

## BOOK REVIEW

### LIMITING THE SCARLET @: DANIEL J. SOLOVE'S *THE FUTURE OF REPUTATION*

THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET. By Daniel J. Solove.\* New Haven & London: Yale University Press, 2007. Pp. 256. \$24.00.

Reviewed by BENJAMIN F. HEIDLAGE†

#### INTRODUCTION

Daniel Solove's recent book *The Future of Reputation* surveys the significant limits that the Internet has imposed on individuals' ability to protect their reputations from unwarranted damage and introduces possible legal and social responses.<sup>1</sup> Solove joins a group of legal scholars who bemoan the demise of privacy, a result they attribute to the rapid evolution of communication technology and to the sudden proliferation of data-collection tools, social-networking sites, and blogs. The book adds to the growing body of legal scholarship focused on the impact of the Internet, which includes works by Lior Strahilevitz<sup>2</sup> and Danah Boyd,<sup>3</sup> who have examined how the Internet has changed the way people interact, and by Lawrence Lessig, who

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\* Associate Professor of Law, The George Washington University Law School.

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<sup>1</sup> The book builds on Solove's prior scholarship and is tailored to be accessible to both legal and lay audiences. See, e.g., DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY & PRIVACY IN THE INFORMATION AGE* (2004) [hereinafter SOLOVE, *THE DIGITAL PERSON*] (reconceptualizing privacy in light of modern methods of collecting and storing information about individuals); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003) (providing justification for privacy in digital age).

<sup>2</sup> See, e.g., Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 921 (2005) (using social-network theory to explain privacy on Internet).

<sup>3</sup> See Danah Boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in YOUTH, IDENTITY, AND DIGITAL MEDIA 119 (David Buckingham ed., 2008) (examining teen use of social network sites).

has written about the dangers of over-regulating this new form of communication.<sup>4</sup>

Solove supports his arguments with anecdotes recounting the Internet's impact on privacy and reputation, giving the book a smooth and informal feel, much like a collection of well-woven blog posts. Rather than present a single argument, Solove combines general observations with broad proposals. While a lack of technical detail may frustrate legal academics, the book offers a useful primer on the difficulties facing both privacy advocates and free-speech absolutists.

Solove divides his book into two parts: The first describes the social effects of the recent explosion of Internet activity, and the second discusses potential legal responses. In Part I, Solove argues that the ease of distributing and viewing (but not removing) information on the Internet diminishes individuals' control over their personal reputations (p. 17). The explosion of Internet gossip is the main force behind this loss, as it has facilitated the use of public shaming as a tool for social control reminiscent of the shaming punishments used in colonial times.<sup>5</sup> Through Internet tools, such as search engines that aggregate and disseminate vast amounts of data, information—accurate or not—can come to be associated with an individual's name. The Google search is thus capable of becoming a digital scarlet letter (p. 94).

In Part II, Solove argues for a number of legal responses to these developments. One proposal is to expand the tort of public disclosure,<sup>6</sup> thereby penalizing bloggers who disclose the identities of the

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<sup>4</sup> See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE CONNECTED WORLD* (2001) (examining legal environment on Internet and arguing that its structure has deleterious effect on creativity and innovation through preventing open access and experimentation).

<sup>5</sup> Solove describes past shaming punishments such as branding, the pillory, Hawthorne's scarlet letter, and others (pp. 90–92). He also details modern “Internet shaming” such as websites like DontDateHimGirl.com, a site that allows women to post photographs of and comments on former relationship partners who cheated on them (pp. 76–89).

<sup>6</sup> The tort of public disclosure is one of the four “privacy torts.” See RESTATEMENT (SECOND) OF TORTS § 652(A) (1977) (stating that “right of privacy” is infringed by “unreasonable publicity given to . . . [an]other's private life”). Samuel Warren and Louis Brandeis developed the modern definition of privacy. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (providing foundational argument for legal protections of privacy). The privacy tort was reformulated into its current four-headed form by William Prosser. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (providing classic definition of modern privacy tort as intrusion into victim's private life, publicity of private facts of victim's life, publicity which places victim in false light, or appropriation of victim's likeness); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 148–56 (2007) (describing continued influence of Prosser's formation).

subjects of their posts (pp. 132–36). Solove posits that such action would force people to act cautiously before revealing others' intimate details.<sup>7</sup> Moreover, he argues, this proposal would also further interests in autonomy, democracy, and truth—the same interests that freedom of speech protects—by providing individuals with space in which to live and act (pp. 130–32).<sup>8</sup>

A second and more ambitious proposal is Solove's attempt to revive the moribund tort of confidentiality (pp. 170–88).<sup>9</sup> The tort of

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<sup>7</sup> It is unclear how much obfuscation would be necessary to preserve anonymity or how much would be acceptable to require. Solove discusses Jessica Cutler—known online as “The Washingtonienne,” who blogged about her Capitol Hill sex life—as an example of a blogger who failed to protect her subjects' privacy adequately (pp. 134–36). Yet Cutler did take some steps to conceal the identity of her subjects, such as not using their names (p. 136).

<sup>8</sup> As Solove mentions, these theories have been debated by others. For instance, some have argued that autonomy promotes people's ability to act and develop as autonomous individuals. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 754 (1999) (“Privacy is also a matter of freedom to escape, reject, and modify [one's personal] identit[y]. I should be free to make and remake myself.”); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426–27 (2000) (arguing that autonomy promotes diversity of speech and behavior); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 974 (1989) (arguing that “mysterious fusion of civility and autonomy lies at the heart of the intrusion tort”). Likewise some scholars have argued that privacy for individuals is necessary for a functioning democratic society. See, e.g., C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 8 (1983) (arguing that privacy is supportive of commitments underlying liberal democratic system); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1611 (1999) (“The lack of appropriate and enforceable privacy norms poses a significant threat to democracy in the emerging Information Age.”). Additionally, other scholars have focused on the role of privacy in the pursuit of “truth.” See, e.g., Erwin Chemerinsky, *In Defense of Truth*, 41 CASE W. RES. L. REV. 745 (1991) (defending value of truth while arguing for strengthening of privacy); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 179 (arguing that truth of facts is weighted too heavily in constitutional analysis of speech); Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 706 (1991) (arguing that truth may not necessarily be valuable); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 334 (1983) (arguing gossip can provide important information on “lifestyles and attitudes” of others).

<sup>9</sup> Solove has written about this in more detail elsewhere. E.g., Richards & Solove, *supra* note 6. Other scholars have made similar proposals. See, e.g., Lisa M. Austin, *Privacy and Private Law: The Dilemma of Justification 1–21* (Oct. 18, 2007) (unpublished manuscript), available at <http://www.law.nyu.edu/clppt/program2007/readings/austin.pdf> (suggesting that privacy law should look, in part, to confidentiality law for justification). As Solove has noted, the tort of confidentiality is strong in Britain, which does not have a more general tort of privacy. See Richards & Solove, *supra* note 6, at 158–66 (outlining origins and development of confidentiality law in twentieth-century Britain). For an overview of the British approach to confidentiality, see R.G. TOULSON & C.M. PHIPPS, *CONFIDENTIALITY* (2d ed. 2006). Confidentiality differs fundamentally from the current American privacy torts. See Richards & Solove, *supra* note 6, at 174 (“The public disclosure tort focuses on the nature of the information being made public. By contrast, the focus of the tort of breach of confidentiality is on the nature of the relationship.”).

public disclosure discussed above focuses on categories of information—such as disclosure of identifying information. In contrast, the tort of confidentiality focuses on the relationships through which the sensitive information passes.<sup>10</sup> Solove suggests that a confidentiality tort avoids First Amendment difficulties in a way that traditional privacy law does not, as it acts more as a contractual or fiduciary duty than as a general prohibition (p. 176).<sup>11</sup>

Solove's proposals span several bodies of legal scholarship, including privacy law,<sup>12</sup> First Amendment law,<sup>13</sup> and cyberlaw more generally.<sup>14</sup> His privacy proposals rest on a redefinition of privacy law

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<sup>10</sup> See sources cited *supra* note 9. The attorney-client, agent-principal, and parent-child relationships are traditional examples of protected relationships. Richards & Solove, *supra* note 6, at 135–37. Solove would expand the tort to cover a significantly broader range of circumstances (pp. 176–83). For a description of the “relational” theory of privacy, see Strahilevitz, *supra* note 2, at 921–22, 972–73.

<sup>11</sup> Solove describes confidentiality agreements as “implied promise[s]” (p. 176). See Richards & Solove, *supra* note 6, at 178–81 (describing how confidentiality law is less threatening to First Amendment values than privacy law); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000) (suggesting that confidentiality, based on traditions of voluntary contract, would be less threatening to First Amendment rights than privacy law); Zimmerman, *supra* note 8, at 363 (same). I am skeptical, however, that such implied legal norms would protect speech rights more than an expanded tort of privacy would; a constraint on speech derived from implied norms of confidentiality is still a government-imposed constraint.

<sup>12</sup> There is much background literature on privacy law. See, e.g., FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* (1997) (examining privacy law in United States and European Union); SOLOVE, *THE DIGITAL PERSON*, *supra* note 1 (arguing for reconceptualization of privacy in light of new technology and information storage); DANIEL J. SOLOVE ET AL., *INFORMATION PRIVACY LAW* (2d ed. 2006) (providing general survey of topic); Lawrence Lessig, *Privacy as Property*, 69 SOC. RES. 247 (2002) (arguing privacy should be theorized in terms of property); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978) (advancing economic approach to privacy law); Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201 (2000) (comparing privacy and intellectual property law). For additional background material on privacy law, see also sources cited *supra* notes 6, 8.

<sup>13</sup> For background on First Amendment case law, see generally GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* (2d ed. 2003). There have been numerous approaches to First Amendment theory. See, e.g., C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (developing “liberty model” of First Amendment in contrast to marketplace of ideas models); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (arguing that First Amendment protects political speech); Volokh, *supra* note 11, at 1057 (arguing that contracts not to reveal information permissibly limit First Amendment rights); see also *supra* note 8 and accompanying text (discussing First Amendment principles in context of privacy).

<sup>14</sup> Cyberlaw is a quickly growing field. See generally MARK A. LEMLEY ET AL., *SOFTWARE AND INTERNET LAW* (3d ed. 2006) (providing overview of issues in Internet law); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) (describing cyberspace as tool for “control” in digital age and discussing possible legal regimes as strengthening or weakening this control).

and require a deeper analysis of their theoretical justifications than could fit these pages. Accordingly, this Book Review will focus on Solove's third proposal—expanding defamation liability to bloggers who fail to remove defamatory third-party comments. This is his most concrete proposal and allows for an analysis of many of the broad issues raised by his privacy proposals.

#### USING DEFAMATION LAW TO LIMIT INTERNET GOSSIP

Solove proposes making bloggers responsible for comments and third-party posts in order to prevent false and defamatory statements from staining the reputations of their subjects (p. 159). This is in stark contrast with the current law: Under the Communications Decency Act, Internet service providers (ISPs) and bloggers are shielded from liability arising from users' speech.<sup>15</sup> This allows bloggers and ISPs to keep defamatory posts online without incurring liability. However, Solove's proposal is not at all unprecedented. For example, courts hold traditional publishers liable for what they print even if they did not create the content.<sup>16</sup> One reason for this disparate treatment is

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<sup>15</sup> See 47 U.S.C. § 230(c)(1) (2000) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 42–43 (4th Cir. 2001) (holding online bookstore Amazon.com immune from liability, despite Amazon.com's ability to edit user comments); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); *Dimeo v. Max*, 433 F. Supp. 2d 523, 529–31 (E.D. Pa. 2006) (holding blogger not liable for comments posted by reader). Solove himself acknowledges that many courts interpret § 230 immunity to cover bloggers for comments made on their blog (p. 154). His proposal thus rejects current judicial interpretations of § 230 (pp. 150–57).

The definition of "content provider" is not entirely clear. For instance, in a recent case, the Ninth Circuit arguably expanded the definition of "content provider" to include websites that solicit specific content from users. See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, No. 04-57173, 2008 WL 879293, at \*3 (9th Cir. Apr. 3, 2008) (denying immunity to website that required users to provide information on race and sexual orientation for use in matching potential roommates' housing preferences, in violation of Fair Housing Act). The court clarified, however, that sites retain their immunity with respect to third-party content, even if the site edits user content for spelling, offensiveness, or length, "provided that the edits are unrelated to the illegality." *Id.* at \*7.

<sup>16</sup> See RESTATEMENT (SECOND) OF TORTS § 577(2) (1977) ("One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication."); cf. *Catalano v. Pechous*, 419 N.E.2d 350, 361 (Ill. 1980) ("[T]he republisher of a defamatory statement made by another remains subject to liability, but he cannot be held liable unless he himself knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity." (citation omitted)).

the belief that traditional publishers exercise more editorial control over the content they publish than either ISPs or bloggers.<sup>17</sup>

Although Solove seeks to limit immunity for Internet content providers, he does not hold bloggers to the same standards as traditional publishers. He worries that a rule that is overly expansive would spur too many lawsuits, creating a litigious Internet culture that would stifle the web's growth and vitality (p. 159). Rather, Solove proposes that once a victim alerts an ISP or blogger that a comment is defamatory, the blogger must take it down or face liability. Under this rule, an ISP or blogger would only be liable for failing to remove the defamatory content after having received prior notice (p. 154).

This regime is similar to the "takedown" provision of the Digital Millennium Copyright Act (DMCA)<sup>18</sup> (p. 155). Under this provision, an entity that believes its copyright has been violated may send a cease-and-desist letter to the ISP, demanding that the material be removed.<sup>19</sup> The ISP must remove the content to avoid liability for the infringement.<sup>20</sup> While the original poster may demand the material be reposted and may subject the ISP to liability for failure to do so,<sup>21</sup> ISPs often limit such liability through user-accepted terms of service.<sup>22</sup>

Solove thus proposes a "Digital Millennium Defamation Act" of sorts: If the ISP or blogger fails to remove the allegedly offending content, it faces liability if the content is, in fact, defamatory.<sup>23</sup> But this would reach further than the DMCA because Solove's proposal does not provide the author an opportunity to request that the content be reposted.

There are two serious objections to Solove's proposal. First, it threatens bloggers' and ISPs' free-speech rights by chilling their willingness to allow third-party comments or even to blog in the first

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<sup>17</sup> See Zeran, 129 F.3d at 333 (suggesting that exercising editorial control is significantly more feasible as traditional print publisher than as publisher of third-party Internet comments).

<sup>18</sup> See 17 U.S.C. § 512(g) (2000) (providing immunity from copyright claims for ISPs who remove infringing material).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See 17 U.S.C. § 512(g)(2) (2000) (prescribing liability for providers who fail to abide by put-back provisions).

<sup>22</sup> See Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 628 (2006) (describing put-back procedure and its limitations).

<sup>23</sup> Others have proposed a similar remedy. See David V. Richards, *Posting Personal Information on the Internet: A Case for Changing the Legal Regime Created by § 230 of the Communications Decency Act*, 85 TEX. L. REV. 1321, 1351 (2007) (suggesting notice-and-removal procedure for private or defamatory content on interactive websites).

place.<sup>24</sup> Second, this proposal would reshape the nature and culture of blogs. Blogs are appealing in part because of their informal, off-the-cuff nature, which might be inhibited by a fear of litigation.

The first concern is that a defamatory takedown provision may have serious effects on individuals' speech rights, especially if its enforcement imitates that of the DMCA. Jennifer Urban and Laura Quilter have noted that the DMCA has resulted in significant over-protection of copyright claims through the zealous use of takedown requests.<sup>25</sup>

Although defamation raises different issues from those raised by copyright violation, many of the concerns of control and responsibility are similar. For instance, cease-and-desist letters may be legally unsound. Thirty-one percent of the cease-and-desist letters that Urban and Quilter analyzed contained serious flaws in their analysis of copyright law.<sup>26</sup> Despite the legal misstatements, the ISPs removed the targeted pieces from their domain, driven by fear of a lawsuit or by ignorance of the legal inadequacies of the letters, or both.<sup>27</sup> It seems naive to expect better legal analysis in letters claiming defamation, because more often lay persons will be the ones drafting the letters. Since the cost of doing so is low, it is intuitive that a person will demand that anything negative about herself be taken down—even if the First Amendment clearly affords the blogger protection—on the chance that the ISP or blogger will follow the demand without much inquiry. The typical blogger is likely to be unaware of her legal rights;<sup>28</sup> letterhead alone could be enough to intimidate bloggers into removing material. Equally troubling, a reputation-damaging statement might be true and thus protected speech.<sup>29</sup> Not all bloggers are law professors like Professor Solove; most will have to research the claims themselves, take a guess, or take the risk-averse approach and delete the offensive content.

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<sup>24</sup> It also restricts available fora for posters. As they do not have an existing right to post in the first place, however, it arguably does not infringe their First Amendment rights.

<sup>25</sup> Urban & Quilter, *supra* note 22, at 641–81 (analyzing data gathered on § 230 (citing Chilling Effects Project, <http://www.chillingeffects.org> (last visited Apr. 7, 2008))).

<sup>26</sup> Urban & Quilter, *supra* note 22, at 666–78. The category of “cease-and-desist letters” includes takedown notices. *Id.* at 623.

<sup>27</sup> *See id.* at 679 (describing lack of counternotices and put-backs before providers removed contested materials).

<sup>28</sup> *Cf. id.* at 679–81 (finding lack of use of counternotice system provided by DMCA). While lack of counternotices might arguably demonstrate that the material violated copyright laws, the fact that so many claims had legal flaws would suggest otherwise.

<sup>29</sup> *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490 (1975) (discussing longstanding view that truth is absolute defense to claims of libel and slander); *N.Y. Times v. Sullivan*, 376 U.S. 254, 274 (1964) (noting suggestion by supporters of Alien and Sedition Acts of 1798 that defense of truth remedied claims of seditious libel).

The chilling effect of self-censorship is difficult to monitor. Deleted comments leave no clue of what or whose content was removed. Thus, the public will never fully understand the impact, and there will be no accountability for those requesting the takedown. Conversely, lawsuits, despite their flaws,<sup>30</sup> publicize attempts by the state or private parties to suppress speech, thus creating accountability for attempts at censorship.

It is also important to consider whose rights are being protected. Corporations attempting to control their brand image—rather than individuals who have been defamed—arguably would reap the most benefit from Solove’s proposal.<sup>31</sup> The Urban and Quilter study found that corporate entities were responsible for the vast majority of takedown notices under the DMCA.<sup>32</sup> Corporations already use cease-and-desist letters in a manipulative manner to attempt to shut down consumer “gripe sites” to protect their images.<sup>33</sup> Another weapon in the corporate arsenal, such as Solove’s cease-and-desist letter, might further threaten the communication of important information on commercial products. Though chilling truly defamatory speech may be desirable, the overbroad effect on the flow of consumer information and on individual rights—caused by disparities in legal expertise and resources—is not.<sup>34</sup>

In addition to its potential to chill specific instances of speech, the second major objection to Solove’s proposal reflects a broad structural concern: It could reshape the nature of blogs and the culture that

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<sup>30</sup> For instance, lawsuits may further publicize any defamatory material (p. 120).

<sup>31</sup> Corporations may sue for defamation. See RESTATEMENT (SECOND) OF TORTS § 561 (1977) (“One who publishes defamatory matter concerning a corporation is subject to liability to it . . . if . . . the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it . . .”).

<sup>32</sup> Urban & Quilter, *supra* note 22, at 649–50.

<sup>33</sup> Rachael Braswell, *Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters To Chill Protected Speech on the Internet*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241, 1283–88 (2007) (stating that “[c]ease-and-desist letters are designed to take advantage of the gripe site operators’ unawareness of their legal rights” and that these letters often “overstate the rights of the sender”); *cf.*, e.g., Ruth La Ferla, *Everyone’s a Critic*, N.Y. TIMES, Apr. 17, 2008, at G1 (describing perfume industry’s response to online critics and noting that “a prominent blogger [was] threatened with a lawsuit by a perfume company because she had deemed its product only ‘O.K.’ and ‘a little disappointing’”). While I suggest above that lay persons may be more likely to make claims of defamation than of copyright violation, it nonetheless seems likely that well-funded corporations would make the vast majority of claims. *Cf. id.* (discussing propensity of large corporations in copyright context to use cease-and-desist letters to “silence their critics”).

<sup>34</sup> Additionally, harm to corporate reputations may not be especially serious. As Solove notes, “[c]ompanies can readily reinvent themselves” (p. 95). The reputational harms are not nearly as great when corporations, as opposed to individuals, are the victims (p. 95).

surrounds them. Changing the legal regime is likely to change the attitudes of those online—not just toward specific comments but toward the endeavor of blogging as a whole. One film director, for example, described such legal controls on the film industry as being the cost of “creativity.”<sup>35</sup> Studio attorneys must clear every recognizable image or symbol from sets.<sup>36</sup> Just as legal hurdles have constricted the creative flexibility of directors, defamation or privacy law may well have similar negative effects on blogs and bloggers. We risk losing the creativity that is essential to the Internet.

Given these concerns, it is dubious that the solution to Internet defamation is forced editorial control in a medium with a free-flowing nature. As mentioned above, publisher liability is justified by the notion that publishers read and edit printed work.<sup>37</sup> Bloggers and ISPs do not normally do this. It is unlikely that bloggers frequently edit comments posted on their site; in fact, many do not even read them.<sup>38</sup> Solove admits that “[b]log posts are edgy, not polished and buffed” (p. 199).

This is especially true on social-networking sites,<sup>39</sup> which often have posting features similar to blogs. Danah Boyd, observing how teenagers use the popular social-networking site MySpace.com, states that online teens “hang out, jockey for social status, work through how to present themselves, and take risks that will help them to assess the boundaries of the social world.”<sup>40</sup> There is value in engaging in online discussions and in maintaining open fora about common experiences without fear of liability. Blogs often act not as newspapers but as public squares, where people interact in an unmediated manner.<sup>41</sup>

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<sup>35</sup> LESSIG, *supra* note 4, at 4 (quoting film director Davis Guggenheim).

<sup>36</sup> *Id.*

<sup>37</sup> See *supra* notes 16–17 and accompanying text.

<sup>38</sup> See James P. Jenal, *When Is a User Not a “User”? Finding the Proper Role for Republican Liability on the Internet*, 24 LOY. L.A. ENT. L. REV. 453, 479 (2004) (describing moderators who “might simply create . . . a forum for hosting content without ever reviewing the content before its distribution”). While Solove’s proposal might put these bloggers “on notice,” they may not want to—or may be unable to—take on the role of full-fledged editor whenever someone complains.

<sup>39</sup> Social-networking sites allow users to create personal profiles and connect to each other online. See, e.g., Facebook.com, <http://www.facebook.com> (last visited Apr. 7, 2008); MySpace.com, <http://www.myspace.com> (last visited Apr. 7, 2008). Many allow users to post public messages on other users’ profiles, subject to some restrictions. See Boyd, *supra* note 3, at 123–24 (discussing posting of publicly viewable comments and tools for restricting profile access).

<sup>40</sup> Boyd, *supra* note 3, at 124.

<sup>41</sup> See generally David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 383–401 (1995) (discussing public forum doctrine and online networks); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY

Extending publisher liability to the Internet, even in the limited way that Solove proposes, may change the character of the Internet. Such liability would force bloggers to act like print publishers. Solove admits this but argues that it may be required since the Internet creates a permanent record of every unmediated utterance. Solove states: “The Internet gives amateurs a power similar to what professionals have . . . [a]nd with power should come some responsibility” (p. 136). But this responsibility comes at a steep price, sacrificing the free-form culture that makes the Internet so appealing. Blogs are successful in part because anyone, from a high school student to a law professor, can start one. While what is posted in a blog’s comments section may be false or defamatory, the possibility of such errors is the price of an open medium.

Of course, at a fundamental level, Solove highlights the tension between unfettered freedom of speech and the threat of severe reputational harms. He suggests that heightening legal protection of reputational interests reinforces the same values that the First Amendment protects: autonomy, democracy, and truth.<sup>42</sup> But even so, Solove’s proposal entails sacrificing some free-speech rights in order to protect privacy and reputation.

#### CONCLUSION

Fortunately, there is a potential alternative to the legal regime Solove favors: Let Internet and blogging norms evolve without legalization; nonlegal norms,<sup>43</sup> after all, have constrained traditional press successfully (p. 194).<sup>44</sup> Most bloggers are probably reasonable and sympathetic people; Professor Solove himself describes how he

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TECH. L.J. 1115, 1117–18 (2005) (suggesting that Internet functions as open forum, despite being owned by private actors).

<sup>42</sup> See *supra* note 8 and accompanying text.

<sup>43</sup> See Robert B. Calдини et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 201, 202–07 (Mark P. Zanna ed., 1991) (describing “activation” of norms through focusing individual’s attention on information); Steven A. Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 *BERKELEY TECH. L.J.* 877, 907–13 (2001) (describing role of “norm proselytizers” in creating norm of privacy on Internet through informing public); see also Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 *V.A. L. REV.* 1781, 1781 n.2 (2000) (providing numerous examples of scholarship illuminating intersections of norms and law).

<sup>44</sup> Such norms have begun to develop, including in areas of privacy. See, e.g., Posting of David Lat to Above the Law, [http://www.abovethelaw.com/2007/07/summer\\_associate\\_of\\_the\\_day.php](http://www.abovethelaw.com/2007/07/summer_associate_of_the_day.php) (July 19, 2007, 12:15 EST) (describing policy of not disclosing names and of deleting any comments that disclose names); Posting of Dan Crow to Official Google Blog, <http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html> (Jan. 26, 2007, 11:36 EST) (describing “robots.txt” file, with which Google complies, that tells search engines which parts of sites to make public and which to keep “private”).

deleted a defamatory comment from his blog<sup>45</sup> upon the request of an aggrieved individual (p. 153). When confronted with examples of reputational harm, legal responses may be appealing. Laws of general application, however, cannot be limited *ex ante* to extreme scenarios. Besides chilling valuable speech, legal rules limit the potential of the Internet. By contrast, norms may provide the flexibility necessary to safeguard both this unique medium and reputational interests. Solove demonstrates that reputational harms are real and significant; to respond to his research, free-speech advocates should undertake a rigorous analysis of the potential of social norms both to protect personal reputations and to safeguard First Amendment rights.

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<sup>45</sup> Concurring Opinions, <http://www.concurringopinions.com> (last visited Apr. 7, 2008).