk John Doe can easily avoid. It is no simple matter for John Doe to "objectively verify" every piece of information about a corporation before publishing it, and, even if he kept a staff of fact-checkers, much of the information published on the boards is inherently speculative in nature, even where it appears to be couched in the form of "facts." John Doe's contribution to public discourse may therefore by silenced by strict application of defamation law. Given this threat, it seems clear that, even in cases involving private figure plaintiffs, John Does should ordinarily receive at least some level of First Amendment protection.

D. The Inadequacies of the Actual Malice Standard

Even if a court were to conclude that the corporate plaintiffs in the new Internet libel actions should be treated as public figures, corporations might still be able to use libel suits to intimidate John Doe

316. Moreover, it may be the more sophisticated or knowledgeable posters who will be deterred by the threat of being sued for libel, since such posters may be more capable of understanding the true magnitude of the threat.

and others like him into silence, since the actual malice standard is not responsive to the distinctive problems raised by these new cases.[317] In addition to proving the common law elements of a libel action, public figure plaintiffs must also prove that the defendant's statements were false[318] and that the defendant made them with actual malice—that is, with knowledge or reckless disregard of their falsity.[319] The actual malice standard is designed to prevent juries from imposing crippling liability on unpopular defendants for minor mistakes of fact.[320] Negligent, and even grossly negligent, publication of defama-

317. I discuss the application of only the actual malice standard in the John Doe cases, but my argument—that the standard is not adequately responsive to the problems raised by the John Doe cases—applies with equal, if not more, force to the application of a negligence or strict liability standard.

318. Truth ordinarily was a defense at common law. *See* KEETON ET AL., *supra* note 35, § 116, at 839.

319. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (defining "actual malice" to require a showing of "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication"); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (defining "actual malice" as a "high degree of awareness of [the] probable falsity" of one's statements); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that a public official plaintiff must prove "that the [defendant's] 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"). Actual malice is a term of art in defamation law and should not be confused with common law malice, a state of mind often defined as "spite, hostility, or deliberate intention to harm." Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 251-52 (1974) (indicating that actual malice is a "term of art" in defamation law); Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n.6 (1974) (defining "reckless disregard" as "subjective awareness of probable falsity"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 10-11 (1970) (reversing a libel verdict because the trial court had misdefined "actual malice," equating it with common law malice). It is also worth noting that "reckless disregard" as a constitutional standard "is virtually unrelated to 'recklessness' in the popular sense of gross negligence or wanton behavior." SACK & BARON, *supra* note 78, § 5.5.1, at 277.

320. *New York Times Co. v. Sullivan* involved this very threat. *See Sullivan*, 376 U.S. at 280-82. Sullivan's defamation action against the *Times* arose from a paid advertisement it published critical of the conduct of Alabama government officials. *See id.* at 256-57. Sullivan, the police commissioner in Montgomery, Alabama, claimed that the advertisement had defamed him because it accused the Montgomery police of harassing civil rights demonstrators, and he promptly sued the *Times* and four black ministers listed as endorsing the advertisement, for a total of $500,000 in damages. *See id.* at 256-57. Sullivan was able to press his claim successfully under Alabama common law because the advertisement concededly contained a number of minor factual inaccuracies, which the *Times* could have discovered had it checked its own files before publishing the article (although, in fairness, the hostile southern jury might very well have found against the defendants in any event). *See id.* at 261, 263. Under Alabama law, these factual inaccuracies were enough to deprive the defendants of any defenses or privileges, because they could not prove that the published facts were "true in all [their] factual particulars," even though they were substantially true. *Id.* at 279. The jury awarded Sullivan $500,000, *see id.* at 256, and, by the time the Supreme Court decided the *Sullivan* case, another southern jury had awarded a $500,000 verdict against the *Times* based on the same advertisement, and suits seeking a total of $2 million were still pending, *see id.* at 278 n.18. Given that the $500,000 verdict in *Sullivan* was, at the time, the largest libel verdict in history, the Supreme Court rightly feared that libel suits were being used as a potent weapon to intimidate into silence those who would

tory falsehoods is protected, at least in cases involving public officials or public figures; it is only intentional or reckless falsehoods that subject a defendant to liability.

The rationale for protecting negligent falsehoods is not that they are valuable in and of themselves. To the contrary, the Supreme Court has repeatedly said that there is no constitutional value in false statements of fact.[321] The reason for protecting negligent falsehoods is to ensure a measure of breathing space around constitutionally valuable speech. As the Supreme Court recognized, "erroneous statement is inevitable in free debate."[322] Without a breathing space around such erroneous statement, the threat of libel suits would cause "would-be critics" to be overly cautious due to "doubt whether [their statements] can be proved true or fear of the expense of having to do so." In *New York Times v. Sullivan* and its progeny, therefore, the Supreme Court crafted a standard designed to protect the *inevitable* erroneous statement (i.e., a negligent erroneous statement) from liability. The implicit assumption underlying the standard seems to be that intentional or reckless falsehoods will be rare and that the ordinary case will, like *Sullivan* itself, involve only negligent falsehoods.[323]

This assumption makes a great deal of sense when applied to those who publish in the institutional media, particularly the institutional press. Reporters have both professional and market incentives to publish accurate information, and the media have institutional mechanisms designed to ensure the accuracy of the information they publish. But it is not entirely clear how the actual malice standard

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report on the civil rights movement. *See id.* at 300-05 (Goldberg, J., concurring). The Supreme Court therefore reversed the verdicts, holding that the First Amendment prohibits states from imposing liability for defamation unless the public official plaintiff proves actual malice with convincing clarity. *See id.* at 283. Conceding that "erroneous statement is inevitable in free debate," the Court thought the actual malice standard necessary to provide the "breathing space" necessary to ensure that public debate remain "uninhibited, robust and wide-open." *Id.* at 270-72.

321. *See id.* at 271-72.

322. *Id*. at 271.

323. Commentators have criticized the actual malice standard as applied to media defendants because its focus on the defendant's state of mind results in expensive and intrusive discovery and because it results in undue judicial interference with the editorial process. *See* Brian C. Murchison et al., Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 11-12 (1994) (arguing that, "by permitting the use of circumstantial evidence of journalistic behavior to prove the journalist's state of mind [on the issue of actual malice], the *Sullivan* rule has spawned a *de facto* set of judge-made standards that covers all aspects of journalistic behavior"); *see also* Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 453 (1984) (proposing that courts clarify the standard as one of "generally accepted journalistic practices").

would apply to the typical John Doe who posts on financial bulletin boards. The Supreme Court's examples of what constitutes actual malice are geared to the investigative practices of the institutional press.[324] In order for a plaintiff to establish actual malice, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[325] Actual malice may be found, for example, where the defendant invents a story, bases it on "an unverified anonymous telephone call," publishes information "so inherently improbable that only a reckless man would have put [it] in circulation," or where the defendant publishes despite "obvious reasons to doubt the veracity of [an] informant or the accuracy of his reports."[328]

Except for stories based on pure fabrication (like Krum's statements that he was having an affair with the wife of HealthSouth's CEO), these examples have little to do with the process John Doe goes through before posting to a message board. The typical John Doe does not get his information from interviews with informants or even from direct perusal of primary sources.[329] Instead, John Doe's information is likely to be based on secondary sources or on rumors started by other John Does. The typical John Doe will have no special training in determining the credibility of his information sources. Nor will he have a staff to check his facts before publishing, an editor to peruse his post for problems, and a lawyer on retainer to advise him of the complexities of libel law. No professional ethic impels him to be accurate.[330] In fact, as previously argued,[331] the culture of the boards encourages just the opposite. The boards prize speed over accuracy

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324. Some have argued that the fact that mere failure to investigate cannot constitute actual malice encourages journalists not to verify questionable sources, because verification might make it easier for a plaintiff to prove that the journalist had "a high degree of awareness of probable falsity." *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-12, at 871 (2d ed. 1988) (claiming that, "[i]n the world of *New York Times Co. v. Sullivan*, ignorance is bliss"); William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 185. Professors Marshall and Gilles have speculated that the reason the Supreme Court refused to hold that mere failure to investigate constitutes actual malice is that the actual malice standard must be applied to media and nonmedia defendants alike. *See id.* at 205.

325. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

328. *Id.* at 732.

329. *See supra* notes 23-34, 121-28 and accompanying text.

330. A good text on the ethics of professional journalists is JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES (1997).

331. *See supra* note 26 and accompanying text.

on the assumption that the reader will be able to sort reason from rhetoric and fact from fiction.

What this evidence suggests is that John Doe is more likely than the average media defendant to be reckless—perhaps indifferent is a better description—with regard to the accuracy of the facts he publishes on Internet financial bulletin boards. Therefore, it may be relatively easy for plaintiffs to establish actual malice.[332] But an alternative, and more convincing, explanation is possible. Rather than regarding John Does as more apt than their media counterparts to be reckless with regard to facts, it may be that both John Doe and his online audience view most of his commentary as rhetorical hyperbole or subjective speculation rather than a sober recitation of actual facts. This alternative explanation also suggests an alternative avenue of First Amendment protection for John Doe's speech: the opinion privilege.

III. PROTECTING JOHN DOE: ADAPTING THE OPINION PRIVILEGE TO CYBERSPACE

The First Amendment extends a privilege to statements that do not imply an assertion of objective fact, either because such statements "cannot 'reasonably [be] interpreted as stating actual facts'" or because such statements are not provably false.[333] This privilege, the opinion privilege,[334] has the potential to protect Internet discourse from wealthy and powerful plaintiffs who attempt to use defamation law to intimidate their online critics into silence. Courts can deploy the opinion privilege at the earliest stages of a defamation action,[335] early enough to prevent even impecunious defendants from engaging

332. This Article advocates extending additional First Amendment protection to those who post on Internet message boards, despite the fact that these posters may be more apt to publish inaccurate information than the average media defendant. Although some would argue that the law should provide more, rather than fewer, incentives for Internet users to "look before they speak," this Article argues that such an approach would jeopardize the viability of the Internet as a medium of communication for "ordinary" speakers. In essence, this Article argues that the speech in Internet message boards has more affinity with informal verbal communication than it does with formal written communication and that the law should take notice of the conventions of the medium in determining whether any individual message is defamatory.

333. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

334. Although *Milkovich* rejected a "wholesale defamation exemption" for opinion, *id.* at 18, it is fair to say that *Milkovich* did not abolish the opinion privilege but redefined it. *See infra* notes 356-405 and accompanying text.

335. *See* Anderson, *supra* note 89, at 507 (perceiving that this rule could be used in a motion to dismiss or in an early summary judgment motion).

in undue self-censorship. In *Milkovich v. Lorain Journal*,[336] however, the Supreme Court threw the opinion privilege into such disarray that it may lack the sensitivity necessary to protect the type of online commentary at issue in the new Internet libel cases.[337] Even so, *Milkovich* need not hinder lower courts in taking the necessary steps to adapt the opinion privilege to cyberspace, a task for which this part gives practical guidance.

*A. The Opinion Privilege in the Lower Courts, Post-*Gertz *and Pre-*Milkovich

In *Gertz v. Robert Welch*,[338] the Supreme Court observed in a now famous dictum, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[339] Lower courts seized this dictum as evidence that opinion, traditionally protected by the common law privilege of fair comment,[340] deserved expansive First Amendment protection.[341] The constitutional privilege for opinion soon came to be a powerful defense to counter the chilling effects of libel ac-

336. 497 U.S. 1 (1990).

337. Although the new John Doe cases highlight the deeper flaws in the opinion privilege, this Article is restricted to consideration of the narrower problems raised by the John Doe cases.

338. 418 U.S. 323 (1974).

339. *Id.* at 339-40.

340. The *Restatement (First) of Torts* reflects one common formulation of the fair comment privilege. Under this approach, opinion is protected if (1) it involves a matter of legitimate public interest, (2) it is based on true or privileged facts available to the audience, (3) it represents the actual opinion of the speaker, and (4) it was not made solely for the purpose of harming the plaintiff. *See* RESTATEMENT (FIRST) OF TORTS § 606(1) (1938); *see also* RESTATEMENT, *supra* note 35, § 566 cmt. b (christening this form of opinion the "pure type" and contrasting it with the "mixed type").

341. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (stating that "*Gertz* elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment"); *see also* RESTATEMENT, *supra* note 35, § 566 cmt. c (assuming that the opinion privilege obviated the need for the common law fair comment privilege); Anderson, *supra* note 89, at 507 (noting that, because most courts viewed *Gertz* as granting constitutional protection to opinion, the opinion privilege was "the fastest-growing body of defamation law in the 1980s"); David A. Logan, *Of "Sloppy Journalism," "Corporate Tyranny," and Mea Culpas: The Curious Case of* Moldea v. New York Times, 37 WM. & MARY L. REV. 161, 163 (1995) (explaining that "[b]y 1990 every federal circuit and the courts of at least thirty-six states and the District of Columbia recognized that a statement of opinion was absolutely protected" based on the *Gertz* dictum); Kathryn Dix Sowle, *A Matter of Opinion*: Milkovich *Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 468 (1994) (noting that "lower courts construed [the *Gertz* dictum] as articulating a broad, First Amendment immunity for the expression of opinion").

tions. Unlike other constitutional privileges, the opinion privilege could be deployed as early as the filing of a motion to dismiss,[342] thereby safeguarding even impecunious defendants from much of the chilling effect of being sued for defamation.

"Opinion," in the ordinary, nonlegal sense of the term, includes statements couched in loose, figurative, or vituperative language, statements that are purely subjective expressions of the speaker's point of view, and statements that contain "deductions from known data or personal observation."[343] Although a prior Supreme Court decision gave lower courts a mandate to protect hyperbole and vituperation,[344] the Supreme Court's enigmatic dictum in *Gertz* did not indicate whether all types of opinion are equally deserving of First Amendment protection. Moreover, the *Gertz* dictum did not give lower courts any guidance in separating fact from opinion,[345] a challenging task under the best of circumstances.[346]

342. *See* Anderson, *supra* note 89, at 507 (explaining that "[w]hether the defamatory statement was opinion often could be determined from the publication itself, or with a minimum of discovery" and that the privilege "therefore could be invoked by a motion to dismiss for failure to state a cause of action or by an early summary judgment motion").

343. Diane Leenheer Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 398-99 (1985). Professor Zimmerman argues that there are three types of language that might be classed as opinion: (1) "[l]oose, figurative language"; (2) the "articulation of subjective and normative judgments"; and (3) "deductions from known data or personal observation." *Id*. Professor Sowle, on the other hand, seems to include "vituperation and rhetoric" as separate categories, although she notes that "[o]pinion, vituperation, and rhetoric are not mutually exclusive speech categories." Sowle, *supra* note 341, at 470-71. Professor Sowle follows Dean Keeton's distinction between deductive and evaluative opinions. An "evaluative opinion" is one that is not provable as true or false. *See* W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1249-59 (1976). A "deductive opinion" is one that "is provable as true or false on the basis of objective evidence." Sowle, *supra* note 341, at 474.

344. *See* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (holding that the use of the term "blackmail" to describe a public figure plaintiff's negotiating tactics was not defamatory in the context of heated public discussion regarding a zoning dispute because "the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable"). In *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), which was decided the same term as *Gertz*, the Supreme Court held that, in the context of a labor dispute, the use of Jack London's definition of a "scab" as a "traitor to his God, his country, his family and his class" was "merely rhetorical hyperbole" and therefore protected under federal labor law. *Id*. at 268, 286.

345. *See* Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 601 (1990) (noting this lack of guidance).

346. *See* Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc) (concluding that separating fact from opinion is "by no means as easy a question as might appear at first blush"); SACK & BARON, *supra* note 78, § 4.1, at 201 ("No task undertaken under the law of defamation is any more elusive than distinguishing between fact and opinion."); SANFORD, *supra* note 7, § 5.1, at 133 (2d ed. 1991) (criticizing lower courts' early attempts to separate fact from opinion); Marc A. Franklin & Daniel J. Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 869-85 (1984); Herbert W. Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962);

Left to their own devices, the lower courts developed various approaches to this critical task.[347] The most influential approach was that put forth in *Ollman v. Evans*,[348] an en banc decision of the U.S. Circuit Court of Appeals for the District of Columbia. The *Ollman* decision was a thoughtful exposition of the difficulties of distinguishing fact from opinion. Writing for the court,[349] then-Judge Kenneth Starr designated four factors that, when considered along with the "totality of the circumstances,"[350] should guide courts in distinguishing fact from opinion: (1) "the common usage or meaning of the specific language of the challenged statements itself"; (2) "the statement's verifiability";[351] (3) the linguistic context of the statement;[352] and (4) "the broader [social] context or setting in which the statement appears."[353] Although the *Ollman* multifactor approach did not obviate the need for courts to grapple with complex interpretive issues, the factors at least guided courts in making rational judgments separating fact from opinion.[354] Yet, just when courts appeared to be reaching consensus

Zimmerman, *supra* note 344, at 400 (identifying the difficulty of separating fact from opinion and noting that "the distinction between fact and opinion has plagued the courts since the introduction of a qualified privilege for fair comment created some protection for ideas"). Although many commentators have decried the difficulty of separating fact from opinion, few deny the importance of extending constitutional protection to statements of opinion. Difficult or not, therefore, courts must undertake the task.

347. *See* 2 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 5.7(D), at 580-81 (1999) (collecting cases).

348. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

349. Seven separate opinions were filed in the case. *See id.*

350. *See id.* at 979.

351. A statement is verifiable if it is "capable of being objectively characterized as true or false." *Id.*

352. *See id*. at 985. In other words, the linguistic context is "the full context of the statement—the entire article or column." *Id.*

353. *Id.* at 979; *see also id.* ("Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion."); *id.* at 982 (noting that "the context to be considered is both narrowly linguistic and broadly social").

354. Although, as this Article contends, the *Ollman* approach has much to recommend it, Bruce Sanford, author of one of the leading treatises on defamation law, probably goes too far in describing the *Ollman* approach "as a nationwide beacon for a reasoned distinction between opinion and fact." SANFORD, *supra* note 7, at § 5.1, 34 (2d ed. 1991 & Supp. 1999); *cf.* Sowle, *supra* note 341, at 469 (observing that the *Ollman* approach "failed to produce predictable outcomes"); Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 762 (1990) (noting that application of the *Ollman* factors leads courts to reach "strikingly varied outcomes" depending on which of the four factors weighs most heavily in the analysis).

on a method for applying a constitutional opinion privilege, the Supreme Court stepped in and threw the entire area into disarray.[355]

B. Milkovich *Throws the Opinion Privilege into Disarray*

After leaving the lower courts to grapple with formulating a constitutional opinion privilege for sixteen years, the Supreme Court finally took up the issue in *Milkovich v. Lorain Journal Co.*[356] The plaintiff in *Milkovich* was a high school wrestling coach from Maple Heights, Ohio, whose team was involved in a fight that broke out during a wrestling match.[357] After a hearing in which Coach Milkovich and his superintendent testified, the Ohio High School Athletic Association ("OHSAA") censured Milkovich, placed his team on probation and declared the team ineligible for the state tournament because of their role in the altercation.[358] Subsequently, several wrestlers and their parents sued, claiming that the OHSAA proceeding violated due process.[359] The judge agreed and, after a hearing in which both Milkovich and his superintendent again testified, overturned the OHSAA probation and ineligibility orders.[360]

The next day, the defendant, Thomas Diadiun, a sports columnist, harshly criticized Milkovich's role in the altercation and his testimony in the court proceeding.[361] The heading for Diadiun's "TD Says" column that day read, "Maple beat the law with the 'big lie.'"[362] In the body of the column, Diadiun made it clear that he had attended both the match at which the brawl had taken place and the OHSAA hearing.[363] Diadiun then wrote:

> Anyone who attended the meet, whether he be from Maple Heights, Mentor [the rival team], or impartial observer, knows in his heart that Milkovich and [Superintendent] Scott lied at the [court] hearing after each having given his solemn oath to tell the truth.

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355. *See* Anderson, *supra* note 89, at 507 (stating that the opinion privilege died with the Court's decision in *Milkovich*); Stern, *supra* note 345, at 595 (observing that the *Milkovich* decision "cast doubt on the vitality of hundreds of lower court cases decided in 'mistaken reliance'" on the *Gertz* dictum).

356. 497 U.S. 1 (1990).

357. *See id.* at 3-4.

358. *See id.* at 4.

359. *See id.*

360. *See id.*

361. *See id.* at 4-5.

362. *Id.* at 5.

363. *See id.* at 4-5.

> But they got away with it.
>
> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not.[364]

Milkovich and Scott both sued for defamation, alleging that Diadiun's column accused them of perjury.[365] While Milkovich's suit was ongoing, the Ohio Supreme Court upheld a grant of summary judgment against Scott.[366] Applying *Ollman*'s four-factor analysis, the Ohio Supreme Court determined that the context of the column negated the impression that Diadiun was asserting that Scott had actually committed perjury; therefore, the column was deemed "constitutionally protected opinion."[367] Subsequently, the Ohio Court of Appeals upheld a grant of summary judgment against Milkovich, concluding that it was bound by the Ohio Supreme Court's analysis in Scott's case.[368]

In a stinging rejection of the *Ollman* approach, the United States Supreme Court reversed.[369] The Supreme Court chastised the lower courts for misreading *Gertz* "to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[370] For the Supreme Court, the operative distinction was not that drawn by the lower courts between fact and opinion; instead, the operative distinction was between statements that imply an assertion of objective facts and those that do not.[371] The Court rejected the fact/opinion distinction as "artificial" because a statement of opinion will often imply the existence of objective facts and such implicit assertions of fact can harm reputation just as much as explicit assertions of fact. Hence, the

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364. *Id.* at 5 n.2 (citation omitted).

365. *See id.* at 6-7.

366. *See* Scott v. News-Herald, 496 N.E.2d 699, 709 (Ohio 1986).

367. Milkovich v. News-Herald, 545 N.E.2d 1320, 1324 (Ohio Ct. App.), *appeal dismissed*, 540 N.E.2d 724 (Ohio 1989), *rev'd sub nom*., Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

368. *See id*.

369. *See Milkovich*, 497 U.S. at 23.

370. *See id.* at 18 (noting that the lower courts developed a number of factors for separating fact from opinion "in what we hold was a mistaken reliance on the *Gertz* dictum"). The *Milkovich* Court interpreted the *Gertz* dictum as "merely a reiteration of Justice Holmes [sic] classic 'marketplace of ideas' concept." *Id*.; *see also* Stern, *supra* note 346, at 617 (arguing that the Court "assailed a caricature of the approach practiced by the vast majority of courts").

371. *See Milkovich*, 497 U.S. at 18 (concluding that opinion should not be protected if it implies "an assertion of objective fact").

Court declared that the statement "'In my opinion Jones is a liar'" can be just as damaging to the reputation of Jones as the statement "'Jones is a liar.'"[372] The first statement may imply a false assertion of fact because it invites the audience to assume that unstated defamatory facts undergird the author's assertion. Moreover, even if the author states the underlying facts on which her conclusion is based, she should still be liable if the underlying facts are incorrect or incomplete, or if she draws erroneous conclusions from them.[373] The Court therefore rejected the proposition that defamatory statements should be protected as long as it is clear that they reflect the author's point of view, or as long as they state accurately the facts on which they are based.[374] Such statements are nonetheless actionable if they imply factual assertions that are defamatory and untrue.

Despite the Court's rejection of the "artificial dichotomy"[375] between fact and opinion, the Supreme Court did not reject the notion that the First Amendment requires a measure of protection for opinion on matters of public concern.[376] Instead, the Court found adequate

372. *Id.* at 19.

373. *See id.*

374. Under the *Restatement (Second) of Torts*, opinion was actionable "only if it implie[d] the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT, *supra* note 35, § 566 illus. 4 & 5. Although this approach seems similar to that adopted in *Milkovich*, the drafters of the *Restatement* would have protected opinion that accurately stated the facts on which it was based. *See id.* As Professor Sowle points out, "cogent policy considerations" support this approach. Sowle, *supra* note 341, at 487. The audience can evaluate the speaker's opinion together with the facts and "judge for themselves the soundness of the speaker's viewpoint." *Id.* at 489. The *Milkovich* approach, however, would still hold the speaker liable for drawing an erroneous conclusion from stated facts. *See Milkovich*, 497 U.S. at 18-19. An erroneous conclusion would be one that was provably false. *See* Sowle, *supra* note 341, at 490. Although the Court did not elaborate on the reason for rejecting the *Restatement* approach, presumably the Court feared that "erroneous conclusions" drawn from underlying facts could harm an individual's reputation because some audience members would give undue weight to the conclusions rather than to the underlying facts themselves.

375. *Milkovich*, 497 U.S. at 19.

376. This point is worth stressing because it is easy to misread the Court's opinion as rejecting the constitutional opinion privilege entirely. In rejecting the argument that "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment," *id.* at 21, the Court was not saying that opinion receives no First Amendment protection, but rather that existing constitutional protections were adequate to the task without using the misleading label "opinion," *see id.* at 19. The words "additional" and "separate" in the sentence quoted above thus appear to be redundant, and the original sentence quoted in its entirety is even more redundant: "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Id.* at 21.

protection for opinion—that is, statements that do not imply an assertion of objective fact—in existing First Amendment doctrine.[377]

Of the doctrines identified by the Court,[378] two stand out as being relevant to whether a defamatory statement implies an assertion of objective fact. First is the doctrine that requires both public figure and private figure plaintiffs to bear the burden of proving falsity in all defamation actions involving matters of public concern,[379] a requirement imposed by the Court in *Philadelphia Newspapers, Inc. v. Hepps*.[380] This requirement protects opinion, as the Court defined it, because statements not *capable* of being proved false are not actionable as implied assertions of objective fact. Put another way, a statement on a matter of public concern that is not provably false is one type of constitutionally protected opinion.[381]

A second type of statement that does not imply an assertion of objective fact—and is therefore constitutionally protected—is a statement that "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[382] The Court gleaned this principle from a line of prior cases protecting rhetorical hyperbole, satire, and parody.[383] The first of these cases, *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[384] was the earliest Supreme Court case to suggest that opinion deserves some constitutional protection. In *Bresler*, a real es-

377. *See id.* at 19 (finding that "existing constitutional doctrine" gives adequate breathing space to freedom of expression "without the creation of an artificial dichotomy between 'opinion' and fact").

378. According to the Court, there are four existing doctrinal requirements that safeguard opinion: (1) the requirement that plaintiffs prove falsity in defamation actions aimed at speech of public concern; (2) the requirement that the defendant not be held liable for speech "that cannot reasonably [be] interpreted as stating actual facts"; (3) the requirement that plaintiffs prove that the defendant was at fault with regard to the falsity of his speech on a matter of public concern; and (4) the requirement that appellate courts independently review determinations of fault. *Id.* at 20-21 (citations and internal quotation marks omitted).

379. *See id.*

380. 475 U.S. 767, 777 (1986) (holding that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern").

381. *See Milkovich*, 497 U.S. at 20.

382. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

383. *See id.* at 17, 20 (analyzing *Bresler* and *Letter Carriers*); *see also Falwell*, 485 U.S. at 57 (stating that, because a parody of Reverend Falwell was "not reasonably believable," it thus could not form the basis for an award of damages); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 285-86 (1974) (claiming that the term "scab," as used, was rhetorical hyperbole and was "protected by federal law"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14-15 (1970) (finding that the word "blackmail" would have been perceived as rhetorical hyperbole by "even the most careless reader").

384. 398 U.S. 6 (1970).

tate developer involved in negotiations with the city council sued a newspaper for publishing that some citizens "had characterized [his] negotiating position as 'blackmail.'"[385] The Supreme Court held, however, that the First Amendment barred imposing defamation liability because "even the most careless reader" would have interpreted the term "blackmail" as "no more than rhetorical hyperbole,"[386] at least where the term "blackmail" arose in the context of a heated public debate over zoning.[387] Although the *Bresler* Court did not frame its analysis in terms of protecting "opinion," the decision nonetheless constitutes strong authority for protecting statements that, while seemingly factual on their face, cannot be construed as stating actual facts when read in context.

This reading of *Bresler* was confirmed by the Court in *No. 496, National Ass'n of Letter Carriers v. Austin*,[388] a case in which the defendant union members labeled the plaintiffs as "scabs" and then invoked Jack London's famous definition of a "scab" as a "traitor to his God, his country, his family and his class."[389] Emphasizing that the statement occurred in the context of a labor dispute, the Court found that the defendants had not accused plaintiffs of treason, but had merely employed the words "in a loose, figurative sense to demonstrate the union's disagreement with the views of those workers [like plaintiffs] who oppose unionization."[390]

Hustler Magazine, Inc. v. Falwell[391] presents a more recent statement of this principle. *Falwell* involved an action of intentional infliction for emotional distress stemming from a highly offensive advertisement parody suggesting that the Reverend Jerry Falwell had sex with his mother in an outhouse.[392] The Court viewed the parody at is-

385. *Id.* at 7.

386. *Id.* at 14.

387. *See id.* at 13.

388. 418 U.S. 264 (1974).

389. *Id.* at 268.

390. *Id.* at 284. The Court found that federal labor law protects "[e]xpression of such an opinion." *Id. Letter Carriers* was based on federal labor law rather than tort law, but the opinion made clear that the Court's analysis was dictated by First Amendment concerns. *See id.* at 280-82.

391. 485 U.S. 46 (1988); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 17, 20 (analyzing *Falwell*).

392. In *Falwell*, the plaintiff sued for both defamation and intentional infliction of emotional distress. *See Falwell*, 485 U.S. at 47-48. The jury rejected the former claim because the advertisement parody could not be interpreted as stating actual facts, but it imposed liability for intentional infliction of emotional distress. *See id.* at 49. For the full text of the advertisement parody at issue in *Falwell*, see POST, *supra* note 159, at 122.

sue as being related, albeit distantly, to political cartoons, satire, and caricature[393]—all of which contribute color and "'emotional impact'"[394] to public discourse. The Court thus held that, at least in cases involving public officials and public figures, the First Amendment bars imposition of liability for "nonfactual" statements like the one at issue in *Falwell*.[395]

What these cases establish, and *Milkovich* confirms, is that the First Amendment protects statements that cannot be interpreted as stating actual facts in order "that public debate will not suffer for lack of 'imaginative expression.'"[396] Taken together, therefore, these cases might form the basis for extending broad First Amendment protection to "loose talk" of the sort that is common in cyberspace.[397] *Bresler*, in particular, emphasized the role of social context in transforming an apparently factual accusation of crime into "no more than rhetorical hyperbole,"[398] and therefore it might be used as authority for courts to create an opinion privilege responsive to the culture of cyberspace.

In *Milkovich* itself, however, the Supreme Court failed to specify what role, if any, context plays in interpreting allegedly defamatory statements. The majority's analysis of Diadiun's statements stressed their verifiability rather than their surrounding context; as the Court noted, whether Milkovich actually committed perjury could be objectively verified "by comparing, *inter alia*, [Milkovich's] testimony before the [association] with his subsequent testimony before the trial court."[399] In addition, the Supreme Court observed that neither the

393. *See Falwell*, 485 U.S. at 55.

394. *Id.*

395. *See id.* at 56 ("We conclude that public figures and public officials may not recover for the tort of infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . . .").

396. *Milkovich*, 497 U.S. at 20.

397. *See* 2 ZUCKMAN ET AL., *supra* note 347, § 5.7, at 585 (arguing that "the Court doesn't provide a definition of 'loose' language needed to permit lower courts to distinguish between 'loose' and, if you will, 'unloose' language as it might affect actionability under the First Amendment"); Anderson, *supra* note 89, at 509 (stating that *Milkovich* failed to indicate how broadly courts should construe First Amendment protection "for statements that do not state actual facts").

398. Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970).

399. *Milkovich*, 497 U.S. at 21; *see also* 2 ZUCKMAN ET AL., *supra* note 347, § 5.7, at 592 (arguing that the Supreme Court's focus on verifiability left lower courts unsure "whether the contextual factors had been swept away, and [whether], if they were, common sense results might be sacrificed on the alter of objective verifiability"); Logan, *supra* note 341, at 167 ("Despite the common sense notion that the context in which a statement occurs is relevant, if not essential, to

"language" of Diadiun's column nor its "general tenor" negated the impression that he was accusing Coach Milkovich of perjury.[400] The Court's analysis took little notice of the fact that the alleged accusation of perjury had appeared in a signed editorial sports column, the tone of which, as described by the dissent, was "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage."[401] Indeed, the broader social context in which Diadiun's accusation was made appeared to play no role in the Court's analysis.[402]

The Court's failure to specify what role context plays in determining whether a statement implies an assertion of objective fact is a critical flaw in its analysis. Whether a given statement constitutes rhetorical hyperbole or satire requires close contextual analysis of the sort in which the Court engaged in the *Bresler* case, but the *Milkovich* opinion makes it clear that the Court had no intention of immunizing speech just because it appears in "[c]ertain formats—editorials, reviews, political cartoons, letters to the editor—[that] signal the reader to anticipate a departure from what is actually known by the author as fact."[403] Thus, of the many questions raised by *Milkovich*,[404] one of the most vexing is whether, and to what degree, the context in which a defamatory statement appears should be considered by courts when determining whether a statement implies an assertion of objective fact.[405]

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understanding the meaning of that statement, the Chief Justice's opinion focused only upon verifiability."); Stern, *supra* note 345, at 614 (arguing that the "the attribute of nonverifiability is woven into the very concept of opinion").

400. In doing so, the Supreme Court explicitly rejected the Ohio court's finding that the context of Diadiun's article negated the impression that he was accusing Milkovich of perjury. *See Milkovich*, 497 U.S. at 21. Five years after the United States Supreme Court decided *Milkovich*, the Ohio Supreme Court held that the Ohio constitution required the court to protect opinion and that opinion was to be distinguished from fact based on the *Ollman* factors: the specific language used, the verifiability of the assertion, the immediate context of the statement, and the broader social context in which the statement was made. *See* Vail v. Plain Dealer Publ'g Co., 649 N.E.2d 182, 185 (Ohio 1995).

401. *Milkovich*, 497 U.S. at 32 (Brennan, J., dissenting).

402. *See* Moldea v. New York Times Co., 22 F.3d 310, 314 (D.C. Cir. 1994) [hereinafter *Moldea II*] ("*Milkovich* did not even pause to assess the effect that the column's context may have had on those who read it."). *But see* Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 53-54 (1993) (stating that the *Milkovich* Court "seemed to suggest that the context surrounding a challenged statement is relevant" only in some circumstances).

403. *Milkovich*, 497 U.S. at 32 (Brennan, J., dissenting).

404. *See generally* Sowle, *supra* note 341, at 552-612 (outlining the issues raised by *Milkovich*).

405. *See* Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 345-51 (1999) (providing a provocative discussion of the importance of context in ascertaining defamatory meaning). The *Milkovich* opinion also failed to

*C. The Opinion Privilege in the Lower Courts, Post-*Milkovich

Not surprisingly, the *Milkovich* decision created confusion in the lower courts on this issue. Some courts continue to rely heavily on context in assessing whether an allegedly defamatory statement implies an assertion of fact.[406] Other courts downplay context in favor of verifiability.[407] The epitome of this confusion is the D.C. Circuit's stunning "self-reversal" in *Moldea v. New York Times Co. (*"*Moldea II*"*)*.[408] Dan Moldea, an investigative reporter and author, sued the *New York Times* over a negative book review that stated, among other things, that Moldea's book contained "too much sloppy journalism" and provided several examples to support this conclusion.[409] The district court, however, granted summary judgment in favor of the *Times* on the grounds that the review "exemplifies a description of a literary work, from one's personal perspective."[410]

In what came to be known as *Moldea I*, a panel of the District of Columbia Circuit Court of Appeals reversed.[411] Applying *Milkovich*, two of the judges concluded that the allegation that Moldea's book contained "sloppy journalism" implied an assertion of "provable, albeit unstated, defamatory facts"—including the facts "that Moldea

specify whether nonmedia defendants should receive the benefit of the opinion privilege. *See Milkovich*, 497 U.S. at 20 n.6 (noting that the Court "reserved judgment" on the question of whether the protection for statements that are not "provably false" applies to nonmedia defendants). In *Bresler*, however, the Court observed that the accusation of blackmail was "not slander when spoken, and not libel when reported in the *Greenbelt News Review*." Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13 (1970). Although this statement is dicta as to the nonmedia speakers, the practical implication is that nonmedia defendants should at least be protected from defamation liability when making statements about matters of public concern that cannot be interpreted as stating actual facts.

406. *See, e.g.*, Assa'ad Faltas v. State Newspaper, 928 F. Supp. 637, 647 (D.S.C. 1996) (looking not only to the words used but also to their context), *aff'd*, 155 F.3d 557 (4th Cir. 1998); Weinstein v. Friedman, 24 Media L. Rep. (BNA) 1769, 1778 (S.D.N.Y.) (applying a test of defamation that required looking at the context), *aff'd*, 112 F.3d 507 (2d Cir. 1996); Keohane v. Wilkerson, 859 P.2d 291, 296 (Colo. Ct. App. 1993) (finding that the context and surrounding circumstances of the statement are relevant), *aff'd*, 882 P.2d 1293 (Colo. 1994); Kumaran v. Brotman, 617 N.E.2d 191, 200 (Ill. App. Ct. 1993) (using contextual analysis to find the term "scam" actionable); Gross v. New York Times Co., 623 N.E.2d 1163, 1167 (N.Y. 1993) (examining both the immediate context and the broader social context).

407. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1057 (9th Cir. 1990) (affirming a district court's holding that plaintiff had not proven Andy Rooney's statements to be false in substance).

408. 22 F.3d 310 (D.C. Cir. 1994). For an interesting and enlightening discussion of this case, see Logan, *supra* note 341, at 168-74, 186-89.

409. Moldea v. New York Times Co., 15 F.3d 1137, 1141 (D.C. Cir.) [hereinafter *Moldea I*], *opinion modified and summary judgment aff'd*, 22 F.3d 310 (D.C. Cir. 1994).

410. Moldea v. New York Times Co., 793 F. Supp. 335, 337 (D.D.C. 1992).

411. *See Moldea I*, 15 F.3d at 1137.

plays fast and loose with his sources" and "that his allegations are not to be believed."[412] The court thought it irrelevant to the *Milkovich* analysis that "the challenged statements appeared in a 'book review' rather than in a hard news story,"[413] and it noted that the appearance of Diadiun's allegations in *Milkovich* in "a forum well known for spirited expressions of personal opinion" had not affected the outcome of the case. Although *Moldea I* was a defensible, if highly literal, application of *Milkovich*, it prompted immediate criticism from journalists and media lawyers alike,[414] and the *Times* promptly petitioned the panel for rehearing.

Surprisingly, the panel granted this petition, and, without hearing additional argument in the case, "confess[ed] error" and "amend[ed] its earlier decision."[416] Judge Harry T. Edwards, author of the court's opinion in *Moldea I*, apologized for giving insufficient consideration to the fact that the allegedly defamatory statements had "appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works."[417] Judge Edwards conceded that, "[w]hile Milkovich could be interpreted as . . . [the court had in its] initial decision," a better interpretation is that the Supreme Court did not "sweep away so much settled law"[419] but instead retained a focus on "the context in which speech appears."[420] The court then held that commentary of the sort at issue in *Moldea* should be actionable "'only when the [reviewer's] interpretations are *unsupportable by reference to the written work*.'"[421] Applying this new "supportable interpretation" standard, the court concluded that the statement that Moldea's book contained "too much sloppy journalism" was "supported by revealed premises that [the court could not] hold to be false in the context of a book review."[422] By adopting a strained interpretation of

412. *Id*. at 1145.

413. *Id.* at 1145-46; *see also id*. at 1146 ("To permit a defendant to escape liability for libel merely because defamatory remarks are published in a book review would be as simplistic as permitting an author to insulate himself or herself by merely prefacing assertions with the words 'I think . . .' and calling everything that followed nonactionable opinion.").

414. *See* Logan, *supra* note 341, at 177-79 (giving examples of criticism).

416. *Moldea II*, 22 F.3d 310, 311 (D.C. Cir. 1994).

417. *Id.*

419. *Id.*

420. *Id*. at 314.

421. *Id*. at 315 (quoting Petition for Rehearing at 8).

422. *Id.* at 317. Note that the court is using context not to determine whether the statements are "rhetorical hyperbole," but rather to determine whether they are provably false. Apparently the court deemed it necessary to use context to ascertain the "real" meaning of the phrase "too much sloppy journalism." Once the "real" meaning was determined, the court then concluded

Milkovich, therefore, the *Moldea II* court managed to reach a pragmatic result: its decision extended broad protection to an important genre of speech by acknowledging the important role context plays in shaping the meaning of allegedly defamatory statements.[423]

As the strange saga of *Moldea* illustrates, whether a court accepts or rejects contextual analysis plays an important role in the outcome of defamation cases, and lower courts can (and many do) plausibly claim to be following *Milkovich* no matter which route they choose. Some courts have therefore resolved the difficulties created by *Milkovich* by interpreting it expansively to allow consideration of social context.[424] Others have simply rejected *Milkovich* entirely, holding that their own state constitutions or the common law requires an *Ollman*-type "totality of circumstances" approach to separating opinion from fact.[425] Nonetheless, the uncertainty surrounding *Milkovich* forces lower courts to address the fact/opinion determination with little meaningful guidance from the Supreme Court, making it difficult to predict in advance what role context will play in the outcome of any particular defamation action.

D. Adapting the Opinion Privilege to Cyberspace

Given this uncertainty, it is worth asking what role context *should* play in adapting the opinion privilege to new Internet libel cases. After *Milkovich*, the opinion privilege applies only to statements that do not imply an assertion of objective facts.[426] As this section illustrates, when the new Internet libel cases are analyzed with due consideration for both the inherently speculative nature of "investment advice" generally[427] and the specific conventions that govern

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that the phrase was not provably false but was rather an aesthetic evaluation of the work based on stated facts. *See id.* For more discussion of the necessity of using context to determine verifiability, see *infra* notes 452-80 and accompanying text.

423. *See* Karl Olson, *On Review, A New Standard for Reviews*, RECORDER, May 25, 1994, at 8 ("[I]n real estate, the three most important factors are 'location, location, and location;' in defamation law the three most important factors in determining whether you have a defamatory factual statement . . . are 'context, context and context.'"), *quoted in* Logan, *supra* note 341, at 193 n.210.

424. *See* Sowle, *supra* note 341, at 535-40 (citing cases).

425. *See, e.g.*, Vail v. Plain Dealer Publ'g Co., 649 N.E.2d 182, 185 (Ohio 1995) (discussing the "separate and independent guarantee of protection for opinion" provided by the Ohio constitution).

426. *See supra* notes 356-73 and accompanying text.

427. *See* Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998) (noting that the context of a challenged article reflected the author's speculative supposition); Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 988 F. Supp. 1341, 1345 (D. Colo. 1997)

discourse on financial message boards, it becomes apparent that many of the allegedly defamatory statements made on financial message boards will not imply assertions of objective fact. In other words, courts should extend the benefit of the constitutional opinion privilege to many (though by no means all) of the defendants in the new Internet libel cases.[428]

1. *An Illustration:* Hitsgalore.com, Inc. v. Shell. Consider once more the facts of *Hitsgalore.com v. Shell*.[429] There, numerous John Does had posted a variety of serious allegations about Hitsgalore.com, Inc. and its officers.[430] The anonymous posters called the corporation a "scam,"[431] a "fraud,"[432] a "flying turd";[433] they labeled its officers as "criminals,"[434] "crooks,"[435] "con men,"[436] "slime,"[437] and "scum"[438] who had lied to the SEC[439] and duped investors in a "classic pyramid scheme."[440] Two posters specifically stated that their posts were stating facts rather than opinion,[441] and one even dared the corporation to sue him.[442]

Most of these accusations are, in *Milkovich's* terms, "provable" as true or false. Although it may not be verifiable that the corporation

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(holding that a bond rating agency's statements were opinions and therefore protected speech), *aff'd*, 175 F.3d 848 (10th Cir. 1999); National Life Ins. Co. v. Phillips Publ'g, Inc., 793 F. Supp. 627, 649 (D. Md. 1992) (refusing to find the actual malice required for a defamation action against a publisher of investment materials).

428. This Article emphatically does not support extending the opinion privilege as a categorical matter to the entire genre of speech on financial message boards. For criticism of such categorical approaches, see generally Thomas, *supra* note 405.

429. Complaint, Hitsgalore.com, Inc. v. Shell, No. 99-1387-CIV-T-26C (M.D. Fla. filed June 1999). The plaintiffs sued Janice Shell, who may have used her real name in her posts, as well as four posters who used only screen names—"Paul Kersey, Mayor, Mr. Pink, and Mshater"—and "John Does 5-100." *Id*. ¶¶ 1, 5-7.

430. *See id*. ¶ 1. The messages were posted on the *Silicon Investor* and *Raging Bull* message boards.

431. *Id.* ¶¶ 22, 25-27 (posting by "Paul Kersey"), ¶ 31 (posting by "Mayor"), ¶ 33 (posting by "Mr. Pink"), ¶ 36 (posting by "Mshater").

432. *Id.* ¶ 23 (posting by "Paul Kersey"), ¶ 30 (posting by "Mayor").

433. *Id.* ¶ 32 (posting by "Mr. Pink").

434. *Id*. ¶¶ 23, 28 (posting by "Paul Kersey"), ¶ 34 (posting by "Mr. Pink"), ¶ 36 (posting by "Mshater").

435. *Id*. ¶ 2 (posting by "Mr. Pink").

436. *Id*. ¶ 21 (posting by "Janice Shell").

437. *Id*. ¶ 37 (posting by "Mshater").

438. *Id*. (posting by "Mshater").

439. *Id*. ¶ 31 (posting by "Mayor").

440. *Id.* ¶ 21 (posting by "Janice Shell").

441. *See id*. ¶ 23 (posting by "Paul Kersey"), ¶ 34 (posting by "Mr. Pink").

442. *Id*. ¶ 34 (posting by "Mr. Pink").

is a "flying turd" or even a "scam,"[443] it is certainly verifiable whether its management engaged in fraudulent or criminal behavior. The defendants' "cybersmear campaign," as the plaintiffs dubbed it,[444] stemmed largely from a *Bloomberg News* article indicating that Hitsgalore.com, Inc., had failed to disclose that one of its founders "'was accused of cheating customers . . . at a previous job.'"[445] Plaintiffs alleged that the article created the misleading impression that Hitsgalore.com had acted improperly in failing to disclose the FTC action against its founder.[446] Plaintiffs further alleged that the SEC imposed no duty to disclose the FTC action in the particular, and rather peculiar, factual circumstances of the case.[447] Thus, one easily could verify whether Hitsgalore.com had defrauded its investors simply by determining whether the SEC rules did or did not require disclosure.

If verifiability is the chief determinant of whether the statement constitutes "opinion," the defendants' prospect of being rescued from defamation liability by the First Amendment looks bleak. Apparently, most of Hitsgalore.com's online detractors made only a minimal degree of investigation before making such inflammatory accusations.[448] They almost certainly did not contact the corporation to get

443. Even this proposition is debatable. The word "scam" is commonly used to describe a scheme to defraud. Thus, the allegation that Hitsgalore.com was a scam might be tantamount to accusing the corporation of defrauding its investors. On the other hand, when read in context, it seems more likely that the word is used to mean that the corporation's stock price is overvalued, a subjective valuation that is not provably false. *See* Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 848, 850, 854 (10th Cir. 1999) (finding that an article stating that the "outlook" on plaintiff's refunding its bond was "negative" due to "ongoing financial pressures" did not contain a "provably false factual connotation" when viewed "in the context of the entire article"). For disagreement as to whether the term "scam" is verifiable, compare Stern, *supra* note 345, at 615 (arguing that the term "scam" is "'incapable of being proven true or false'"), and *NBC Subsidiary (KCNC-TV), Inc. v. The Living Will Center*, 879 P.2d 6, 11-12 (Colo. 1994) (en banc) (concluding that the term "scam" when used in the context of a news broadcast discussing the marketing of a living will package was not actionable because the facts on which the broadcaster based his opinion were disclosed), with *Kumaran v. Brotman*, 617 N.E.2d 191, 200 (Ill. App. Ct. 1993) (finding the term "scam" to be actionable). What this disagreement illustrates is that, in order to determine whether a statement is provably false, a court must first determine what the statement means—an interpretive inquiry that often cannot be resolved without reference to context.

444. Complaint ¶ 36, *Hitsgalore.com*., No. 99-1387-CIV-T-26C. The plaintiffs alleged that "[t]he May 11, 1999 Bloomberg Report served as the catalyst for the Defendants to perpetuate a nationwide cybersmear campaign of HITSGALORE on the Internet." *Id*.

445. Rancho Cucamonga, *Hitsgalore.com Omitted Fraud Link; Stock Plunges*, BLOOMBERG NEWS, May 11, 1999.

446. Complaint ¶ 30, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

447. *Id*. at ¶¶ 34-35.

448. The tenor of the comments suggests that the detractors had not conducted independent research. *See infra* notes 461-63 and accompanying text.

its view. Nor is it likely that they researched exactly what the SEC requires corporations to disclose in the unique circumstances at issue in the case, even though the corporation issued a press release that might have put them on notice that the *Bloomberg News* report's version of events was contested.[449] Indeed, not only did some posters accept the *Bloomberg* report and the accusations of other posters at face value, they extrapolated from the reported facts to accuse the corporation of outright criminality and fraud.[450] Thus, one might argue from the face of the complaint that the plaintiffs have a colorable argument that the defendants acted with reckless disregard of the falsity of their allegations and, moreover, that these allegations caused monetary damages.[451]

Even under *Milkovich*, however, this need not be the end of the analysis. As *Milkovich* observed, the First Amendment safeguards more than just statements that are not "provably false."[452] It also safeguards statements that "cannot reasonably be interpreted as stating actual facts."[453] Although *Milkovich* itself did not indicate how broadly such protection should extend, the decisions relied on by *Milkovich*[454] as the basis for such protection—*Greenbelt Cooperative Publishing Ass'n v. Bresler, No. 496, National Ass'n of Letter Carriers v. Austin, Hustler Magazine, Inc. v. Falwell*—clearly indicate that the inquiry demands close contextual analysis.[455]

Contextual analysis, in turn, suggests that the comments of Hitsgalore.com's detractors should not be interpreted as stating actual facts about the corporation and its officers. The immediate context of the allegedly defamatory message posts makes apparent that they

449. *See* Complaint ¶ 37, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

450. *See supra* notes 121-28 and accompanying text.

451. The company attributed the losses to a drop in the corporation's stock price, the loss of advantageous business relationships with third parties, and exposure of the corporation to shareholder class action lawsuits. *See* Complaint ¶ 39, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

452. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-21 (1990).

453. *Id.* at 2.

454. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970). For more extensive discussion of these cases, see *supra* notes 383-98 and accompanying text.

455. *See* Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 660 (1990) (arguing that the "thrust" of the Supreme Court's decisions in *Bresler*, *Letter Carriers*, and *Falwell* is that context is highly relevant to the question of constitutional protection for opinion).

were not intended to be sober recitations of fact.[456] Most of the posters made no pretense to having firsthand knowledge of the facts, and it is apparent that many of them were merely expressing outrage over the facts reported in the *Bloomberg News* article. The tone of the postings ranged from shrill[457] to sardonic,[458] and many were filled with grammatical errors, misspellings, cryptic abbreviations, and odd punctuation[459]—all of which signal readers that they were not reading buttoned-down analyses of Hitsgalore.com's financial prospects. If this were not enough to caution readers to read the contents with care, the comments also appeared in a forum that explicitly warns readers not to rely solely on the information posted in making investment decisions.[460]

Furthermore, as noted in Part I, any reader familiar with the culture of the financial bulletin boards (and indeed of most electronic bulletin boards) would know that board culture encourages discussion

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456. The full text of the allegedly defamatory posts is included in Complaint ¶¶ 39-43, *Hitsgalore.com*, No. 99-1387-CIV-T-26C.

457. *See, e.g.*, *id.* ¶ 40 ("Come on folks, please do yourselves a favor cleanse yourselve [sic] and your soul of this mess and admit to being duped. By remaining silent you will allow Dorian Reed to perpetrate this crime to yet another bunch of unsuspecting victims . . . . End this SCAM now!" (quoting post # 6570 by "Paul Kersey")); *id*. (quoting post # 8272 by "Paul Kersey"):

> If this message board were truly uncovered it would reveal the entire IR [Investor Relations] department of HITT [Hitsgalore.com, Inc.'s abbreviation on NASDAQ] lead [sic] by none other than Dorian Reed posting under the name of Mr. Hopkins. Save those amateurish scare tactics for the fellow inmates of your next federal penitentiary . . . . This is a 100% SCAM.

See also id. ¶ 40 ("I PHUCKING HATE CRIMINALS, especially ones that repeat the same phucking pathetic scam over and over on unsuspecting victims and abuse the American market system in their path of personal gains and destruction." (quoting post # 8451 by "Paul Kersey")).

458. *See, e.g.*, Complaint ¶ 32, *Hitsgalore.com*, No. 99-1387-CIV-T-26C (quoting post # 2708 by "Mr. Pink"):

> A "flying turd" is a company that Mr. Pink is [sic] believes will rise in spite of a valuation difficult to arrive at by traditional valuation measures. A T3/f is either a fraud or overvalued company that Mr. Pi&f, in His infinite wisdom believes is poised to fall.
>
> He will do some work on this potential turd [Hitsgalore] but for now withholds His regal opinion.

459. *See, e.g.*, *id.*

460. *See Silicon Investor Message Boards: StockTalk>Terms of Use* (visited Jan. 28, 2000) <http://www.siliconinvestor.com/misc/tou. html> (on file with the *Duke Law Journal*) ("You should exercise discretion and skepticism before relying on information in messages, since it may be incorrect or misleading."); *Yahoo! Message Boards: About the Business and Finance Message Boards* (visited Jan. 28, 2000) <http://messages.yahoo.com/reminder.html> (on file with the *Duke Law Journal*) ("Reading information from message boards is no substitute for independent research, and it's a bad idea to trade or make any investment decisions based on message boards.").

participants to play fast and loose with facts. Within this culture, readers understand that other participants are, like themselves, neither trained journalists nor trained financial analysts. Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly. Thus, when an anonymous poster states that Hitsgalore.com is "100% SCAM"[461] and that its officers are "criminals,"[462] it is not clear that these statements should be taken any more literally than the statement that Hitsgalore.com is a "flying turd."[463] The general tenor of the entire thread of conversation in the aftermath of the *Bloomberg News* report was emotional and overheated. Accusations were thrown about loosely by perhaps as many as a hundred different participants. Often, the text of a posted message alone suggested that it was no more than an emotional rant against the corporation. Viewed in this light, the inflammatory comments of Hitsgalore.com's online detractors seem immature and irresponsible, but not necessarily factual.

This argument is even more compelling when one places the comments of Hitsgalore.com's detractors within the broader context of "stock tips"—a category of speech long recognized as a haven for conjecture and speculation rather than strict factual accuracy.[464] In *Biospherics, Inc. v. Forbes, Inc.*,[465] the United States Court of Appeals for the Fourth Circuit noted the speculative nature of "stock tips" generally in extending the opinion privilege to a stock tips article in *Forbes* magazine.[466] The defamation suit at issue in *Biospherics* was brought by a corporation that had been described as overvalued in *Forbes*'s "Streetwalker" column.[467] The article, entitled "Sweet-Talkin' Guys," concluded that the plaintiffs' low-calorie sweetener

461. Complaint ¶ 27, *Hitsgalore.com*, No. 99-1387-CIV-T-26C (posting by "Paul Kersey").

462. *Id.*

463. *Id*. ¶ 32 (posting by "Mr. Pink"). As defined by "Mr. Pink," this term seems to mean that the stock is overvalued. *Id*.

464. *See* Jefferson County Sch. Dist No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 850, 855 (10th Cir. 1999) (holding that an investment advice article stating that "[t]he outlook on [plaintiff's] general obligation debt is negative, reflecting the [plaintiff's] ongoing financial pressures" was opinion rather than fact); Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998) (noting that "stock tips" commonly express opinion rather than fact); *see also* McCullough v. Shearson Lehman Bros., Inc., No. CIV.A.86-2752, 1988 WL 23008, at *5 (W.D. Pa. Feb. 18, 1988) (concluding that investors "who blindly follow third party stock tips" should not be entitled to relief under section 10(b) of the Securities Act because such reliance is unreasonable).

465. 151 F.3d 180 (4th Cir. 1998).

466. *See id*. at 184 ("We do not propose a 'doctrinal exemption' [from defamation law] for stock tip articles . . . . But rarely would a stock tip article of this tenor and in this context prove actionable.").

467. *See id*. at 182.

was not "'up to the company's claims,'" apparently because the sweetener had not yet gained FDA approval and because it would be priced too high to compete with other sugar substitutes.[468] The article therefore advised investors to "short the stock."[469] Apparently, some investors heeded this advice, because plaintiffs soon brought a libel suit seeking over $15 million.[470]

The court nonetheless affirmed dismissal of plaintiff's action on the grounds that the statements at issue were constitutionally protected opinion.[471] Citing *Milkovich* as authority for its conclusions,[472] the court relied heavily on the context and tenor of the *Forbes* article in determining that the author's statements were "constitutionally protected subjective views."[473] The court noted that the article made "no claim to first-hand knowledge of facts,"[474] that its tone was "breezy"[475] rather than "solemn,"[476] that it contained "irreverent and indefinite language,"[477] and that it fully disclosed the (apparently true) underlying facts on which it was based.[478] Although the court stopped short of declaring a "'doctrinal exemption' for stock tip articles," its opinion did acknowledge that such articles are generally subjective and speculative rather than objective assertions of fact.[479] Thus, the court concluded that, "even assuming [the allegedly defamatory statements] could be verified, no fact finder could 'reasonably . . . interpret' any of them as stating or implying 'actual facts.'"[480]

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468. *Id.* (quoting Caroline Waxler, *Sweet-Talkin' Guys*, FORBES, Jan. 13, 1997, at 266, *available in* 1997 WL 9058534). The plaintiffs did not dispute these underlying facts. *See id.* at 184.

469. *Id*. at 182. An investor sells a stock short by "enter[ing] an order to sell the security at the current price with the understanding that the investor is to fulfill that obligation at a later date by purchasing the security at a lower price." THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 10.12, at 530 (West 3d ed. 1996).

470. *See Biospherics*, 151 F.3d at 182.

471. *See id.*

472. *See id.*

473. *Id.* at 184.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at 185.

478. *See id.*

479. *Id*. at 184; *see also id.* at 186 (observing that "the role of stock analysts in assessing the price of a security, even given their highly valued skills, remains a far cry from a presiding judge's role in determining the result in a case before him").

480. *Id*. at 186. Of course, one might contend that the "stock tips" authored by anonymous John Does such as those sued by Hitsgalore.com, Inc., are a far cry from stock tips in *Forbes*'s "Streetwalker" column and that therefore they are undeserving of such protection. Indeed, the Supreme Court in *Milkovich* explicitly refused to answer whether constitutional protection for statements that are not provably false should extend to nonmedia defendants. *See* Milkovich v.

The Fourth Circuit's analysis in *Biospherics* is equally applicable to many of the new Internet libel cases, including *Hitsgalore.com, Inc. v. Shell*. When one views the allegedly defamatory statements at issue in context—both the immediate context and the broader social context—it becomes apparent that many of the allegedly defamatory statements cannot be interpreted as stating actual facts, but instead are either "subjective speculation" or "merely rhetorical hyperbole." Indeed, it is immediately apparent that most of the comments that Hitsgalore.com found objectionable were based, however loosely, on the original *Bloomberg News* report and the precipitous drop in Hitsgalore.com's stock price. In order to conclude that such commentary is constitutionally protected, however, a court must understand the culture of the boards and be willing to read and interpret the defendants' statements in the context within which they occur.

2. *Justification and Limitations.* Compelling policy justifications favor adoption of the contextual approach to Internet libel suggested here. The Supreme Court has noted that protection of "statements that cannot reasonably be interpreted as stating actual facts" is necessary so that "public debate will not suffer for lack of imaginative expression."[481] The Court thus recognizes, at least implicitly, that meaningful public discourse consists of more than merely dry recitations of facts. Public debate entails appeals to the emotions as well as appeals to reason, and appeals to the emotions are often couched in loose, figurative, or hyperbolic language. Thus, the privilege for nonfactual expression is designed to protect the richness and texture of public discourse as well as its purely factual content, and extending the privilege to the ordinary John Does who frequent financial message boards would validate their unique contributions to financial discourse. True, the contributions of ordinary John Does to financial discourse are less controlled, less factual, less accurate, and less reliable than those of financial analysts, but in some senses that is exactly

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Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990). Yet, as discussed extensively *supra* Part II.B, the speech of ordinary John Does makes a significant contribution to public discourse on financial matters. *See supra* notes 204-47 and accompanying text. Although that contribution may not be equivalent to the contribution of *Forbes* or other financial publications, it is nonetheless worthy of protection.

481. *Milkovich*, 497 U.S. at 20 (citations and internal quotations omitted). The Supreme Court does not elaborate on this justification, except to say that such expression has "traditionally added much to the discourse of our Nation." *Id.* at 20; *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54-55 (1988) (giving several historical examples of how political cartoons have contributed to public debate).

the point. John Doe makes a distinctive contribution to public discourse and, as extensively argued in this Article, one that is worthy of a high degree of First Amendment protection.

A second, more complex argument supports protecting statements that cannot be interpreted as stating actual facts. Defamatory statements are actionable because of their presumed effect on those who hear or read them. A defamatory statement is defined as a statement that tends to harm the plaintiff's reputation in the eyes of his community.[482] Thus formulated, the structure of the tort acknowledges that harm to reputation is "a socially constructed injury, an injury defined by the response of others to the defendant's communications."[483] Courts must therefore gauge the tendencies of a defendant's statements based on their predicted effect on the "attitudes, beliefs, and prejudices" of the audience that receives them.[484]

It is impossible to predict correctly the effect of a defendant's statements without consideration of both the immediate textual context and the larger social context.[485] Context may render innocent a statement that appears to be harmful, or it may render harmful a statement that appears to be innocent. The statement that "Brutus is an honourable man,"[486] standing alone, appears to be complimentary, but every reasonable reader of Shakespeare's *Julius Caesar* knows that, when read in context, the statement means just the opposite. To give another example, what could be more factual than the statement that "Dr. Jones is a murderer"?[488] Yet, an audience that knows the

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482. *See* RESTATEMENT, *supra* note 35, § 559.

483. Lidsky, *supra* note 53, at 13.

484. *Id.*

485. Although one could gather a number of hermeneutic theorists to make this point, it seems unnecessary, at least for present purposes. One of the most eloquent statements of this point is that of Justice Oliver Wendell Holmes: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). That is not to say that hermeneutic theory is not valuable in providing a clearer understanding of the deficiencies of the opinion privilege as currently constituted. For a detailed critique, see Thomas, *supra* note 405, at 346-50 (discussing linguistic theories that illustrate the role of context in determining meaning).

486. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2 (Mark Antony's funeral oration).

488. RODNEY SMOLLA, SUING THE PRESS 60 (1986); *see also* Van Duyn v. Smith, 527 N.E.2d 1005, 1014 (Ill. App. Ct. 1988) (holding that the statement that a director of an abortion clinic was "wanted" for "killing the unwanted" was opinion when considered in its social context).

statement is made by an abortion protestor criticizing Dr. Jones for performing abortions can discount this apparently factual statement as nothing more than a statement of hyperbole; consequently, it would be fundamentally unfair to subject the protestor to defamation liability based on the literal meaning of the statement, particularly where it is offered as commentary on an important subject of public discourse.

This argument suggests that courts failing to consider context run the risk of holding the defendant liable for harm he did not cause.[489] It also suggests that courts must be careful not to presume that they understand the context of a given statement, for, as one writer has noted, "[t]o decide that the statement is factual outside its context only assumes unconsciously that it appeared in a 'normal' context."[490] Indeed, this is why courts should not simply assume that the ordinary John Does who frequent financial message boards adhere to the same standards of factual accuracy as professional journalists; doing so poses a risk that courts will err in predicting the actual effects of John Doe's statements.

It is not fair to say, however, that the First Amendment protects statements that cannot reasonably be interpreted as stating actual facts because they cause no harm. Recall the earlier discussion of *HealthSouth v. Krum*.[491] It is likely that the readers of the HealthSouth message board on *Yahoo! Finance* did not believe that "I AM DIRK DIGGLER" actually was having an affair with the CEO's wife, Leslie Scrushy.[492] Therefore, it is hard to see how the *reputation* of either the CEO or his wife could have been damaged by "Diggler's" statements.[493] Yet, there is no doubt that both Scrushys were

489. The necessity of pursuing such abstract inquiries arises from defamation's anomalous doctrine of presumed harm. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (describing "[t]he common law of defamation [as] an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss"). It is important to understand that the doctrine of presumed harm allows plaintiffs to recover substantial damages with no proof that they suffered any actual harm. *See* Anderson, *supra* note 53, at 749-51. The doctrine of presumed harm applies in most, though not all, libel actions. For further discussion, see Lidsky, *supra* note 53, at 5-6, 12-13.

490. *See* Ott, *supra* note 354, at 786. Ott gives several other interesting examples of how context affects meaning. *See id.* at 785-87.

491. *See supra* notes 39-59 and accompanying text.

492. *See* Phillips, *supra* note 455, at 663 ("[I]t appears disingenuous to argue that statements are not actionable because, owing to the context in which they are made, nobody believes them.").

493. *See* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18 (1983) ("[D]efamation does not provide compensation for emotional disturbance, but rather remedies a wrongful disruption in the 'relational interest' that

offended, outraged, and embarrassed by the statements, and they may well have been exposed to pity or ridicule as a result.[494] Even if the audience does not believe the truth of aggressively uncivil statements of the sort at issue in *HealthSouth v. Krum*, such statements have the potential to inflict psychological or emotional harm on their targets.[495] Thus, protection of such statements as "opinion" runs the risk of giving free license to the likes of Peter Krum to inflict harm on his targets.

This analysis suggests two possible limitations that should be imposed on any extension of the opinion privilege to cyberspace. As noted above, First Amendment doctrine protects nonfactual expression not because it does no harm,[496] but because it makes an important contribution to public discourse. However, speech that deals only with private matters (like the sex life of a private individual) makes no contribution to public discourse almost by definition,[497] and to grant broad protection to such speech would unjustifiably skew the balance between protection of speech and protection of individuals

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an individual has in maintaining personal esteem in the eyes of others." (citing LEON GREEN, CASES ON INJURIES TO RELATIONS 193-276 (1940))). Although statements that harm reputation may cause emotional distress, the distress is deemed to stem from others' reaction to the statement rather than from the statement itself. *See* KEETON ET AL., *supra* note 35, § 111, at 771. Of course, defamation plaintiffs do not sue solely to gain recompense for reputational harms but also "to salve hurt feelings and express outrage at the misbehavior of defendants who publish false statements." Lidsky, *supra* note 53, at 15; *see also* Walter Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis*, 15 VAND. L. REV. 1173, 1177 (1962) (arguing that the common law of defamation fails to adequately protect psychic injuries that flow from defamatory communications).

494. In *Gertz v. Robert Welch, Inc.*, 428 U.S. 323 (1974), the Supreme Court held that a private figure plaintiff who cannot prove actual malice can only recover for defamation upon a showing of "actual injury," which includes impairment of reputation as well as "personal humiliation[] and mental anguish and suffering." *Id*. at 380. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1977), the Supreme Court held that a private figure plaintiff could establish "actual injury" by showing emotional distress alone, thereby giving states authority to predicate defamation actions on "elements other than injury to reputation." *Id*. at 460-61.

495. Perhaps such actions are more properly thought of as actions for intentional infliction of emotional distress. *See* Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 309 (1987) (arguing that "[t]he focus of defamation . . . should remain on reputation, not on the unpleasant but usually temporary effects that communication has on the victim himself" and stating that "these effects are better addressed by the tort of infliction of emotional distress").

496. It is nonetheless fair to say that the harm is somewhat indeterminate, and it is a harm different from that caused by a false factual statement. *See id.*

497. Under this approach, the privilege would extend only when the defendant's comments were reasonably related to the topic of the board. As the analysis of *Dun & Bradstreet* suggests, matters of truly private concern should be relatively rare. *See supra* notes 304-12 and accompanying text.

from uncivil communications.[498] Thus, protection for "opinions" on the financial message boards should apply only when such opinions relate to a matter of public concern.

A second limitation flows in part from the first: courts should not extend the privilege to every statement made on a financial message board, but should evaluate each case on its own merits. Courts must determine not only whether the defendant's speech involved a matter of public concern; courts must also evaluate each individual statement in both its immediate and larger social context to determine whether the defendant's statements are capable of being interpreted as stating actual facts about the plaintiff. Although it is fair to predict that many of the new Internet libel cases will involve rhetorical hyperbole or nonfactual speculation and can therefore be resolved by a motion to dismiss, this Article does not advocate a wholesale exemption for statements that appear on financial message boards. As argued previously, the conventions of discourse on the boards tolerate a great deal of loose, figurative language, and readers are generally on notice that they should not put much reliance on the information posted there. Occasionally, however, either the language of a message will denote it as being factual, or a poster will take affirmative steps to induce reliance by suggesting that he has special expertise or insider access to information. Thus, although the culture of the boards and the inherently speculative nature of financial discourse will commonly signal readers that they should not interpret the statements posted as being purely factual, a poster who tries to cloak himself in an aura of factual accuracy must take the consequences when the audience does in fact rely on his posts as stating actual facts.[499] Applying these limitations helps to maintain at least a minimal degree of civility in cyberspace without jeopardizing its unique contributions to public discourse.

If the approach advocated here is not mandated by *Milkovich*, neither is it forbidden. Moreover, lower courts need not rely on federal constitutional law to begin adapting the opinion privilege to cy-

498. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988) (restricting its holding to commentary about public figures).

499. *See, e.g.*, Miller, *Firm Accuses Former Executive*, *supra* note 6, at C1 (discussing John Doe cases brought in order to discover whether a former president was the poster of allegedly defamatory messages); *cf.* Wat Henry Pontiac Co. v. Bradley, 210 P.2d 348, 351 (Okla. 1949) (observing that superior knowledge can transform opinion into fact in the sales context); Valley Datsun v. Martinez, 578 S.W.2d 485, 490 (Tex. Civ. App. 1979) (holding that "knowledge of the seller, in conjunction with the buyer's relative ignorance, operates to make the slightest divergence from mere praise into representations of fact").

berspace, but instead can adapt state constitutional or common law[500] to the task. Ideally, of course, the Supreme Court should resolve the uncertainty its decisions have engendered, but lower courts cannot wait for Supreme Court guidance to begin protecting John Doe.

At the risk of being redundant, this Article urges courts to extend to the new class of Internet libel defendants all of the existing protections the First Amendment has to offer. Although each new case must be judged on its own merits, the typical plaintiff is likely to be a public figure. Courts should therefore require the plaintiff to prove fault and falsity in addition to the common law elements of defamation. Standing alone, however, this requirement does little to alleviate the chill of the new libel actions. The costs of responding to a libel suit are beyond the average person's means, regardless of whether he ultimately prevails. Protecting freedom of speech in cyberspace therefore requires courts to take an active role in dismissing cases at an early stage. Fortunately, the constitutional privilege for nonfactual expressions lends itself to use for resolving libel cases as early as a motion to dismiss. Nevertheless, if the privilege is to prevent libel suits from silencing John Doe, courts must apply it with due consideration for the unique social context of cyberspace.

CONCLUSION: PROTECTING JOHN DOE REDUX

Defamation law has long contained "anomalies and absurdities for which no legal writer ever has had a kind word,"[501] and this legal writer is no exception. Since 1964,[502] the Supreme Court has held out the promise that systematic application of First Amendment principles could cure these anomalies and absurdities and bring needed uniformity to the unruly mass of state tort law. This promise has never been borne out. Over the past thirty-five years, the Supreme Court has constitutionalized the tort of defamation in a piecemeal fashion, responding "bit by bit"[503] to the threat defamation poses to media defendants.

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500. *See, e.g.*, Lane v. Random House, Inc., 985 F. Supp. 141, 150 (D.D.C. 1995) (remarking that the fair comment privilege would "also be an adequate basis upon which to grant [defendant's] motion for summary judgment" because the commentary at issue revealed its factual foundation and therefore any reasonable reader could "judge independently whether the comment [was] reasonable").

501. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971); *see also* KEETON ET AL., *supra* note 35, § 111, at 771.

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

503. *See* Anderson, *supra* note 89, at 554:

The new Internet libel cases highlight the deficits of this approach. As the Internet turns more ordinary John Does into publishers, it is also turning them into defamation defendants. Yet, lower courts are forced to guess whether and to what extent these new defendants merit First Amendment protection. Of particular concern is the uncertainty attending some of the most basic inquiries of First Amendment doctrine, including whether nonmedia defendants merit full protection, whether corporations are public figures, and whether context plays a role in separating statements that imply an assertion of objective fact from those that do not. Although the increasing pervasiveness of "interstate" speech makes libel a "field that cries out for [the] uniformity"[504] that only the Supreme Court can bring,[505] lower courts cannot wait for Supreme Court guidance to deal with the complex issues raised by the new John Doe cases.

The chief threat posed by the new cases is that powerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse. If this were the only threat the new John Doe cases posed, they would be relatively easy to resolve, perhaps with anti-SLAPP legislation of the sort recently enacted in California.[506] The problem, however, is that many plaintiffs will have legitimate claims against aggressively uncivil and vicious speakers whose only intent is to destroy the reputation of their targets. Thus, courts must formulate a response that is nuanced enough to respond to the facts of each individual case and that resolves cases quickly enough to prevent ordinary John Does from being chilled by the mere threat of being sued.

As this Article has argued, one of the most effective means for countering the chill of the new John Doe suits is the opinion privilege—the privilege for statements that do not imply assertions of ob-

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> Over the past quarter century, case by case and bit by bit, the [Supreme] Court has thoroughly revised the common law of libel. It has created . . . a matrix of substantive principles, evidentiary rules, and de facto innovations in judge-jury roles and other procedural matters. These are all constitutional based and can only be changed by those who have the power to change constitutional rules.

504. *Id.* at 553.

505. *See id*. at 554.

506. *See* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2000). Twelve other states have anti-SLAPP provisions, including Colorado, Delaware, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Oklahoma, Rhode Island, and Tennessee. *See* Gail Diane Cox, *Pushing the SLAPP Envelope*, NAT'L L.J., Apr. 19, 1999, at A1 (discussing some of the "unintended consequences" of anti-SLAPP statutes). Ten additional states are said to be contemplating anti-SLAPP legislation at present. *See id*.

jective facts. Unlike other constitutional privileges, the opinion privilege can be deployed against meritless defamation actions as early as a motion to dismiss. And, when it is applied with due consideration for the unique social context of the financial message boards and the inherently speculative nature of financial discourse, the privilege gives broad protection to the imaginative expression that ordinary John Does contribute to the formerly staid world of financial discourse. More importantly, it allows the First Amendment "preference"[507] for a truly participatory public discourse to be realized.[508] Perhaps, as the great Judge Learned Hand suggested,[509] this preference is folly, but it is folly on which we have staked our all.

507. *See* Cate, *supra* note 205, at 578 ("The Internet gives real meaning to the constitutional preference for a 'multitude of tongues.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945))).

508. *See* Branscomb, *supra* note 8, at 1671 ("To foreclose . . . a most interesting experiment in democratic discourse would be disheartening and disillusioning. Is it not possible to find some other way of moderating abuses of computer-mediated communications systems?").

509. *Associated Press*, 52 F. Supp. at 372 ("[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.").