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Defamation in the Internet Age: Why Roommates.com Isn't Enough to Change the Rules for Anonymous Gossip Websites

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NOTE

DEFAMATION IN THE INTERNET AGE: WHY *ROOMMATES.COM* ISN'T ENOUGH TO CHANGE THE RULES FOR ANONYMOUS GOSSIP WEBSITES

*Skyler McDonald**

I. INTRODUCTION

Everyone "Googles" his or her own name once in a while. Imagine that a young woman looks herself up on the Internet one day, and finds that a person she does not know is posting offensive, false comments about her. These posts say that she enjoys having sex with family members, fantasizes about being raped by her parent, that she has a sexually transmitted disease and abuses heroin. That is precisely what happened to a female student at Yale Law School over many months.[1]

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These and many other messages about this student were posted on the website AutoAdmit.com.[2] Even after the woman filed her lawsuit, one particularly vicious poster, with the user name AK47, wrote that she "should be raped."[3] The plaintiff sent AT&T, the Internet Service Provider (ISP), a subpoena for information relating to the identity of the posters.[4] The court granted the woman's motion to engage in limited discovery, but AK47 (John Doe 21) filed a motion to quash the subpoena.[5] He claimed that the subpoena violated his First Amendment rights.[6]

Whose interests should prevail in this case? Should AK47's right to free speech trump the Yale Law School student's right to seek redress for wrongs? Alternatively, should the woman be able to force an ISP to reveal the poster's identity, even if it would mean repressing the free flow of ideas on the Internet? This balancing becomes even more complicated when you take into account the Communications Decency Act (CDA). Section 230 of the CDA gives ISPs immunity for the content third-party users post on their websites.[7] For years, many courts refused to lift the CDA's shield but, in 2008, the Ninth Circuit ruled otherwise in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.[8] This Note explores the ramifications of the *Roommates.com* decision on gossip sites, such as AutoAdmit.com, that allow their users to post anonymously.

The anonymity the Internet provides can be a blessing and a curse. Online pseudonyms can further the perception that "anything goes"; some commentators have linked cyberspace to a Wild West-style frontier, where the social norms that typically constrain people in their day-to-day discourse are thrown out the window.[9] Obviously, this anonymity opens the door to cyber-smear campaigns. Some scholars have even argued that rational and civil discourse on the Internet decreases proportionally as meaningless or hateful discourse

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was writing this Note.

1. Doe I v. Individuals (*AutoAdmit.com*), 561 F. Supp. 2d 249, 251 (D. Conn. 2008).
2. *Id.*
3. *Id.* at 252.
4. *Id.*
5. *Id.*
6. *Id.* at 253. In October 2009, the parties in the *AutoAdmit.com* case settled the suit for an undisclosed sum of money. Edmund H. Mahoney, *Ex-Yale Students Settle Internet Defamation Lawuit*, HARTFORD COURANT, Oct. 22, 2009, *available at* http://www.courant.com/news/connecticut/hc-autoadmit1022.artoct22,0,3272457.story. The court dismissed the lawsuit without prejudice, leaving the plaintiffs free to re-file it if new information emerges. *Id.*
7. 47 U.S.C. § 230 (2006).
8. 521 F.3d 1157, 1175 (9th Cir. 2008).
9. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885 (2000).

increases.[10] This argument is a variation of a social psychology hypothesis known as the broken windows theory.

> [A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is *broken and is left unrepaired*, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in rundown ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.[11]

According to the theory, this "'untended' behavior" leads to the "breakdown of community controls."[12] Perhaps this theory can apply to online communities as well as physical ones. One commentator, Jason Kottke, draws this corollary:

> Much of the tone of discourse online is governed by the level of moderation and to what extent people are encouraged to 'own' their words. . . . Undeleted hateful or ad hominem comments are an indication that that sort of thing is allowable behavior and encourages more of the same. Those commenters who are normally respectable participants are emboldened by the uptick in bad behavior and misbehave themselves.[13]

Furthermore, Kottke notes that anonymity exacerbates this situation, inquiring, "[H]ow does the community punish or police someone they don't know?"[14]

This Note attempts to resolve the anonymity dilemma posed by defamatory postings on gossip websites. Part II of this Note introduces defamation law, the CDA and Congress' impetus for passing § 230 of the CDA in particular, the provision at issue in this Note. Part III discusses the cases that have interpreted § 230 of the CDA, and delves into one of the most influential, *Zeran v. America Online, Inc.*[15] Part III

10. *See, e.g.*, *id.* at 903.

11. *See* George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC, Mar. 1982, at 29, 31 (capitalization removed and emphasis added), *available at* http://www.theatlantic.com/doc/198203/broken-windows.

12. *Id.*

13. Jason Kottke, *Does the Broken Windows Theory Hold Online?*, KOTTKE.ORG, Dec. 1, 2008, http://kottke.org/08/12/does-the-broken-windows-theory-hold-online.

14. *Id.*

15. Zeran v. Am. Online, Inc. (*Zeran I*), 958 F. Supp. 1124 (E.D. Va. 1997).

also addresses the issue of online posts concerning public officials. Part IV outlines the *Roommates.com* decision in detail and will compare it with a very similar case, *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*[16] Part V introduces a few of the websites in existence that provide their users with anonymity and seem to encourage "juicy," possibly defamatory, posts. Part VI begins by discussing the arguments for and against extending the *Roommates.com* decision to gossip sites that allow anonymity. This Note then lays out some possible solutions that courts have formulated to date and a solution recently applied by a New York court that closely follows the arguments expressed in this Note. Part VII concludes that the *Roommates.com* holding was narrow, and for reasons both idealistic and practical, should not be used as a basis for withdrawing CDA immunity from these gossip sites. Notwithstanding, this Note concludes that the victims of these malicious and defamatory posts should have recourse in the courts to compel ISPs to release the identity of the poster, if possible.

II. BACKGROUND

A. *The Law of Defamation*

Before addressing the CDA, one must first consider the underlying common law of defamation. The tort of defamation has its roots in English common law.[17] The definition of defamation has changed little over the years.[18] An eighteenth century English court wrote "[I]f any man deliberately or maliciously publishes any thing [in] writing concerning another which renders him ridiculous, or tends to hinder mankind from associating . . . with him, an action well lies against such publisher."[19] In comparison, the modern *Restatement (Second) of Torts* states that "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[20]

Defamation is divided into two branches: libel, or written defamation, and slander, or spoken defamation.[21] "The practical difference is that *libel* is actionable *per se*, but *slander* is not actionable

16. 519 F.3d 666 (7th Cir. 2008).

17. JOSEPH W. LITTLE & LYRISSA BARNETT LIDSKY, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 802–03 (Matthew Bender & Co. 2d ed. 2000) (1997).

18. *Compare* Villers v. Monsley, (1769) 95 Eng. Rep. 886 (K.B.), *with* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

19. *Villers*, 95 Eng. Rep. at 886.

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

21. LITTLE & LIDSKY, *supra* note 17, at 803.

without proof of special damage. . . ."[22] Messages posted on the Internet fall under the category of libel, because as one California court wrote, "[t]he messages were composed and transmitted in the form of written words just like newspapers, handbills, or notes."[23] That court explained that the only difference between defamatory messages posted on the Internet and more traditional venues is the choice to disseminate the writings electronically.[24] Further, defamation is a strict liability tort.[25] Under common law, the plaintiff had to prove just one thing–that the defendant made and published a defamatory statement.[26]

The Florida Supreme Court elaborated on the common law of defamation, in which only publication of the defamatory statement is truly necessary and not any form of malice, stating that [27]

> [c]onsequently, the publication of a libel per se is such that, in the eyes of the law, its publication per se necessarily imports injury, and thereby obviates the necessity of either pleading or proving damage or malice in fact, since both of these elements are presumed as a matter of law in such cases.[28]

In 1964, the Supreme Court stepped in and added a new layer to defamation law. In *New York Times Co. v. Sullivan*,[29] the Court added the requirement of "actual malice" when public figures claim defamation. The Court wrote:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[30]

Ten years later, in *Gertz v. Robert Welch, Inc.*,[31] the Supreme Court declined to extend this standard to defamation suits by private

22. LITTLE & LIDSKY, *supra* note 17, at 803.
23. Varian Med. Sys., Inc. v. Delfino, 6 Cal. Rptr. 3d 325, 343 (Ct. App. 2003).
24. *Id*.
25. LITTLE & LIDSKY, *supra* note 17, at 819.
26. Furine Blaise, Comment, *Game Over: Issues Arising When Copyrighted Work is Licensed to Video Game Manufacturers*, 15 ALB. L.J. SCI. & TECH. 517, 536 (2005) (citing Beauharnais v. Illinois, 343 U.S. 250, 254 (1952)).
27. Layne v. Tribune Co., 146 So. 234, 236 (Fla. 1933).
28. *Id.*
29. 376 U.S. 254 (1964).
30. *Id.* at 279–80.
31. 418 U.S. 323 (1974).

individuals.[32] "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[33] In other words, the standard for private figures is not one of strict liability. It is important to point out that *Roommates.com*, a focal point of this Note, is not a defamation case.[34] It is a case that deals with a violation of the Fair Housing Act.[35] However, this Note seeks to apply to the tort of defamation those principles in *Roommates.com* which pertain to the CDA. Having established the elements of common law defamation, one can evaluate how Congress has addressed this liability in the Internet age.

B. *Discussion of the CDA*

The Communications Decency Act became effective on February 8, 1996.[36] Section 230(c) of the CDA, the "Good Samaritan" provision, shields providers of interactive computer services from liability arising from content created by third-party users.[37] It states that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[38] Section 230 defines "'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."[39] However, the immunity will not be granted for "information content providers," defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[40] As the Fourth Circuit explained, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[41]

Congress passed § 230 in reaction to a New York state court case[42]

32. *Id.* at 344.

33. *Id.* at 347.

34. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

35. *See id.*

36. Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 137 (1996) (codified as amended at 47 U.S.C. § 230 (2006)); *see also Zeran I*, 958 F. Supp. at 1129.

37. 47 U.S.C. § 230(c)(1) (2006).

38. *Id.*

39. *Id.* § 230(f)(2).

40. *Id.* § 230(f)(3).

41. Zeran v. Am. Online, Inc. (*Zeran II*), 129 F.3d 327, 330 (4th Cir. 1997).

42. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710 (N.Y. App. Div. May 24, 1995).

that held Prodigy Services Co., an ISP, responsible for libelous material posted on one of its message boards.[43] Prodigy had decided to delete some of the messages that it found inappropriate, but not all of them.[44] The court found that because of these actions, Prodigy was legally responsible for the messages it did not delete, including the one at issue.[45] Prodigy explained that its message boards receive over 60,000 posts a day, making it virtually impossible to manually read every one.[46] So, to comply with the decision, the service provider said it would stop screening for any libelous messages to avoid liability.[47]

Congress, hoping to relieve ISPs of this "grim choice," passed § 230 of the CDA in an effort to allow the companies to edit or remove some posts without being liable for anything and everything they missed.[48] "In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . . ."[49]

III. HOW COURTS HAVE APPLIED THE CDA TO DATE

A. *The* Zeran *Decision*

The Fourth Circuit became the first appellate court to interpret § 230 of the CDA in *Zeran v. America Online, Inc.*[50] The case arose in the mid-1990s during the beginning of the Internet boom. Ken Zeran was the victim of a "malicious hoax," wherein an anonymous person or persons attached his name and telephone number to several notices on one of AOL's "bulletin board[s]."[51] The notices advertised T-shirts with slogans glorifying the Oklahoma City bombing, in which 168 people were killed.[52] The slogans available included "McVeigh for President 1996" and "Visit Oklahoma . . . It's a BLAST!!!"[53] Predictably, Zeran was inundated with angry and threatening phone calls, including death threats.[54] He contacted AOL and asked them to take the notice down.[55]

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43. *Id.* at *5.

44. *Id.* at *2.

45. *Id.* at *5.

46. *Id.* at *3.

47. *Id.* The court erroneously concluded that there was no danger of Prodigy skipping its screening process because Prodigy's claim was based on an assumption that "incorrectly presume[d] that the market will refuse to compensate a network for its increased control and the resulting increased exposure." *Id.* at *5.

48. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008).

49. *Id.*

50. 129 F.3d 327, 334–35 (4th Cir. 1997); *see also* Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 583 (2008).

51. *Zeran I*, 958 F. Supp. 1124, 1126 (E.D. Va. 1997).

52. *Id.*

53. *Id.* at 1127 n.3.

54. *Id.* at 1127.

It agreed, but the calls did not stop.[56] While AOL deleted the first notice, a second appeared, again advertising T-shirts with vulgar and offensive references to the bombing and still touting Zeran's name and phone number.[57] Zeran once again called AOL to complain and, this time, contacted the FBI.[58] Zeran claimed that during one time span he received abusive phone calls every two minutes.[59] In April 1996, he filed suit against AOL, alleging that the company was negligent in failing to respond adequately to the notices.[60] AOL sought immunity under the CDA, arguing that Congress gave ISPs (such as AOL) immunity from claims based on online postings by a third-party.[61] AOL prevailed at the district court level.[62] On appeal, the Fourth Circuit affirmed, rejecting *Zeran*'s argument that because AOL had notice of the postings, that notice removed CDA immunity.[63] In other words, the court broadened the CDA's shield from mere immunity for deleting posts to a much broader immunity for simply being a publisher of information.

The *Zeran* decision generated controversy among subsequent courts. A California court has characterized *Zeran*'s interpretation of § 230 as "misleading."[64] The California court wrote,

> [t]he effect of *Zeran* is to confer on providers and users of interactive computer services complete immunity from liability for transmitting the defamation of a third party. . . . Since the decision in *Zeran*, no court has subjected a provider or user of an interactive computer service to notice liability for disseminating third-party defamatory statements over the Internet.[65]

Scholarly work has also criticized how broadly the *Zeran* court applied immunity, arguing that Congress only intended § 230 immunity to apply in cases like *Stratton Oakmont v. Prodigy Services, Co.*[66] or that the

55. *Id.*

56. *Id.*

57. *Id.* The notices said to ask for "Ken" and "please call back if busy." *Zeran II*, 129 F.3d 327, 329 (4th Cir. 1997).

58. *Zeran I*, 958 F. Supp. at 1128.

59. *Zeran II*, 129 F.3d at 329.

60. *Id.* at 329–30.

61. *Id.*

62. *Id.*

63. *Id.* at 335.

64. Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 153 (Ct. App. 2004).

65. *Id.*

66. Brian C. McManus, Note, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647, 668–69 (2001); David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There* Any *Liability Left After* Zeran*?*, 39 SANTA CLARA L. REV. 905, 929–30 (1999).

court improperly mixed the common law distinction between publishers and distributors of defamatory material.[67]

A later circuit court case addressed the situation where there seemed to be, at least superficially, more content development on the part of the website than in the *Zeran* case. Five years prior to the *Roomates.com* decision, the Ninth Circuit decided *Carafano v. Metrosplash.com, Inc.*, a case involving an Internet dating site.[68] The complaint centered around the dating website Matchmaker.com, where users could post anonymous profiles and then contact other members.[69] The website asked users to answer a multiple-choice questionnaire and write short essays about themselves.[70] An unknown user posted a profile of Christianne Carafano, a popular Hollywood actress known by her screen name Chase Masterson.[71] The imposter posted untrue information about the actress, writing that she was searching for a "'hard and dominant' man" and was "looking for a one-night stand."[72] The post also listed her home address in Los Angeles.[73] Carafano sued the website and lost at the district court level.[74] On appeal, the circuit court affirmed, stating that Matchmaker.com was immune from liability under the CDA's § 230.[75] The court noted a "consensus developing across other courts of appeals that § 230(c) provides broad immunity for publishing content provided primarily by third parties."[76] The court reasoned that merely providing a questionnaire for users to fill out did not make Matchmaker.com an information content provider.[77]

B. *A Different Standard for Public Figures?*

Another facet of the problem of anonymous, defamatory online posts arises when the person being defamed is a public figure. In *Melvin v.*

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67. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 640 (2001); Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 679 (2002).

68. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).

69. *Id*.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1122. Although not for reasons related to the CDA, Carafano lost on the underlying claim. *Id.*

75. *Id.* at 1125.

76. *Id.* at 1123.

77. *Id*. at 1124; *cf.* Fair Hous. Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1166 (9th Cir. 2008) (ruling that by using pull-down menus with a limited population of answers, Roommates.com had crossed the line from passive service provider to active content provider).

Doe,[78] a Pennsylvanian judge sued the anonymous authors of statements made about her on a website known as Grant Street '99.[79] The statements alleged she had lobbied the governor's office to appoint a particular attorney to a vacant spot on the bench.[80] The Pennsylvania Supreme Court seemed to emphasize the fact that she was a public official, but remanded the question of whether a public official must establish a prima facie case of actual economic harm before obtaining the identity of their defamers.[81]

In 2005, in the defamation case of a Smyrna, Delaware, town council member and his wife, the Delaware Supreme Court took up where the Pennsylvania Supreme Court left off.[82] The couple alleged that a person with the online alias "Proud Citizen" had posted negative comments about Cahill's job performance on a website sponsored by the *Delaware State News*.[83] The posts stated that Cahill was "paranoid," had impeded cooperation among the city government and noted "an obvious mental deterioration."[84] The Cahills got the poster's Internet Protocol address from the blog owner and then obtained a court order requiring Comcast (the ISP) to disclose Doe's identity.[85] Doe sought a protective order, which the trial judge denied.[86] Doe appealed and the Delaware Supreme Court reversed.[87] The court was "concerned that setting the standard too low [would] chill potential posters from exercising their First Amendment right to speak anonymously."[88] Notwithstanding the court's acknowledgement that Cahill was a public figure, the court held that because Cahill's defamer was anonymous, he did not have to prove actual malice,[89] the benchmark the Supreme Court has set for defamation cases involving public officials.[90] The court implied that it would be unfair to make a plaintiff plead an element of the claim that was out of his control.[91] Regardless of this lowered standard, the court still found that Cahill had failed to meet his burden and dismissed the complaint.[92]

78. 836 A.2d 42 (Pa. 2003).
79. *Id.* at 43.
80. *Id.* at 43–44.
81. *Id.* at 50.
82. Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005).
83. *Id.*
84. *Id.*
85. *Id.* at 454–55.
86. *Id.* at 455.
87. *Id.* at 455, 468.
88. *Id.* at 457.
89. *Id.* at 454, 464.
90. *See supra* notes 29–30 and accompanying text.
91. *Cahill*, 884 A.2d at 464.
92. *Id.* at 467–68. If a public official were to be defamed on a gossip site such as JuicyCampus.com, it is still unclear which standard a court would use: the Supreme Court's

IV. *ROOMMATES.COM* AND THE CHINK IN THE CDA'S ARMOR

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,[93] the Ninth Circuit found an exception to the wide CDA immunity established by earlier courts.[94] In that case, the Fair Housing Council of San Fernando Valley sued the roommate-matching website for violating the Fair Housing Act (FHA).[95] The website sought to hide behind CDA § 230 immunity.[96] The court, in examining the website, found that in order to search for a vacant room and space, or to advertise for a roommate, users had to use pull-down menus that listed a short number of choices.[97] Among these pull-down menus, users had to identify their gender, sexual orientation, and whether they had children.[98] The court held that these pull-down menus meant Roommate had crossed the line from passive service provider to active content provider.[99] The court reasoned that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer . . . of that information."[100] Further, because Roommate's actions were entirely its own and not that of a third party, the court concluded that § 230 of the CDA did not apply to it and that "Roommate is entitled to no immunity."[101] However, the court did conclude that the "'Additional Comments' section" was entitled to CDA immunity[102] because the content on this page came entirely from subscribers, which Roommate merely passively displayed to other users.[103]

Less than a month before the *Roommates.com* decision, the Seventh Circuit decided a similar case involving the online bulletin board Craiglist.com.[104] In that case, a lawyers' association brought suit against

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standard of actual malice, or the Delaware Court's standard not requiring actual malice.

93. 521 F.3d 1157 (9th Cir. 2008).

94. *Id.* at 1165.

95. *Id*. at 1162. Specifically, the Fair Housing Council alleged the website had violated § 3604(c) of the FHA (prohibiting discrimination on the basis of race, color, religion, sex, familial status or national origin) and California housing discrimination law. *Id.* at 1162 n.4.

96. *Id.*

97. *Id.* at 1165.

98. *Id.*

99. *Id.* at 1166.

100. *Id.*

101. *Id.* at 1165.

102. *Id.* at 1173–74.

103. *Id.* at 1174.

104. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

the website claiming that some posts violated the Fair Housing Act.[105] Among the posts that the plaintiffs found objectionable were notices proclaiming "NO MINORITIES" or "No children" from prospective landlords.[106] And, similar to *Roommates.com*, Craigslist.com sought immunity under CDA § 230.[107] In contrast to the *Roommates.com* decision, however, the website in *Craigslist* merely provided a blank forum for users to post whatever they wanted, discriminatory or not.[108] However, unlike the Roommates.com's website, there were no drop-down menus on Craigslist.com. The Seventh Circuit held that the CDA provided immunity for Craigslist, writing that the association "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."[109]

The question that remains after these two cases is which approach is better, or is each appropriate in its own way? One can argue that the *Roommates.com* case applies only to such user-interactive features as the pull-down menus. Indeed, the Ninth Circuit court continually mentioned how the website's design "force[d]" users to use these menus and make discriminatory choices.[110] It seems inaccurate to conclude that Craigslist solicited information that would violate the FHA in the same manner Roommates.com did.[111] In that paradigm, *Roommates.com* would be applicable only to this small subset of cases, while *Zeran*, its progeny, and *Craigslist* would be the overarching judicial decision. On the other hand, it could be argued that *Roommates.com* broke from precedent, and provided the first turning of the tides. Since the case is so recent, there are many unanswered questions in its wake: Does *Roommates.com* conflict with *Zeran*? Or weaken *Zeran*'s persuasiveness? Some would argue vehemently against this argument, raising the point that the security *Zeran* has provided to ISPs has allowed Web 2.0 to flourish and that an opposite holding in *Zeran* would have stifled the Internet.[112] This argument may have been true in 1997, but now "[t]he Internet is no longer a fragile new means of

105. *Id.* at 668.

106. *Id.*

107. *Id.* at 668 (calling Craigslist.com an "electronic meeting place").

108. *See id.*

109. *Id.* at 672.

110. Fair Hous. Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1172 (9th Cir. 2008).

111. Courts in the Seventh Circuit continue to construe the CDA narrowly. In a 2009 case, a county sheriff sued Cragislist.com for providing a forum that facilitated prostitution. The court found that Craigslist was entitled to CDA protection because it was not actively creating the posts and was merely passively displaying the illegal material. Dart v. Craigslist, Inc., No. 09-C-1385 (N.D. Ill. Oct. 20, 2009) (order granting defendant's motion for judgment on the pleadings).

112. Ziniti, *supra* note 50, at 583.

communication that could easily be smothered in the cradle . . . . Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted."[113] Perhaps it's time for the Internet to no longer be coddled.

V. THE GOSSIP SITES

Websites that seem to be a particularly rich breeding ground for these dangers are those created for the purpose of discussing other people, or "gossip sites." Many of these websites provide their users with anonymity.[114] For example, JuicyCampus.com[115] promised its

113. *Roommates.com*, 521 F.3d at 1164 n.15.

114. Anonymous speech is nothing new. American courts have held that the First Amendment generally protects anonymous speech. The U.S. Supreme Court opined in *Talley v. California* that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." 362 U.S. 60, 64 (1960). Nearly forty years later, the Court again upheld the value of free speech when it struck down both a statute requiring initiative-petition circulators to wear identification badges bearing their name and another statute mandating that initiative supporters report names and addresses of all paid circulators. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 184 (1999). When the Internet was just coming out of infancy and gaining widespread attention, the Court extended its First Amendment protection on speech to the Internet. Reno v. ACLU, 521 U.S. 844, 870 (1997) (striking down CDA provisions that prohibited the transmission of obscene or indecent material to minors as unconstitutional because the provisions violated the free speech rights enshrined in the First Amendment).

However, the right to anonymous speech is not absolute. In 2000, an anonymous plaintiff filed suit against five John Does, alleging that the John Does published in Internet chat rooms certain defamatory material misrepresentations. *In re* Subpoena Duces Tecum to Am. Online Inc., No. 40570, 2000 WL 1210372, at *1 (Va. Cir. Ct. Jan. 31, 2000). The plaintiff subpoenaed AOL for the names of the John Does and AOL refused, claiming that the subpoena infringed upon the John Does' free speech rights. *Id.* at *2. The Court held that while the right to anonymous communication on the Internet falls within First Amendment's scope, "the right to speak anonymously is not absolute." *Id.* at *6. "The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions." *Id.* at *6.

115. As of February 5, 2009, JuicyCampus.com was shut down, allegedly for economic reasons. Alison Go, *Juicy Campus Will Be Shut Down*, U.S. NEWS & WORLD REPORT, Feb. 4, 2009, http://www.usnews.com/blogs/paper-trail/2009/02/04/juicy-campus-will-be-shut-down.html. The editorial boards of college newspapers nationwide cheered the website's demise and students seemed to breathe a collective sigh of relief. *See, e.g.*, Heather Mayer, *Juicy Campus Shut Down*, THE DAILY ORANGE, Feb. 5, 2009, *available at* http://media.www.dailyorange.com/media/storage/paper522/news/2009/02/05/News/Juicy.Campus.Shut.Down-3614672.shtml; *Juicy Campus Shut Down in Wake of Economy*, THE INDEPENDENT FLORIDA ALLIGATOR, Feb. 5, 2009, *available at* http://www.alligator.org/opinion/editorials/article_7e633464-72d5-57a0-9b3b-13226e4233c7.html; *Good Riddance*, THE HOYA, Feb. 10, 2009, *available at* http://www.thehoya.com/opinion/good-riddance/. Users seeking "JuicyCampus.com" are now immediately directed to the "Official JuicyCampus Blog," which then redirects all traffic to www.collegeacb.com. *See* Official Juicy Campus Blog, http://juicycampus.blogspot.com/ (last visited Oct. 13, 2009). In a CollegeACB.com press

users, at the top of its website in a bright pink text box, "This is the place to spill the juice about all the crazy stuff going on at your campus. It's totally anonymous, no registration, login, or email verification required."[116] This website allowed people to write virtually anything, unconfirmed, about anybody. A sampling: someone from Anytown University posted this: "Jane Doe does not know when to shut her fat gullet. The morbidly obese junior has made it her duty to be a complete bitch to all unsespecting [sic] classmen . . . dont [sic] let yourself be overwhelmed by such a grotesk [sic] being . . . she will die eventually, until then we can pray."[117] Under a post entitled "Sarah Doe," a poster said: "Let's talk about her slut factor."[118] The responses included the fact that she had multiple STDs, had sex with an entire fraternity, and was a "dirty whore."[119] JuicyCampus.com's privacy policy did warn that they "reserve[d] the right to disclose your personally identifiable information and/or non-personally identifiable information as required by law and when [they] believe that disclosure is necessary to protect [their] rights and/or to comply with a judicial proceeding, court order, or legal process served on [their] web site."[120] However, just a few paragraphs below this disclaimer the website seemed to encourage users who are particularly concerned with their security to use software that will hide their IP address. "Just do a quick search on Google and find one you like," the site urged.[121]

Another college gossip website that offers its users anonymity is www.collegeacb.com. The website allows users to log in if they choose, but also allows anyone to post anonymously comments to existing posts.[122] This site does seem to have fewer mean-spirited posts than JuicyCampus.com, with more users actually looking for feedback on topics like "How many people can say they've truly been in love?" or "My best friend and I are crazy over the same girl. Do you think that it would cause problems between us . . . ?"[123] In addition, there seems to

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release, the website stresses that through more stringent user moderation and other features, collegeACB will not become the next JuicyCampus.com, "a website that fostered superficial interactions, often derogatory and needlessly crude. By contrast, the ACB consistently hosts a higher level of discourse." CollegeACB Press Release, http://collegeacb.blogspot.com/2009/02/colleg eacb-press-release. html (last visited Oct. 5, 2009).

116. JuicyCampus.com, http://www.JuicyCampus.com (last visited Jan. 29, 2009).

117. *Id.* All names have been changed to protect the victims.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Juicy Campus Closes, www.collegeacb.com Juicy Campus Replacement, http://collegeacb.blogspot.com/2009/02/juicy-campus-closing_05.html (last visited Oct. 5, 2009).

123. CollegeACB, http://www.collegeacb.com (last visited Feb. 9, 2009).

be almost no one on collegeacb.com using people's actual names in any context, which is a far cry from the content of JuicyCampus.com. Perhaps it has something to do with the fact that instead of JuicyCampus.com's call to "C'mon. Spill the juice,"[124] CollegeACB's home page states that it gives posters "a place to vent, rant and talk to [their] peers . . . about subjects that might otherwise be considered taboo."[125] The difference between the comparative innocence of the posts on CollegeACB.com and the vitriol on JuicyCampus.com may lend credence to the broken windows theory as it applies to the Internet.[126] Fewer people are "breaking windows," or saying vicious things on CollegeACB's site, and thus it is less acceptable for others to do so.

The website DontDateHimGirl.com also allows anonymous posting.[127] It is not quite as freewheeling as JuicyCampus; it requires users to sign up and give a valid email address,[128] although this may be meaningless as many ISPs offer e-mail services without requiring any of the user's personal information. This website is created for people who want to sound off about their cheating significant others.[129] One particularly attention-grabbing post shouts: "JOHN DOE . . . RAPPER GAVE ME AIDS!!!!"[130] Another woman posted that a man named Jack Doe abused her daughters, burglarized her home, and threatened her.[131]

One more example is WikiLeaks.com. This website publishes and comments on leaked documents that allegedly uncover government and corporate misconduct.[132] For example, the site lionized a whistleblower who exposed the "allegedly illegal and corrupt activities of Sean Doe, then Insurance Commissioner of California."[133] No mention was made as to what these actions were and no links were available to reputable news sources, merely to a Wikipedia article and to guerillalaw.com.[134]

What can Jane Doe, Jack Doe or Sean Doe do? Even if they try to find out who posted this information, it may be to no avail because the websites do not collect any information on its users and, arguably, the websites, under the CDA, are immune from what these people write. These websites occupy a murky no-man's-land in American

124. JuicyCampus.com, http://www.JuicyCampus.com (last visited Jan. 29, 2009).

125. CollegeACB Press Release, *supra* note 115.

126. *See* Kelling & Wilson, *supra* note 11 and accompanying text.

127. Don't Date Him Girl, http://www.DontDateHimGirl.com (last visited Oct. 10, 2009).

128. *Id.*

129. *Id.*

130. *Id.* The website is not substantiating this devastating accusation.

131. *Id.*

132. WikiLeaks, http://www.WikiLeaks.com (last visited Oct. 10, 2009).

133. WikiLeaks, Cindy Ossias, http://wikileaks.org/wiki/Cindy_Ossias http://www.WikiLeaks.com (last visited Oct. 10, 2009).

134. *Id.*

jurisprudence.

VI. THE RULES GOING FORWARD

A. *The Gray Area*

These gossip sites that provide anonymous posting are caught in the gray area between what is definitely not immune, as defined by the *Roommates.com* precedent (drop-down menus and being *forced* to post something illegal in order to use a web site) and what is definitely immune, as defined by *Zeran*, *Craigslist* and the CDA (picking which posts to edit or ignore, and being a passive conductor of information).

Within this gray area, these gossip websites encourage defamation, but do not force it—thus, not satisfying "the definitely not immune" elements. They are technically passive conductors of information, but actively eliminate users' personal liability in order to let these users spew their vitriol more freely. Is this the sort of freedom the CDA was enacted to protect? Or have the courts gone too far in protecting the Internet and the unfettered speech found on it?

B. *Arguments for Extending the* Roommates.com *Decision to Lift CDA Immunity for These Sites*

The majority in *Roommates.com* correctly found that there should be a link between what is allowable in the real world and on the Internet. "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[135] An argument can be made, relying on dicta from the *Roommates.com* decision, that websites such as JuicyCampus.com and DontDateHimGirl.com, created for the express purpose of spreading gossip and protecting users by guaranteeing their anonymity, are actively soliciting defamatory material, in the same manner that Roommates.com users were engaging in illegal conduct that violated the FHA. The majority in *Roommates.com*, discussing an earlier case, explained "[t]he salient fact . . . was that the 'website' . . . did absolutely nothing . . . to encourage defamation or to make defamation easier."[136] The argument follows that this would make these anonymous gossip sites "information content providers," thus falling outside the scope of CDA immunity. Indeed, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,[137] the Supreme Court confronted the issue of whether Grokster, a peer-to-peer file sharing computer software distributor, could be held liable for the copyright infringement

135. Fair Hous. Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1164 (9th Cir. 2008).

136. *Id.* at 1172.

137. 545 U.S. 913 (2005).

committed by third-parties who used their service.[138] In ruling against Grokster, the Court wrote "[t]he record is replete with evidence that from the moment Grokster . . . began to distribute [its] free software, [it] clearly voiced the objective that recipients use it to download copyrighted works, and [it] took active steps to encourage infringement."[139] And, similar to some of the gossip sites discussed in this Note, "the business models employed by Grokster . . . confirm that [its]principal object" was for customers to use it to commit illegal acts.[140]

In addition, some scholars have argued that broad immunity is contrary to the policies that moved Congress to enact the CDA in the first place. "Immunizing a system operator who knowingly and willfully transmits inaccurate content on an electronic bulletin board does not promote the 'vibrant speech' policy behind the CDA."[141]

Perhaps one of the strongest arguments for using *Roommates.com* to lift CDA immunity for these types of websites is that it takes away the "safety valve" of personal responsibility that many courts have relied on in their decisions. For example, the *Zeran* court cautioned:

> None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer."[142]

However, this sentiment loses much of its punch when one considers that Mr. Zeran got nothing out of his lawsuit and that the "original culpable party" in that case went unpunished.[143]

The Fifth Circuit reasoned similarly in a case where a 13-year-old girl made a MySpace account (even though she was too young to legally do so) and presented herself as an 18-year-old female.[144] As a result, her profile was made public. A 19-year-old contacted her; when they met, he sexually assaulted her.[145] In holding that MySpace may use § 230 immunity to escape liability, the court wrote, "Parties complaining that they were harmed by a web site's publication of user-

138. *Id.* at 918–19.
139. *Id.* at 923–24.
140. *Id.* at 926.
141. Wiener, *supra* note 66, at 930.
142. *Zeran II*, 129 F.3d 327, 330 (4th Cir. 1997) (citations omitted).
143. *Id.*
144. Doe v. MySpace, Inc., 528 F.3d 413, 416 (5th Cir. 2008).
145. *Id*.

generated content have recourse; they may sue the third-party user who generated the content."[146] These excerpts highlight precisely how dangerous these websites' guarantee of anonymity is. Once you withdraw this safety valve that courts seem to rely on to justify CDA immunity for the host websites, it leaves the victim with no recourse.

C. *Arguments Against Extending the* Roommates.com *Decision to Gossip Sites*

1. What Values Does the CDA Protect?

The dissent in *Roommates.com* succinctly describes the danger of scaling back CDA immunity for interactive websites, stating that the majority's "expansion of liability for ISPs threatens to chill the robust development of the Internet that Congress envisioned."[147] It seems fairly obvious that providers are immune from liability for editing some unseemly posts and not others.[148] The real policy question is the broader one addressed by the *Roommates.com* dissent: Whether an overzealous scaling back of CDA immunity will suffocate the free flow of ideas that characterizes the Internet.

This worry and the general idea that less is more when it comes to Internet regulation evolved very early in the Internet's lifespan. In 1995, scholar Jeffrey Taylor noted, "Internet users have grown to be fiercely anti-totalitarian in their views of censorship and regulations. . . . Users follow protocol out of respect for each other rather than in adherence to a particular set of rigid laws or standards."[149]

The Internet, and especially its interactive websites and blogs, allows Everyday Joes equal access to give their opinions and engage in discourse[150] that is unprecedented in history–unprecedented because on the Internet, there is no gatekeeper and virtually no limit on the audience. In the past, a person wanting to express his views to an audience had two choices: he could sermonize from the steps of City Hall or write a letter to be published in a newspaper. He arguably may reach more people with the newspaper, but an editor would decide what to strike from his letter or even whether to publish it. Indeed, before the Internet, most everyday people were pushed to the sidelines of public discourse because they weren't rich or powerful. Publishing giants and

146. *Id.* at 419.

147. Fair Hous. Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, J., concurring in part and dissenting in part).

148. *See id.* at 1174 (majority opinion); Batzel v. Smith, 333 F.3d 1018, 1032 (9th Cir. 2003).

149. Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 FLA. L. REV. 247, 276 (1995); *see supra* text accompanying notes 11–14.

150. Lidsky, *supra* note 9, at 860–61.

TV magnates controlled the "marketplace of ideas" and information, including when to present it, how to present it, and even what spin the editorial board would put on it.[151] Now, that same town crier can simply transfer his unedited soliloquy to blogspot.com, and reach millions "with a voice that resonates farther than it could from any soapbox."[152]

The *Roommates.com* dissenters relied heavily on the theory of congressional intent. They wrote that a divide between cyberspace and the physical world "is precisely the path Congress took with the CDA: the anomaly that a web host may be immunized for conducting activities in cyberspace that would traditionally be cause for liability is exactly what Congress intended by enacting the CDA."[153] The Fourth Circuit, back in 1997, set forth essentially the same justification:

> Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[154]

It is important to bear in mind that the Ninth Circuit did not find the entire website undeserving of CDA immunity. The plaintiffs in *Roommates.com* tried to argue this, saying the "Additional Comments" section could be seen as soliciting discriminatory information because the pull-down panels before it did.[155] But the court rejected this interpretation.[156] In fact, the court erred on the side of providing

151. *Id.* at 894.

152. Reno v. ACLU, 521 U.S. 844, 870 (1997).

153. Fair Hous. Council of San Fernando Valley v. Roommates.com, Inc., 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part and dissenting in part).

154. *Zeran II*, 129 F.3d 327, 330–31 (4th Cir. 1997) (internal citations omitted).

155. *Roommates.com*, 521 F.3d at 1173.

156. *Id.* at 1174–75.

websites with immunity.[157] "Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged . . . the illegality of third parties."[158]

2. Practical Problems

But perhaps courts should not be the ones to decide where to draw the line. Considering the murky jurisprudence in this area of the law and the fact that the whole issue of immunity stemmed from a legislative act, perhaps it should be Congress' job to amend the CDA to take cases such as *Roommates.com* and these gossip websites into account. The main problem with this approach is logistics. Who would police this new law, whatever it may be? Certainly it is too massive a job for Congress. So should it be the websites themselves? Even if Congress were to mandate self-policing, would it even be possible? Consider this from the *Craigslist* case:

> An online service could hire a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be reviewed before being put online, long delay could make the service much less useful, and if the vetting came only after the material was online the buyers and sellers might already have made their deals. Every month more than 30 million notices are posted to the craigslist system. Fewer than 30 people, all based in California, operate the system, which offers classifieds and forums for 450 cities. It would be necessary to increase that staff (and the expense that users must bear) substantially to conduct the sort of editorial review that the Lawyers' Committee demands—and even then errors would be frequent.[159]

Another potential problem with self-policing is a website cherry-picking the content it wants to keep and the content it wants to avoid. One of the great strengths of the Internet is the ability for an Everyday Joe to simply log on and, through his blog or posting on a separate website, share his opinions with the world. One could argue that regulating these gossip sites could be the start of Internet censorship. And one must keep in mind 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

157. *Id.* at 1174.

158. *Id*.

159. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668–69 (7th Cir. 2008).

ordinary citizens to play a meaningful role in public discourse."[160] However, it is undeniable that many other anonymous Internet users will use that forum to intentionally malign another person. And therein lies the tightrope courts must walk. As one commentator put it, "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."[161]

D. *Walking the Tightrope: A Reasonable Solution*

There is no easy answer as to what is the proper course to follow when it comes to gossip websites that offer users anonymity and encourage defamatory posts. However, in light of the practical issues associated with policing these sites and the generally narrow language in the *Roommates.com* case, it seems clear that *Roommates.com* does not lift the veil of CDA immunity that these websites enjoy. As the court in *Carafano* explained, "despite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress intended that service providers . . . be afforded immunity from suit."[162] The court in the *AutoAdmit.com* case likely has it right: While the offending website may be immune, the courts should strive to ensure the actual offender is not.[163] Courts should have the freedom to compel websites to release their posters' identifying information so that victims may obtain some remedy. The biggest problem here, obviously, is that these websites take great strides to ensure their users' anonymity and likely see it as a cornerstone of the business. Either Congress or the courts should change the rules for these websites by requiring that the websites collect identifying information. Then, if a person sues the website to find out who his defamer is, the website would have a chance in court to argue against disclosure. This would adequately balance the rights of persons harmed by these websites' anonymity policies while not being so restrictive as to chill free speech on the Internet. To reach this solution, courts have developed a variety of tests.

E. *The Different Tests to Apply*

In *Krinsky v. Doe*,[164] a corporate president brought an action against ten defendants for alleged defamatory statements they posted on the Internet about her.[165] Specifically, the poster said she had "fat thighs, a

160. Lidsky, *supra* note 9, at 945.
161. *Id.*
162. Carafano v. Metrosplash.com Inc., 339 F.3d 1119, 1125 (9th Cir. 2003).
163. *AutoAdmit.com*, 561 F. Supp. 2d 249, 253 (D. Conn. 2008).
164. 72 Cal. Rptr. 3d 231 (Ct. App. 2008).
165. *Id.* at 235.

fake medical degree, 'queefs' and has poor feminine hygiene."[166] She subpoenaed the ISP to ascertain the identities of these anonymous posters.[167] One defendant moved to quash, but the court denied it,[168] saying Krinsky had to make a prima facie showing of the alleged tort first.[169]

The *Krinsky* case sets out several different methods that courts have adopted to date to balance competing interests.[170] The first test starts on the plaintiff-deferential side of the scrutiny scale, applying a "good faith" standard.[171] *In re Subpoena Duces Tecum to America Online, Inc.* provides an example of the "good faith basis" test.[172] The court in *AOL* suggested a three-prong test for when to issue a subpoena in these circumstances.[173] First, the court must be satisfied by the pleadings or evidence.[174] Second, the party seeking the information need only have a "legitimate, good faith basis" to contend that he or she is the victim of the actionable conduct.[175] Third, the subpoenaed information regarding identity must be centrally needed to advance that claim. [176]

A step up on the scrutiny scale is the four-part test written by a New Jersey court in *Dendrite International, Inc. v. Doe No. 3*.[177] The New Jersey court was concerned that the plaintiffs would engage in harassing or bullying behavior in order to silence their critics.[178] Under this test, first, the plaintiff must make an effort to notify the poster of the subpoena, setting forth the specific actionable comments.[179] Second, the plaintiff must give the poster a reasonable time to respond.[180] Third, the plaintiff must produce enough evidence to prove a prima facie cause of action.[181] And finally, the court must balance that evidence against the defendant's First Amendment rights.[182]

The Delaware Supreme Court, in *Cahill v. Doe*,[183] held that the

166. *Id.*
167. *Id*.
168. *Id.* at 235–36.
169. *Id.* at 246.
170. *Id.*
171. *Id.* at 241.
172. No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000).
173. *Id.* at *7, *8.
174. *Id.*
175. *Id*.
176. *Id.*
177. Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001).
178. *Id.*
179. *Id*. at 760.
180. *Id.*
181. *Id.*
182. *Id.* at 760–61.
183. 884 A.2d 451 (Del. 2005).

good-faith standard was too low.[184] But, on the other hand, the court noted, the *Dendrite* standard was too high.[185] Therefore, the court tied the sufficiency of a plaintiff's showing to whether he or she could survive a summary judgment motion.[186] The court stated its approach, eliminating the fourth step of the *Dendrite* test—the balancing of rights—because "[t]he summary judgment test is itself the balance."[187] Even courts that use a motion-to-dismiss standard required "some showing" that the tort ever took place.[188]

The *Krinsky* court considered all of these tests in its analysis and decided to eschew putting a "procedural label . . . to the showing required of a plaintiff."[189] The *Krinsky* court did, however, similar to the third prong of the *Dendrite* analysis, require that the plaintiff make a prima facie showing.[190] The court hoped this would be enough to stop subpoenas that were merely meant to harass defendants, while still permitting that "[w]hen there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment."[191] If the plaintiff can make a prima facie showing of an underlying cause of action, he may obtain the subpoena. But it is unclear if this standard is really any different from tying the granting of the subpoena to surviving a motion to dismiss, and in reality, creating a one-step procedural test.

One scholar, Ben Quamby, has laid out the options available to those who claim they have been libeled online.[192] One course is to fight online libel through the courts.[193] While this can be "a powerful weapon in a libel victim's arsenal,"[194] there are significant drawbacks. Chief among these drawbacks is the fact that many courts may be hesitant to help plaintiffs because they are afraid of restricting free speech.[195] Another significant drawback to suing the defamer, even assuming you can get the website to divulge his or her identity, is the potential inadequacy of the remedies.[196] The remedies sought usually fall into three categories: a

184. *Id.* at 458.

185. *Id.* at 459–61.

186. *Id*. at 460.

187. *Id.* at 461.

188. Rocker Management LLC v. John Does 1 Through 20, 2003 WL 22149380, at *1, 2003 U.S. Dist. Lexis 16277, at *3.

189. Krinsky v. Doe, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008).

190. *Id.*

191. *Id.*

192. Ben Quarmby, *Protection from Online Libel: A Discussion and Comparison of the Legal and Extrajudicial Recourses Available to Individual and Corporate Plaintiffs*, 42 NEW ENG. L. REV. 275, 275, 287–97 (2008).

193. *Id.* at 287–94.

194. *Id.* at 292.

195. *Id.* at 288–89.

196. *Id.* at 292–93.

court order compelling removal of the offensive material, a public apology, and monetary damages.[197] Unfortunately, removal of information or a public apology usually comes too late to alleviate any damage, and monetary damages are rare in these cases.[198]

For these reasons, Quamby thinks it wiser for the defamed victim to pursue recourses outside the courtroom.[199] These include releasing a public statement refuting the alleged libel, putting pressure on website administrators and ISPs to take the information down, or hiring a company as a private watchdog.[200] At this point, many mainstream ISPs have clauses in their privacy statements that allow them to release personal information when required to do so by court order or legal process.[201]

F. Compromise in Action: Cohen v. Google, Inc.

In August 2009, a New York state court toed the line between the competing interests—remedying defamation while protecting freedom of speech—that are explored in this Note and ordered Google to disclose the identity of an anonymous Internet blogger (Anonymous Blogger) to the woman he had maligned.[202] Liskula Cohen, a model and the plaintiff in this case, alleged that five different blogs entitled "Skanks of NYC" were posted on Google's Blogger.com service.[203] The blogs included pictures of her and contained defamatory statements using the words "skanky," "skank," and "ho."[204] Cohen then sought a court order to pry the real name of the party named "Anonymous Blogger" from Google's records.[205] Google refused.[206] The court required Cohen to make a strong showing that her defamation action was meritorious before it would act.[207] Google and Anonymous Blogger advanced three arguments against a court order. First, that the comments on the blog were merely opinion, not fact, and that even false

197. *Id.* at 292.

198. *Id.* at 292–93.

199. *Id.* at 293–94.

200. *Id.* at 294–97.

201. Google.com, Privacy Policy, http://www.google.com/intl/en/privacypolicy.html#information (last visited Oct. 10, 2009); Yahoo.com, Yahoo! Privacy Center, http://info.yahoo.com/privacy/us/yahoo/details.html (last visited Oct. 10, 2009).

202. Cohen v. Google, Inc., No. 100012/09, 2009 WL 2883410 (N.Y. Sup. Ct. Aug. 17, 2009).

203. *Id.* at *1.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at *2. The court rejected Anonymous Blogger's argument that it should use the more rigorous standard from the *Dendrite* case, saying the prima facie showing of a meritorious case was sufficient to calm any constitutional qualms. *Id.* at *2 n.5.

opinions will not support a defamation claim.[208] The court rejected this argument, saying that whether a statement is one of fact or opinion is a question of law for the court to decide.[209] Further, the court found that in this instance, these statements were facts that "if proven false, could form the predicate for a defamation claim."[210] Second, the defendant and Anonymous Blogger argued that the words "skank" and "ho" were vague and loose insults, like the invective "jerk."[211] The court disagreed, reciting the dictionary definitions of these terms and stating that the blog taken as whole is greater than the sum of its parts—"the thrust of the Blog is that petitioner is a sexually promiscuous woman."[212] Google and Anonymous Blogger advanced one more, ultimately fruitless argument. As the court explained: "The court also rejects the Anonymous Blogger's argument that this court should find as a matter of law that Internet blogs serve as a modern day forum for conveying personal opinions, including invective and ranting. . . ."[213] One can extrapolate from the court's reasoning that the current approach to blog posting is a morally bankrupt way to govern discourse on the Internet, and that the anonymity the Internet offers should not be used as a mask for perpetrating crimes. In short, the court in this case took the route, the middle way, proposed in this Note: allow victims of defamation a chance to show the merits of their claim in court and obtain the identity of their tormentor, while permitting courts to protect both free speech and the rights of the victim. As the court reiterated,

> The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.[214]

VII. CONCLUSION

In 1996, Congress passed the Communications Decency Act that immunized websites from liability for what third parties post. A year

208. *Id.* at *2.
209. *Id.*
210. *Id.*
211. *Id.* at *3.
212. *Id.*
213. *Id.* at *4.
214. *Id.* (quoting *In re* Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001).

later, the Fourth Circuit interpreted this statute to give broad immunity to ISPs.[215] However, in 2008, the court in *Roommates.com* scaled back this immunity for a website that it said was an active developer, along with its users, of illegal content.[216] In light of the *Roommates.com* decision, it is unclear whether gossip sites that promise their users anonymity and seem to encourage illegal posts should enjoy CDA immunity. Because of practical considerations of enforcement and the narrow language of the *Roommates.com* case (especially when read with a similar case concerning Cragislist.com), it seems apparent that these websites do enjoy CDA immunity from liability. Under the "broken windows" social theory,[217] these gossip sites may have to take it upon themselves to govern the tone of the discourse, as the more "broken windows," or nasty, defamatory comments a site allows, the more defamatory comments it is likely to attract.

Furthermore, to allow a recourse for victims of online, anonymous defamation, websites should be compelled to disclose a tormenter's identity to the victims. To determine when to divulge identifying information, many tests strive to balance the victim's right to redress with the poster's First Amendment rights and society's interest in a free flow of ideas on the Internet.[218] Rather than leaving the victim of defamation without redress, courts, when appropriate, should utilize these tests to require the disclosure of the identity of the defamer who is posting the defamatory comments on the gossip site.

215. *Zeran II*, 129 F.3d 327, 334-35 (4th Cir. 1997).

216. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–66 (9th Cir. 2008).

217. *See supra* notes 11–14 and accompanying text.

218. *See supra* Part V.E.