Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Interest Speakers Extend

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The first post about Jane Doe II went up on the AutoAdmit.com website in late January 2007. The message linked to a picture of the Yale law student and encouraged other posters to “Rate this HUGE breasted cheerful big tit girl from YLS.” A flood of hateful speech directed at her quickly followed. Doe II was not alone; she was one of several people who became objects of derision on the AutoAdmit site, an internet message board frequented by law students and prospective law students from around the country that draws as many as one million visitors a month. However, the posts about her were particularly vicious.

AutoAdmit was, at the time, a forum with no moderator. It was a place where any user could leave or respond to a simple text message, where the owner recorded little information about his site’s users, and where nearly anything could be posted with impunity. The only

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2. Id.
3. Id.
4. Id.
6. See id. The description of the site is given in past-tense because in early 2009, the site’s owner, Jared Cohen, began enforcing minor content restrictions geared to clean up racist material and spam. He assigned moderators to remove objectionable material. Id.
requirement to leave a message was that a user had to register a username and password, providing an email address for verification. The email address and password used for registration were the only pieces of information about the user that AutoAdmit's owner kept. With the ease of obtaining web-based email addresses from the internet, it was not particularly difficult for users to register with a fictitious email and have a degree of anonymity.

That initial post about Doe II, while crude, would turn out to be tame. Often the posts described users' desires to perform sexual acts on Doe II and claims that she had incestuous desires. Several revealed personal information about Doe II. An email outlining her father's felony conviction was sent directly to Doe II and at least one faculty member at Yale Law School. She unsuccessfully requested that the website administrators remove the content. Then Doe II, joined by a classmate who had also been discussed on the site, Jane Doe I, filed a defamation, invasion of privacy and copyright infringement lawsuit in the U.S. District Court for the District of Connecticut against more than forty of the anonymous posters. Soon, Judge Christopher F. Droney was grappling with a question that courts across the country would come

8. See Margolick, supra note 5. One poster, who called himself Vincimus, had this to say about Doe II: "Anyone who goes to the gym in the afternoon has seen her trapping [sic] around in spandex booty shorts and a strappy tank top." Id. Another poster, using the handle Cheese Eating Surrender Monkey followed with "Take your goddamned cell phone next time and snap a pic, for Chrissakes." Id. Jane Doe I faced similar slurs. In 2005, shortly after she graduated from Stanford, she became an object of derision on the site. A poster named neoprag said "I'll force myself on her, most definitely... I think I will sodomize her. Repeatedly." Id. Another user of the site, whose handle is :D, replied: "Just don't fuck her, she has herpes." Id.
10. The website essentially had two operators. See Margolick, supra note 5. Jarret Cohen, an insurance salesman, owned it. Anthony Ciolli, a University of Pennsylvania law student, held the title of "Chief Education Director" and contributed articles to the site. Id. The women appealed to Ciolli, because he was a regular poster and his identity was widely known to board users, to remove the objectionable content. Id. But Ciolli said he did not have the ability to do that, only Cohen could, and that he forwarded their complaints on to Cohen. Cohen, the site owner, had essentially abandoned it and did not remove the content. Id.
11. Id.
to face with increasing frequency: when should courts pierce the veil of anonymity so that plaintiffs can sue anonymous internet detractors?  

This Note will examine how courts, including Droney's, are balancing First Amendment rights to anonymous internet speech against plaintiffs' rights to discovery in civil actions. There has yet to be guidance from a federal appellate court on the issue, with a variety of tests developing primarily in district courts, intermediate state courts and three state supreme courts. The issue is arising in courts across the country as internet interactivity proliferates, with many newspapers allowing comments below stories on their websites, message boards devoted to nearly every topic, and the numbers of blogs exploding. By one estimate, there were fifty million blogs on the internet by the end of July 2006.

Anonymity has a long history in American discourse. Most famously, perhaps, Alexander Hamilton, John Jay and James Madison published eighty-five essays known as "The Federalist Papers" under the pseudonym "Publius." The essays, printed in newspapers in 1787, were intended to persuade New Yorkers to support ratification of the new Constitution. The Supreme Court has repeatedly held that anonymous speech is a First Amendment right.

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12. Doe I, 561 F. Supp. 2d at 252-57. Judge Droney ruled against withholding the identity of John Doe 21, who posted under the pseudonym "AK47", even though the internet service provider (ISP) had already given his identity to the plaintiffs. Droney eschewed the tests which have developed in other jurisdictions and which will be discussed infra in the text accompanying notes 99-101. He used his own test. It did not balance the anonymous speaker's First Amendment rights against plaintiff's right to proceed, nor did it require a strong showing of evidence to make a prima facie claim.


16. See generally McIntyre, 514 U.S. at 364-75 (showing several examples of different North Eastern cities printing the Federalist Papers in 1787).

17. See generally McIntyre, 514 U.S. at 341-343.
First Amendment. The Court has also ruled that the right to assemble includes a right to do so anonymously, in that other group members may know one’s identity but the group should not be compelled to reveal its members’ identities. In Reno v. ACLU, the Supreme Court ruled that First Amendment protections indeed carry over to the internet when the court invalidated a portion of the Communications Decency Act of 1996 because it was not sufficiently narrow to prevent restrictions on protected speech.

Yet, despite all these protections, “the right to speak anonymously . . . is not absolute.” It does not always cover defamatory speech. And when people choose to use potentially defamatory language on the internet, either anonymously or pseudonymously, this First Amendment right of anonymous speech collides with a plaintiff’s right to seek damages for false accusations leveled against him or her. It is difficult to speak anonymously in electronic communication without leaving a small piece of identifying information behind—in the case of internet speech it is the speaker’s internet protocol (IP) address, which is unique to each user. The address can be masked, but often people who speak anonymously on the internet are unaware they are leaving a digital fingerprint behind and fail to cover their tracks.

To communicate with each other, every computer needs a unique IP address, which is typically assigned by an individual’s internet service provider, such as Time-Warner Cable, Verizon DSL, or a university computer networking office. Armed with an IP address and a

18. Id. at 342.
22. See Reno, 521 U.S. at 870.
24. Id.
26. See SOLOVE, supra note 14, at 147.
27. Id.
court order, a plaintiff can then subpoena the identity of the person who has been assigned the IP address. As long as the IP address is not shared, such as at a public coffeehouse with no security measures, then the plaintiff has identified the anonymous speaker.

The result is that most anonymous speech on the internet is not truly anonymous. In fact, the speaker's identity can be uncovered by piecing together information logged by third parties through which the communication passed. Courts are routinely facing this dilemma: When, and by what standard, should the veil of anonymity be lifted?

Essentially four competing tests have developed in the previous eight years: the good faith standard, a balancing test, the summary judgment standard and the motion to dismiss standard.

THE GOOD FAITH STANDARD

The first test to gain favor was the so-called "good faith" standard, which was a low bar. Through In re Subpoena Duces Tecum to America Online, Inc., the court provided a three part test: First, the party seeking the information must satisfy the court through pleadings or evidence; Second, it has a "legitimate, good faith basis to contend" it is the victim of actionable conduct; Third, the subpoenaed identity information must be centrally needed to advance that claim.

The court used this standard to allow the plaintiff in that case, "Anonymous Publicly Traded Company," to access the identities of several John Doe defendants because it demonstrated a "legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction." This standard is highly deferential to plaintiffs

29. Id.
31. Id. at 37.
32. Id.
33. Id.
34. Id.
because it requires only that the court find that the plaintiff show a "good faith basis" for its prima facie case.\textsuperscript{35}

The problem with this type of test is the ease with which it can be abused. Because it is so deferential, a plaintiff whose real interest is in identifying the speaker to embarrass or harass him or her has to show very little before the court will unmask the speaker. The test does not make any mention of giving the defendant an opportunity to show the plaintiff is operating in bad faith. Take for example the corporation frustrated by negative publicity on a particular financial message board. Its quickest route to silencing its critics is to unmask them, and that is precisely what has happened under this standard.\textsuperscript{36} The corporation is not truly concerned with recovering damages from a libel verdict; it wants to silence its critics.

**THE BALANCING TEST**

In one of the leading cases, *Dendrite International Inc. v. Doe*,\textsuperscript{37} New Jersey’s intermediate appellate court laid out a four-part test for trial courts to use when examining whether to allow discovery of an anonymous internet poster’s identity.\textsuperscript{38} First, the court should “require the plaintiffs to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure.”\textsuperscript{39} The anonymous posters should have a “reasonable opportunity” to oppose the matter and notification should be made in the same forum where the speech in question was initially made.\textsuperscript{40} Second, the plaintiffs must “identify and set forth the exact statements” by anonymous speakers that are alleged to be actionable.\textsuperscript{41}

\textsuperscript{35} See id.

\textsuperscript{36} See Lidsky, supra note 25

\textsuperscript{37} 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). Dendrite International Inc. is a publicly traded pharmaceutical company. It brought suit against an anonymous poster, John Doe, who was posting information in Yahoo!’s finance forum about the company. Id. at 760.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} Id.
Third, the court should carefully review the complaint and other information included to determine whether the plaintiff has made a prima facie cause of action against the anonymous defendants. The plaintiff must show enough supporting evidence for the complaint to survive a motion to dismiss. Lastly, if the first three parts of the test are met, the court must then "balance the defendant’s First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed."

The Dendrite court’s test was different primarily because of the first and fourth elements: the notice requirement and the balancing test. The balancing test forced New Jersey courts to consider the First Amendment right of the anonymous speaker to leave messages on the internet without revealing his or her identity against the plaintiff’s right to proceed with a civil case and to balance the harm done to the speech rights should the speaker’s identity be revealed.

The Maryland Court of Appeals adopted this same test in Independent Newspapers, Inc. v. Brodie, a case of first impression for that state, with one small wrinkle. The Maryland court added a requirement that reasonable time be given after notice for the anonymous speaker to respond. It found the balancing arm compelling, but not too high of a bar: “We are cognizant that setting too low a threshold would limit free speech on the Internet, while setting too high a threshold could unjustifiably inhibit a plaintiff with a meritorious defamation claim from pursuit of that cause of action.”

By balancing the speaker’s First Amendment rights against the plaintiff’s need to know the speaker’s identity, the court must examine whether the speech in question is of the sort that should be protected, even when there is a prima facie showing of libel. While this step may allow protection of some potentially defamatory speech, it is important

42. Id. at 760.
43. Id.
44. Id. at 760-61.
46. Id. at 47.
47. Id. at 45.
because it forces the court to reconcile the particular claim against that particular speaker's right to remain anonymous.

THE SUMMARY JUDGMENT STANDARD

Some courts have not been happy with this higher standard, while others have avoided it altogether. In Doe v. Cahill the Delaware Supreme Court announced a new, more simplified test that removes the balancing portion. First, "to the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure." The defendant must also have reasonable time to respond. Second, the plaintiff must show that the action can survive a motion for summary judgment and must provide enough evidence for each element of the action in order to make a prima facie case against the defendant.

The Cahill court argued that the second element of the Dendrite test, requiring that the plaintiff identify and set forth the exact defamatory statements, was unnecessary because it is subsumed by the summary judgment test. That is, in order to survive summary judgment, the plaintiff will have to lay out the allegedly defamatory statements. It also rejected the balancing test, or the fourth prong of Dendrite, on the grounds that it added no extra layer of protection, that the summary

50. See Lassa v. Rongstad, 718 N.W.2d 673 (Wis. 2006). The Wisconsin Supreme Court adopted a motion to dismiss standard instead of a summary judgment standard. Wisconsin requires particularity in defamation cases so the court decided that surviving a motion to dismiss would provide adequate protection against undue First Amendment infringement. Id. at 687.
51. 884 A.2d 451.
52. Id. at 460. Patrick Cahill, a Smyrna, Delaware city councilman, brought a defamation suit against an anonymous poster on a blog hosted by the Delaware State News who left two comments under the pseudonym "Proud Citizen." Id. at 454.
53. Id. at 461.
54. Id. at 460.
55. Id. at 461.
judgment standard itself provides a balance, and that the balancing test muddies the analysis.\footnote{Id. at 461.}

The Cahill court also considered the “good faith” standard because that was the basis on which the trial court had analyzed the case.\footnote{Id. at 457.} “We are concerned 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.”\footnote{Id.} The court rejected the standard as too permissive:

Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the Superior Court, 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.\footnote{Id.}

While the Cahill standard is not as lenient, and therefore as dangerous to anonymous speakers, as the “good faith” standard, it is still too easy on plaintiffs who wish to unmask anonymous commenters. 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

\footnote{Id. at 461.}\footnote{Id. at 457.}\footnote{Id.}\footnote{Id.}
the Supreme Court has held that political speech should get the highest level of protection.\textsuperscript{60}

**THE MOTION TO DISMISS STANDARD**

The motion to dismiss standard is accepted by a small minority. It was adopted in *Lassa v. Rongstad*\textsuperscript{61} by the Supreme Court of Wisconsin because of the nature of that state's libel law;\textsuperscript{62} though the test is one of only three, yet reported, to be adopted by any state's highest court of appeal.\textsuperscript{63} The Wisconsin court considered the *Cahill* test but opted instead to require that a court initially determine whether a claim can survive a preliminary motion to dismiss before allowing discovery to reveal an anonymous speaker's identity.\textsuperscript{64} The reason for this difference is that Wisconsin requires libel claims to be stated with particularity; thus an initial analysis of whether a claim can survive a motion to dismiss should satisfy the concerns laid out in *Cahill*, according to the court.\textsuperscript{65}

**ANON LURKING IN CYBERSPACE**

The problem of anonymous internet speech colliding with plaintiff's rights was easily foreseeable. A decade ago Professor Froomkin argued for balancing First Amendment rights to freedom of speech with the need to regulate criminal, defamatory or otherwise tortious speech.\textsuperscript{66} His analysis focused on the intertwined nature of First Amendment rights and regulatory schemes that are hampered by anonymity, such as criminal enforcement, regulation of campaign speech

\begin{itemize}
\item \textsuperscript{60} See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).
\item \textsuperscript{61} 718 N.W.2d 673 (Wis. 2006).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See Lassa, 718 N.W.2d 673; Cahill, 884 A.2d 451; Indep. Newspapers, Inc. v. Brodie, 2009 Md. LEXIS 18 (Md. Feb. 27, 2009) available at http://mdcourts.gov/opinions/coa/2009/63a08.pdf. So far these are the only three cases to make it to a court of last resort.
\item \textsuperscript{64} Lassa, 718 N.W.2d at 687.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} See A. Michael Froomkin, *Legal Issues in Anonymity and Pseudonymity*, 15 INFO. SOC'Y 113 (1999).
\end{itemize}
and tracking financial transactions. Yet Froomkin cautioned against regulation of anonymous speech because of the difficulty in drawing a line between what should be protected and what should not. He argued that, "[o]nce down this slippery slope of regulation, it is notoriously difficult to find a logical place to stop."

As courts began to unmask anonymous internet speakers, especially those using the low bar in In re: Subpoena Duces Tecum to America Online, Inc., a new phenomenon began to emerge. Corporate plaintiffs sought identities of speakers for the purpose of silencing them, or exacting extra-judicial remedies. Professor Lidsky reported on the use of courts to unmask speakers as part of corporate public relations campaigns even though companies see no hope of collecting actual damages from the plaintiffs. Lidsky noted that, "[a]lthough corporations that sue John Doe may never recover money damages, they may still deem it economically rational to sue the pseudonymous posters who make negative statements about them on financial message boards."

Professor Ekstrand examined how, after Dendrite, the tests had been developed by the courts. She concluded that the post-Dendrite outlook for anonymous internet criticism was good. Her analysis showed that most courts had given deference to the long history of anonymous speech in the United States and afforded it First Amendment protection. The conclusion is understandable given the New Jersey court's fourth step in Dendrite, which requires the balance of First Amendment rights against the plaintiff's right to proceed with an action.

67. Id.
68. Id. at 118.
69. Id.
71. See Lidsky, supra note 25.
72. Id.
73. Id. at 877.
75. Id. at 425.
76. Id.
But that view has only gained favor with a few courts after *Dendrite*, most notably the Arizona Court of Appeals, which adopted a different test that included the same balancing prong in *Mobilisa Inc. v. Doe*\(^{77}\) and the Maryland Court of Appeals in *Brodie v. Independent Newspapers*.\(^{78}\) Since Ekstrand's analysis, several new cases have been reported, including *Mobilisa* and *Independent Newspapers*, addressing these tests. Several are in line with *Cahill*, in which the balancing prong was dropped. While those cases have been more favorable to anonymous speakers than those decided under the pre-*Dendrite* good faith standard, the trend of some courts to move away from the balancing test is troubling because it makes it easier to unmask anonymous speakers.

There is also a view that *Cahill* is too high a standard for plaintiffs to meet and that it fails to protect victims of online defamation by failing to give them the necessary tools to bring their defamers to court.\(^{79}\) Professor Malloy argues that the *Cahill* standard has several fundamental flaws. In her view it fails to properly account for damage to victims of online defamation, it makes the sweeping assumption that readers will view blogs as opinion instead of fact, and it fails to provide a proper judicial remedy.\(^{80}\)

Professors Lidsky and Cotter argue for a test, which they call the "privilege analysis," similar to *Cahill*, but divergent in that it would restore the balancing test applied in *Dendrite*.\(^{81}\) Like *Cahill* and *Dendrite*, it starts with a notice requirement. The Lidsky and Cotter test

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77. 170 P.3d 712, 723 (Ariz. Ct. App. 2007). In *Mobilisa*, the appellate court agreed to adopt the two-part test in *Cahill*, but a third prong was also added. The appellate court held that, to obtain a court order compelling discovery of an anonymous internet speaker's identity, the requesting party had to show that: (1) the speaker was given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could have survived a motion for summary judgment on the elements of the claim not dependent on the identity of the anonymous speaker, and (3) a balance of the parties' competing interests favored disclosure.


80. *Id.* at 1191-92.

describes the "summary judgment" standard in two separate parts: establishing a qualified privilege to speak anonymously and then overcoming that privilege.\textsuperscript{82} The court would first examine whether the speech was "core First Amendment speech" or some other type of speech.\textsuperscript{83} If it is core speech, then it gets a privilege, as does other anonymous speech outside of the electronic communication context, that protects the speaker's identity.\textsuperscript{84} If that privilege is there, then the plaintiff must overcome it in order to reveal the identity.\textsuperscript{85} And the plaintiff does precisely that by making a prima facie showing of evidence to support those elements of the plaintiff's claims that are within the plaintiff's control.\textsuperscript{86} For example, in a defamation case, the plaintiff would have to make a prima facie showing that the communication at issue is defamatory in nature.\textsuperscript{87} The last step in this test restores the balancing function and requires a court to weigh the competing interests of the anonymous speaker and the party seeking to reveal his or her identity.\textsuperscript{88}

Several authors find the source of the problem in section 230 immunity.\textsuperscript{89} Section 230 of the Communications Decency Act of 1996\textsuperscript{90} provides immunity for internet service providers ("ISPs") to tortious claims that result from their users' actions. Professor Solove argues that section 230 immunity has been interpreted too broadly with the result being that website operators do not have any motivation to rein in content.\textsuperscript{91} "It creates the wrong incentive, providing a broad immunity

\textsuperscript{82} Id. at 1599-1601.

\textsuperscript{83} Id. at 1599.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 1600.

\textsuperscript{86} Id. at 1600-1601.

\textsuperscript{87} Id. at 1600.

\textsuperscript{88} Id. at 1601-02.

\textsuperscript{89} See SOLOVE, supra note 14, at 159. Section 230 immunity refers to the Communications Decency Act of 1996, 47 U.S.C.A. § 230 (West 2008) which grants immunity to internet service providers for tortious conduct of their users. It has been interpreted to protect website administrators and blog authors from liability for comments left by their users.


\textsuperscript{91} See SOLOVE, supra note 14, at 159.
that can foster irresponsibility." His answer is to find a balance between the anonymous internet speaker’s First Amendment rights and the privacy rights of individuals:

The solution is to create a system for ensuring that people speak responsibly without the law’s cumbersome costs. The task of devising such a solution is a difficult one, but giving up on the law is not the answer. Blogging has given amateurs an unprecedented amount of media power, and although we should encourage blogging, we shouldn’t scuttle our privacy and defamation laws in the process.  

Solove argues for a balancing between privacy rights and First Amendment rights. In his view the balance between the two is tilted too-heavily in the pro-free speech direction and it needs to be brought back toward the middle to protect privacy. The argument against narrowing immunity of internet service providers under section 230 is succinctly stated by Jim Harper of the Cato Institute: "Holding ISPs liable for customers’ online behavior would lead them to charge more and suppress beneficial content and activity—often zealously, sometimes over-zealously."

FINDING THE RIGHT TEST

With four distinct tests laid out by different courts in different jurisdictions, it is necessary to analyze whether lower courts are favoring one test over another or applying them haphazardly. And if lower courts are applying the tests in a more uniform fashion, what is the common theme? Also, one must consider if it is possible for a one-size-fits-all approach that deals with defendants in defamation actions, potential witnesses in liability actions, and copyright infringement claims, to revealing anonymous internet speakers to actually work.

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92. Id.
93. Id. at 160.
94. Id. at 159.
95. Id. at 160.
To answer these questions this Note looks to appellate court decisions post-Cahill and select trial court opinions in cases involving anonymous internet speakers and using IP addresses to reveal identities. Specifically, the analysis looks at how courts have interpreted the four tests that have been handed down by appellate courts and whether they are faithfully adhering to all or parts of those tests. The focus will be on how three recently reported cases Mobilisa,97 Lassa,98 and Krinsky v. Doe 6,99 which each offer a new variation on the Cahill or Dendrite tests, fit into the spectrum of cases. The lower court cases included will primarily be those that have been reported to the Media Law Reporter because it is a clearinghouse for such cases and locating those which have not been reported would be nearly impossible.100

Given the non-trivial differences between these standards, courts are struggling to find consistency in how to apply them.101 For example, a New York trial court recently adopted the balancing prong, following the logic of the Dendrite court, when it allowed the revelation of the identity of an anonymous commenter on a newspaper’s website.102 The court offered no comment on why it found the balancing prong necessary.103

Just weeks earlier, Judge Droney opted not to apply the balancing prong in his examination of whether the identity of poster

98. Lassa v. Rongstad, 718 N.W.2d 673 (Wis. 2006).
100. This note will not include every case adjudicated solely by a trial-level court because those cases lack the authority of precedent, even though some, such as In re: Subpoena Duces Tecum to America Online, Inc., No. 40570, 52 Va. Cir. 26, 2000 Va. Cir. LEXIS 220 (Va. Cir. Ct. 2000), become important as guidance for other courts. Also not all of those cases are reported.
101. See Mobilisa, Inc., 107 P.3d at 719 (adopting the balancing test as one prong of a slightly different test that has many elements of Cahill and Dendrite); Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (acknowledging neither test, but essentially following the Cahill example and leaving out the balancing portion); Ottinger v. Journal News, 36 Med. L. Rptr. 2018, 2008 N.Y. Misc. LEXIS 4579 (N.Y. Sup. Ct. 2008) (using the balancing standard prong to allow an identity to be revealed).
103. Id.
"AK47" could be revealed in the AutoAdmit case. The Court acknowledged the importance of the balancing analysis and argued: "This balancing analysis ensures that the First Amendment rights of anonymous Internet speakers are not lost unnecessarily, and that plaintiffs do not use discovery to 'harass, intimidate or silence critics in the public forum opportunities presented by the Internet'" (quoting from Dendrite). Yet Judge Droney neglected to apply a separate balancing analysis. He instead examined: 1) notice; 2) identification of defamatory statements; 3) whether an alternative means to obtaining the identity of the speaker exists; 4) whether there is a central need for the identity of the speaker; 5) the speaker's expectation of privacy at the time of the posting; and 6) whether plaintiff has made a prima facie case for each element of the claim against the defendant. Droney's steps 3, 4, and 5 break out pieces that would be subsumed in a Dendrite analysis, but fail to weigh the speaker's constitutional right to speak anonymously against the harm done to the plaintiff if he is allowed to remain masked.

The esteemed judge from the District of Connecticut is not alone in struggling with how to handle this conflict. A Montana trial court recently side-stepped the constitutional issues raised by potentially defamatory anonymous internet speech when it found an answer to the quandary in the state's shield law. In that case, a failed candidate for political office had sued his rival for defamation. As part of the suit, he sought the identities of anonymous commenters on the Billings Gazette's website, some of which he thought belonged to his rival. The judge applied Montana's shield law, which protects news organizations and anyone connected to the news organization for the "purpose[s] of gathering, writing, editing, or disseminating news."

105. Id. at 254 (emphasis added).
106. Id. at 254-55.
That decision was surely welcomed by the *Gazette*, but it will not do much good the next time a Montana court is wrestling with an anonymous commenter unless that comment happened to have been left on a website owned by a news organization. Two other courts, one in Oregon and one in Florida, followed that lead a few weeks later and used state shield laws to protect anonymous commenters on news websites as well.\(^\text{110}\)

When the California Court of Appeals took up a similar case, it opted to craft a test similar to *Cahill*. In *Krinsky*, the Court made a two part test that mimics *Cahill* with the major difference being how it describes the second prong.\(^\text{111}\) The *Krinsky* court shied away from calling it a “summary judgment” standard: “We find 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.”\(^\text{112}\) Rather the Court described it as a requirement that plaintiff make a prima facie showing of the elements of libel,\(^\text{113}\) which accomplishes the same effect as the second prong of *Cahill*.

**A NEW TEST EMERGES**

Yet another court to take up this issue, post-*Cahill*, opted to craft its own standard that includes the balancing arm\(^\text{114}\) but that is different from *Dendrite* because it combines the second and third parts of that court’s test. When the Arizona Court of Appeals First Division attempted to apply *Cahill* or *Dendrite*, it found both tests lacking.\(^\text{115}\) “[W]e

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112. *Id*.

113. *Id* at 1172, 72 Cal. Rptr. 3d at 245.


115. *Id*.
conclude that courts should utilize a single test in deciding whether to
grant or deny a request to discover the identity of an anonymous internet
speaker,"¹¹⁶ Judge Timmer wrote for a 2-1 majority.¹¹⁷ The court then
proceeded to lay out a new test, cobbled from both Cahill and Dendrite.
The Arizona court retained the notice requirement found in each. "A
court should not consider impacting a speaker’s First Amendment rights
without affording the speaker an opportunity to respond to the discovery
request."¹¹⁸

The court rejected plaintiffs requests for more lax, pre-Cahill
and pre-Dendrite standards. "We agree with the Cahill court that
requiring a plaintiff to merely set forth a prima facie claim (Sony Music)
or survive a motion to dismiss (Seescandy.com) would set the bar too
low, chilling potential speakers from speaking anonymously on the
internet."¹¹⁹ Instead, the court picked up the second part of the Cahill
standard: requiring the requesting party’s cause of action to be able to
survive a motion for summary judgment.¹²⁰ The court then stepped away
from Cahill and drew on the Dendrite decision to craft its final prong:
"[W]e disagree with [the Cahill] court’s conclusion that a balancing step
is unnecessary."¹²¹ The court argued that it is needed in order to account
for the "vast array of factually distinct cases likely to involve anonymous
speech."¹²²

[W]ithout a balancing step, the superior court would
not be able to consider factors such as the type of
speech involved, the speakers expectation of
privacy, the potential consequence of a discovery
order to the speaker and others similarly situated, the
need for the identity of the speaker to advance the
requesting party’s position, and the availability of

¹¹⁶. Id.
¹¹⁷. Id.
¹¹⁸. Id.
¹²⁰. Id.
¹²¹. Id.
¹²². Id.
alternative discovery methods. Requiring the court to consider and weigh these factors, and a myriad of other potential factors, would provide the court with the flexibility needed to ensure a proper balance is reached between the parties’ competing interests on a case-by-case basis.123

The test that emerged from Mobilisa has the familiar features of Cahill and Dendrite, yet it is its own. To satisfy the test, the party that wishes to obtain an anonymous internet speaker’s identity must show, first, that the speaker has been notified adequately and has had a reasonable opportunity to respond to the discovery request. Second, the underlying cause of action has to be able to survive a motion for summary judgment on elements not dependent on the speaker’s identity. Lastly, a balance of the parties competing interests must still favor disclosure.124

By retaining the balancing prong, the Mobilisa court gave itself a safety valve to prevent valuable, constitutionally protected speech from being hampered by plaintiffs. It is important to take notice that the reason the Arizona court found the balancing test necessary was because the court envisioned a wide-array of fact patterns in which the question would arise, and it recognized the need for a mechanism to deal with those situations on a case-by-case basis.

PROS AND CONS OF THE BALANCING PRONG

The first argument against the balancing prong is laid out fairly succinctly in Cahill:125 if a test is utilized that requires a claim to survive a summary judgment analysis, then the First Amendment rights of the speaker will necessarily be taken into account.126 This argument fails to consider the possibility that a plaintiff in some situations may be able to survive summary judgment, even though the harm done by revealing the speaker’s identity may far outweigh the damage of the libel.

123. Id. (citing Dendrite, 775 A.2d at 761).
124. Id.
126. Id. at 460.
In *Mobilisa*, Judge David Barker offered an interesting dissent in which he argued that the balancing test should be used after examination of whether the plaintiff has established a genuine issue of material fact on each element of the claim, other than identity, only in limited circumstances. In Barker's view, when the person whose identity is sought is also the defendant, then the balancing test risks taking away the plaintiff's right to redress even after he or she has shown that there is a genuine issue of material fact and the claim can survive the First Amendment.

The balancing prong is essentially a last-gap measure to ensure that an anonymous speaker's First Amendment right to withhold his or her identity is not lightly impinged in order to allow a plaintiff to move forward in a civil suit. As Professors Lidsky and Cotter argue, "[T]he defendant should have a final opportunity to convince the judge, in camera, that the magnitude of harm she faces if her identity is revealed outweighs the plaintiff's need for her identity." Without this opportunity to make a last-gasp argument that the harm will outweigh the good, an anonymous speaker runs a huge risk of being unmasked.

The AutoAdmit case offers a real world example. The supposedly libelous statement attributed to "AK47" that Judge Droney said was enough to make a prima facie showing of libel is as follows: "Alex Atkind, Stephen Reynolds, [Doe II], and me: GAY LOVERS." (Doe II is one of the plaintiffs in the case.) Droney decided that it was defamatory because "any discussion of Doe II's sexual behavior on the internet tends to lower her reputation in the community, particular in the case of any potential employers who might search for her name online." There is a strong argument that Judge Droney's defamation analysis is faulty, and many courts have declined to find an accusation of

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127. *Mobilisa Inc.*, 170 P.3d at 725 ("I have no disagreement with an additional balancing . . . when the anonymous speaker is someone other than the defendant").
128. *Id.* at 725-726.
129. See Lidsky and Cotter, *supra* note 81, at 1601.
130. *Id.*
132. *Id.*
homosexuality as a statement that harms one’s reputation.\textsuperscript{133} Setting those aside, the libel claim in this statement is essentially that the poster accused the plaintiff of being a “gay lover.” If that is libelous, it is certainly not a claim that is bound to significantly damage one’s reputation, even if false, in an employment context, which was the crux of Judge Droney’s concern. In fact, many employers view diversity of employees as a benefit. Perhaps the sentence could be interpreted another way, that Doe II was sexually promiscuous with three other people. That construction raises a question of whether plaintiff can make a prima facie showing that it is defamatory as well, as courts have struggled to keep up with society’s changing sexual mores and deciding whether an allegation of promiscuity is defamatory.\textsuperscript{134}

What is clear is revealing the poster’s identity is surely going to cause him great harm, as the specific poster is known for racist comments on the site and his “outing” has been anticipated on several legal blogs.\textsuperscript{135} The fear of having the veil of anonymity lifted appears to be powerful in the AutoAdmit case. As of mid-February 2009, four of the pseudonymous defendants had settled, with only one having his identity revealed in court documents.\textsuperscript{136}

A TEST THAT UPHOLDS THE FIRST AMENDMENT

Several of the courts that have dealt with this issue are on the right path with the use of a balancing prong, but the question remains open as to what a strong test that upholds First Amendment principles should look like. Mobilisa came the closest to answering this question.

\begin{enumerate}
\item[136.] See Margolick, \textit{supra} note 5.
\end{enumerate}
Notice: Clearly the anonymous speaker needs the opportunity to respond to the pleadings in the case before his or her identity has been handed over. Most of the courts looking at this issue see the value in notice and require notice at some level, whether it is posting a message in the forum where the speech was made, or when possible, sending notice through the speaker's internet service provider.\textsuperscript{137} As the Cahill court said, "[t]he notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond."\textsuperscript{138}

Summary judgment: After providing notice, the plaintiff should have to show a likelihood of success on each element of the claim, strong enough that the pleadings can survive a motion for summary judgment, before the anonymous speaker can be unmasked. "Requiring the requesting party to satisfy this step furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate speech,"\textsuperscript{139} the Arizona court said in Mobilisa.

Balancing: The third, and most important piece, is the balancing arm. The presumption should be in favor of a speaker remaining anonymous and should only be overcome when the harm to the plaintiff in not unveiling the anonymous speaker far outweighs the harm done to the speaker by revealing her identity. By setting the bar that high, the courts afford the greatest amount of constitutional protection to anonymous internet speakers, while not precluding plaintiffs from making a showing that they have been harmed. To go back to the AutoAdmit case, it would prevent a plaintiff from using the threat of identifying a speaker, such as AK47, at the negotiating table without first making a basic showing that she can succeed on the underlying defamation claim.


\textsuperscript{138} Cahill, 884 A.2d at 461.

\textsuperscript{139} Mobilisa, Inc., 170 P.3d at 720.
The Mobilisa court wanted the balancing test because of the flexibility it provides to examine each situation on a case-by-case basis.\textsuperscript{140} The court is right to seize on that aspect of the balancing test because it foresees a potentially broad array of fact patterns that can confound these cases. This proposed test is essentially what the Arizona Court of Appeals came to, except it leans more heavily toward the speaker remaining anonymous. The reason to tip the scale in that direction is as much rooted in our society’s historic use of anonymous speech\textsuperscript{141} as it is in the faith that the marketplace of ideas will self-correct false speech. Just as members of an advocacy group have a First Amendment-rooted right to withhold their identities from the government,\textsuperscript{142} people who participate in protected speech on a message forum may have an interest in withholding their identities, in order to foster a broader, less restrained discussion. When the threat of later being identified exists, without a strong presumption in favor of keeping the speaker’s identity hidden, it has a chilling effect on the speaker. The speaker who called himself AK47 has stopped posting at the AutoAdmit site, at least under that moniker, since his identity was handed over to the plaintiffs, even though the defamation claim against him is suspect at best.

CONCLUSION

Lack of uniformity in determining when to unmask anonymous internet speakers is creating problems in lower courts. No one standard appears to be winning favor, and each jurisdiction that takes up the issue is putting its own stamp on the problem. There are two lines of cases that share common themes, one that draws its inspiration from Cahill (without a balancing test) and the other from Dendrite (with a balancing test). Neither the Cahill line (California, Delaware, and Wisconsin) nor the Dendrite line (Arizona, Maryland and New Jersey) in the six appellate courts that have so far published opinions on the issue, has gained a

\textsuperscript{140} Id.
\textsuperscript{141} McIntyre, supra note 15.
\textsuperscript{142} NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958).
majority. And even then, those courts can not agree on what form the tests should take.

The courts that are following Dendrite's lead and including some form of balancing test are the ones that are closest to the answer. They are upholding the First Amendment's long history of protecting anonymous speech. Yet even if courts move away from the balancing arm, it is important for internet users to have some understanding of when they are likely to be identified for their words and when they are not. The lack of conformity among the courts is a particularly compounding problem when it is applied to the internet, which is not inherently borderless but is able to reach into so many different jurisdictions with relative ease.143