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DAVID DOE V. GOLIATH, INC.: JUDICIAL FERMENT IN 2009 FOR BUSINESS PLAINTIFFS SEEKING THE IDENTITIES OF ANONYMOUS ONLINE SPEAKERS

Clay Calvert, Kayla Gutierrez, Karla D. Kennedy & Kara Carnley Murrhee

ABSTRACT

This Article analyzes a quartet of judicial opinions from 2009 and 2008 affecting the First Amendment right to engage in anonymous speech on the Internet. Comprehensively, it initially traces both U.S. Supreme Court precedent on anonymous speech and the evolution of judicial online-unmasking standards that strive to balance the interest of free expression against the need for redress when anonymous postings cause harm. It then concentrates on four very recent opinions—Swartz v. Doe, Independent News, Inc. v. Brodie, Solers, Inc. v. Doe, and Krinsky v. Doe 6—in which the business interests of a person or corporation were jeopardized or threatened by anonymous postings. It compares and contrasts the 2009 and 2008 unmasking standards, ultimately finding that stabilization is finally occurring in the judicial fermentation process. The Article thus concludes by arguing that legal scholarship, rather than focusing on crafting new unmasking tests, should instead concentrate on the relatively neglected antecedent task of creating a paradigm or framework for determining which of the major unmasking tests should be applied in any given case. Just as libel law embraces multiple fault standards (actual malice, negligence, and strict liability), the applicability of which are determined by the specific facts of a case, so too should courts and legal scholars now focus on formulating a rubric for determining which of the various unmasking tests should be applied, given the unique facts of each anonymous online-posting case.
DAVID DOE V. GOLIATH, INC.: JUDICIAL FERMENT IN 2009 FOR BUSINESS PLAINTIFFS SEEKING THE IDENTITIES OF ANONYMOUS ONLINE SPEAKERS

CLAY CALVERT, KAYLA GUTIERREZ, KARLA D. KENNEDY & KARA CARNLEY MURRHEE*

INTRODUCTION

I wouldn’t go to that Dunkin’ Donuts of Brodie’s anyway . . . have you taken a close look at it lately? One of the most dirty and unsanitary-looking food-service places I have seen . . . I bought coffee [a] couple of times but quickly lost my appetite.¹

 Appearing in a thread of exchanges on a website owned by Independent Newspapers, Inc.,² this maligning message, posted under the pseudonym RockyRaccoonMD,³ was just one of several similarly negative ones⁴ catching the eye of Zebulon Brodie, the

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2. Independent Newspapers, Inc. Website, http://www2.newszap.com/ini (last visited Feb. 10, 2010) (describing the company as “dedicated to community journalism. Its newspapers in Arizona, Delaware, Florida and Maryland are published for, of and by the people. Independent’s newspapers are dedicated to community journalism, with a unique blend of issue-oriented stories, reader submissions and ‘refrigerator’ news and photos[,]” and stating that its "mission is to provide the information and understanding citizens need to make intelligent decisions about public issues. In doing so, we strive to report the news with honesty, accuracy, fairness, objectivity, fearlessness, and compassion.”).
3. Brodie, 966 A.2d at 446.
4. For example, a message posted by “Suze” stated that trash building up next to Brodie’s Dunkin’ Donuts shop was “wafting into the river that runs
owner of the disparaged donut shop in Centreville, Maryland. The case is just one of several from 2009 and 2008 in which corporations or business executives sought court orders to compel website operators to reveal the identity of anonymous individuals who allegedly defamed them online with false criticisms affecting their business-related activities. Although sometimes these lawsuits are legitimate, the danger for freedom of expression comes when they amount to so-called "cyberSLAPP" cases—the name stems from the more well-known, stand-alone acronym of

right alongside." Id.

5. See Henri E. Cauvin, Md. Court Weighs Internet Anonymity, WASH. POST, Dec. 9, 2008, at B1 (reporting on Brodie's lawsuit and noting that he "contends that he was defamed by comments about his shop, a Dunkin' Donuts in Centreville, posted on NewsZap.com. The shop was described as one 'of the most dirty and unsanitary-looking food-service places I have seen.'").


7. Brodie, 966 A.2d at 447 (writing that "Brodie served Independent Newspapers with another subpoena, ordering discovery of 'any and all documents and tangible things identifying and/or relating to... 'CorsicaRiver,' 'Born & Raised Here,' 'chatdusoleil,' 'RockyRaccoonMD' and 'Suze'"). See Steve Lash, Md. Court of Appeals Grapples with Online Anonymity, DAILY REC. (Baltimore, Md.), Dec. 9, 2008 (reporting that "Independent Newspapers Inc. . . . is fighting a discovery order to surrender the names of people whose posts on an online community forum allegedly defamed the operator of a Centreville Dunkin' Donuts," noting that Brodie sought "the names of two commenters to its Web site who, in an online exchange, said the Eastern Shore franchisee operated a 'dirty and unsanitary-looking' Dunkin' Donuts and that 'no one is cleaning the outside of the building and the [garbage is] wafting into the river that runs right alongside.'").


SLAPP\textsuperscript{11}—that

typically involve a person who has posted anonymous criticisms of a
corporation or public figure on the Internet. The target of the
criticism then files a frivolous lawsuit just so they can issue a
subpoena to the website or Internet Service Provider (ISP) involved,
discover the identity of their anonymous critic, and intimidate or
silence them.\textsuperscript{12}

The question thus arises: \textit{What should a court require of a}
business-oriented plaintiff who is attempting to learn the identity of
an anonymous poster before it orders a website or online service
provider to reveal the poster's name or IP address?

Courts so far have failed to provide an agreed-upon answer,
and the various standards they apply indicate a state of judicial
ferment.\textsuperscript{13} As University of Florida Professor Lyrissa Lidsky
observed in a 2007 law journal article, "courts are struggling to
craft standards to distinguish 'cyberSLAPPs' from legitimate tort
claims before compelling defendants to disclose their identities."\textsuperscript{14}

The state of ambiguity described by Lidsky was palpable in
2009 when the case of \textit{Independent Newspapers, Inc. v. Brodie}\textsuperscript{15}
made its way to the Maryland Court of Appeals. It marked the
first time that the court had to address the issue of unmasking
anonymous posters who engage in allegedly defamatory
speech.\textsuperscript{16} Framing the scenario in \textit{Brodie} as one that mandated balancing
the First Amendment\textsuperscript{17} interest in protecting and preserving a

\begin{itemize}
\item[11.] \textit{See generally} \textit{GEORGE W. PRING \& PENELope CANAN, SLAPPs:}
\textit{GETTING SUED FOR SPEAKING OUT} (Temple Univ. Press 1996) (providing a
comprehensive review of SLAPPs by the professors who coined the catchy
acronym for Strategic Lawsuits Against Public Participation); \textit{ROBERT D.}
\textit{RICHARDS, FREEDOM'S VOICE: THE PERILOUS PRESENT AND UNCERTAIN}
\textit{FUTURE OF THE FIRST AMENDMENT} 7-26 (1998) (providing an overview of the
use of SLAPPs and the typical scenarios in which they arise).
\item[12.] \textit{CyberSLAPP.org, Frequently Asked Questions, http://www.cyberslapp.}
\textit{org/about/page.cfm?PageID=7} (last visited Feb. 10, 2010).
\item[13.] \textit{See infra} Part II (setting forth three different rules from three different
cases).
\item[14.] Lyrissa Barnett Lidsky \& Thomas F. Cotter, \textit{Authorship, Audiences,}
\textit{and Anonymous Speech}, \textit{82 NOTRE DAME L. REV.} 1537, 1556 (2007); \textit{see also}
Lyrissa Barnett Lidsky, \textit{Silencing John Doe: Defamation \& Disclosure in}
common tactic used by corporations and their CEOs to sue for defamation any
time subpoenas come in for harsh criticism on the financial message boards—
many designed solely for intimidating their critics into silence).
\item[15.] \textit{966 A.2d} at 446.
\item[16.] \textit{See} \textit{Cauvin, supra} note 5, at B1 (reporting that "[i]t is the first time the
Maryland Court of Appeals has confronted the question of online anonymity,
an issue that has surfaced in state and federal courts over the past few years
as blogs and other online forums have increasingly become part of the national
discourse.").
\item[17.] The First Amendment to the United States Constitution provides, in
pertinent part, that "Congress shall make no law \ldots abridging the freedom of

speaker’s online anonymity\textsuperscript{18} with a state’s interest in compensating its citizens for reputational harm,\textsuperscript{19} the appellate court was cognizant of the difficult task it faced:

We recognize the complexity of the decision to order disclosure regarding pseudonyms or usernames in the context of the First Amendment and a defamation allegation. On the one hand, posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity . . . . On the other, viable causes of actions for defamation should not be barred in the Internet context.\textsuperscript{20}

This Article focuses on the continuing "complexity"\textsuperscript{21} in the evolution and ferment in 2009 and 2008 of the various standards courts are applying to address this balancing act within the specific context of corporate or business entities seeking to stop people who they believe are unfairly criticizing their business activities. Sexual and salacious cases involving anonymous posters generate more mainstream news media attention, such as the high-profile dispute involving personal attacks about the alleged sexual behavior of model Liskula Cohen\textsuperscript{22} or similar ones,
targeting college students on the now-defunct JuicyCampus.com website. But these disputes do not affect the vital type of anonymous whistle blowing that sometimes transpires, in the name of the public good, with allegations of corporate greed and wrongdoing.

This Article thus concentrates on three opinions from 2009, including a major federal appellate court ruling in Solers, Inc. v. Doe, in which the business interests of a person or corporation are jeopardized or threatened by anonymous postings. In Solers, for instance, a Virginia corporation that develops software and other technologies wanted the identity of a poster who accused it of illegal conduct and copyright infringement. As with the Maryland Court of Appeals in Brodie, it was the first time for the U.S. Court of Appeals for the District of Columbia in Solers to consider what circumstances, if any, allow business-oriented plaintiffs to learn the identity of an anonymous and alleged defamer.

Because, as the appellate court in Solers observed, there is no

Duman, Anonymous ‘Flaming’ is a Cold Approach, SACRAMENTO BEE, Sept. 5, 2009, at A15 (observing that Liskula Cohen’s case is “making headlines in the mainstream press, thanks to Rosemary Port, a 29-year-old Fashion Institute of Technology student who used a free account provided by Google to call Vogue cover model Liskula Cohen an ‘old hag,’ a ‘ho’ (not an agricultural implement) and a ‘skank,’” and adding that the story “is getting a lot of media play . . . ”); Editorial, Speaking Up for Anonymity, BALT. SUN, Aug. 31, 2009, at 12A (observing that “a lot has been said recently about Vogue model Liskula Cohen and her suit to discover the identity of a blogger who called her a ‘skank’”); Jason Temple, Blogger’s Google Suit Seen as Weak, S.F. CHRON., Aug. 28, 2009, at C1 (discussing Liskula Cohen’s case).

23. See Justin Pope, Gossip Site JuicyCampus.com Dries Up, WASH. POST, Feb. 15, 2009, at A3 (describing how on JuicyCampus.com “typical discussion threads included ‘biggest slut on campus’ and ‘easiest freshmen.’ Others identified women who had gained weight, and one post named a rape victim and said she ‘deserved it.’”); Susan Kinzie, Juice, the Whole Juice and Nothing but the Juice, WASH. POST, Oct. 30, 2008, at B1 (commenting on the controversy surrounding JuicyCampus.com, a “fast-growing gossip website” accessible to college students who can “post gossip anonymously[,]” ranging from “what the school’s easiest classes are and . . . whether the football team should be abolished” to the “names of sluts . . . whether certain guys are gay, . . . whether soccer guys are hot and whether a certain girl has herpes.”).


26. Id. at 944-45.

27. See id. at 950 (writing that “[t]his appeal presents us with issues of first impression—whether the First Amendment protects the anonymity of someone such as Doe, and, if so, under what circumstances a plaintiff such as Solers may invoke court processes to learn Doe’s identity and have its day in court.”).
uniform standard applicable in all jurisdictions today, protections currently afforded for Doe defendants are decided on a case-by-case and/or jurisdiction-by-jurisdiction basis. This Article thus addresses three timely research questions:

1. **What legal standards are courts in 2009 and 2008 applying to balance the interests between a person's right to speak freely and anonymously on the Internet and the right of business-oriented plaintiffs to preserve their reputations and financial interests?**

2. **What are the differences and similarities among the standards applied by courts in 2009 and 2008 to balance the interests?**

3. **How are the standards applied in 2009 and 2008 either similar to or different from the earlier tests created in a trio of major cases in this area from other jurisdictions prior to 2008, namely: a) In re Subpoena Duces Tecum to America Online, Inc., b) Dendrite International, Inc. v. Doe, and c) Doe v. Cahill.**

Part I of this Article provides an overview of the First Amendment right to engage in anonymous speech, briefly tracing its history through relevant case law and legal scholarship, and it suggests how this unenumerated right now gives rise to some of the Internet-based issues presented in this Article. Part II then describes and compares/contrasts the standards applied in three early and important decisions on the ability to compel revelation of an anonymous poster's identity—In re Subpoena Duces Tecum to America Online, Inc., Dendrite International, Inc. v. Doe, and Doe v. Cahill. Next, Part III analyzes a trio of 2009 business-interest cases—the appellate court rulings in Solers and Brodie, as well as the recent October 2009 ruling by a Tennessee trial court judge in Swartz v. Does—along with a 2008 California appellate court ruling in Krinsky v. Doe that attempted to balance the interests between the right of a person to speak freely and anonymously on the Internet about a business entity and the right of a business-centric plaintiff to preserve its reputation and.

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28. The appellate court wrote in Solers, "Courts have applied a variety of tests to grapple with the question of when it is appropriate to force a third party to reveal the identity of a defendant charged with defamation." Id. at 952.

29. Other more recent cases clearly are relevant, such as Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007), but they tend to borrow from or modify one or more of the three main early cases addressed here.


32. 884 A.2d 451 (Del. 2005).

33. *Infra* notes 39-88 and accompanying text.

34. *Infra* notes 89-194 and accompanying text.

35. Swartz v. Does, Memorandum and Order, No. 08C-431 (Cir. Ct. Davidson County Oct. 8, 2009).

financial interests against attacks. In the process, Part III not only compares the standards used in Swartz, Solers, Brodie, and Krinsky with each other, but also compares them with the older tests fashioned by the courts in America Online, Dendrite, and Cahill. In addition, it critiques the emerging standards in Swartz, Solers, Brodie, and Krinsky. A review of the legal scholarship in these areas is incorporated into Parts I through III, rather than being set forth in a separate literature review.

Finally, Part IV concludes by arguing that courts, rather than continuing to refine variations of the three major unmasking tests that already exist, should now focus on the heretofore-neglected antecedent task of creating a paradigm or framework for determining which of those three tests should be applied in any given case. Just as libel law embraces multiple fault standards (actual malice, negligence and strict liability), the applicability of which are determined by the specific facts of a case, so too should courts and legal scholars now concentrate on formulating standards for determining which of the unmasking tests should be applied based on the unique facts of each anonymous online-posting scenario.

I. THE FIRST AMENDMENT AND THE IMPORTANCE OF PROTECTING ANONYMOUS SPEECH

A trio of judicial decisions in 2009: Swartz, Solers, and Brodie, and one in 2008 Krinsky v. Doe, regarding the right to speak anonymously or, perhaps more accurately, a person's right not to speak her name, demonstrate the continuing evolution during the past decade toward greater First Amendment protection of anonymous speech online. Much ink, in turn, was spilled in law journals with discussions of its progression prior to the 2009 rulings in Swartz, Solers, and Brodie addressed here.

37. See generally infra notes 195–347 and accompanying text.
38. Infra notes 348–355 and accompanying text.
40. 977 A.2d 941 (D.C. Cir. 2009).
41. 966 A.2d 432 (Md. 2009).
43. See Aaron C. David, Media Need Not Reveal Web Posters' Identities; Ruling Applies 1st Amendment to Internet, WASH. POST, Feb. 28, 2009, at B08 (quoting Sam Bayard, assistant director of the Citizen Media Law Project at Harvard Law School for that proposition that "a recent trend" is "that there is at least a qualified right to speak anonymously on the Internet. Courts are going to require the plaintiff or others seeking identities to make a heightened showing that they have a valid cause of action.").
44. A review of the literature reveals that many articles have been written by attorneys and professors, in addition to the ones already cited here by the likes of Lidsky and Spencer. See, e.g., Konrad S. Lee, Hiding from the Boss Online: The Anti-Employer Blogger's Legal Quest for Anonymity, 23 SANTA
Although recent decisions favor higher standards before corporations can compel service providers to reveal anonymous critics, inconsistent legal protections within the states\textsuperscript{45} and few well-established principles\textsuperscript{46} regarding the balancing of interests in anonymous-defamer-of-business-interest scenarios could turn back the page at any time.

In early cases such as \textit{In re Subpoena Duces Tecum to America Online,}\textsuperscript{47} plaintiffs had to meet low thresholds when compelling subpoenas for identity disclosure, suggesting that very little evidence was needed to compel the identities of anonymous speakers.\textsuperscript{48} In another early case,\textsuperscript{49} a court used a motion-to-dismiss standard\textsuperscript{50} that only required a plaintiff to "make some
showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act.\textsuperscript{51} Some later judicial attempts, however, have better weighed the interests of anonymous speakers against corporate plaintiffs and applied more rigorous standards.\textsuperscript{52}

How did it get to this point? Why, in the first place, is it important to protect online anonymous speech?

Prior to the advent of the Internet, most cases involving anonymity pivoted on speech about politics or matters of public concern conveyed via decidedly low-tech means.\textsuperscript{53} For instance, the U.S. Supreme Court in 1960 involved the right to engage in anonymous political expression on handbills in \textit{Talley v. California}.\textsuperscript{54}

\textit{Talley} concerned a broadly drafted Los Angeles law that barred distribution of all handbills, under all circumstances and in all places, unless they carried the names and addresses, printed on the face or cover, of the people who wrote them or caused their
distribution. Protecting the anonymity of handbill publishers, the Supreme Court declared the law overbroad, finding it failed to serve its original purpose. In other words, "an identification requirement would tend to restrict freedom to distribute information, and thereby freedom of expression." Significantly, the Court emphasized the importance of allowing individuals to remain anonymous so that democracy may thrive. It also stressed how anonymity allows those with dissenting viewpoints, who may otherwise fear reprisal or be chilled in their speech, to express their views:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.

Viewed in this light, it is clear why Professor Seth Kreimer asserts that "Talley seems to stand for the principle that it is not disclosure, but political privacy, that is fundamental to our political system."

In 1995, the Supreme Court again addressed restrictions on anonymous political speech conveyed on a primitive medium—paper leaflets—in McIntyre v. Ohio Elections Commission. It held unconstitutional in McIntyre an Ohio law that prohibited the distribution of anonymous campaign literature, reasoning that "under our Constitution, anonymous pamphleteering is not a

55. Id. at 60-61.
56. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) (writing that "the overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").
57. Attorneys for California argued that the main intent of the law was to provide a way to identify those responsible for fraud, false advertising and libel, but the Court held the ordinance was not narrowly tailored to serve those interests because it simply banned all handbills under all circumstances anywhere that did not include the names and addresses in the handbill location the ordinance required. Talley, 362 U.S. at 64.
58. Id.
59. The Supreme Court wrote in Talley that "[e]ven the Federalist Papers, written in favor of the adoption of our constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." Id. at 65.
60. Id. at 64.
pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."63

As in Talley, the high court’s rhetorical flourishes centered on the political nature of the anonymous speech. Attorney Lee Tien observed in a 1996 law journal article that “McIntyre is viewed as elevating the importance of political speech over its nonpolitical counterpart. The political framing of anonymity remains powerful and undergirds McIntyre.”64 In particular, Tien contended McIntyre firmly established in First Amendment jurisprudence that “there are legitimate reasons for anonymity, including fear of official reprisal or social ostracism, or simply desire to maintain privacy.”65

It is important to note that Talley and McIntyre did not create an absolute right to engage in an anonymous speech, but rather the cases are cabined by their unique facts and political contexts. As University of Miami Professor Michael Froomkin, a frequent author on Internet law and anonymity,66 argued in a 1995 law journal article:

As ringing a defense of the First Amendment as the Talley and McIntyre decisions may be, they involved political speech. At most, they merely suggest the outcome for cases involving anonymous speech that is not “political speech” and hence not “core” First Amendment speech. It is also important to understand that the anonymity cases decided by the Supreme Court involved very broadly drafted statutes, and that the Supreme Court has carefully left open the question whether a statute regulating (or prohibiting) anonymous speech would survive review if the statute were narrowly tailored . . . .67

Just as Talley and McIntyre forced legal scholars to contemplate the degree to which the First Amendment protected anonymous speakers in political contexts, the rise of the Internet poses, perhaps, even more difficulty in determining the parameters of anonymous speech rights in matters that may or may not be of public concern in cyberspace. Internet-based cases

63. Id. at 357.
65. Id. at 126.
like those involving model Liskula Cohen\textsuperscript{68} certainly are a country mile removed from the kind of anonymous speech that the high court was worried about protecting in \textit{Talley} and \textit{McIntyre}. Indeed, while the Court in \textit{Talley} noted that "anonymity has sometimes been assumed for the most constructive purposes,"\textsuperscript{69} it clearly is used online for very destructive purposes, as with Liskula Cohen.

Yet exchanging ideas in relatively unfettered fashioned in a metaphorical marketplace of ideas\textsuperscript{70} like the Internet is the crux of First Amendment protection behind anonymous speech.\textsuperscript{71} As Professor Kreimer observed regarding anonymous political speech, "absent the \textit{Talley} principle,\textsuperscript{72} some messages may never enter the marketplace of ideas at all."\textsuperscript{73} Professor Froomkin concurs with this sentiment, contending that the option to speak anonymously online has enhanced the "quantity of speech"\textsuperscript{74} and "quality of speech and debate."\textsuperscript{75}

As a potentially powerful tool in the promotion of democratic

\begin{footnotesize}
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68. See \textit{supra} note 22 and accompanying text (describing the case involving Liskula Cohen).
71. See \textit{McIntyre} v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (stating that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry,["] and thus that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); \textit{Talley}, 362 U.S. at 65 (recognizing the qualified right that anonymous speech can be assumed for the "most constructive purposes."); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (stating that historical tradition of sponsoring a robust political debate extends First Amendment protections to "all discussion and communication involving matters of public or general concern, without regard to whether the persons are famous or anonymous."); McConnell v. Fed. Elections Comm'n, 540 U.S. 93, 277 (2003) (opining that "[t]he right to anonymous speech cannot be abridged based on the interests asserted by the defendants.").
72. See Kreimer, \textit{supra} note 61 and accompanying text (describing what Kreimer calls the \textit{Talley} principle).
73. Kreimer, \textit{supra} note 61, at 87.
75. \textit{Id}.
\end{footnotesize}
discussion\textsuperscript{76} and "robust debate,"\textsuperscript{77} the Internet allows the expression of even the most unpopular ideas without fear of retaliation or reprisal.\textsuperscript{78} Along with the explosion of online media, it is perhaps this seeming sense of autonomy\textsuperscript{79} that has given rise to a growth in the amount of online self-expression.\textsuperscript{80} However, because "the right to speak anonymously is not absolute,"\textsuperscript{81} the boundaries of privacy are tested when potentially harmful or defamatory statements, posted by anonymous Internet speakers, are discovered by the individual or entity they target.

Like all forms of speech, anonymous speech's protection depends on the category of speech involved.\textsuperscript{82} Although the Supreme Court has refused to permit disclosure of speakers' identities that would chill the exercise of political rights,\textsuperscript{83} anonymous defamatory speech receives no Constitutional protection,\textsuperscript{84} as some Doe defendants are learning the hard way.

\textsuperscript{76} Doe v. Cahill, 884 A.2d 451, 455 (Del. 2005) (describing the Internet as "democratizing" the "nature of public discourse").


\textsuperscript{78} McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (explaining that a "decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."); id. at 342, 357. (stating that "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejude her message simply because they do not like its proponent," making "[a]nonymity . . . a shield from the tyranny of the majority.").

\textsuperscript{79} John Horrigan, Pew Internet & Amer. Life Proj., Wireless Internet Use (2009), available at http://www.pewinternet.org/-/media/Files/Reports/2009/Wireless-Internet-Use.pdf (showing that increased use of mobile devices, combined with broader measures of use of mobile digital resources have resulted in a sharp increase in the number of Americans who have accessed the Internet by wireless means from the end of 2007 to the beginning of 2009; see generally Eugene Volokh, Cheap Speech and What It Will Do, 104 Yale L.J. 1805 (1995) (characterizing speech taking place on the Web as cheap because nearly anyone with access to the Web has the power to be her own editor and publisher for little or no cost).

\textsuperscript{80} ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (describing the Internet as "a decentralized, global medium of communication . . . that links people, institutions, corporations and governments around the world[,] and that enables communications to take place "almost instantaneously").

\textsuperscript{81} In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 34 (2000) (emphasis added).

\textsuperscript{82} See Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002) (opining that "the freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.") (emphasis added).

\textsuperscript{83} Talley v. California, 362 U.S. 60, 64 (1960); NAACP v. Alabama, 357 U.S. 449, 459-60 (1958).

\textsuperscript{84} Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
The expansion of the Internet is generating a line of lawsuits that pits corporate interests in preserving reputation and financial wellbeing against the right of a person to speak, as philosopher John Stuart Mill so eloquently put it, "fully, frequently, and fearlessly."\textsuperscript{85} While the U.S. Supreme Court once described the "vast democratic fora of the Internet,"\textsuperscript{86} it can also be a very harmful venue when abused.

The use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics also threatens to stifle the free exchange of ideas.\textsuperscript{87} In the wars corporations wage against anonymous digital Does, attorney David Johnson contends that courts face a task akin to determining which came first—the chicken or the egg:

While courts permit disclosure of an alleged defamer's identity, a court faced with a complaint that accuses an anonymous speaker of engaging in defamation faces a "chicken and the egg" dilemma. If trial proves that the speaker is liable for defamation, then his anonymity was not entitled to First Amendment protection and should be disclosed. If trial proves that the speaker is not liable for defamation, then his anonymity was entitled to First Amendment and should not be disclosed. However, disclosure of a speaker's identity is generally required for a court to determine whether his words were defamatory. In other words, you have to disclose his identity to determine whether his identity should be disclosed.\textsuperscript{88}

With this in mind, the Article now examines three major cases, all involving the unmasking of anonymous speakers on the Internet, but each creating a different test in a different jurisdiction for determining when the cloak of anonymity must be doffed.

\section*{II. Different Cases, Different Standards: A Review of a Trio of Key Decisions Prior to 2008}

How should courts determine whether and when an anonymous, online-defamer defendant can be identified? This question was at the heart of three key cases—American Online, Dendrite, and Cahill—examined in this part of the Article. These cases bring to the fore the dilemma surrounding the right to anonymity and the need for transparency in online communications.
cases are selected because they illustrate different judicial tests for resolving the unmasking issue. Sections A, B, and C below briefly analyze them, elucidating the different standards developed by the courts for balancing the integral interests. Part D then compares and contrasts the tests fashioned in this trio of cases.

A. *The Virginia Ruling: In Re Subpoena Duces Tecum to American Online, Inc.*

In January 2000, a Virginia circuit court faced the issue of whether “the First Amendment right to anonymity should be extended to communications by persons utilizing chat rooms and message boards.” In *In re Subpoena Duces Tecum to America Online, Inc.*, the plaintiff filed suit under the name “anonymous publicly traded company,” or APTC, to enforce a subpoena against America Online, Inc. The subpoena requested the identities of several AOL subscribers who made negative comments about APTC in chat rooms and on message boards. AOL countered that the subpoena “unreasonably impairs the First Amendment rights of the John Does to speak anonymously on the Internet and therefore should be quashed.”

The decision boiled down to a question of reasonability for the court. Resurrecting policy arguments from earlier anonymous

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89. Cahill, for instance, was chosen because it is “one of the most influential cases in this area of law.” Legal Protections for Anonymous Speech in Delaware, CITIZEN MEDIA LAW PROJECT, Apr. 26, 2008, http://www.citmedialaw.org/legal-guide/delaware/legal-protections-anonymous-speech-delaware.


91. See generally Virginia’s Judicial System, http://www.courts.state.va.us/courts/circuit/home.html (last visited Feb. 10, 2010) (providing background information on the role and jurisdictional powers of circuit courts in Virginia and stating that “[t]here is a circuit court in each city and county in Virginia. The circuit court is the trial court with the broadest powers in Virginia” and “handles all civil cases with claims of more than $15,000.”).


93. *Am. Online*, 52 Va. Cir. at 26 (writing that “[p]laintiff Anonymous Publicly Traded Company (APTC) seeks to learn the identities of the subscribers so that it can properly name them as defendants in an action it has instituted in the State of Indiana.”).

94. *Id.* at 26-27.

95. *Id.* at 28.

96. See *id.* at 29 (stating that “the Court must consider whether the subpoena served on AOL is unreasonable and oppressive” and asking “whether the subpoena is (1) an unreasonable request in light of all the circumstances surrounding the subpoena or (2) that produces an oppressive effect on the entity challenging the subpoena.”).
speech cases,97 the court ruled that an individual’s right to anonymity would not be impinged by revelation, provided that the requester passed a so-called good-faith test.98 Although AOL proposed a more rigorous standard99 to expose the identity of Doe defendants, the court rejected it, deeming it “unduly cumbersome.”100 Instead, it adopted a less stringent, three-element test for discovering anonymous posters. Under this standard, the court would allow discovery only if:

1. it was satisfied by the pleadings or evidence supplied to that court;
2. the party requesting the subpoena had a legitimate, good faith basis to contend that it might be the victim of actionable conduct; and
3. the identity of the poster was centrally needed to advance the claim.101

Holding that APTC satisfied all three prongs, the court required AOL to reveal the identity of the anonymous Does, stating that such a revelation was “not unreasonable.”102 The test created in America Online has been referred to by other courts simply as “a good faith standard.”103

What does this mean for protecting online anonymity? The Citizen Media Law Project, which is affiliated with Harvard Law School’s Berkman Center for Internet and Society, classifies the America Online standard as a “low-burden” test that “is the weakest or most lenient standard for determining whether

97. See id. at 33-34 (analyzing the Supreme Court’s opinions in the anonymous speech cases of Talley and McIntyre).
98. Id. at 37.
99. As the circuit court observed:
AOL proposes that this Court adopt the following two prong test to determine when a subpoena request is reasonable and accordingly would require AOL to identify its subscribers: (1) the party seeking the information must have pleaded with specificity a prima facie claim that it is the victim of particular tortious conduct and (2) the subpoenaed identity information must be centrally needed to advance that claim.
Id. at 36.
101. Am. Online, 52 Va. Cir. at 37 (emphasis added).
102. See id. at 37 (writing that “[a] review of the Indiana pleadings and the subject Internet postings satisfies this Court that all three prongs of the above-stated test have been satisfied as to the identities of the subscribers utilizing the four e-mail addresses in question.”).
disclosure of identity is warranted."104 The danger of using such a low standard ties directly to the notion of cyberSLAPPs discussed earlier in this Article105 because, as one article recently noted, were courts to apply the America Online test, "frivolous defamation suits could be filed simply to reveal the identity of an alleged defamer, and used to harass him or her."106 Academics' optimism for greater free speech protection from corporate plaintiffs seeking to squelch negative speech may wane, depending on future court interpretations of the less rigorous good-faith test set forth in America Online. In the words of Professor Omer Tene of the College of Management School of Law in Israel, "an apparently anonymous string of numbers is not as anonymous as it seems."107

In the cases set forth below, the good faith test was decidedly rejected because it was perceived as providing too little protection for anonymous speech.


A second significant decision concerning the standards for unmasking anonymous Internet posters—and the first in the nation at the appellate court level—was handed down a year later in 2001 by a New Jersey intermediate appellate court. In Dendrite International v. Doe, the appellate division of the New Jersey Superior Court held that Dendrite, a software company, was not entitled to learn the identities of Doe defendants who posted critical comments on a Yahoo! message board.109 In Dendrite, the company alleged that unnamed defendants defamed it, disclosed

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105. Supra notes 10–14 and accompanying text.

106. Tara E. Lynch, Good Samaritan or Defamation Defender? Amending the Communications Decency Act to Correct the Misnomer of Section 230 . . . Without Expanding ISP Liability, 19 SYRACUSE SCI. & TECH. L. REP. 1, 28 (2008).

107. Omer Tene, What Google Knows: Privacy and Internet Search Engines, 2008 UTAH L. REV. 1433, 1446 (2008). This "anonymous string of numbers" is a user's IP address "assigned to a user's computer by her Internet Service Provider (ISP) in order to communicate with her computer on the network." Id. at 1445.


109. Id. at 772 (concluding that plaintiff Dendrite failed to satisfy the test to obtain the identities sought).
trade secrets, and breached employment contracts.110

Writing for a unanimous three-judge panel, now-retired Judge Robert A. Fall began by noting that courts facing the same issue as the one before it must strike “a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.”111 Suggesting that each case brings its own unique facts to this balancing equation, Judge Fall added that the determination “must be undertaken and analyzed on a case-by-case basis.”112 The appellate court then set forth guidelines for trial courts to follow that require identity-requesters like Dendrite to:

1. attempt to notify the anonymous posters that they are being subpoenaed and provide them with “a reasonable opportunity”113 to oppose the attempt to reveal their identities (notice and opportunity can be considered, alternatively, as separate prongs, which would give the Dendrite test five factors);114

2. specify “the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech”;115

3. “set forth a prima facie cause of action”116 against the Doe defendants and, in the process, “produce sufficient evidence supporting each element of its cause of action”117 beyond simply surviving a standard motion to dismiss.

If a plaintiff like Dendrite satisfies all of these steps, then the court must engage in a fourth determination. In particular, it “must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie

110. Id. at 760 n.1.
111. Id. at 760.
112. Id. at 761.
113. Id. at 760.
114. Id.
115. Id.
116. Id. A major problem here with the term prima facie case is the substantial ambiguity in its meaning. As one federal appellate court wrote:

The phrase “prima facie case” has long been recognized to have two meanings. It usually means evidence sufficient to permit (but not require) a fact-finder to find a disputed matter in favor of the party presenting the prima facie case. This is the prima facie case that creates a permissible inference. In some limited circumstances, it can mean, in addition, evidence sufficient to require a finding of a disputed matter in favor of the party presenting the prima facie case in the absence of a proffer of evidence by the opposing party.
Fisher v. Vassar College, 114 F.3d 1332, 1362 (2d Cir. 1997).
117. Dendrite, 775 A.2d at 760.
The case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.\(^{118}\)

In a nutshell, the *Dendrite* test, by requiring the requester to establish a prima facie case with more evidentiary support than is necessary to survive a motion to dismiss, sets "a higher bar"\(^{119}\) than the *America Online* opinion described earlier. In addition, it mandates, as its fourth and final step, that judges balance the competing interests—a step conspicuously absent in *America Online*. As Professors Jon Darrow and Steve Lichtenstein aptly summed it up in a 2006 article, *Dendrite* "set the standards high"\(^{120}\) for determining whether to grant the plaintiff a subpoena or court order to force disclosure of identity.

The notice-and-opportunity, prima facie evidence and balancing-the-interests standards established by the New Jersey court in *Dendrite International v. Doe* has been heralded as a "persuasive model"\(^{121}\) for the courts, proffering what some have called the proper balance between interests raised by suits against anonymous Internet posters.\(^{122}\) As attorney and lecturer in law Shaun B. Spencer observed in a 2001 law review article, "had the *Dendrite* court not required evidence of actual harm, the court would have deprived John Doe needlessly of his First Amendment right to speak anonymously so that Dendrite could pursue a claim for which it could never recover."\(^{123}\) University of Marquette Professor Gregory Naples concurs with this sentiment, stating that "the degree to which courts will invoke a requirement of actual harm before permitting a plaintiff to proceed on a discovery claim is currently under debate, but seems to be an evolving decisional theory that is gaining support as the result of the

\(^{118}\) Id. at 760-61.


\(^{121}\) Spencer, *supra* note 10, at 519.

\(^{122}\) See Vogel, *supra* note 44, at 810; see also Reder & O'Brien, *supra* note 100, at 217 (stating that *Dendrite* achieves the proper "balance between employees' speech and privacy rights, employers' reputational interests, and the necessity of compelling identity disclosure."). See also Stephen R. Buckingham & Alix R. Rubin, *Anonymous "Posters" Complicate Discovery*, N.Y.L.J., Feb. 10, 2010, at s4 (quoting ACLU counsel J. C. Sayler as describing the *Dendrite* balancing test as a "fair, workable test" that reduces "the threat of the subpoena power to punish people for criticizing others online," but adding that it "doesn't close the courthouse door to those with meritorious claims.").

\(^{123}\) Spencer, *supra* note 10, at 504 n.88 (clarifying that "[t]he court, however, did not require proof of actual malice because Dendrite could not be expected to establish actual malice without learning the Does' identities.").
While the First Amendment serves as a valuable tool to protect the identity of speakers in anonymous-defamer-of-business-interests scenarios, Professor Michael Vogel of the University of Illinois College of Law argues that the Dendrite test "goes beyond what is necessary to satisfy the First Amendment" because it gives a "broad level of authority... to a single, trial-level judge." In the end, it may be too early to tell whether Dendrite will continue to be hailed as a definitive standard because, as Professor Victoria Ekstrand of Bowling Green State University points out, precedent in this area of law is still new and "hardly guarantee[s] the trend will continue."

C. The Delaware Ruling: Doe v. Cahill

At the heart of the Supreme Court of Delaware's 2005 opinion in Doe v. Cahill were allegedly defamatory statements concerning Patrick Cahill's performance as a city councilman for Smyrna, Delaware. Posted anonymously "on an Internet website sponsored by the Delaware State News called the 'Smyrna/Clayton Issues Blog,'" the allegations suggested Cahill had character flaws, experienced mental deterioration, and was paranoid.

Before it fashioned a test for determining when a person like Cahill can obtain the identity of an anonymous poster of allegedly defamatory speech, Delaware's high court made several key foundational observations about:

* THE INTERNET: The Court called it a "unique democratizing medium" that allows "more and diverse people to engage in public debate."

* SPEECH ON THE INTERNET: The Court asserted that "Internet speech is often anonymous" and that "speech over the Internet is entitled to First Amendment protection. This protection extends to anonymous Internet speech." The Court somewhat grandiosely speculated that "anonymous Internet speech in blogs or chat rooms in some instances can become the..."
modern equivalent of political pamphleteering.”

DEFAMATION: The Court observed that “the First Amendment does not protect defamatory speech.”

Melding this trio of foundational observations into a single guiding principle for the rest of its balancing analysis, the Delaware Supreme Court wrote that “we must adopt a standard that appropriately balances one person’s right to speak anonymously against another person’s right to protect his reputation.” It is not surprising, in light of its statements above regarding both the importance and the potential of anonymous Internet speech, that the Court began its balancing approach by expressing concern “that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.”

It thus also comes as no shock that the Cahill court quickly rejected a good-faith test like that in America Online as too low of a standard to protect the interests of anonymous speakers. As the Delaware Supreme Court reasoned in rejecting the good faith test:

Plaintiffs can often initially plead sufficient facts to meet the good faith test... even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

The italicized statements above indicate that Delaware's high court was keenly aware of the potential for cyberSLAPPs that could be used by corporate plaintiffs to squelch anonymous speech critical of their business interests. To prevent such a situation, the Delaware Supreme Court adopted a summary judgment standard, rather than Dendrite's prima facie standard, and

135. Id.
136. Id.
137. supra notes 132–135 and accompanying text.
138. Cahill, 884 A.2d at 457.
139. See id. at 458 (writing that the good faith standard adopted in America Online “is too easily satisfied to protect sufficiently a defendant’s right to speak anonymously.”).
140. Id. at 457 (emphasis added).
141. See supra notes 10–14 and accompanying text (discussing cyberSLAPPs).
142. See supra notes 10–14 and accompanying text (discussing cyberSLAPPs).
143. See Cahill, 884 A.2d at 460 (writing that “we conclude that the summary judgment standard is the appropriate test by which to strike the
concluded “that before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”

What does this mean? In federal courts, a party is entitled to summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” As interpreted by the U.S. Supreme Court in the context of a defamation suit, this standard places the judge in the position of “determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Materiality of a fact is determined by the underlying substantive law (in Cahill, for instance, defamation law) and “factual disputes that are irrelevant or unnecessary will not be counted.”

Delaware’s statute governing summary judgment motions mirrors the federal rule. In contrast, a prima facie case can mean two different things—“a state which is achieved when the plaintiff has presented enough evidence to avoid a directed verdict” or “the sense of a presumption where the burden of producing evidence is shifted to the defendant, who necessarily loses unless he produces the evidence called for.”

Summary judgment, as Professor Christopher Fairman writes, thus “deals with claims lacking merit,” and it “provides an efficient end to meritless litigation, lifting this final burden between a defamation plaintiff’s right to protect his reputation and a defendant’s right to exercise free speech anonymously.”

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144. See supra note 116 (describing the ambiguity issues in the meaning of the term prima facie).
145. Cahill, 884 A.2d at 460 (emphasis added).
146. FED. R. CIV. P. 56(c).
148. Id. at 248.
149. Id.
150. See DEL. CH. CT. R. 56(c) (2009) (providing, in relevant part, that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).
152. Id. See supra note 116 (discussing the ambiguity of the meaning of the term prima facie case).
from the shoulders of the pleadings.”\textsuperscript{154} In other words, adoption of a summary judgment standard in the Internet-based anonymous speech cases provides a mechanism for weeding out odious cyberSLAPPs.

The Delaware Supreme Court dubbed its new-fangled test “a modified \textit{Dendrite} standard.”\textsuperscript{155} In particular, the test retains \textit{Dendrite}’s first prong, requiring the requester to attempt to notify and provide the anonymous poster with a reasonable opportunity to respond,\textsuperscript{156} but it jettisons \textit{Dendrite}’s final balancing step. The Delaware high court reasoned here that “the summary judgment test is itself the balance. The fourth requirement adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis.”\textsuperscript{157} A similar argument was made regarding the prima facie test by Professor Lyrissa Lidsky in a 2009 law journal article when she wrote that “arguably, a separate balancing test is unnecessary because a balancing of interests is built into the prima facie evidence standard.”\textsuperscript{158}

The Court also dumped \textit{Dendrite}’s second prong, which requires a requesting party that is suing for defamation to set forth the exact statements that allegedly are libelous,\textsuperscript{159} reasoning that it is “subsumed in the summary judgment inquiry. To satisfy the summary judgment standard a plaintiff will necessarily quote the defamatory statements in his complaint.”\textsuperscript{160}

The \textit{Cahill} Court thus seems to have been concerned with fashioning not only a speech-protective test, but one that is parsimonious in its prongs, streamlining \textit{Dendrite}. The open question that must be resolved over time is whether the Delaware Supreme Court’s decision to discard \textit{Dendrite}’s balancing-of-the-interests requirement will undermine the court’s effort to ratchet

\footnotesize{\textsuperscript{154} \textit{Id.} at 994.  
\textsuperscript{155} \textit{Cahill}, 884 A.2d at 461.  
\textsuperscript{156} \textit{See supra} notes 113-14 and accompanying text (describing this aspect of the \textit{Dendrite} test).  
\textsuperscript{157} \textit{Cahill}, 884 A.2d at 461.  
\textsuperscript{158} Lyrissa Barnett Lidsky, \textit{Anonymity in Cyberspace: What Can We Learn from John Doe?}, 50 B.C. L. REV. 1373, 1380 (2009). Lidsky explains that:  
[u]nder the prima facie evidence standard, the defendant’s right to speak anonymously outweighs the plaintiff’s right to pursue a libel action unless and until the plaintiff presents evidence that the libel claim is viable. . . . . An explicit balancing test serves only to tilt the scales further toward the protection of anonymous speech, because it presumably allows even a viable defamation claim to be dismissed on the ground that it is not strong enough to outweigh defendant’s First Amendment interests.  
\textit{Id.} at 8-9.  
\textsuperscript{159} \textit{See supra} note 115 and accompanying text (describing this part of the \textit{Dendrite} test).  
\textsuperscript{160} \textit{Cahill}, 884 A.2d at 461.}
up protection for First Amendment concerns. The Cahill standard also has been the subject of academic criticism. In particular, Professor Elizabeth Malloy of the University of Cincinnati College of Law insists that the Cahill standard is so strict that it gives "victims of anonymous blog defamation little grounds for recovery" and "does not address the problems of ease of access, permanence, or pervasiveness of defamatory information on the Internet." She highlights several alleged problems arising from the Cahill decision that did not appear to be at odds in the other standards:

- the standard is "highly deferential to anonymous bloggers";
- the Court's opinion centers on its characterization of blogs in general;
- the opinion fails to provide a "plausible judicial outlet for plaintiffs," implying that extrajudicial measures are more adequate; and finally,
- the Court's holding that the Internet will not be distinguished from any other medium of communication is

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161. One student-authored law journal article asserts this may, indeed, be problematic, contending that:

By leaving off the balancing prong it still allows for the unveiling of a speaker's identity even if the speech is of a class that should be protected. Take, for example, the anonymous blogger who writes extensively on local politics. If, in a particular post, he is correct in his factual assertions about a candidate on all but one key point, one that is potentially defamatory, a prima facie case would be easy to make, and therefore the court would unveil the speaker's identity. Yet repeatedly the Supreme Court has held that political speech should get the highest level of protection.


162. Malloy, supra note 44, at 1193.

163. Id.

164. See id. at 1190-91 (stating that plaintiffs must "satisfy the summary judgment burden, but they must also deal with a characterization of the Internet that makes the task nearly impossible."). "The Cahill court focuses on the crude nature of the writings on the Internet as merely indicative of opinion," noting that:

the Internet provides the ability to reach millions of people at the press of a button. Although the ability to post anonymously on the Internet allows certain individuals to express their beliefs without fear of retaliation or discrimination, it also protects careless and irresponsible individuals from the threat of lawsuits for their false comments.

165. Id. at 1191-92 (stating that "because of the misspellings, hyperbole, and general nature of blogs, a reasonable person would likely conclude that they only represent opinions" and adding that "if a plaintiff brings a defamation suit he is almost guaranteed to fail because the court has characterized personal blogs as difficult to interpret as fact by a reasonable person.").

166. Id. at 1192.
seemingly contradictory.\textsuperscript{167}

With this in mind, Section D below concludes this part of the Article by briefly comparing and contrasting the tests from \textit{America Online}, \textit{Dendrite}, and \textit{Cahill}.

D. Comparing and Contrasting the Major Tests

Courts today generally pay homage to the nation's long history and tradition of protecting anonymous speech,\textsuperscript{168} as they tend to apply one of the more rigorous unmasking standards to cases of anonymous Internet speech—namely, \textit{Dendrite}\textsuperscript{169} or \textit{Cahill}\textsuperscript{170} or some variation thereof.\textsuperscript{171} But their varied attempts to

\begin{footnotesize}
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\item \textsuperscript{167} See id. (stating that "the Internet is quite different than other mediums in its ease of access, permanence, and pervasiveness. Gossip through newspapers and even through people may take time, but it can take merely seconds on the Internet.").
\item \textsuperscript{168} Ekstrand, supra note 48, at 425. Ekstrand acknowledges, however, that, based on Justice Antonin Scalia's dissenting opinion in \textit{McIntyre v. Ohio Elections Comm'n}, the "tradition" of protecting anonymous speech is something separate from outright Constitutional protection. \textit{Id.} at 412.
\item \textsuperscript{169} See generally \textit{Brodie}, 966 A.2d 432 (involving a dispute over whether a business-minded plaintiff can compel the identities of three anonymous users of an online community forum, hosted by Independent Newspapers, Inc., for making allegedly defamatory statements); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007) (involving a suit against a blogger for statements posted by others on her blog that criticized a school board member's position in opposition to public funding for the extracurricular activities of children attending private religious schools).
\item \textsuperscript{170} Best W. Int'l, Inc. v. Doe, 2006 WL 2091625 (D. Ariz. July 25, 2006) (involving a dispute over whether the plaintiff could serve subpoenas on several ISPs through which several anonymous posters made comments that were allegedly defamatory, breached contracts with the chain, and revealed confidential information); Reunion Indus. Inc. v. Doe 1, 80 Pa. D. & C. 4th 449, 456 (Ct. Com. Pl. 2007) (involving a complaint filed by a publicly traded corporation that raised a cause of action of commercial disparagement for comments made by three anonymous posters on a Yahoo! message board); McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006) (involving the dismissal of a suit brought by a Massachusetts real estate developer for allegedly defamatory statements posted on an Internet gripe site for failing to substantiate his claims against the owner of the site www.paulmcmann.com, and noting that a plaintiff need not show actual malice when proving his case in the face of a \textit{Cahill} summary judgment motion).
\item \textsuperscript{171} See, \textit{e.g.}, Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007) (adopting a hybrid, three-step test in determining whether the defendant violated federal electronic communications law when an anonymous e-mail address, literally named theanonymousemail.com, allegedly intercepted the e-mail sent from the chief executive officer of Mobilisa, to a women with whom he was involved, without or in excess of authorization); Sony Music Entm't, Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (synthesizing elements from \textit{Seesand} and \textit{Dendrite} when the court required a showing of a prima facie claim, specificity of the discovery request, the absence of alternative means to retrieve the identifying information, a central need for the identifying information to advance the claim, and the balancing of the party's expectation to privacy).
\end{itemize}
\end{footnotesize}
strike a balance between the competing interests is resulting in a crazy quilt of tests\textsuperscript{172} and legal standards that “undercut[ ] one of the most cardinal values of the law—predictability.”\textsuperscript{173} This is problematic both because consistency and predictability are needed to help breed judicial legitimacy\textsuperscript{174} and because the fluid nature of the Internet cuts across state jurisdictions and thus conceivably could subject any single anonymous posting to different tests, depending on the choice-of-law rules of the jurisdiction where a case is filed.

The good faith test in \textit{America Online} marked an early effort, as Professor Ekstrand writes, “to establish important parameters regarding the evidence plaintiffs must submit before online anonymous identities are revealed.”\textsuperscript{175} It was quickly trumped by more protective standards because it created ambiguity as to the amount of evidence required\textsuperscript{176} and ignored the “possibility of a middle ground.”\textsuperscript{177} Attempting to reach this middle ground, the New Jersey court in \textit{Dendrite} endeavored to balance the strength of the prima facie case of defamation against the defendant’s right to anonymity.\textsuperscript{178}

The development of the prima-facie-plus-balancing test in \textit{Dendrite} provided, according to Professors Margo Reder and Christine O’Brien, an “excellent foundation for the developing jurisprudence of compelling identity disclosure of anonymous posters through pre-subpoena discovery and litigation.”\textsuperscript{179}

\begin{quote}
\textsuperscript{172} \textit{Legal Protections for Anonymous Speech,} CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/legal-guide/legal-protections-anonymous-speech (last visited Feb. 10, 2010) [hereinafter CMLP- Legal Protections] (explaining that the “tests or standards can be placed into roughly two categories: (1) high-burden tests and (2) low-burden tests.”).

\textsuperscript{173} Reder & O’Brien, \textit{supra} note 100, at 217. \textit{See also} Anthony Ciolli, \textit{Technology Policy, Internet Privacy and the Federal Rule of Civil Procedure}, 11 YALE J. L. & TECH. 176, 184 (2009), available at http://www.yjolt.org/files/-11-YJOLT-176.pdf (stating that “since the overwhelming majority of courts have still not developed precedent on this issue, the lack of a uniform standard creates unpredictability.”).


\textsuperscript{175} Ekstrand, \textit{supra} note 48, at 423.

\textsuperscript{176} CMLP-Legal Protections, \textit{supra} note 172.

\textsuperscript{177} Spencer, \textit{supra} note 10, at 507 discussing how the court’s rationale for fashioning such a lenient test rests on the false choice that the court posited: (1) that the First Amendment provides an absolute privilege for anonymous speakers, in which case state law could not protect against anonymous but tortious speech; (2) that John Doe will lose his anonymity even though a jury may later find that the statements were true or otherwise not actionable.

\textsuperscript{178} \textit{Dendrite}, 775 A.2d at 760-61.

\textsuperscript{179} Reder & O’Brien, \textit{supra} note 100, at 217.
compared to America Online or Cahill, the Dendrite test has gone a long way toward achieving a "balance between employees' speech and privacy rights, employers' reputational interests, and the necessity of compelling identity disclosure." Although the final balancing-of-the-interests prong established by Dendrite has been criticized for being overly protective of anonymous Internet speakers, a similar case applying the Dendrite standard proves that it does not inevitably preclude recovery when the plaintiff brings a valid claim. A key distinction among the tests is the inclusion or exclusion of a balancing-of-the-interests factor that was adopted by Dendrite, rejected by Cahill, and absent from America Online.

Noting the difficulties created by the prima-facie-plus-balancing test established in Dendrite, the Cahill court opted for a summary judgment standard under which a plaintiff seeking to unmask a Doe defamer "must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within the plaintiff's control." Gregg Leslie, legal defense director for the Reporters Committee for Freedom of the Press, agrees with the Cahill decision, asserting that an alternative, "good-faith standard is too low because there are many times when anonymous speech is justified . . . ." Robert O'Neil, founding director of the Thomas Jefferson Center for the Protection of Free Expression and former president of the University of Virginia, concurs, stating that he is "comfortable with setting a high standard given the value and interest in anonymous speech on the Internet." Why? Because, in part, he buys into the notion that "some of the great promise of the Internet as a democratizing, speech-enhancing medium does depend on some level of protection for the anonymous critic whether it be in the corporate context or the political context." Yet, conversely, Cahill also has been criticized for providing victims of anonymous defamation with "little grounds for recovery."

In comparison, Dendrite and Cahill bode well for the

180. Id.
181. Supra notes 125–26 and accompanying text.
185. Id. (quoting O'Neil).
186. Id.
187. See Malloy, supra note 44, at 1187-93 (discussing the strictness of the Cahill standard and how it affects defamation plaintiffs).
protection of online anonymous speakers and their Internet postings in balancing the equities and rights at issue. The more rigorous standards adopted by both of these courts seem to offer defendants better protection than *America Online* in standing up to corporate plaintiffs alleging defamation because, as Professor Lidsky wrote in her 2009 article, they require "some indicia that their suits are viable libel actions before the court will order disclosure of defendants' identities." Additionally, both *Dendrite* and *Cahill* require the plaintiff to make a reasonable effort to notify the defendant of the subpoena or discovery request, which the *America Online* court did not. According to attorney Shaun Spencer, this is particularly important since "merely attending a hearing would give away John Doe's identity if the plaintiff's representative would recognize him," and having time to find legal representation is essential to remaining anonymous.

In the end, no one can be confident whether a given court will apply a good-faith test, a motion-to-dismiss test, a summary judgment test, a balancing test or develop a completely new test. In weighing the balance between the interests of critics and corporations, the courts still have a long way to go before they arrive at a uniform standard. Yet recent court decisions demonstrate, as Professor Lidsky asserts, that the *Dendrite* test "appears to be gaining ground as the dominant standard" and judges' increasing "familiarity with Internet discourse makes for better legal decisions in John Doe cases."

With this in mind, the Article now turns to three 2009 cases and one 2008 case, each of which centers on the defamer-of-business-interests scenario, to illustrate the continuing ferment in this field of the law.

III. THE EVOLUTION OF UNMASKING STANDARDS IN 2009 AND 2008: WHEN BUSINESS INTERESTS ARE ATTACKED ANONYMOUSLY ONLINE

This part has six sections. The first four sections analyze judicial opinions from 2009 and 2008 in Tennessee, the District of Columbia, Maryland, and California involving anonymous online attacks affecting business interests. The fifth section then compares the unmasking standards adopted in these cases. Finally, the sixth section summarizes the findings and answers the three research questions framed in the Introduction. The

190. CMLP-Legal Protections, *supra* note 172.
192. *Id.* at 512 (explaining that "notice is futile if it does not afford John Doe a reasonable opportunity to find counsel and challenge the subpoena.").
194. *Id.* at 1381.
cases are in reverse chronological order.

A. The Tennessee Ruling: Swartz v. Does

In October 2009, Judge Thomas Brothers of the Sixth Circuit Court of Tennessee held that plaintiffs Donald and Terry Swartz, a husband-and-wife team involved in real estate transactions and operating facilities for recovering substance abusers, were entitled to unmask the identity of a Doe defendant who made disparaging statements jeopardizing their business interests on a blog called “Stop Swartz.” It marked the first time any Tennessee court faced such an Internet-based unmasking issue. After initially acknowledging that the First Amendment protects anonymous speech and recognizing that it is “a particularly important component of internet speech,” Judge Brothers began his own balancing of the interests by noting that such protection is not absolute. In determining the test that best strikes the interests between anonymity and compensating plaintiffs for injury, Judge Brothers, not surprisingly, classified the America Online standard discussed earlier in this Article as “among the weakest of the standards,” noting that it only requires the plaintiff to have a legitimate, good faith basis in a underlying claim before unmasking is permitted. He also rejected a motion to dismiss standard as confusing because motion to dismiss rules vary from jurisdiction to jurisdiction. In addition, Judge Brothers noted Cahill’s adoption of a summary judgment statement.

But the judge rejected these standards and, instead, glommed onto the Dendrite test, pointing out that a growing number of courts are following it, including the high court of Maryland in

196. See id. at 2 (noting the business activities of the plaintiffs and identifying the blog in question). Among the allegations were those of “improper management of rehabilitation facilities, exploitation of recovering substance abusers, [and] inferior construction work . . . .” Id. at 9.
197. See id. at 6 (writing that “this appears to be a case of first impression in Tennessee. The Court is not aware of any reported Tennessee case that addresses the issue of defamation and online anonymity.”).
198. Id. at 5.
199. Id.
200. Id. at 5-6.
201. Supra Part II, Section A and accompanying text.
202. Swartz, Memorandum and Opinion at 6-7.
203. Supra Part II, Section A.
204. Swartz, Memorandum and Opinion at 6-7.
205. Id. at 7 n.22.
206. Supra Part II, Section B.
207. Swartz, Memorandum and Opinion at 7.
the Brodie decision addressed later. He concluded that Dendrite provides “the best method of determining whether a plaintiff is entitled to pierce a defendant's shield of anonymity.”

Why did he decide this? Bowing to First Amendment concerns, he emphasized that under Dendrite, “mere allegations of fact are insufficient” to unmask an anonymous poster. He also seemed to find clarity in the Dendrite test, pointing out that rather than getting bogged down in potentially confusing terminology like prima facie and summary judgment, Dendrite focuses on “the requirement that a plaintiff make a substantial legal and factual showing that the claims have merit before permitting discovery of an anonymous defendant's identity.” Further beefing up protection for anonymous speech, the judge held that the plaintiffs must prove the elements via “affidavit, deposition, or sworn statement,” not merely by conclusory pleading. Judge Brothers broke the first Dendrite prong of notice-and-opportunity into two separate factors, thus defining the test as requiring, in order, the plaintiff to:

1. try to notify the anonymous Doe that he is being subpoenaed;
2. provide the Doe with a reasonable opportunity to respond and object to the revelation of his identity;
3. identify the exact statements made by the Doe that allegedly give rise to the Doe's civil liability for the underlying cause(s) of action; and
4. make a prima facie or a substantial showing of proof of each element of each cause of action.

The fifth and final prong of Dendrite, in Judge Brother's interpretation, requires the balancing of the First Amendment interests of a Doe's anonymous speech against the strength of a plaintiff's case and need for a Doe's identity. Perhaps the most interesting part of the judge's analysis here is his articulation of three factors for consideration on the final Dendrite balancing prong:

- the specificity, relevance, and materiality of the plaintiff's discovery request;
- the absence of alternative means to obtain the Doe's identity; and
- the extent and reasonableness of the Doe's expectation of
privacy.\textsuperscript{216}

Such specification of hard-and-fast factors that courts can latch on to, as it were, seems like an important step forward in eliminating some of the judicial guesswork in the \textit{Dendrite} balancing equation. Judge Brothers should be lauded for this, in the opinion of the authors.

Unfortunately for the Doe defendant in \textit{Swartz}, however, Judge Brothers found that the plaintiffs had overcome all of these hurdles. But in a significant move that will expedite appellate court review of the case and Tennessee's adoption of \textit{Dendrite}, Judge Brothers granted the Doe defendant's request for interlocutory review.\textsuperscript{217} In doing so, he pointed out the need for "the development of a uniform body of law" in this area.\textsuperscript{218} To put it bluntly and in relation to the title of this Article, Judge Brothers was concerned with the need for stabilization in the fermentation process.

\textbf{B. The D.C. Court of Appeals Ruling: Solers, Inc. v. Doe}\textsuperscript{219}

Just two months prior to the Tennessee court's ruling in \textit{Swartz}, the U.S. Court of Appeals for the District of Columbia handed down its opinion in \textit{Solers, Inc. v. Doe}.\textsuperscript{220} In this case, an anonymous tipster reported online\textsuperscript{221} to an industry trade association that Solers, Inc., a software and technology company,\textsuperscript{222} allegedly pirated software and engaged in other illegal activity.\textsuperscript{223} Solers claimed the allegations were false and defamatory and interfered with its business relationships.\textsuperscript{224} After convincing the trade association that the allegations were indeed false,\textsuperscript{225} Solers launched a lawsuit against the anonymous tipster and subpoenaed his identity.\textsuperscript{226}

The appellate court, in its August 2009 opinion, was faced with balancing the competing interests of the anonymous tipster and the corporation.\textsuperscript{227} Significantly, this was the first case in

\begin{itemize}
  \item \textsuperscript{216} \textit{Id.} at 11.
  \item \textsuperscript{217} \textit{Id.} at 12.
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} 977 A.2d 941 (D.C. Cir. 2009).
  \item \textsuperscript{220} \textit{Id.}
  \item \textsuperscript{221} \textit{Id.} at 945 (explaining that the Doe defendant used the "website reporting form" that is part of Software Information & Industry Association's (SIIA) "Corporate Anti-Piracy program" to provide information about Solers.").
  \item \textsuperscript{222} \textit{Id.} at 945.
  \item \textsuperscript{223} \textit{Id.} at 945.
  \item \textsuperscript{224} \textit{Id.} at 944.
  \item \textsuperscript{225} \textit{Id.} at 945 (explaining that a review of its computer systems "confirmed that Solers had violated no party's copyright.").
  \item \textsuperscript{226} \textit{Id.} at 946 (claiming the allegations also damaged Solers' "prospective advantageous business opportunities").
  \item \textsuperscript{227} \textit{Id.} at 951 (citation omitted) (specifying that a balance must be struck
\end{itemize}
which it had dealt with one-on-one communication involving online anonymous speech. Affirming the right of anonymous speech in matters of public concern, the court made clear "that speech over the Internet is entitled to First Amendment protection [and that] [t]his protection extends to some anonymous Internet speech."

In fashioning the "general framework" for a test the court would apply, Judge John Fisher wrote for a unanimous three-judge panel that the good faith standard adopted in America Online "insufficiently protect[ed] a defendant's anonymity," reasoning that both it "and the similarly lax motion to dismiss test may needlessly strip defendants of anonymity in situations where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity."

Turning to other standards, the appellate court found that "the important feature of Dendrite and Cahill is to emphasize that the plaintiff must do more than simply plead his case." Adopting Dendrite's final balancing prong, however, was unnecessary. Reasoning that a "one size [standard] does not necessarily fit all[,"] the court, therefore, adopted a test similar to Cahill, arguing that it "provides valuable flexibility" for courts in determining whether a subpoena should be enforced. The appellate court thus held that in Internet unmasking cases

"between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendant.").

228. Leo Rydzewski & Charles D. Tobin, District of Columbia Applies First Amendment Protections to Anonymous Internet Speech, MEDIA & COMMCNS (Holland & Knight, Wash., D.C.), Fall 2009, http://www.hklaw.com/id24660/PublicationId2767/ReturnId31/contentid54450 (observing that "with this decision, D.C. has joined a growing number of states that recognize First Amendment protections for anonymous Internet speech. The ruling is even more unique in that, while most of the other precedent arose out of chatroom environments, this matter involved a direct one-on-one communication.").

229. Solers, 977 A.2d at 950.
230. Id. (citing Cahill, 884 A.2d at 456).
231. Id. at 952 (stating that the Solers standard strikes a middle ground between previously applied tests).
232. Id.
233. Id.
234. Id. at 954.
235. Id. at 956. In siding with Cahill, the court in Solers held that "no balancing test is required because '[t]he summary judgment test is itself the balance.'" Id. (citing Cahill, 884 A.2d at 461. The court went on to write that "accordingly, a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously." Id. (citing Krinsky v. Doe No. 6, 159 Cal. App. 4th 1154, 1171-72 (2008)).
236. Solers, 977 A.2d at 952.
237. Id. at 954 n.10.
238. Id.
within its jurisdiction, courts must:

(1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit. We do not require a separate balancing test at the end of the analysis, nor do we require a showing that the plaintiff has exhausted alternative sources for learning the information.\(^{239}\)

In response to the court's decision, attorney David Johnson, who specializes in digital media litigation, wrote that the test adopted in Solers seemed to address "some of the criticisms leveled against the heavier standards on plaintiffs."\(^{240}\) Whereas other court-established tests require a plaintiff to "provide evidence for all elements of a defamation claim[,]"\(^{241}\) Johnson deemed the test adopted in Solers a "moderate test,"\(^{242}\) asserting that heavier standards implicate burdens that are nearly impossible for a plaintiff to satisfy.\(^{243}\)

Likewise, media defense attorney Charles Tobin, who argued on behalf of the trade association in Solers, told the authors of this Article, in exclusive e-mail correspondence, that the appellate court's ruling "provides important recognition of both the historic importance of anonymous speech in general and the proliferation of the Internet media as a primary means of communication."\(^{244}\) Tobin confirmed that the Solers court "appropriately recognize[d] the importance of preserving the First Amendment rights of critics and whistleblowers to remain anonymous on the internet."\(^{245}\) He also acknowledged the significant legal and social responsibility given to judges in allowing the Internet to flourish in a mode that is "vital to a healthy American democracy."\(^{246}\)

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239. Id. at 954.
241. Id.
242. Id.
243. Id.
244. E-mail from Charles D. "Chuck" Tobin, Partner, Holland & Knight LLP, to the authors (Oct. 14, 2009, 16:42:00 EST) [hereinafter Tobin E-mail] (on file with authors).
245. Id.
246. Id.
C. The Maryland Ruling: Independent Newspapers, Inc. v. Brodie

In February 2009, the Maryland Court of Appeals became only the second state high court to address the disclosure of names for comments posted in an Internet forum in Independent Newspapers, Inc. v. Brodie. In Brodie, the plaintiff alleged he was defamed on the “Centreville Eyesores” board by two discussion threads, one accusing him of destroying a historical landmark and the other concerning the cleanliness and maintenance of his Dunkin Donuts shop. Brodie argued that the owner of the board, Independent Newspapers, and three Doe defendants, known only by their usernames, were liable for defamation and conspiracy to defame.

The issue of first impression for the Maryland court involved “balancing an individual’s First Amendment right to speak anonymously on the Internet against a plaintiff’s right to seek judicial redress for defamation.” The Court made some important foundational observations in balancing these interests. Recognizing what it called the “magnitude of the protection of anonymous speech under the First Amendment,” the Court noted that “protections under the First Amendment have been extended to the Internet by various federal courts and courts in our sister states.” Weighing in on the First Amendment side of the equation, and with an apparent eye out for the type of cyberSLAPPs discussed earlier in this Article, the court observed that “posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity.”

247. 966 A.2d 432 (Md. 2009).
248. Id.
249. Id. at 443.
250. Id. In the posting, the pseudonymous poster, CorsicaRiver, wrote:
   I think there must be a special circle in Hell reserved for a greedy selfish developer who deliberately burns down a beautiful pre-Civil War house, after cutting down all the 100-year-old cypress trees around it. A really hot circle of Hell, where they do nasty things to you with nail guns and hot asphalt.
   Id.
251. Id. at 446. One comment stated, “I wouldn’t go to that Dunkin’ Donuts . . . anyway . . . have you taken a close look at it lately? One . . . most dirty and unsanitary-looking food-service places I . . . seen.” Id.
252. Id. at 442.
253. Id. at 447.
254. Id. at 441 (citing Lubin v. Agora, Inc., 882 A.2d 833, 836 (2005), which involved a suit in which the court denied a motion to enforce a subpoena aimed at compelling Agora’s newsletter subscriber list).
255. Id. at 442.
256. Supra notes 10–14 and accompanying text.
257. Brodie, 966 A.2d at 449.
balanced this against the recognition that anonymity of speech “is not absolute and may be limited by defamation considerations.”  

To establish a proper standard balancing these interests, the court proposed a five-prong test that tips the scales in favor of a *Dendrite*-like approach. Wary of setting the bar too low or too high, the Court that it felt was “mindful of the features of Internet dialogue that increase the potential for damage to persons who are the subject of these communications.” The *Brodie* court thus created a five-part test that mandates a trial court judge to:

(1) require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board; (2) withhold action to afford the anonymous posters a reasonable opportunity to file and serve opposition to the application; (3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech; (4) determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters; and (5), if all else is satisfied, balance the anonymous poster’s First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity, prior to ordering disclosure.

Sam Bayard, assistant director of the Citizen Media Law Project at Harvard Law School, asserts that, taken together, this and other recent state court cases demonstrate a convergence of law surrounding the right to online anonymity. According to Bayard, the test established in *Brodie* illustrates that “courts are going to require the plaintiff or others seeking identities to make a heightened showing that they have a valid cause of action.” Professor Lidsky agreed with this sentiment in her 2009 law

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258. *Id.* at 441 (citation omitted).
259. *966 A.2d* at 456 (citing *America Online*’s good faith test). The court noted that doing this could “inhibit the use of the Internet as a marketplace of ideas . . . .” *Id.* *See supra* Part II, Section A and accompanying text (analyzing *America Online*).
260. *966 A.2d* at 456 (citing to *Cahill*’s summary judgment test). The court feared that doing so would “undermine personal accountability and the search for truth, by requiring claimants to essentially prove their case before knowing who the commentator was.” *Id.* at 456-57. *See supra* Part II, Section C and accompanying text (analyzing *Cahill*).

261. *966 A.2d* at 457.
262. *Id.*
263. Aaron C. Davis, *Media Need Not Reveal Web Posters’ Identities; Ruling Applies 1st Amendment to Internet*, WASH. POST, Feb. 28, 2009, at B08 (quoting Bayard).
264. *Id.*
review article, writing that the standard adopted in *Brodie*—established by the court in *Dendrite*—"appears to be gaining ground as the dominant standard."265

Despite this growing convergence, some have expressed dislike for the standard adopted by *Brodie*. Judge Sally Adkins, in fact, wrote a concurring opinion in *Brodie* calling the final balancing element in the *Brodie* test "unnecessary and needlessly complicated."266 Agreeing with this sentiment but for different reasons, University of Maryland Professor Danielle Citron argues that "the majority's balancing test provides insufficient First Amendment protection for the anonymous commenters on the Internet."267

D. The California Ruling: *Krinsky v. Doe* 6268

In February 2008, a California appellate court issued an opinion giving strong protection for anonymous Internet speakers when it prevented the discovery of an unknown defendant's identity in *Krinsky v. Doe* 6269. In this case, a pseudonymous poster made disparaging comments about Lisa Krinsky, a high-ranking corporate officer of a Florida company.270 The comments "devolved into scathing verbal attacks"271 on a Yahoo! financial message board that the trial court judge suggested were made to drive down the price of Krinsky's company and to manipulate its stock price, as one posting stated that the management of Krinsky's company consisted "of boobs, losers and crooks."272 After accusing the Doe defendant of defamation and intentional interference with a contractual and/or business employment relationship,273 Krinsky subpoenaed the message-board host, which Doe 6, in turn, attempted to quash.274

The California Appellate Court faced what it dubbed the difficult task of "weighing Doe 6's First Amendment right to speak anonymously against plaintiff's interest in discovering his identity in order to pursue her claim."275 It emphasized that the "use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views,

265. Lidksy, supra note 158, at 1378.
266. *Brodie*, 966 A.2d at 458 (Adkins, J., concurring).
269. *Id.*
270. *Id.* at 1158-59.
271. *Id.* at 1158.
272. *Id.* at 1159-60.
273. *Id.*
274. *Id.* at 1160.
275. *Id.* at 1165.
or criticize corporate or individual behavior without fear of intimidation or reprisal."276 The court nonetheless pointed out that any complete or absolute expectation of anonymity online simply is meritless, as "no one is truly anonymous on the Internet, even with the use of a pseudonym. Yahoo! warns users of its message boards that their identities can be traced, and that it will reveal their identifying information when legally compelled to do so."277

With the realities of Internet speech in mind, Judge Franklin D. Elia, writing for a three-judge panel, found it "unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet."278 He reasoned that different jurisdictions have different standards for such motions,279 a problem noted earlier in this Article.280

The court's focus on the medium in which the comments were posted in Krinsky, rather than the label of the test, perhaps paved the way for the more recent cases discussed above. By applying a test that "functions a lot like the Cahill test,"281 the court made clear the requirement of bringing forth a sufficient showing to prove a prima facie claim.282 Yet, the court demonstrated its understanding of the realities of the Internet when it allowed for an exception—or perhaps a "softening of the test for elements"283—of that which was beyond the plaintiff's control.284 It is perhaps for this reason that Nathaniel Gleicher describes the Krinsky test as a Dendrite-Cahill blend.285 In particular, the Krinsky test:

1. adopts Cahill's initial notice prong, 286 but modifies it by

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276. Id. at 1162.
277. Id.
278. Id. at 1170.
279. Id.
280. See supra note 116 and accompanying text (discussing the ambiguity of the meaning of prima facie).
283. Bayard, supra note 281.
285. Gleicher, supra note 119, at 342-43 (arguing that the court "endorsed a Dendrite-Cahill standard" when it "returned instead to the Dendrite terminology," by requiring that the plaintiff "make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity . . . .") (quoting Krinsky, 159 Cal. App. 4th at 1171).
286. See Krinsky, 159 Cal. App. 4th at 1171 (writing that "we agree with the Delaware Supreme Court that the first requirement, an attempt to notify the defendant, does not appear to be unduly burdensome").
pointing out that “it would be unrealistic and unprofitable to insist”\(^\text{287}\) in the posting of such a notice on the same message board where the allegedly defamatory statement was made “when ISP’s and message-board sponsors (such as Yahoo!) themselves notify the defendant that disclosure of his or her identity is sought, notification by the plaintiff should not be necessary”\(^\text{288}\).

2. employs the prima facie showing of the elements prong from *Dendrite*\(^\text{289}\) such that there must be a “factual and legal basis”\(^\text{290}\) as set forth by evidence from the plaintiff that the underlying cause of action exists;

3. requires it to be clear to the court that discovery of the defendant’s identity is necessary to pursue the plaintiff’s claim; and

4. rejects the *Dendrite* balancing prong.\(^\text{291}\)

Applying this test to the facts of the case, the appellate court found that Krinsky had failed to make a prima facie case for either of her two causes of action, noting the statements simply were not assertions of fact.\(^\text{292}\)

Professor Lidsky observes that the judicial interpretation of anonymous speech in *Krinsky* illustrates that the courts are “(1) craft[ing] new legal doctrines to protect anonymous speech, and (2) adapt[ing] existing First Amendment protections to hyperbole, satire and other ‘non-factual’ speech to protect the distinctive discourse of message boards.”\(^\text{293}\) She asserts that “where a court less well versed in Internet culture might have seen invective unworthy of protection, the *Krinsky* court appreciated both the value of financial message boards as a forum for ordinary John Does to discuss corporate affairs and the distinctive nature of discourse on those boards.”\(^\text{294}\) As boiled down by attorney and lecturer in law at Yale University, Victoria A. Cundiff, the fact that some employees think their supervisor is a “jerk” and communicate that viewpoint online is “hardly a trade secret,”\(^\text{295}\) or in this case, a breach of an employee/business contractual

\(^{287}\) *Id.*

\(^{288}\) *Id.*

\(^{289}\) *Id.* at 1172 (writing that “we therefore agree with those courts that have compelled the plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant’s motion to quash a subpoena seeking his or her identity.”).

\(^{290}\) *Id.*

\(^{291}\) *See id.* (holding that “a further balancing of interests should not be necessary to overcome the defendant’s constitutional right to speak anonymously.”).

\(^{292}\) *Id.* at 1179.

\(^{293}\) Lidsky, *supra* note 158, at 1384.

\(^{294}\) *Id.*

agreement.

In summary, in each of the four cases discussed in Part III, judicial acknowledgement of the Internet as a primary means of communication perhaps demonstrates that courts are "engrafting time-tested protections to the emerging forms of media." The accumulation of rules applied in these four cases suggests that the law is striving to keep up with new technology and timely issues.

With this in mind, this Article now compares the unmasking tests fashioned in the 2009 and 2008 opinions with the earlier standards established by the trio of anonymous-defamer decisions—America Online, Dendrite, and Cahill—to determine how the unmasking standards for anonymous speech on the Internet are evolving. For purposes of helping readers to better understand the differences across the four current cases, the authors have created a table in the next section illustrating the points of similarity and contention across the quartet of cases.

E. Comparison of the 2009 and 2008 Standards

The table below identifies six possible factors/prongs in unmasking tests, running down the left side, and the four different cases running horizontally on the top.

TABLE 1. ELEMENTS ADOPTED OR REJECTED BY COURTS IN 2009/2008 BUSINESS INTERESTS CASES

<table>
<thead>
<tr>
<th>FACTORS/PRONGS</th>
<th>SWARTZ</th>
<th>SOLERS</th>
<th>BRODIE</th>
<th>KRINSKY</th>
</tr>
</thead>
<tbody>
<tr>
<td>GOOD FAITH</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
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<td>NOTICE</td>
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<td>X</td>
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</tr>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>BALANCING OF THE INTERESTS</td>
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<td>No</td>
<td>X</td>
<td>No</td>
</tr>
</tbody>
</table>

'X' indicates an adopted element, while 'No' indicates an element that was considered and rejected.

296. Tobin E-mail, supra note 244.
297. 52 Va. Cir. 26 (2000).
299. 884 A.2d 451 (Del. 2005).
1. **Good Faith**

When deciding whether to unmask an anonymous speaker in an Internet defamation claim, courts must ensure the standard(s) are akin to Goldilocks' porridge—not too hot and not too cold, but just right. All four of the 2009 and 2008 opinions discussed above found the good-faith test from *America Online* too cold, as it were, and rejected it.\(^\text{300}\) *Krinsky*, for instance, classified the good-faith standard as being "too easily satisfied,"\(^\text{301}\) reasoning that it did "not offer a practical or reliable way to determine a plaintiff's good faith leaving the speaker with no protection."\(^\text{302}\) *Brodie* called it "perhaps the weakest"\(^\text{303}\) protection for the First Amendment interests. *Solers* warned that the test "may needlessly strip defendants of anonymity in situations where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity."\(^\text{304}\)

2. **Notice**

All four 2009 and 2008 cases required the plaintiffs to attempt to notify anonymous posters before allowing a court-ordered revelation of identity, but the language used to define notice varied. *Krinsky* defined notice simply as "an attempt to notify the defendant,\(^\text{305}\) while *Solers* required that "reasonable efforts are made to notify the defendant that the subpoena has been served."\(^\text{306}\) But *Solers* noted that most cases distilled a common theme: "to provide . . . notice, usually by posting it in the same manner in which the allegedly defamatory statement was published."\(^\text{307}\)

There are two ways, however, in which notice to a Doe poster may be issued:

- *through a plaintiff*; or
- *through an Internet Service Provider that has received a subpoena.*

In the first scenario, the plaintiff must take efforts to notify anonymous posters of a subpoena, including, but not limited to, posting a message on the ISP's pertinent message board, as set forth in *Dendrite*.\(^\text{308}\) However, *Krinsky* recognized that the

\(^{300}.\) See supra note 259.


\(^{302}.\) Id. at 1167.

\(^{303}.\) *Brodie*, 966 A.2d at 451.

\(^{304}.\) *Solers*, 977 A.2d at 952.

\(^{305}.\) *Krinsky*, 159 Cal. App. 4th at 1171 (adding that this attempt was not "unduly burdensome").

\(^{306}.\) *Solers*, 977 A.2d at 954.

\(^{307}.\) Id. at 954 (citing *Cahill*).

\(^{308}.\) *Dendrite*, 775 A.2d at 760.
message board, chat room or other forum may no longer exist when a lawsuit is filed, thus making it “unrealistic and unprofitable” \(^{309}\) for the plaintiff to notify the Doe defendant. Therefore, the second way in which notice can be fulfilled is if “ISPs . . . themselves notify the defendant that disclosure of his or her identity is sought.”\(^{310}\) In this scenario, the requirement of notification by the plaintiff is lifted and shifted, for example, to Yahoo! or Google once they are subpoenaed.

Swartz acknowledged that “notice provided through Google was sufficient notice to enable . . . Doe . . . to challenge the request for pre-service discovery.”\(^{311}\) Finally, it is important to note that in all of these cases, no judge proposed other possible methods that might be used to notify anonymous posters of impending subpoenas. This failure to provide judicial guidance regarding alternative mechanisms for notice is problematic for those who are defamed online.

Although Krinsky specified where and how notification is made, Brodie and Solers interpreted the notification requirement in broader terms. \(^{312}\) Brodie held while notice should give plaintiffs a reasonable opportunity to oppose subpoenas, it did not specify where notice should occur. Solers acknowledged that “many courts have required the plaintiff to provide this notice,”\(^{313}\) but nonetheless shifted responsibility to the trial court “to determine in the circumstances of each case who should notify the anonymous defendant of the efforts to discover his identity.”\(^{314}\)

Whether future courts interpret notification according to the facts of each individual case (as the Brodie and Solers courts did), or specify details, such as who notifies the anonymous poster (as the Swartz court did) or where notification takes place (as the Krinsky court did), the notice requirement is generally accepted across jurisdictions. It appears to be sufficiently clarified such that the most recent case, the October 2009 ruling in Swartz, no longer adds clarifying language to the notice requirement.\(^{315}\) It, instead, strictly adhered to one standard, Dendrite.\(^{316}\)

3. Opportunity

The quartet of 2009 and 2008 opinions recognized that the

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310. Id.
311. Swartz, Memorandum and Opinion at 8.
312. Brodie, 966 A.2d at 445.
313. Solers, 977 A.2d at 954.
314. Id. at 955.
315. See Swartz, Memorandum and Opinion at 8 (stating that “the Dendrite test is the best method”).
316. Id.
elements of notice and opportunity are intertwined. In *Brodie*, notification gave anonymous posters the opportunity "to oppose the discovery request." Likewise, *Krinsky* required a "reasonable time" for a Doe to take action, while *Solers* similarly called for a "reasonable opportunity" to quash a subpoena. In brief, all four courts emphasized a reasonability of time to halt subpoenas, regardless of whether they more closely followed *Dendrite's* or *Cahill's* notice provision.

4. **Specificity**

In a commonly adopted prong of the *Dendrite* standard, courts in the four cases ruled that plaintiffs must state the alleged defamatory statements with specificity. Borrowing from *Dendrite*, both *Brodie* and *Swartz* required the plaintiff to identify and set forth the **exact** statements purportedly made by an anonymous poster. Although *Krinsky* adopted a hybrid of the *Cahill* and *Dendrite* standards, it simply stated that the "plaintiff must . . . set forth the specific statements that are alleged to be actionable." Significantly for defamation claims, this mandate for specificity brings a more thorough examination of the evidence: "the court must consider all of the words used, not merely a particular phrase or sentence." The recent decisions, thus, set apart an important element among varying standards for anonymous Internet defamation cases.

5. **Prima Facie Showing of Evidence**

In each of the recent decisions, the courts held that a business-oriented plaintiff filing a defamation suit must set forth a prima facie showing that a cause of action for defamation exists. But rather than get mired in the potentially confusing procedural labels such as summary judgment or prima facie, they also

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317. *See infra* notes 317-321 and accompanying text.
322. *See supra* notes 22-24 and accompanying text.
325. *Id.* at 1175 (quoting Hoch v. Rissman, 742 So. 2d 451, 460 (Fla. Dist. Ct. App. 1999)).
326. *Swartz*, Memorandum and Opinion at 9; *Solers*, 977 A.2d at 954; *Brodie*, 966 A.2d at 457; *Krinsky*, 159 Cal. App. 4th at 1154.
327. *Swartz*, Memorandum and Opinion at 8; *Solers*, 977 A.2d 941 at 954 (stating that "procedural labels such as *prima facie* or *summary judgment* may prove misleading, but the test we now adopt closely resembles the *summary judgment* standard articulated in *Cahill.*"); *Krinsky*, 159 Cal. App. 4th at 1170 (stating that "we find it unnecessary and potentially confusing to
focused on the requirement in Swartz called a "substantial legal and factual showing"\textsuperscript{328} that the claims have merit before permitting discovery of an anonymous defendant's identity. As noted in Krinsky, "requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism,"\textsuperscript{330} suggesting the dangers of cyberSLAPP cases discussed earlier.\textsuperscript{331}

Although the courts all agreed that a plaintiff must make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity, the Solers court added a layer of language that closely resembled the Cahill court's decision when it required "the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control . . ."\textsuperscript{332} In other words, this meant the court would apply a summary judgment standard. The only other court of the more recent cases to use similar language was Krinsky, when it wrote that "a plaintiff need produce evidence of only those material facts that are accessible to her."\textsuperscript{333} Whether the court applied a summary judgment or prima facie showing, the important feature of the 2009 and 2009 decisions, however, is that they emphasized the plaintiff's role in doing "more than simply plead his case,"\textsuperscript{334} as did Dendrite and Cahill.\textsuperscript{335}

6. Balancing-of-the-Interests Prong: The Sticking Point Among the Courts

Although the trio of judicial decisions in 2009 and the Krinsky 2008 opinion acknowledged the requirement of a prima facie showing,\textsuperscript{336} they divided on whether or not to adopt the balancing-of-the-interests prong adopted in Dendrite.\textsuperscript{337} Solers and Krinsky rejected outright the need for a separate balancing test,\textsuperscript{338} arguing

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\textsuperscript{328} Swartz, Memorandum and Opinion at 8.
\textsuperscript{329} Id.
\textsuperscript{330} Krinsky, 159 Cal. App. 4th at 1171. It added that "even the decisions imposing a motion-to-dismiss obligation nonetheless require some showing that the tort took place." Id.
\textsuperscript{331} See supra notes 10–14 and accompanying text (addressing cyberSLAPPs).
\textsuperscript{332} Solers, 977 A.2d at 954 (emphasis added).
\textsuperscript{333} Krinsky, 159 Cal. App. 4th at 1172 (emphasis added).
\textsuperscript{334} Solers, 977 A.2d at 954.
\textsuperscript{335} Id.
\textsuperscript{336} Krinsky, 159 Cal. App. 4th at 1171.
\textsuperscript{337} Dendrite, 775 A.2d at 760-61.
\textsuperscript{338} Krinsky, 159 Cal. App. 4th at 1172 (stating that "[a]ccordingly, a further balancing of interests should not be necessary to overcome the
it was unnecessary because a summary judgment test itself provides balancing. Judge Elia, opining in *Krinsky*, reasoned that “a further balancing of interests should not be necessary to overcome the defendant’s constitutional right to speak anonymously.” Judge Fisher, writing in *Solers*, contended a separate balancing-of-the-interests prong was unnecessary “to overcome the defendant’s constitutional right to speak anonymously.”

On the other hand, *Brodie* and *Swartz* followed what the authors consider a wholesale adoption of the separate balancing test established in *Dendrite* requiring courts, as *Swartz* put it, “to balance the strength of plaintiffs’ claims against the First Amendment concerns of defendant.” As contended by Judge Battaglia in *Brodie*, the separate balancing prong “most appropriately balances a speaker’s constitutional right to anonymous Internet speech with a plaintiff’s right to seek judicial redress from defamatory remarks.” According to Judge Brothers in *Swartz*, this method offers what he considers to be the “best method of determining whether a plaintiff is entitled to pierce a defendant’s shield of anonymity.”

The *Swartz* court, however, went one step further when it enunciated three factors, as spelled out in Section A, that should be considered by courts in applying the final *Dendrite* balancing prong, namely the: (a) specificity, relevance and materiality of the plaintiff’s discovery request; (b) absence of alternative means to obtain the Doe’s identity; and (c) extent and reasonableness of the Doe’s expectation of privacy.

**F. Resolution of the Research Questions**

In summary, then, and in answer to the trio of research issues, it was unnecessary because a summary judgment test itself provides balancing. Judge Elia, opining in *Krinsky*, reasoned that “a further balancing of interests should not be necessary to overcome the defendant’s constitutional right to speak anonymously.” Judge Fisher, writing in *Solers*, contended a separate balancing-of-the-interests prong was unnecessary “to overcome the defendant’s constitutional right to speak anonymously.”

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questions at the heart of this Article, four key generalizations are revealed from the quartet of 2009/2008 cases analyzed above:

1. The America Online good-faith test is being squarely rejected because it provides too little protection for the First Amendment speech interests of anonymous posters.

2. There is general agreement that both efforts to notify the Doe and a reasonable opportunity for the Doe to respond must occur before judicial revelation of the Doe's identity is compelled, but the nuances of the notice and opportunity requirements vary slightly from court to court.

3. There is growing concern that slapping on labels like motion to dismiss, prima facie or summary judgment to the standards applied obfuscates judicial analysis, as courts seem now to be more concerned with spelling out the precise pleading and evidentiary burdens the plaintiff must satisfy, regardless of their assigned label.

4. There is fundamental disagreement about the necessity of the Dendrite balancing-of-the-interests prong, with two of the four courts adopting and the other two rejecting it.

The bottom line is that there now appears to be stabilization in the judicial fermentation process on unmasking standards, with, to make an enological metaphor, a few more years in the judicial barrel probably necessary to produce a test that is palatable for all sides in unmasking cases.

CONCLUSION

Ultimately, all of the issues addressed in this Article could be avoided if an Internet service provider voluntarily releases to a requester the identity of an anonymous poster. But such a disclosure-upon-request policy would shatter any remaining illusions or expectations of privacy and anonymity, thus chilling speech on the Internet, allowing potential cyberSLAPPs to proliferate and destroying the possibility of an unfettered marketplace of ideas. AOL thus posts a policy on its website providing that:

Upon receipt of a valid subpoena, it is AOL's policy to promptly send notification to the account holder whose information is sought. AOL will not produce the subpoenaed account holder information until 10 days after the account holder has been notified, so that the account holder whose information is sought will have adequate opportunity to take appropriate legal action, should the account holder wish to do so. AOL will issue invoices for the costs associated with subpoena compliance.348

347. See supra INTRODUCTION.
This policy provides an account holder with an opportunity to make a motion to quash the subpoena, in line with AOL's stated commitment "to protecting the privacy of its account holders."349

Having answered in Part III, Section F the three research questions posed in the Introduction, the authors use the Conclusion to suggest an avenue for future research on the unmasking issue. Rather than continuing to focus on the evolution of judicial standards or proposing new unmasking standards, a new direction that might prove useful for courts is the formulation and creation of a rubric or formula for determining which of the current standards that seem to be gaining judicial acceptance—namely, variations of either Cahill or Dendrite, with America Online falling out of favor—is most appropriate to apply in any given case.

In other words, if we assume that courts today are likely to choose from among variations of Dendrite, Cahill and, albeit rarely, America Online, then legal research here could take a step backwards, as it were, and focus on the antecedent task of creating a framework that would help a judge to choose the most appropriate test to apply in the specific situation before her. Why not recognize that the existence of multiple standards is okay and that courts should have the opportunity to choose from among them, rather than be bound to blindly follow one? Libel law, after all, has embraced different fault standards for different scenarios,350 reflecting what might be considered a continuum from least protective of free speech interests (strict liability) to most protective of First Amendment concerns (actual malice).351 Criminal and civil law apply different burdens of proof before the prosecution or plaintiff can prove its case.352

If there is nothing wrong with having different unmasking standards from which judges can choose, then it becomes

aolpol/civilsubpoena.html (last visited Feb. 12, 2010).
349. Id.
352. See generally C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 VAND. L. REV. 1293 (1982) (describing the differences between the "beyond a reasonable doubt" and "preponderance of the evidence" standards that apply, respectively, in criminal and civil cases); Gregory F. Parisi, Trial: Proof Issues, 86 GEO. L.J. 1732 (1998) (analyzing the "beyond a reasonable doubt" standard that applies in criminal cases).
necessary to develop a framework or rubric for helping courts to pick the appropriate test in a given case.

In some cases, such as those involving anonymous personal attacks on one's sexuality such as Liskula Cohen,\textsuperscript{353} it would seem that the First Amendment interests are relatively less important to protect than in those scenarios involving anonymous revelations about a business's supposed wrongdoings that could affect the wellbeing and interests of many people. The weak \textit{America Online} standard actually might be appropriate for a Cohen-like case, but not for the latter situation.

In 2007, law student Ryan Martin argued "that courts should develop different standards for unmasking anonymous internet speakers depending on whether the speech at issue is of a political or non-political nature."\textsuperscript{354} We now know, of course, that different standards have indeed developed, with some being more protective of speech than others. But rather than deciding which standard best fits based upon whether or not the speech is political—defining what is or is not political speech is not a straightforward task, to begin with\textsuperscript{355}—it might be more helpful to develop a battery of factors or criteria that courts can apply in a totality-of-the-circumstances approach to choose the most appropriate test.

For instance, questions that seem relevant for resolution in determining what standard to apply might include:

- \textit{Who is seeking the information?} A private individual, a public figure, a political figure, a large corporation, a non-profit charitable enterprise, etc.?

- \textit{What is the information about?} An individual's personal life, a corporation's alleged business wrongdoings, a child's alleged actions with another child, an adult's actions with a child, the financial dealings of a couple going through a divorce, etc.?

- \textit{Why is the information being sought?} To redress injury: to an individual's reputation, to a corporation's reputation, to an individual's emotional tranquility, for interfering with a corporation's business interests, etc.? To harass a speaker and to chill expression?

- \textit{From whom is the information being sought?} A newspaper that operates a website, a social-networking site like Facebook, a personal blog like that in Liskula Cohen's case, a major online service provider, a search engine like Google, etc.?

Depending upon the answers to such questions and the

\textsuperscript{353} Supra note 22 and accompanying text.

\textsuperscript{354} Martin, supra note 104, at 1218.

\textsuperscript{355} Cf. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 15 (1992) (observing that "the self-governance theory proves incapable of supporting a principled limitation to conventional 'political' speech, because in modern life it is virtually impossible to identify any topic that might not bear some relation to self-governance.").
multiple variations of scenarios to which they lead, there may or may not be a need to apply a tough unmasking standard. It is this seam of research that the authors of this Article will mine in future articles.

In the meantime, this Article found stabilization occurring in 2009 in the formulation of unmasking standards in the defamation-of-business-interests scenario, with courts still splitting on whether or not a separate balancing-of-the-interests prong should be included in any unmasking determination. The Swartz court’s proposal of three factors in October 2009 that courts should take into account when adopting such a balancing is a step forward in that it helps to provide more structure to the balancing decision.