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Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet

In recent decades, policymakers have made a wager on anti-SLAPP legislation. Their wager assumes that anti-SLAPP legislation properly balances the rights of petition and free speech with the right of redress for defamation. With such vital interests at stake, it may seem odd that policymakers are basing their bet on decades-old empirical data and a decidedly narrow theoretical justification. But that is exactly what is happening with anti-SLAPP legislation. This is particularly troubling in light of the recent expansion of anti-SLAPP into the realm of Internet defamation claims, where the stakes for online speakers and those they speak about are exponentially higher. This expansion of anti-SLAPP requires that policymakers reassess the purposes of anti-SLAPP and ensure that the procedural safeguards they have instituted properly balance the rights of all interested parties. Accordingly, this comment argues for an empirical and theoretical rethinking of anti-SLAPP in light of changed circumstances.

INTRODUCTION

Practically every discussion of anti-SLAPP legislation and litigation begins with an acknowledgement of Professors George Pring and Penelope Canan.¹ In fact, the now ubiquitous term “SLAPP,” an acronym for “Strategic Lawsuits Against Public Participation,” was coined by Pring and Canan in the mid-1980s.² Their ten-year study of 247 separate lawsuits first identified “[a] new breed of lawsuits . . . stalking America.”³ These lawsuits, known as SLAPPs, are a pernicious form of meritless legal action intended solely to retaliate against the exercise of petition and speech rights.⁴ Pring and Canan’s exposé of SLAPPs forms the key theoretical

1. See, e.g., *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012).

2. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 3 (1996).

3. *Id.* at 1.

4. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 396 (1993).

justification⁵ (and only empirical basis⁶) for an ongoing slew of legislation meant to curb such strategic litigation. At least twenty-nine states,⁷ the District of Columbia, and the territory of Guam⁸ have enacted some form of anti-SLAPP legislation since Pring and Canan first published their study. Recent lobbying efforts by reporters,⁹ citizens' rights groups,¹⁰ and even the American Bar

5. See Baker & Histetler LLP, *A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting It Passed*, SOC'Y OF PROF. JOURNALISTS, <http://www.spj.org/antislapp.asp> (last visited Oct. 13, 2015) ("In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by [George] Pring's and Penelope Canan's seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California.") [hereinafter *A Uniform Act*]. It is also worth noting that the model anti-SLAPP statute outlined by the Society of Professional Journalists uses Pring and Canan's empirical data from the 1980s to describe SLAPP statutes generally and the need for anti-SLAPP statutes specifically. See *id.*

6. 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, 94-95 (1997). While the legislative history of anti-SLAPP statutes rarely name-check Pring and Canan directly, many statutes make identical references to "a disturbing increase in lawsuits" of the SLAPP variety. *E.g.*, 735 ILL. COMP. STAT. 110/5 (West 2007); CAL. CIV. PROC. CODE § 425.16(a) (West 2015); *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 939 (Mass. 1998) (citing legislative history and attributing the passage of Massachusetts' anti-SLAPP law to a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances"). This assertion of a "disturbing increase" appears to have no empirical basis other than Pring and Canan's initial assertions and related scholarship. See PRING & CANAN, *supra* note 2, at 3 (indicating that "SLAPPs were 'reborn' in the political activism of the 1960s and 1970s; they grew and multiplied in the 1980s; and in the 1990s they are a major threat to involved citizens"); see also Barker, *supra* note 4, at 396.

7. Samantha Brown & Mark Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, 19 REV. EUR. COMPA. & INT'L ENVTL. L. 3, 3 (2010) (U.K.).

8. Kristen Rasmussen, *SLAPP Stick: Fighting frivolous lawsuits against journalists: A state-by-state guide to anti-SLAPP laws*, REP. COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists/statutory-solution> (last visited Nov. 6, 2015).

9. See Jack Komperda, *Journalism Advocates Calling for Federal Legislation in Wake of Phone Records, Email Seizures*, REP. COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/journalism-advocates-callin> (last visited Nov. 6, 2015).

10. For example, one particularly vocal and well-organized group is the Public Participation Project, made up of "numerous organizations and businesses, as well as prominent individuals" based out of California. See *Public Participation Project: Fighting for Free Speech*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/about/staff/> (last visited Oct. 13, 2015).

Association¹¹ aim to pass an anti-SLAPP statute at the federal level to provide broad-based protection for speech and petitioning.¹²

The difficulty with this legislation lies not in its goals, but in its outdated empirical basis and incomplete theoretical justification. The push for federal anti-SLAPP legislation and expanded legislation at the state level is justified by Pring and Canan's narrow study and galvanized by stories of brave individuals speaking out against large corporate interests and being sued into silence.¹³ This narrative fails to account for two recent and substantial shifts in the law and society: first, the expansion of anti-SLAPP protections beyond Pring and Canan's original focus on petitioning activity to any statement in a public forum in connection to an issue of public interest¹⁴ and, second, the expansion of public discourse on to the Internet.¹⁵ Taken together, these two shifts mean that anti-SLAPP laws are now thoroughly entangled in the web of Internet defamation law. While such statutes have always balanced the dueling interests of free speech and redress for defamation,¹⁶ the expansion of anti-SLAPP

11. See AM. BAR ASS'N RES. 115 (August 6–7, 2012), <http://www.anti-slapp.org/wp-content/uploads/2012/08/aba.pdf> (“[T]he American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).”).

12. The model statutes proposed by these groups are almost uniformly based on Pring and Canan's empirical research and theoretical model. See, e.g., *A Uniform Act*, *supra* note 5.

13. See, e.g., *id.* Under the section heading “Tell A Meaningful Story[,]” the Society of Professional Journalists' anti-SLAPP information page reads, somewhat cynically, “Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible ‘poster children’ for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.”

Id. The section goes on to outline several such stories from California, Washington, and New York, all revolving around individuals and small groups being sued for petitioning government entities against the economic interests of powerful corporate and business interests (a waste-burning plant and two real-estate developers). *Id.*

14. CAL. CIV. PROC. CODE § 425.16(e) (West 2015).

15. See, e.g., *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1007 (2001) (holding that a series of websites were public forums for purposes of California's anti-SLAPP laws).

16. The Supreme Court of Rhode Island succinctly summarized the balancing act inherent in anti-SLAPP laws when addressing their own state's law:

By the nature of their subject matter, anti-SLAPP statutes require meticulous

laws to Internet speech dramatically raises the stakes for both speakers and those they speak about. For instance, the potential for viral libel and the permanence of defamatory statements made on the Internet compound the potential harms to victims of defamation. On the other hand, even legitimate defamation actions can chill vital speech on the most crucial public forum of our age—the Internet. Pring and Canan’s theoretical justification for anti-SLAPP, focused exclusively on the threat posed by SLAPPs to petitioning activity, simply does not account for these risks.

Thus, this Comment proposes an empirical and theoretical reevaluation of anti-SLAPP laws in light of changed circumstances. Once policymakers have an accurate idea of the reach of anti-SLAPP laws and the actual interests involved, they can properly calibrate the standard of proof requirements to match those interests. This rethinking of anti-SLAPP would ensure that these laws correctly balance the interests they were designed to address.

Part I of this Comment explains the philosophy and mechanics of anti-SLAPP statutes. Part II explores the new dynamic created by the introduction of defamation law to Internet-based speech, with a focus on blogs, social networks, and consumer review sites. This Part also links the philosophy of anti-SLAPP laws to this new dynamic. Part III provides specific examples of the intersection of Internet defamation and anti-SLAPP laws and explains the application of these examples to a fundamental rethinking of anti-SLAPP rhetoric and structure. Part IV summarizes the need for a theoretical and empirical reevaluation of anti-SLAPP laws, outlines potential starting points, and concludes.

drafting. On the one hand, it is desirable to seek to shield citizens from improper intimidation when exercising their constitutional right to be heard with respect to issues of public concern. On the other hand, it is important that such statutes be limited in scope lest the constitutional right of access to the courts (whether by private figures, public figures, or public officials) be improperly thwarted. There is a genuine double-edged challenge to those who legislate in this area.

Palazzo v. Alves, 944 A.2d 144, 150 (R.I. 2008); *see also* Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 860 (2000) (questioning whether the “very broad scope” of California’s anti-SLAPP law is “the best balance between the rights of speech and petition and the right to sue and get redress for alleged wrongs”).

I. THE CREATION AND EXPANSION OF ANTI-SLAPP LEGISLATION

In its purest form, a SLAPP involves a filer using the threat of a lawsuit to intimidate individuals and community groups into silence. The rhetoric surrounding anti-SLAPP legislation follows a fairly simple narrative pattern that is drawn from Pring and Canan's original theoretical framework. Thus, SLAPPs are typically defined as meritless and malicious lawsuits, meant entirely to intimidate and silence legitimate speakers.¹⁷ This cynical use of the legal system is clearly inimical to free and open debate on public issues and, by extension, the function of basic democratic institutions. Recognizing the immediate threat of such lawsuits, the Pring and Canan study called for legislative action.¹⁸ In the years since Pring and Canan's study, twenty-nine states have answered that call by enacting some form of anti-SLAPP legislation.¹⁹ This Section further outlines the typical narrative of anti-SLAPP legislation, sketches its function, and explains its expansion beyond petitioning activity to general speech rights.

A. The Anti-SLAPP Narrative

Using analysis of thousands of lawsuits nationwide and interviews with both plaintiffs and defendants, Pring and Canan's groundbreaking study first identified SLAPPs as a nationwide trend. According to the study, SLAPPs are a pernicious form of predatory legal action intended solely to retaliate against or stop the exercise of free speech and petition rights. Thus, the goal of a true SLAPP is neither to win the lawsuit nor to redress any compensable damages.²⁰ The goal of a SLAPP is straightforward—silence the opposition.²¹

17. See, e.g., CAL. CIV. PROC. CODE § 425.16(a) (West 2015) (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”); *A Uniform Act*, *supra* note 5 (“[P]ublic participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.”).

18. PRING & CANAN, *supra* note 2, at 188–207.

19. Brown & Goldowitz, *supra* note 7.

20. *SLAPP Stories*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/slapp-shots/> (last visited Oct. 9, 2015).

21. Tate, *supra* note 16, at 803–04.

Filers of true SLAPPs seek to stop public participation by “drag[ging] citizens out of the political arena and into the courthouse with staggering personal lawsuits.”²² For Pring and Canan, the defining feature and key concern of such SLAPPs was not “the parties’ subjective motives or good faith or . . . who was right or wrong on the merits.”²³ Instead, SLAPPs were most readily defined by “their cause and effect.”²⁴ That is, SLAPPs “happen when people participate in government, and [they are troubling because] they effectively reduce future public participation.”²⁵ Distilled to its essence, a SLAPP is “a civil complaint or counterclaim [that is] filed against nongovernment individuals or organizations . . . on . . . a substantive issue of some public interest or social significance.”²⁶

A prototypical SLAPP goes something like this: a citizen, referred to as a “target,” says something to a government agency that someone else, referred to as a “filer,” doesn’t like.²⁷ The filer typically has some sort of financial interest in the public debate or government action being taken—be it a real estate development, an environmental zoning issue, or a political campaign.²⁸ In order to silence the target, the filer files a lawsuit, usually alleging some form of defamation²⁹ or tortious interference with business practices.³⁰ The suit is, by definition, meritless. That is, the filer does not hope to win the suit. The filer does not care about actual redress of the wrongs alleged. The filer only wants to tie up the target’s resources in litigation.³¹ If the target’s emotional and financial resources are dominated by the lawsuit, then she is unable to continue the public debate. So, the filer demands redress into the millions,³² drags out

22. PRING & CANAN, *supra* note 2, at 2.

23. *Id.* at 8.

24. *Id.*

25. *Id.* at 8–9.

26. *Id.*

27. *See id.* at 9–10.

28. *See* Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 26 (1989).

29. *Id.*

30. *See, e.g.*, *Protect Our Mountain Env’t, Inc. v. Dist. Court*, 677 P.2d 1361, 1365–66 (Colo. 1984) (describing multiple instances of SLAPP-like actions involving charges of tortious interference with business practices from various jurisdictions).

31. *See* PRING & CANAN, *supra* note 2 at 212 (arguing that SLAPPs are “tactics to drain the resources, commitment, and vocabulary of political debate, [and] are a creative means for ideologically warring against egalitarian principles of citizen participation”).

32. Canan, *supra* note 28, at 26 (describing the average demand for redress as

discovery, and generally makes life miserable until the target either recants or simply shuts up.³³ The filer then quietly withdraws the suit, and continues in whatever public issue or debate sparked the confrontation in the first place. Even after the lawsuit is dropped, the target is left rattled and defeated, unable or unwilling to continue the public fight.³⁴ What is more, others who may share the target's views on the public issue or debate are intimidated into silence by the prospect of winding up in a multi-million dollar lawsuit with the filer.³⁵

For a real-life example of a quintessential SLAPP, Canan cites the case of *Parnas Corp. v. Pierce Canyon Homeowner's Ass'n*.³⁶ In that case, several homeowners' associations in the newly booming Silicon Valley banded together to push back on encroaching real estate development. The associations pressed for a ballot measure that would put significant government oversight on developers. Despite being outspent "eight to one," the small "grassroots political organization" managed to pass the ballot measure and to pack the city council that would oversee implementation.³⁷ An unsurprisingly furious real estate developer retaliated by filing a defamation suit against the homeowners associations, seeking a ludicrous \$40,150,000 in damages.³⁸ As Canan observes, "The pursuit of the lawsuit was very telling."³⁹ The developer hauled the new city council members into depositions solely to watch them squirm, sued various individuals and organizations that had nothing to do with the alleged defamation, and halted the legal drama only when he had extracted variances from the city council.⁴⁰

\$9,000,000).

33. See PRING & CANAN, *supra* note 2, at 6.

34. See *id.* at 5; see also Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 227 (2011) (describing Canan's work detailing the psychological and physical tolls of SLAPP suits).

35. See PRING & CANAN, *supra* note 2, at 219.

36. No. 450512 (Cal. Super. Ct., Santa Clara County filed May 19, 1980); Canan, *supra* note 28.

37. *Id.* at 26–28.

38. *Id.* at 29.

39. *Id.* at 28–29.

40. *Id.* at 29.

B. Structure of Anti-SLAPP

Anti-SLAPP legislation is meant to turn the tables on SLAPP-filers by providing SLAPP targets with an expedited review of the case in the form of a special motion to strike.⁴¹ Certain anti-SLAPP statutes even award full attorney's fees to defendants if they succeed in the motion to strike.⁴² These statutes provide a safety net for the targets of SLAPPs, allowing them to quickly and painlessly dispose of a meritless lawsuit.⁴³

In 1992, California enacted one of the first anti-SLAPP measures in the country.⁴⁴ The statute has become a model for anti-SLAPP legislation in other jurisdictions, such as Washington⁴⁵ and the District of Columbia,⁴⁶ as well as prominent model statutes drafted by various special interest groups.⁴⁷ The statute provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike.”⁴⁸ That special motion to strike is evaluated based on a two-part test: “First, the defendant must make a prima facie showing that a cause of action arises from an act in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue.”⁴⁹ Second, once the defendant meets that initial burden, discovery is frozen,⁵⁰ and “the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim.”⁵¹ The court considers the parties’ pleadings and affidavits, as well as any submitted evidence, “accept[ing] as true the evidence favorable to

41. See *A Uniform Act*, *supra* note 5, app. A (explaining the mechanics of an anti-SLAPP motion under the heading “What Will Anti-SLAPP Legislation Do?”).

42. Emily Miller, *Anti-SLAPP Laws on Trial*, REP. COMMITTEE FOR FREEDOM PRESS (Apr. 22, 2015), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/anti-slapp-laws-trial>.

43. See *SLAPP Stories*, *supra* note 20.

44. Tate, *supra* note 16, at 801; see also PRING & CANAN, *supra* note 2, at 189.

45. See *Alaska Structures, Inc. v. Hedlund*, 323 P.3d 1082, 1085 (Wa. 2014).

46. *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK L. (Nov. 10, 2011), <http://www.sedgwicklaw.com/anti-slapp-statutes-spread-across-the-nation-11-10-2011/>.

47. See, e.g., Brown & Goldowitz, *supra* note 7, at 7 n.35.

48. CA. CIV. PROC. CODE § 425.16(b)(1) (West 2015).

49. *Birkner v. Lam*, 156 Cal. App. 4th 275, 280–81 (2007).

50. Tate, *supra* note 16, at 801.

51. *Birkner*, 156 Cal. App. 4th at 281.

the plaintiff and evaluat[ing] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."⁵² This procedural mechanism is intended to weed out SLAPPs at an early stage before the damaging "chilling effect" takes hold of either the target or observers in the community.⁵³

The "genuine double-edged challenge" of anti-SLAPP statutes lies in balancing two competing interests: the "constitutional right to be heard with respect to issues of public concern" and the "constitutional right of access to the courts" belonging to lawsuit filers.⁵⁴ If the burden of proof to survive the motion is too high, legitimate defamation claims will not be redressed. On the other hand, if the burden of proof is too low, SLAPPs may go forward despite anti-SLAPP laws and legitimate speech will be chilled. The California legislature settled on a relatively middling burden of proof, a "probability of prevailing on the claim[,]" which may have been a concession to business interests involved in the lobbying effort.⁵⁵

C. Expansion of Anti-SLAPP

Pring and Canan's theoretical framework and empirical research were deliberately limited to speech under the petition clause.⁵⁶ Nevertheless, current proponents of anti-SLAPP legislation and many existing laws have expanded this definition beyond that limited context to include any suit based on "speech on an issue of public interest or concern."⁵⁷ For instance, California's anti-SLAPP law, a basis for multiple model statutes,⁵⁸ provides that an "act in furtherance of a person's right of petition or free speech" includes "any written or oral statement or writing *made in a place open to the*

52. Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264, 273 (2011).

53. See *A Uniform Act*, *supra* note 5; see also PRING & CANAN, *supra* note 2, at 11–12.

54. Palazzo v. Alves, 944 A.2d 144, 150 (R.I. 2008).

55. See Tate, *supra* note 16, at 818 n.86.

56. See PRING & CANAN, *supra* note 2, at 8–9.

57. *Guarding Against the Chill: A Survival Guide for SLAPP Victims*, FIRST AMEND. PROJECT, <http://www.thefirstamendment.org/antislappresourcecenter.html#What%20are%20slapps> (last visited Oct. 10, 2015).

58. See, e.g., Brown & Goldowitz, *supra* note 7, at 7 n.35; *A Uniform Act*, *supra* note 5 (noting, in commentary, that certain provisions of the Society of Professional Journalists' model statute are drawn directly from or influenced by the California statute).

public or a public forum in connection with an issue of public interest . . .”⁵⁹ This provision expands the reach of the statute far beyond the petitioning activity that originally concerned Pring and Canan.⁶⁰ One anti-SLAPP proponent explained the expansion as a natural outgrowth of the original conception of anti-SLAPP:

Originally, SLAPPs were conceived as lawsuits suppressing citizens’ rights to monitor government functions. Over time, we’ve realized that this construction is too narrow. Although we still need to protect government watchdogs, we also need to guard against plaintiffs who use litigation to remove socially valuable content from our information ecosystem.⁶¹

While this expansion may be ideologically in line with the original spirit of anti-SLAPP, the practical effects of the expansion are drastic. In fact, “many questions of defamation law are now resolved in SLAPP proceedings in [California].”⁶² What is more, many courts consider websites accessible to the public to be “public forums” within the meaning of anti-SLAPP statutes.⁶³ As will be explained below, this expansion has shifted the impact of anti-SLAPP from straightforward petitioning activity to significantly more fraught questions of Internet defamation.

II. A NEW DYNAMIC OF COMPETING INTERESTS

Anti-SLAPP laws have always balanced two competing interests: bedrock First Amendment principles of free and open discourse and the right to seek redress in a court of law.⁶⁴ However, this balance is made significantly more precarious by the expansion of anti-SLAPP laws to Internet discourse as described above. On one side of this balance, the Internet has become a crucial component of public discourse⁶⁵ and is, therefore, particularly vulnerable to the “chilling

59. CAL. CIV. PROC. CODE § 425.16(e) (West 2004 & Supp. 2015) (emphasis added).

60. See Eric Goldman, *Why I Support HR 4364, the Proposed Federal Anti-SLAPP Bill*, TECH. & MARKETING L. BLOG (Mar 3, 2010), http://blog.ericgoldman.org/archives/2010/03/hr_4364.htm.

61. *Id.*

62. See MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 261 (8th ed. 2011).

63. Barrett v. Rosenthal, 146 P.3d 510, 514 n.4 (Cal. 2006).

64. See Palazzo v. Alves, 944 A.2d 144, 150 (R.I. 2008).

65. Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8

effect” of threatened litigation.⁶⁶ On the other side of the balance, the Internet amplifies the harm caused by libelous publications.⁶⁷ Thus, the advent of the Internet has profoundly affected defamation law, upping the ante for both those engaged in public discourse and victims of libelous attacks. This Section will address this dynamic of competing interests by first sketching the potential “chilling effect” in Internet discourse and then exploring the “augmentation of [libel] harms”⁶⁸ made possible by the Internet.

A. The Internet and a Renewed Chilling Effect

First, it is difficult to overstate the importance of the Internet to truly democratic public discourse on matters of public concern.⁶⁹ The Internet provides ordinary citizens with unprecedented access to “channels of effective communication”⁷⁰ once reserved solely for public figures and media outlets.⁷¹ Blogs, social media, and other Internet fora provide cheap and easily accessible mass communication unheard of in previous eras.⁷² In short, “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.”⁷³ In short, the Internet may very well be an embodiment of the “marketplace of ideas” beyond anything previously conceived.⁷⁴

FIRST AMEND. L. REV. 176, 199 (2009).

66. See Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace* 49 DUKE L.J. 855, 945 (2000) (“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.”).

67. Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1461 (2012).

68. *Id.*

69. Richards, *supra* note 65.

70. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

71. Lidsky, *supra* note 66, at 894–95.

72. *Id.*; Richards, *supra* note 65.

73. Lidsky, *supra* note 66, at 894.

74. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Penn. 1996) (“It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”).

Unfortunately, along with democratized access to mass media comes a concomitant potential for liability for online speech.⁷⁵ The “chilling effect” that plagued legacy media sources in decades past has “particular resonance in cases involving ‘nonmedia’ defendants like those typically sued in the new Internet libel cases.”⁷⁶ This “chilling effect” is familiar in the law—fear of it drove the creation of the *New York Times* “actual malice” standard for defamation claims against public officials⁷⁷ and the subsequent extension of that standard to “public figures” in *Gertz v. Robert Welch, Inc.*⁷⁸ This standard raised the burden of proof necessary to prove defamation claims if the plaintiff was a public official or one of several classes of public figure.⁷⁹ In instituting this standard, the Court was willing to tolerate “erroneous statement[s]” as an inevitable component of free debate.⁸⁰ And, in order to prevent a broader “chilling effect” on public discourse, the Court was willing to tolerate the potentially “melancholy and unfair results” that the standard might yield for victims of defamation who were unable to meet the heightened burden of proof.⁸¹

Similarly, Pring and Canan asserted that SLAPPs affect not only the target of the SLAPP, but other citizens observing the legal circus who might be fearful of speaking out in future.⁸² Referring to the propensity of SLAPPs to chill speech, Pring and Canan found that “SLAPP exposure or awareness make[s] a difference.”⁸³ That is, the news of the travails of SLAPP targets and the implied threat of coercive litigation combine to discourage others in the community from speaking out or participating in public issues for fear of similar retaliation.⁸⁴ The Internet, with its ability to disseminate even

75. See Lidsky, *supra* note 66, at 888–89.

76. *Id.* at 889.

77. *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring) (“The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms. . .”).

78. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

79. See JOSEPH F. SCHUSTER, *THE FIRST AMENDMENT IN THE BALANCE* 223–28 (1993).

80. *Sullivan*, 376 U.S. at 271.

81. See SCHUSTER, *supra* note 79, at 224.

82. PRING & CANAN, *supra* note 2, at 2–3.

83. *Id.* at 219.

84. Canan opined, perhaps a bit melodramatically, [W]e can never calculate the ripple effects of this attempt to silence effective public

peculiarly local news nationally⁸⁵ and internationally,⁸⁶ has the potential to amplify the chilling effect of individual, local SLAPPs by spreading news of their occurrence far and wide. If exposure to the very idea of SLAPPs was theoretically enough to discourage local speech thirty years ago, news of SLAPPs broadcast⁸⁷ instantaneously to massive and diverse Internet audiences across the country poses a considerably greater threat to the marketplace of ideas here and now. As significantly more people are exposed to the idea of being sued for their everyday speech online, significantly more people could be discouraged from participation online. In other words, the chilling effect that troubled Pring and Canan could find redoubled vigor.

B. The Internet and Amplified Harm from Libel

At the same time, the Internet also has the potential to drastically amplify the harms caused by libelous statements. This is because the Internet increases the ability of ordinary users to cause significantly more reputational damage than would be possible with traditional media. While Pring and Canan played down resource inequality as a

opposition. What about the impact of this lawsuit on scores of people who have read newspaper reports about the plight of these citizens? What about friends and families who have received letters describing the ordeal? What about Boy Scout and Girl Scout leaders who, as a result of these suits, grow up to circumscribe their wholly enthusiastic invocations to “get involved” with gusto? Like the pebble thrown in the water, a single SLAPP can have effects far beyond its initial impact.

Canan, *supra* note 28, at 30.

85. See Keith Coffman, *Denver Teacher’s Third Grade Assignment Goes Viral Online*, YAHOO NEWS (Apr. 17, 2015, 6:48 PM), <http://news.yahoo.com/denver-teachers-third-grade-assignment-goes-viral-online-224846727.html> (describing a Denver teacher’s assignment to her third-grade class that gained national recognition under the hashtag “#WishMyTeacherKnew”).

86. Terrance F. Ross, *The Math Question That Went Viral*, ATLANTIC (Apr. 14, 2015), <http://www.theatlantic.com/education/archive/2015/04/the-math-question-that-went-viral/390411/> (describing a particularly baffling Singaporean primary school homework problem that was posted online and spread internationally via Twitter, Reddit, and Facebook).

87. See, e.g., Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES (Jun. 6, 2010), <http://www.nytimes.com/2010/06/01/us/01slapp.html> (describing a defamation suit filed by a towing company against Justin Kurtz, who created a Facebook page to criticize the business after they towed his car). Neatly summarizing the First Amendment concerns, Kurtz stated, “There’s no reason I should have to shut up because some guy doesn’t want his dirty laundry out . . . It’s the power of the Internet, man.” *Id.* Indeed. See also Elizabeth Hartfield, *Bad Yelp Review Results in Lawsuit for Virginia Woman*, ABC NEWS (Dec. 7, 2012), <http://abcnews.go.com/Business/woman-sued-giving-bad-online-reviews/story?id=17894367> (describing a Virginia resident’s legal battle over her negative online review of a local contractor, which the contractor claimed was defamatory).

hallmark of SLAPP suits,⁸⁸ much of the rhetoric and justification for anti-SLAPP legislation has leaned on a David versus Goliath trope.⁸⁹ The Internet upends real world David and Goliath power dynamics by giving David a technological edge.⁹⁰ In simplest terms, the Internet allows ordinary users to “target a message to an audience with common interests and concerns, the very audience likely to be most receptive to [their] comments.”⁹¹ This allows ordinary individual users to cause significantly more damage to targets with defamatory attacks than would otherwise be possible in the real world.⁹²

Two other peculiar aspects of Internet discourse make defamatory statements published online particularly volatile: virality and permanence. First, the potential for libel to “go viral” augments the harm to defamation victims by exponentially expanding the reach of libelous statements. “Because . . . defamatory statements can be copied and posted in other Internet discussion fora, both the potential audience and the subsequent potential for harm are magnified.”⁹³ Indeed, viral content shared via social networks spreads much like an epidemic, spilling over from one network to another in rapid succession.⁹⁴

Next, the Internet rarely forgets.⁹⁵ As one commentator observed,

88. PRING & CANAN, *supra* note 2, at 216 (“Clearly wrong is the view of most SLAPPs as ‘Goliath versus David’ contests, of big corporations suing the little guy. These are present but rare; SLAPP filers are overwhelmingly local Davids suing local Davids, even though they may be bigger frogs in their local pond.”).

89. See BYRON SHELDRIK, BLOCKING PUBLIC PARTICIPATION: THE USE OF STRATEGIC LITIGATION TO SILENCE POLITICAL EXPRESSION 44 (2014) (discussing Canadian SLAPP cases that “demonstrate[] the inequality of resources that frequently make SLAPPs a David v. Goliath type litigation”); *Guarding Against The Chill*, *supra* note 57 (describing typical SLAPP filers as “corporations, real estate developers, government officials and others”); Leslie Machado, *David v. Goliath in DC Superior Court*, D.C. ANTI-SLAPP L. (Sep. 23, 2014), <http://dcslaplaw.com/2014/09/23/david-v-goliath-in-dc-superior-court/>.

90. See MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 9–12 (2013) (arguing that the technological advantage of the sling made the biblical David more than a match for the lumbering Goliath).

91. Lidsky, *supra* note 66, at 884.

92. *Id.*

93. *Id.* at 884–85.

94. See Lilian Weng et al., *Virality Prediction and Community Structure in Social Networks*, 3 SCI. REP. 2522 (Aug. 28, 2013), <http://www.nature.com/srep/2013/130828/srep02522/full/srep02522.html>.

95. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0;

We've known for years that the Web allows for unprecedented voyeurism, exhibitionism and inadvertent indiscretion, but we are only now beginning to understand the costs of an age in which so much of what we say, *and of what others say about us*, goes into our permanent—and public—digital files.⁹⁶

Permanence on a grand scale is possible because online data can be copied and stored by multiple users, even when the original data has been deleted by its creator.⁹⁷ Thus, libelous statements, once typed into a comments section or any other Internet forum, are unlikely to ever fully go away.⁹⁸ Further, libelous statements are likely to attach to a victim's name in aggregated search results, tarnishing their reputation again and again in perpetuity.⁹⁹

Thus, the Internet provides an easily accessible platform for “unscrupulous or merely reckless” individuals to “pollute the information stream with defamatory falsehoods” that may spread virally out of control, and linger long after the controversy has ended.¹⁰⁰ If anti-SLAPP laws make it too difficult for a defamation claim to survive an initial motion, victims of pernicious Internet defamation may find no remedy in the courts.

III. THE NEW DYNAMIC EXPLORED

To further explore this new dynamic of heightened risk for speakers and those they speak about, two real-world defamation actions are instructive. Both cases demonstrate the chill of threatened litigation in cyberspace and the greater potential for harm posed by online defamation. More importantly, both cases have significant implications for anti-SLAPP theory. The first case, *Oberst v. Faircloth*,¹⁰¹ demonstrates the murky morality of online defamation and gives a taste of the new balance of interests at play in modern

see also Lidsky, *supra* note 66, at 885 (“[A]s the persistence of Internet hoaxes demonstrates, once a rumor takes hold in cyber space, it may be almost impossible to root out.”) (footnote omitted).

96. Rosen, *supra* note 95 (emphasis added).

97. See Bernstein, *supra* note 67, at 1480–81.

98. See *id.* at 1480 (“Durability, the second level of extra harm associated with virtual injuries, derives from the truism that anything put into the virtual world tends to linger.”).

99. *Id.* at 1481.

100. See Lidsky, *supra* note 66, at 884.

101. Complaint, *Oberst v. Faircloth*, No. 1:14-cv-01031 (S.D.N.Y. Feb. 19, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1026992/co-complaint.pdf>.

SLAPPs. The second case, *Wong v. Jing*,¹⁰² shows that even the most mundane of Internet interaction can trigger a SLAPP. Importantly, both cases implicate anti-SLAPP laws, but neither case resembles the paradigm SLAPP originally contemplated by those laws.¹⁰³

A. Oberst v. Faircloth

In December of 2013, feminist discussion forum xoJane posted an essay entitled “IT HAPPENED TO ME: I Dated a Famous Rock Star & All I Got Was Punched in the Face” authored by an anonymous user.¹⁰⁴ The article recounted the author’s relationship with an unnamed “rock star boyfriend-turned-attacker” who verbally, emotionally, and physically abused her.¹⁰⁵ Buried in the comments section, an anonymous commenter recounted her own trauma at the hands of another unnamed indie musician. The commenter claimed that the musician, a “vicious monster[,]” had sexually assaulted and raped her when she was only sixteen.¹⁰⁶ Stating that her husband had encouraged her to come forward, the author soon identified her attacker as Conor Oberst, lead singer of the popular indie band Bright Eyes and several other musical side-projects. The commenter claimed that Oberst “took advantage of [her] teenage crush on him” and sexually assaulted her backstage at a concert in North Carolina.¹⁰⁷ Despite being quickly deleted, the comments were copied, shared, and archived by thousands of Tumblr accounts and various other blogs,¹⁰⁸ garnering the attention

102. 117 Cal.Rptr.3d 747 (Cal. Ct. App. 2010).

103. As discussed *supra* notes 28, 89 and accompanying text, “The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants’ continued political or legal opposition to the developers’ plans.” *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 815 (1994).

104. Anonymous, *IT HAPPENED TO ME: I Dated a Famous Rock Star & All I Got Was Punched in the Face*, XOJANE (Dec. 17, 2013), <http://www.xojane.com/it-happened-to-me/it-happened-to-me-i-dated-a-famous-rock-star-all-i-got-was-punched-in-the-face> [hereinafter *IT HAPPENED TO ME*].

105. *Id.*

106. *Conor Oberst: Rapist*, URBANCATFITTERS (Jan. 3, 2014), <http://urbancatfitters.com/post/72164714862/conor-oberst-rapist> [hereinafter URBANCATFITTERS].

107. Jessica Testa, *Conor Oberst Accused of Raping Teenager 10 Years Ago, Denies Allegations*, BUZZFEED (Jan. 7, 2014), <http://www.buzzfeed.com/jtes/conor-oberst-responds-to-rape-allegations-left-by-anonymous#.hb66M0yyy>.

108. *See id.*; *see also* URBANCATFITTERS, *supra* note 106.

of major news outlets.¹⁰⁹ Oberst's publicist responded swiftly, threatening litigation: "Conor has nothing but abhorrence for the perpetrators of such crimes of sexual violence. The behavior attributed to him by this individual is in direct opposition to his principles. Conor is consulting with a libel attorney regarding this matter."¹¹⁰

Because the commenter's xoJane handle was linked to her Facebook account, she was quickly identified as Joanie Faircloth, a young resident of North Carolina.¹¹¹ Faircloth took to her Tumblr account to further explain her comments.¹¹² She also accused Oberst's lawyers of offering her "hush money" to recant her allegations.¹¹³ Many outlets expressed solidarity with Faircloth,¹¹⁴ including some of Oberst's diehard fans.¹¹⁵

Shortly after Faircloth was identified, Oberst filed a lawsuit in diversity in the Southern District of New York, alleging libel and seeking one million dollars in damages.¹¹⁶ Oberst's father and business manager filed a declaration with the court claiming that Oberst had lost at least \$500,000¹¹⁷ in album sales¹¹⁸ and tour

109. See, e.g., Chris Martins, *Conor Oberst Denies Anonymous Rape Allegation, Consults Lawyer*, SPIN (Jan. 7, 2014), <http://www.spin.com/articles/conor-oberst-anonymous-rape-allegation-response-libel/>; Testa, *supra* note 107.

110. Martins, *supra* note 109 (alteration in original).

111. Tracie Egan Morrissey, *Rape, Lies and the Internet: The Story of Conor Oberst and His Accuser*, JEZEBEL (Feb. 28, 2014), <http://jezebel.com/rape-lies-and-the-internet-the-story-of-conor-oberst-1531785539>.

112. *Id.* Faircloth posted under the handle "xoJaneCommenter." *Id.*

113. Alan Duke, *Woman Recants Conor Oberst Rape Story: 'I made up those lies'*, CNN (July 14, 2014), <http://www.cnn.com/2014/07/14/showbiz/conor-oberst-rape-recanted/>.

114. S. W. Kiley, *Why I Believe Conor Oberst's Anonymous Rape Accuser*, FRISKY (Jan. 8, 2014), <http://www.thefrisky.com/2014-01-08/why-i-believe-conor-obersts-anonymous-rape-accuser/>.

115. See *id.*; URBANCATFITTEES, *supra* note 106 (quoting a Tumblr post by user "oberstingwithconor" that stated, in part, "It doesn't make sense for her to be fabricating this story[.] The kind of attention this will bring is something nobody would want. Think about it. Also, Conor was notorious for sleeping with younger girls during that time. Through running this blog I've heard many stories that confirm this."). This single reblog has been "liked" or reblogged into the thousands. *Id.*

116. Jason Newman, *Conor Oberst Files Libel Lawsuit over Rape Allegations*, ROLLING STONE (Feb. 20, 2014), <http://www.rollingstone.com/music/news/conor-oberst-files-libel-lawsuit-over-rape-allegations-20140220>; Complaint at 3, Oberst v. Faircloth, No. 1:14-cv-01031-KBF (S.D.N.Y. Feb. 19, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1026992/co-complaint.pdf>.

117. Jessica Testa, *No, Conor Oberst Wasn't Fired by His Record Label over Rape Allegation*, BUZZFEED (July 8, 2014), <http://www.buzzfeed.com/jtes/tmz-wrong-about->

revenue.¹¹⁹ Several months after Oberst filed the suit, a judge issued a default judgment against Faircloth, who failed to appear.¹²⁰

Later that month, Faircloth released a notarized statement recanting her allegations against Oberst and apologizing for harming his reputation and possibly making the reporting of sexual assaults and rapes more difficult for victims.¹²¹

1. *Implications for anti-SLAPP*

No anti-SLAPP statute was invoked in Oberst's lawsuit—the suit never really made it to court. Oberst dropped the suit shortly after Faircloth's apology hit the major news outlets.¹²² Nevertheless, Faircloth's accusations against Oberst mirror a dynamic at the heart of anti-SLAPP legislation: the inherent tension between defamation law and an "uninhibited, robust, and wide-open" public discourse.¹²³ More importantly, their story demonstrates that both aspects of that dynamic are amplified by the peculiarities of the Internet. It should be noted that this Comment takes no position on whether or not Oberst was justified in his lawsuit or whether Faircloth was, in fact, telling the truth. Instead, the story is presented solely to explore the entanglement of anti-SLAPP legislation with exceedingly sensitive public discourse and Internet defamation.

conor-oberst#.foaMA3GGG.

118. Oberst was set to release a new album shortly after the allegations surfaced. See Evan Minsker & Amy Phillips, *Conor Oberst Announces New Album Upside Down Mountain and Tour, Shares "Hundreds of Ways,"* PITCHFORK (Feb. 11, 2014), <http://pitchfork.com/news/53917-conor-oberst-announces-new-album-upside-down-mountain-and-tour-shares-hundreds-of-ways/>. Oberst's father claimed that certain media outlets, including National Public Radio, had refused to host Oberst or promote his album, and a music publisher had unceremoniously dumped him because of the allegations. See Testa, *supra* note 117.

119. One of Oberst's side projects, Desaparecidos, cancelled an Australian tour shortly before the suit was filed. Morrissey, *supra* note 111.

120. Duke, *supra* note 113.

121. See Jeremy Gordon, *Conor Oberst Rape Accuser Issues Public Apology*, PITCHFORK (July 14, 2014), <http://pitchfork.com/news/55885-conor-oberst-rape-accuser-issues-public-apology/>.

122. Kory Grow, *Conor Oberst Drops Libel Lawsuit Against Rape Accuser Following Her Apology*, ROLLING STONE (July 21, 2014), <http://www.rollingstone.com/music/news/conor-oberst-drops-libel-lawsuit-against-rape-accuser-20140721>.

123. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

a. Increased chilling effect. First, Oberst's suit, right or wrong, bears many of the hallmarks of a SLAPP, especially the significant chilling effect on future speech. For instance, Oberst filed in the Southern District of New York, far from Faircloth's home in North Carolina. Filing in a far-away jurisdiction can stretch a target's resources, forcing them to capitulate rather than attempt to litigate at a distance.¹²⁴ Further, Oberst, as a successful musician and producer, has significantly more resources to throw at a large-scale civil lawsuit than Faircloth, who was apparently under significant financial strain.¹²⁵ While Pring and Canan found that, at that time, many SLAPP filers were economically equal with their targets,¹²⁶ many filers in modern SLAPPs have "extensive resources" that are used to "bury opponents in expensive litigation."¹²⁷ Finally, Oberst withdrew the lawsuit only after Faircloth recanted. As noted above, the filer of a SLAPP is not truly seeking damages from a target. The filer only wants the target's silence.¹²⁸

Thus, while many facts indicate otherwise,¹²⁹ it is still within the realm of possibility that Faircloth was, in fact, telling the truth. Only she and Oberst know what did or did not happen at that concert over a decade ago. If Faircloth was telling the truth, the threat of Oberst's lawsuit was a SLAPP that effectively silenced her legitimate speech on a serious issue of public concern in a public forum.¹³⁰ Moreover, even if Faircloth was lying, Oberst's very public threat of a million-dollar lawsuit may have chilled other legitimate, truthful speech regarding sexual violence against women. Certain outlets that

124. See Lidsky, *supra* note 66, at 891–92.

125. See Morrissey, *supra* note 111.

126. PRING & CANAN, *supra* note 2, at 220.

127. Miller, *supra* note 42.

128. *Supra* note 21 and accompanying text; see also Tate, *supra* note 16, at 803–04.

129. The first and most damning fact is, of course, the signed and notarized retraction of the accusation. See Gordon, *supra* note 121. There are also several significant inconsistencies in her story of the attack and other problematic instances of dishonest Internet activity from Ms. Faircloth's past. See generally Morrissey, *supra* note 111.

130. While it is unclear whether any state anti-SLAPP statute would have applied in this federal suit, the state in which the suit was filed, New York, does have an anti-SLAPP statute that emphasizes the need to protect "the free exercise of speech . . . particularly when such rights are exercised in a public forum with respect to issues of public concern." See *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347, 359 (S.D.N.Y. 2000) (citing legislative history of New York's Anti-SLAPP measure). In any event, because the lawsuit was brought in diversity, a federal anti-SLAPP measure could have applied had one been in place at the time. See *infra* note 135 and accompanying text.

reported on Oberst's lawsuit identified this very dynamic¹³¹ and some called for Oberst to drop the suit, even if Faircloth's accusations were untrue.¹³² Internet news outlets carried this story nationally and internationally, potentially reinforcing a damaging "rape culture" narrative.¹³³ Actual victims of sexual assault might see Faircloth, threatened with legal action in a faraway state by her alleged attacker, and decide that speaking up is dangerous. This is precisely the chilling effect that Pring and Canan asserted results from SLAPP suits,¹³⁴ but on a much grander scale.

While a federal anti-SLAPP law would likely have applied in this instance,¹³⁵ it is unclear whether the statute would have protected Faircloth from protracted litigation. Oberst, a public figure, would likely have to prove a "sufficient prima facie showing of facts to sustain a favorable judgment"¹³⁶ by at least indicating actual malice.¹³⁷ Nevertheless, "it may be relatively easy for plaintiffs to establish actual malice" because of the "reckless [or] perhaps indifferent" nature of online communication.¹³⁸ Thus, an anti-SLAPP statute that

131. See Joy Wagner, *Despite Rape Allegations, Conor Oberst Still Has a Career*, FEMINIST CURRENT (Jun. 18, 2014), <http://feministcurrent.com/9168/despite-rape-allegations-conor-oberst-still-has-a-career/> (arguing that Oberst's lawsuit was a demonstration of rape culture and may very well contribute to the silence of other victims of sexual assault).

132. See Marc Hogan, *Conor Oberst Urged to Drop Libel Suit Against Alleged Rape Victim*, SPIN (Feb. 24, 2014), <http://www.spin.com/articles/conor-oberst-urged-drop-lawsuit-rape-right-speak-out/> ("Right to Speak Out says [the] lawsuit could discourage sexual assault victims from coming forward.").

133. See Wagner, *supra* note 131.

134. PRING & CANAN, *supra* note 2, at 219.

135. The Citizen Participation Act of 2009, a federal anti-SLAPP bill proposed but not passed in 2009. Kimberly Chow, *Federal Anti-SLAPP Bill Introduced in the House*, REP. COMMITTEE FOR FREEDOM PRESS (May 15, 2015), <https://www.rcfp.org/browse-media-law-resources/news/federal-anti-slapp-bill-introduced-house>, would have granted protection to "any written or oral statement made in a . . . public forum in connection with an issue of public interest." Citizen Participation Act of 2009, H.R. 4364, 111th Cong. § 11(1)(B) (2009). Other model statutes have similar provisions. Brown & Goldowitz, *supra* note 7, at 7. A more recently proposed federal anti-SLAPP bill, the SPEAK FREE Act of 2015, appears to eliminate the public forum requirement, but purports to protect any "oral or written statement or other expression . . . that was made in connection with an official proceeding or about a matter of public concern . . ." SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. § 2 (2015). As discussed previously, websites are typically considered public forums, *supra* note 63 and accompanying text, and the topic of a public figure allegedly sexually assaulting or raping an underage girl is almost certainly an issue of public interest or concern.

136. H.R. 4364 § 5(b).

137. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

138. Lidsky, *supra* note 66, at 919.

only requires a “prima facie showing” or “reasonable likelihood of success” may not do much to protect Faircloth, and may even send a broader message that the law cannot protect important online speech.

b. Increased damage from libel. As the potential chill of defamation actions moves more rapidly through cyberspace, so too does actual libel. Indeed, as Oberst’s publicist observed soon after the initial accusations had exploded online: “[T]he internet allows for groundless statements like this to travel the world before the truth has any time to surface.”¹³⁹ Indeed, the Internet, amplified by social networks, contributes to what Professor Anita Bernstein calls an “augmentation of harm” from libel.¹⁴⁰ It would be easy to characterize Faircloth and Oberst’s confrontation as a “David versus Goliath” struggle, but “this characterization ignores the power that the Internet gives irresponsible speakers to damage the reputations of their targets.”¹⁴¹ Instead, the Internet

helps equalize power imbalances in the real world by giving anonymous John Does . . . a meaningful opportunity to be heard. In the online world, every [user] is potentially a publisher, capable of transmitting messages instantaneously to millions of readers. More significantly, the Internet allows [a user] to target a message to an audience with common interests and concerns, the very audience likely to be most receptive to his comments.¹⁴²

Thus, a David like Faircloth was able to do significant damage to a public-figure Goliath like Oberst with little more than a few typed words in the comments section of a rather obscure website. Faircloth’s accusations set off an electronic wildfire throughout Tumblr and other social media outlets. Individual users quickly disseminated Faircloth’s story thousands and thousands of times over. The accusations quickly spread from individual-to-individual social networks to larger pop culture websites, such as BuzzFeed, and eventually to established national news sites, such as CNN.com.¹⁴³

139. Testa, *supra* note 107.

140. Bernstein, *supra* note 67, at 1461.

141. Lidsky, *supra* note 66, 865 (discussing large corporate plaintiffs suing individual anonymous Internet users for defamation).

142. *Id.* at 884.

143. Duke, *supra* note 113.

“By the time Oberst issued a statement denying the allegations, it was seemingly too late. People believed he was a rapist. Even his die-hard fans were conflicted.”¹⁴⁴

Faircloth’s accusations also clearly demonstrate the permanence of Internet libel: Faircloth herself, or xoJane moderators, deleted the initial accusations, but not before other users had taken screenshots or otherwise archived the content and disseminated it to countless other users through social media.¹⁴⁵ Even after Faircloth publicly recanted and apologized, the sting of the accusations lingers: “For a lot of people out there, there will always be a question mark next to Oberst’s name, a mark that nothing will be able to erase.”¹⁴⁶ This is particularly true because the whole ordeal will forever be associated with Oberst’s name in search engines that will churn up the accusations again and again.¹⁴⁷

B. Wong v. Jing

A second story demonstrates that newly expanded anti-SLAPP laws touch even the most commonplace electronic interaction—the online gripe. Sometime in 2006, Tai Jing and Jia Ma, husband and wife, brought their young son to Yvonne Wong, a local dentist, for a checkup.¹⁴⁸ Wong filled a cavity in the boy’s mouth using a silver amalgam that contained trace amounts of mercury.¹⁴⁹ Wong remembered explaining to Ma that, despite their mercury content, silver amalgam fillings were perfectly safe and widely used.¹⁵⁰ In fact, Wong typically provided patients with paperwork explaining the risks and advantages of silver amalgam along with a consent form for minor children.¹⁵¹

Two years later, Ma scheduled another checkup for her son, but abruptly cancelled and was charged a late-cancellation fee.¹⁵² The

144. Morrissey, *supra* note 111.

145. *Id.*

146. Tom Hawking, *The Sad, Strange Aftermath of the Conor Oberst Rape Accusations*, FLAVORWIRE (July 17, 2014, 10:45 AM), <http://flavorwire.com/467845/the-sad-strange-aftermath-of-the-conor-oberst-rape-accusations>.

147. *See* Bernstein, *supra* note 67, at 1461.

148. Wong v. Tai Jing, 117 Cal. Rptr. 3d 747, 755 (Cal. Ct. App. 2010).

149. *Id.*

150. *Id.* at 762.

151. *Id.* at 756.

152. *Id.*

next month, when Ma arrived for the rescheduled appointment, her son was noticeably fussy. He squirmed in the chair and refused to sit still for x-rays of his teeth. Despite this difficulty, Wong was able to diagnose two cavities on the right side of the boy's mouth. Perhaps frustrated by the extra effort needed to keep the boy still, Wong deferred further x-rays. Nevertheless, believing the boy had more cavities on the unexamined side of his mouth, Wong instructed Ma to schedule a return appointment.¹⁵³ When Ma discovered that Wong's office could not accommodate her son that weekend due to staffing issues, the topic of the previous month's missed appointment came up again. After some argument, Wong agreed to waive the late cancellation fee as a concession for being unable to accommodate Ma that weekend—or simply to placate a difficult customer. Frustrated with the whole ordeal, Ma refused to set up another appointment, demanded her son's dental health files, and ostensibly consulted another dentist.¹⁵⁴

Shortly after this tiff, a scathing review appeared on Yelp.com under Dr. Wong's business listing authored by Tai Jing, Ma's husband.¹⁵⁵ Tai Jing wished aloud that Yelp had a zero star rating, as opposed to the lowest one-star rating currently allowed by the site,

153. *Wong*, 117 Cal. Rptr. 3d at 762.

154. *Id.* at 756.

155. The full review, as quoted in the court's opinion, read as follows:

"1 star rating. [] Let me first say I wish there is [sic] '0' star in Yelp rating. Avoid [Dr. Wong] like a disease! [] My son went there for two years. She treated two cavities plus the usual cleaning. She was fast, I mean really fast. I won't necessarily say that is a bad thing, but my son was light headed for several hours after the filling. So we decided to try another dentist after half a year. [] I wish I had gone there earlier. First the new dentist discovered seven cavities. All right all of those appeared during the last half a year. Second, he would never use the laughing gas on kids, which was the cause for my son's dizziness. To apply laughing gas is the easiest to the dentist. There is no waiting, no needles. But it is general anesthetic, not local. And general anesthetic harms a kid's nerve system. Heck, it harms mine too. Third, the filling Yvonne Wong used is metallic silver color. The new dentist would only use the newer, white color filling. Why does that matter? Here is the part that made me really, really angry. The color tells the material being used. The metallic filling, called silver amalgams [sic], has a small trace of mercury in it. The newer composite filling, while costing the dentist more, does not. In addition, it uses a newer technology to embed fluoride to clean the teeth for you. [] I regret ever going to her office. [] P.S. Just want to add one more thing. Dr Chui, who shares the same office with Yvonne Wong is actually decent."

Id. at 755.

and advised potential clients to avoid Wong “like a disease!”¹⁵⁶ The review implied that Wong failed to advise Ma about the potential risks of silver amalgam fillings, missed several cavities during the examination, and used a potentially dangerous general anesthetic to incapacitate the child.¹⁵⁷

Wong filed suit against Ma and Jing for defamation and intentional infliction of emotional distress, and against Yelp for refusing to remove the review from their website.¹⁵⁸ The defendants collectively filed an anti-SLAPP motion, arguing that Yelp constituted a public forum under California’s anti-SLAPP law.¹⁵⁹ The lower court denied Ma and Tai Jing’s motion, and Wong voluntarily dismissed the charges against Yelp.¹⁶⁰ The court of appeals reversed in part, granting the anti-SLAPP motion for Ma and dismissing the claims for infliction of emotional distress.¹⁶¹ Nonetheless, the court allowed the case against Tai Jing to proceed, ruling that Wong had “made a prima facie showing of probable success on her cause of action for libel [against Jing]” because Jing’s review contained disprovable assertions of fact that a jury could reasonably believe constituted libel.¹⁶²

1. *Implications for anti-SLAPP*

This little bit of local legal theatre again sets the stage for a much broader conflict of competing interests: the potentially far-reaching chilling effect of such lawsuits on public participation in consumer reviews and other online discourse, and the amplified damage inflicted on businesses and individuals by online gripes.

a. Amplified chilling effect. First, the threat of libel suits based on offhand online reviews may have a severe impact on the quantity and quality of online reviews in general. While we may not have a great deal of sympathy for Jing and his scathing review, it must be remembered that he was speaking as a layman receiving what he interpreted as conflicting information from two experienced

156. *Id.*

157. *Id.*

158. *See id.* at 753–58.

159. *Id.* at 755.

160. *Id.* at 756–58.

161. *Id.* at 768–69.

162. *Id.* at 766.

practitioners. If Jing was sore over a spat between his wife and the dentist and decided to retaliate online, then his liability for defamation seems fair. But, if he simply misunderstood the technical information on filling compounds and the difference between anesthetics that was given to him by a second dentist, liability for simply relaying such information seems less just. As one commentator observed, “Writing a legally defensible online rant is unexpectedly tricky. You’re free to vent, but you’re not free to make false statements of fact, and the distinction between venting and defamation isn’t always clear.”¹⁶³ If the line between online defamation and online venting is unclear and the current structure of even the most expansive anti-SLAPP laws is not enough to protect an online misstep from liability, then “many would choose to forego speaking in the future to avoid the hassle and expense of [potential] libel litigation.”¹⁶⁴ Thus, the online spread¹⁶⁵ of stories such as *Wong v. Jing* and other consumer gripe suits may “encourage[] prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.”¹⁶⁶ Such prospective self-censorship is likely to undermine the potential pool of consumer information and the overall willingness of users to speak out about consumer experiences (or anything of any social value) online. This chilling effect is especially potent because Wong successfully overcame an anti-SLAPP challenge to her case. Thus, in the context of anti-SLAPP legislation, it should be questioned whether the “likelihood

163. Eric Goldman, *Blasting Your Landlord Online? Pick Your Words Wisely*, FORBES (Aug. 12, 2013), <http://www.forbes.com/sites/ericgoldman/2013/08/12/blasting-your-landlord-online-pick-your-words-wisely/>.

164. See Lidsky, *supra* note 66, at 892.

165. The story of Wong and Jing appears to have remained fairly local. See Deborah Gage, *Dentist Sues Over Negative Yelp Review*, SFGATE.COM (Jan. 13, 2009), <http://www.sfgate.com/business/article/Dentist-sues-over-negative-Yelp-review-3176311.php>. Nevertheless, consumer gripe lawsuits can and do become national news. See, e.g., Justin Jouvenal, *\$750K Lawsuit Over Yelp Review Will Go to Trial*, WASH. POST (Jan. 27, 2014), http://www.washingtonpost.com/local/crime/750k-lawsuit-over-yelp-review-will-go-to-trial/2014/01/26/63e9d372-8539-11e3-8099-9181471f7aaf_story.html; Chris Morran, *Obedience School Sues Yelper for \$65K Over Negative Review*, CONSUMERIST (Mar. 26, 2015), <http://consumerist.com/2015/03/26/obedience-school-sues-yelper-for-65k-over-negative-review/>; Lauren Evans, *Watch Repairman Sues Yelp Reviewer Over Negative Feedback*, GOTHAMIST (Mar. 21, 2014), http://gothamist.com/2014/03/21/watch_repairman_sues_yelpers.php.

166. See Lidsky, *supra* note 66, at 888 (footnote omitted).

of success” standard applied in Wong is high enough to protect against the true chilling effect of SLAPP-like suits on nonparties.¹⁶⁷

b. Amplified harm from libel. On the other hand, as stated above, the Internet can rapidly amplify the damage caused by libelous statements. In the context of consumer gripe sites such as Yelp, the damage caused to businesses can be especially severe. For example, a Harvard Business School study that evaluated the effect that Yelp reviews have on restaurant demand found that an increase of one star in a restaurant’s rating can make a 5-9% difference in annual revenue.¹⁶⁸ Further, Yelp’s penetration has actually warped the market, driving consumers towards independent restaurants and away from chains.¹⁶⁹ And, because consumers gauge the quality of independent restaurants largely on their online reviews, Yelp’s influence on the market may be critical to success or failure of individual restaurants.¹⁷⁰ While this particular study did not extend beyond the restaurant market, the implications for any business (or dental practice) are clear: you may live or die by your online reputation.¹⁷¹ Because consumers take online ratings as a “public signal of quality[,]”¹⁷² maliciously negative or false reviews could irrevocably damage business prospects by driving countless potential consumers away.¹⁷³ Consumer sites like Yelp provide potential

167. See *Wong*, 117 Cal. Rptr. 3d at 760. It is worth noting that Wong’s suit bore some resemblance to a SLAPP. For instance, in an interview with a Bay Area news outlet, Wong herself stated, “I don’t want these lies to be posted on the Web site [sic] about me[.] . . . I’m not looking for money.” Gage, *supra* note 165. Thus, like many SLAPP filers, Wong was looking to silence Jing, not to collect damages. See *supra* note 22 and accompanying text.

168. See Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com 2* (Harvard Bus. Sch., Working Paper No. 12-016, 2011), http://www.hbs.edu/faculty/Publication%20Files/12-016_0464f20e-35b2-492e-a328-fb14a325f718.pdf. While the study does not specifically address the effects of a one-star decrease on small businesses, it is clear that “a restaurant’s average rating has a large impact on revenue[,]” *id.* at 4, and the likely effects of negative reviews on the revenue of individual businesses is easily inferred from the study’s findings.

169. *Id.* at 5.

170. See *id.* at 4–5.

171. See, e.g., Max Fisher, *From Gamergate to Cecil the lion: internet mob justice is out of control*, VOX (July 30, 2015), <http://www.vox.com/2015/7/30/9074865/cecil-lion-palmer-mob-justice> (describing the potency of the social media attacks on real-life targets, especially the use of Yelp and other business sites to destroy the dental practice of Walter Palmer, who killed Cecil the Lion in 2015).

172. See Luca, *supra* note 168, at 19.

173. See Fisher, *supra* note 171 (citation omitted) (“They went after his business, a

libelers with easy access to a public platform, amplifying the impact of their defamatory attacks.

While these negative effects may be essentially confined to local consumers, the possibility of a particular review going viral is ever present—like, for instance, a lukewarm review of a small-town Olive Garden that somehow ended up in the *Wall Street Journal*.¹⁷⁴ Thus, both the actual and potential damage inherent in such reviews is extensive. Further, many reviews are more or less permanent,¹⁷⁵ as is demonstrated by Yelp’s refusal to remove Tai Jing’s scathing review upon Wong’s request.¹⁷⁶ Some review sites, such as Ripoff Report, do not allow even original authors to retract their reviews.¹⁷⁷ Taken together, the advent of consumer sites has a profound effect on business—particularly if those businesses are defamed. Accordingly, if anti-SLAPP laws are not properly calibrated to protect the interests of businesses and individuals harmed by online gripes, the potential for damage is extensive.

The cases outlined above are a far cry from the quintessential SLAPP outlined by Pring and Canan decades ago. They are also a far cry from the rhetoric employed by policymakers to justify the passage of anti-SLAPP laws today. And yet it is clear that anti-SLAPP statutes are being applied to such cases in increasing numbers. The anti-SLAPP laws currently on the books and pending in various

private dental practice, posting thousands of negative reviews on Yelp and other sites. The practice has since shut down.”)

174. See James R. Hagerty, *When Mom Goes Viral*, WALL ST. J. (Mar. 12, 2012), http://www.wsj.com/article_email/SB10001424052702304537904577275683631110396-1MyQjAxMTAyMDEwMzExNDMyWj.html?mod=wsj_share_email (describing the online furor over eighty-five year old Marilyn Hagerty’s online review of Grand Fork’s new Olive Garden restaurant as “impressive”). It should be noted, however, that Hagerty’s review, which emphasized the “warmth of the décor” without much praise for the chicken Alfredo, was published online in her local newspaper, and not a consumer review site. *Id.* Nevertheless, her explosive rise from relative obscurity to social media darling indicates the power of seemingly mundane content to spread virally.

175. Caitlin Dewey, *A vengeful internet trashed the Yelp page of the Minnesota dentist who shot Cecil the lion*, WASH. POST (July 28, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/07/28/a-vengeful-internet-trashed-the-yelp-page-of-the-minnesota-dentist-who-shot-cecil-the-lion/> (“[E]ven if business owners don’t want their business to appear on [Yelp], there’s absolutely no way they can remove it.”).

176. Jing, ostensibly as a result of the suit, removed “all but one sentence of the review, although Wong’s low one-star rating remains on Yelp.” Gage, *supra* note 165.

177. Eric Goldman, *The Latest Insidious Tactic to Scrub Online Consumer Reviews*, FORBES (July 23, 2013), <http://www.forbes.com/sites/ericgoldman/2013/07/23/the-latest-insidious-tactic-to-scrub-online-consumer-reviews/>.

legislatures may very well be the best answer we have to the problem of SLAPPs and Internet defamation. Nevertheless, if policymakers are not considering situations like those of Faircloth and Oberst or Wong and Jing when formulating these laws, how can we be sure the laws properly address their interests?

IV. CONCLUSION

The expansion of anti-SLAPP to public speech, particularly on the Internet, presents a dilemma for policymakers: should they protect the rights of petition and free speech from increased threat of chilling, or should they protect defamation victims who are at a significantly greater risk of harm from online libel? Obviously a balance will need to be struck between these interests, and that balance will inevitably depend on an adjustment of the lynchpin of anti-SLAPP statutes—the burden of proof on the plaintiff. A higher burden of proof¹⁷⁸ might mean less protection for libel victims, but a lower burden of proof¹⁷⁹ might mean less protection for legitimate speakers. The problem with current laws and legislative proposals is that we do not actually know if the standards of proof serve either interest properly, if at all.¹⁸⁰

Accordingly, the theoretical and empirical justification for anti-SLAPP legislation, rooted in Pring and Canan's decades-old study, is in need of reevaluation. The expansion of anti-SLAPP laws into the realm of Internet defamation law has upped the ante—the stakes for speakers and those they speak about have risen significantly.

178. A more demanding burden of proof could be justified by appealing to the hallowed "Marketplace of Ideas," since a relatively easy burden of proof could chill valuable speech. Elimination of such speech from the Marketplace of Ideas "truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy." ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 161 (1995) (footnote omitted).

179. A lesser burden of proof might be justified by the lack of social utility in defamatory lies, which can be summarized in the cryptic adage: "[T]o live outside the law, you must be honest[.]" BOB DYLAN, *Absolutely Sweet Marie, on BLONDE ON BLONDE* (Sony Music 1966).

180. For instance, the standard of proof utilized by California's Anti-SLAPP law—a template for many model statutes, *supra* note 58 and accompanying text, and a current federal proposal, *see* Chow, *supra* note 135—was likely a concession to business interests. Tate, *supra* note 16, at 818 n.86. There were many varying proposals for higher and lower standards of proof before the California legislature settled on the current language, which requires plaintiffs to demonstrate a probability of success, which is akin to the preponderance of the evidence standard. *See id.* How effective such a compromise standard is for modern anti-SLAPP cases is anyone's guess.

Policymakers should not be content to wager on research and theory that does not address these interests. It is time to stop and assess what effect this legislation is having on conflicts played out online and in the courtroom—particularly relating to the burden of proof required of the plaintiff in anti-SLAPP motions. Proceeding without any current empirical investigation or theoretical understanding that acknowledges and accounts for all of the interests implicated by existing laws may undermine both the laudable goals of the legislation and the equally laudable right to seek redress for injury in a court of law.

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