Unmasking Online Assailants: When Should an Anonymous Online Poster be Exposed for Defamatory Content?

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The internet is the ultimate “marketplace of ideas.” From one’s bedroom, a person can share ideas with people all across the world. Often this speech online is anonymous. On the internet speakers can mask their real identities with screen names or no name at all. With this anonymity comes the potential for others to be harmed by another’s speech.

The internet is a medium that all citizens can access. With this increased access also comes little censorship or fact-checking. Under the cloak of anonymity, speakers may be uninhibited to say things that they would never say ordinarily offline if their identities were attached to their words. This freedom to express oneself anonymously can be beneficial because it allows the anonymous speakers to operate without fear that they could be harmed by their online comments in their ordinary lives. But in other cases, the cloak of anonymity can lead to speech that defames others. While defamation can occur virtually anywhere on the internet, certain sites like the infamous campus gossip site JuicyCampus.com¹ and its successor Collegeacb.com² and dontdatehimgirl.com³ encourage participants to make remarks that can damage others’ reputations.

The now extinct JuicyCampus.com and its successor Collegeacb.com are college gossip sites. The main topic on these sites is other students. Once a user logs on to the site he or she can choose his or her college from a list on the main page, which takes the user to a list of topics that other users are discussing. All of the posters are anonymous. Some of the posts are seemingly

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¹ JuicyCampus, [http://juicycampus.blogspot.com/](http://juicycampus.blogspot.com/) (Last Updated February 4, 2009). JuicyCampus.com was a college gossip site that was forced to shut down because of lack of revenue. It directs users to a similar site, [http://www.collegeacb.com/](http://www.collegeacb.com/).


harmless and discuss current television programs or movies. Others posts, however, target specific students. One with the heading of a female student’s name included the comment that “she is a dirty pirate hooker.” Another alleged that a named member of the Delta Chi fraternity raped a girl the previous year. Yet another has the heading “Girls that are clinically insane.” Others responded to that thread by listing the names of students and even arguing about the sanity of girls on the list. One user contributed the name “Chelsea C.” to the list. Others commented that not only was Chelsea C “clinically insane,” but also that “she had herpes” and “is a lesbian.”

Dontdatehimgirl.com is another site that can lead to defamation. Dontdatehimgirl.com operates under the subheading “Don’t Date Him Girl Until You Check Him Out First!” Dontdatehimgirl.com offers its users several options. The site includes articles about dating and forums where others can rate men that they have dated. It is in these forums where the potential for defamation is the greatest. A user, who posts under a screen name, can discuss the men they have dated. There is even a place to post a photo of a particular man in these posts. One post with the caption “Britt N. Boston Area” reads,

“Attention ladies, it seems he is out there again approaching new victims! He is on online dating websites like match.com. He is an abuser, liar and cheater. Raging alcoholic and drug addict. He is very violent; choked a woman’s throat (thanks god he was convicted and incarnated) several women had restraining orders against him, including his ex-wife. He is an alcohol addict, drug addict, he is stealing, several DUIs. Approaches his female victim just to get money out of

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4 Out of respect for those targeted, exact links and names to these posts will not be included.
5 CollegeACB, Supra http://collegeacb.com/
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Dontdatehimgirl.com, Supra http://dontdatehimgirl.com/home/
12 Id.
13 Id.
her. He had even the gut to steal the debit card from his girlfriend and spending hundreds of bucks on it. In addition he stole the car so that she had to file a report at the police. He can not keep any job. A complete looser with several personality disorders because he is blaming his victim for everything (even for almost killing her)
And he has an incurable STD ! In summary he is not worth anything.
So be aware ladies !!!!!!!!!! And stay safe !!!”

While certain posts on JuicyCampus.com, Collegeacb.com and Dontdatehimgirl.com may be true, other posts may not be. These false posts can form the basis for a defamation claim. Of course this speech can have other legal consequences such as intentional infliction of emotional distress, privacy violations, threats, and criminal violations. However, the scope of this essay will be limited to defamation.

Defamatory speech is speech that damages the reputation of a person or lowers him or her in the esteem of the community. Ordinarily, a person who has been defamed may sue the speaker for defamation. But on the internet the process for repairing a damaged reputation is not as simple. To maintain a case, a plaintiff needs an identifiable defendant, and on the internet the defamer is likely to be anonymous. A plaintiff is thus forced to subpoena the defendant’s internet service provider to uncover the defendant’s real identity. In response to a plaintiff’s subpoena, defendants can file a motion to quash the plaintiff’s subpoena to protect their anonymity. As a result, courts must then balance the plaintiff’s interest to have their reputation remain untarnished with the defendant’s interest to speak anonymously online. The requirement that courts balance these interests adds another layer to the problem. Specifically, when the court balances the parties’ interests it must set the burden low enough that plaintiffs who bring suits in good faith can recover, but high enough that it protects defendants from suits aimed only at silencing them. To solve these problems different jurisdictions have developed four tests: a good

14 Id.
faith standard, a motion to dismiss standard, a prima facie evidentiary standard, and a summary judgment standard. As a preliminary matter, most jurisdictions require that the plaintiff provide the defendant with notice. Courts then apply one of the four tests. The good faith standard requires the plaintiff to meet the lowest burden of all the tests. Under a good faith standard, the plaintiff is required to prove that they are bringing their suit in good faith and not solely to silence the defendant. Under the motion to dismiss standard, the plaintiff must prove that his or her claim can survive a motion to dismiss before the defendant is unmasked. A prima facie evidentiary standard requires the plaintiff to prove that he or she can make a prima facie showing that the content was false and defamatory. The summary judgment standard requires that the plaintiff to meet the highest burden, or prove that his or her case can withstand a summary judgment challenge. In addition to these evidentiary standards, some jurisdictions include a First Amendment balancing step where the defendant’s interest in remaining anonymous is balanced against the plaintiffs need for the defendant’s identity.

The variety of tests applied by different jurisdictions has led to a lack of consistency in circumstances where defendants will be unmasked. Courts should adopt a uniform standard that requires a plaintiff to provide notice to the defendant and can meet a prima facie evidentiary standard. A uniform standard is needed to combat the potential problem of forum-shopping. Because the internet reaches so many people in so many places, the lack of a uniform standard could result in plaintiffs attempting to litigate defamation claims in remote jurisdictions. This risk increases if plaintiffs can choose their evidentiary standard, and specifically target defendants in jurisdictions with the lowest evidentiary burdens. The prima facie evidentiary standard is the ideal standard. It offers anonymous defendants more protection from meritless
exposure than the lower good faith and motion to dismiss standards, while still setting the burden of proof low enough that plaintiffs are afforded the ability to recover.

Part I of this paper will explore the historical framework of the competing interests of the anonymous speech protection and the ability to protect one’s reputation through the defamation tort. Part II will discuss the challenges of applying traditional defamation law to a non-traditional medium, the internet. Part III will discuss the process of subpoena, which is the first procedural step a plaintiff must take in any online defamation suit. Part IV will provide detailed examples of how courts have applied the four tests to determine when to unmask an anonymous defendant. Part V will advocate for the adoption of a uniform standard that requires plaintiffs to prove they provided the defendant with notice and can meet a prima facie evidentiary standard. This ideal test offers anonymous speakers protection, while allowing defamation victims the ability to unmask their online assailants so they can recover from their injuries.

PART I: THE COMPETING INTERESTS OF ANONYMOUS SPEECH AND DEFAMATION CLAIMS.

The tension between a defendant’s desire to speak anonymously on the internet and a plaintiff’s interest in protecting their reputation is the tension of two long held interests in American law. Since America’s origin, speakers have masked their identities. Sometimes, speakers used anonymity to protect themselves in instances when the speech would have been dangerous an identifiable speaker. On the other side of the scale, the right to recover from defamatory speech has also been recognized since the beginning of American law. An analysis of the historical origins offers insight into the contemporary debate on how these values should best be balanced in cases that arise online.
A. ANONYMOUS SPEECH

The Supreme Court first recognized the value in protecting anonymous speech in 1960 in *Talley v. California.*\(^\text{16}\) In *Talley*, the Court struck down a Los Angeles City ordinance that required handbills to include the real names and addresses of the distributors and creators.\(^\text{17}\) Justice Black, writing for the majority, discussed the long history of anonymity in America.\(^\text{18}\) Anonymous speech has played a role in American society since before the nation’s creation. Under colonial rule, speech was restricted by the English monarchy and those speaking against the colonial rulers could be punished.\(^\text{19}\) Revolutionaries concealed their identities to avoid being prosecuted.\(^\text{20}\) Some of the most influential works were published anonymously. Thomas Paine published his pamphlets and leaflets under pseudonyms.\(^\text{21}\) The Federalist papers were published under fictitious names.\(^\text{22}\) The Supreme Court recognized that “[a]nonymity is a shield from the tyranny of the majority.”\(^\text{23}\) The Supreme Court elaborated on the protection anonymity can offer in *Talley*, writing,

Anonymous pamphlets, leaflets, and even books have played an important role in the progress of mankind. Persecuted groups and sects have from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.\(^\text{24}\)

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\(^\text{16}\) *Talley v. Cal.*, 362 U.S. 60 (1960).
\(^\text{17}\) *Id.*
\(^\text{18}\) *Id.* at 64-65.
\(^\text{20}\) *Talley*, 362 U.S. at 65.
\(^\text{21}\) *Id.* at 63.
\(^\text{22}\) *Id.*
\(^\text{24}\) *Talley*, 362 U.S. at 64.
In addition to anonymity for political uses, some of literature’s greatest authors have used pseudonyms. Notably, Samuel Clemens wrote under the pen name Mark Twain, and Benjamin Franklin wrote under several different names.

Thirty-five years later the Supreme Court expanded on *Talley* in the case *McIntyre v. Ohio Elec. Commn.* when it overruled an Ohio ordinance that prohibited anonymous distribution of campaign materials. Justice Stevens relied on the long history of anonymous work and recognized that an author may have compelling reasons for wishing to remain anonymous. Justice Stevens reaffirmed Justice Black’s belief that the ability to publish anonymously allows an author to escape persecution. He also recognized that anonymity could enhance the persuasiveness of an argument. “Anonymity. . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” In a footnote, Justice Stevens explained the value of concealing one’s identity. He wrote that,

> Of course, the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.

In the next case that recognized protection for anonymous speech, *Buckley v. American Constitutional Law. Foundation*, the Supreme Court expanded on its decision in *McIntyre* and

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25 *McIntyre*, 514 U.S. at 342.
26 Id.
27 Id. at 349.
28 Id. at 342-343.
29 Id. at 342.
30 Id. at 342.
31 Id. at 349 quoting *N.Y. v. Duryea*, 351 N.Y.S. 2d 978, 996 (N.Y. Sup. 1974)
overturned a Colorado law that required signature gatherers to wear nametags. The Court stated that the anonymity of the signature gatherers needed to be protected because it was the moment when “the circulator’s interest in anonymity is the greatest.”

Similarly, in *Watchtower Tract and Bible Society of New York. v. Village of Stratton*, the Supreme Court struck down a city ordinance that required groups to register for a permit before going door-to-door. One rationale for striking down this law was that it could have a chilling effect. Some people might have been deterred from going door to door because they feared negative economic repercussions, especially if their cause was unpopular.

Protection for anonymous speech has been extended to the internet. Several courts have identified *Reno v. American Civil Liberties Union*, as extending protection for anonymous speech to the internet. Among the benefits of communication on the internet recognized by the Court in *Reno*, is that the internet is a low cost commodity that allows everyone with access to it to express their ideas. The majority in *Reno* wrote:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

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33 *Id.* at 199.
35 *Id.* at 166.
38 *Reno* at 521 U.S. at 870.
39 *Id.*
B. THE TORT OF DEFAMATION

Despite the protection of anonymous speech and the First Amendment’s freedom of speech guarantee, defamatory speech is a limit of unrestricted speech.

“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include … the libelous. . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Defamation is a tort that is brought against a person whose words, written or spoken, harm another’s reputation. Defamation was recognized as a tort under the English common law tradition that formed the foundation of American law. Throughout history three basic conceptions of reputation have justified the need for the right to protect one’s reputation through a tort for defamation.

The first view of reputation was that it represented honor. This justification for a defamation tort was prevalent in societies with fixed hierarchical social structures, such as Medieval England. The view of reputation as honor predominated the earliest defamation laws. Defamation actions were originally decided by the ecclesiastical courts of England. Unsatisfied with the remedies provided by the church courts, the defamed often turned to

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40 U.S. Const. amend. I
“Congress shall make no law . . . abridging the freedom of speech”
41 Beauharnais v. Ill., 343 U.S. 250, 266 (1952).
violence to avenge their honor.\textsuperscript{44} In response to the threat of violence, the English parliament enacted the \textit{Scandalum Magnatum}, which formed the foundation of defamation law under the English common law.\textsuperscript{45} One justification for the \textit{Scandalum Magnatum} was that the inability to prevent one’s reputation, and thus one’s honor, from being insulted would deter the nation’s “best men” from entering public service.\textsuperscript{46} A second justification was that the \textit{Scandalum Magnatum} was to stifle the critics who questioned the monarchy’s legitimacy.\textsuperscript{47} Therefore, the aim of the \textit{Scandalum Magnatum} was to maintain the status of those in heightened positions in society.

Another view of reputation was that it was a form of property. A person developed his or her reputation. Like other personal property, a person’s reputation could be damaged. Defamation provided a remedy for damages to reputation just as other torts provided remedies for when a person’s physical property has been harmed.\textsuperscript{48} The concept of reputation as property was central in cases where the defamatory speech harmed a person’s business. A good reputation can help a person acquire more business whereas a damaged reputation can deter customers. Under a scheme that views reputation as a form of property, the victim was made whole again by the monetary damages he or she received.

The final view of reputation was that it is a form of dignity.\textsuperscript{49} Under this conception of reputation, defamation law protects respect, which is a form of dignity.\textsuperscript{50} Societies operate under

\textsuperscript{44} Id.
\textsuperscript{45} Id. at 266.
\textsuperscript{46} Id. at 265.
\textsuperscript{47} Id.
\textsuperscript{50} Id.
basic “rules of civility.” Those who follow the social norms are included and those who do not are excluded. Therefore a person who loses the esteem of community members will be excluded from that community. A defamation suit offers the defamed the ability to show the community that he or she has conformed to the rules of civility. This conception of reputation as a form of dignity is the form that current American jurisprudence embraced. In justifying the need for protection from defamation, Justice Stewart wrote in his concurring opinion in *Rosenblatt v. Baer* that,

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects on more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

Despite theoretical conceptions about reputation, a damaged reputation can have noticeable effects on a person’s life. A person’s reputation is connected to many facets of his or her life. Lies that damage a person’s reputation could negatively affect his or her career. For example, a person falsely accused of stealing from a company could lose his or her job, and other employers who believe that the allegations are true might be reluctant to hire him or her. A person who owns his or her own business might lose customers if they believe allegations that he or she cheats customers. In other cases a damaged reputation could prevent others from associating with him or her. As the examples from JuicyCampus.com, CollegeAcb.com, and Dontdatehimgirl.com illustrate a person who is accused of being “insane,” “a liar,” “a cheater,” or “[having] herpes” is likely to lose social connections, romantically or otherwise, if others believe these statements.

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51 *Id.* at 710
52 *Id.* at 711.
53 *Id.*
54 *Id.* at 713.
55 383 U.S. 75, 92 (1966) (Stewart, J. concurring)
Although there is some variation between jurisdictions, Restatement (Second) of Torts states that a basic cause of action for defamation must satisfy the following elements:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and
(d) either actionability of the statement irrespective or special harm caused by the publication.  

Of course defamation is a limit on speech, and free speech is protected by the First Amendment. Over the last half-century, the Supreme Court has developed tests to balance the suppression of defamatory speech against the First Amendment’s protection of free speech. The Supreme Court first encountered defamation in the arena of the First Amendment in the case *New York Times Company. v. Sullivan.* The plaintiff, L. B. Sullivan, was an elected Commissioner of Montgomery, Alabama during the civil rights movement. He sued the New York Times Company for a full page advertisement that appeared in its newspaper the New York Times. The advertisement claimed that the Montgomery, Alabama police and others were waging a “war of terror” in response to peaceful demonstrations by African-American students. Subsequent paragraphs of the ad went on to detail the “war of terror.” Two of the paragraphs included in the advertisement were inaccurate.

The Court addressed the issue of when a person could be liable for remarks made about an official who acted in his or her official capacity. The central consideration in conjunction with this was that the First Amendment protects public discussion. The Supreme Court

56 Restatement (Second) of Torts, § 558 Restatement of the Law (1997)
57 *N.Y. Times Co. v. Sullivan,* 736 U.S. 254 (1964)
58 *Id.* at 256.
59 *Id.*
60 *Id.* at 256-257.
61 *Id.* at 257
62 *Id.* at 258-259.
63 *Id.* at 268
recognized “[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need… to survive.”’  

The Court decided that officials could only recover for false statements about their official conduct made with “actual malice.” Actual malice means that the speaker knew or recklessly disregarded the statement’s falsity. The Court concluded that the statements made about the Montgomery police officers did not rise to the level of actual malice. The Court later concluded that public figures, as well as public officials, fit into the same classification under the test from *New York Times Company*.

The Supreme Court applied a different standard to speech that concerned a private individual in *Gertz v. Robert Welch, Inc.* Elmer Gertz, the plaintiff, was an attorney in a civil lawsuit who represented the family of a youth who was shot by a police officer. The respondent, Robert Welch, Inc. published an article in one of its outlets, “American Opinion” that asserted that Gertz was a communist and had a criminal record. Both of these claims were false. The Supreme Court began its analysis by referencing the “marketplace of ideas.” It stated that there are no false ideas under the First Amendment, and that false opinions will be corrected through “competition with other ideas.” The Court then distinguished false opinions from false statements of fact, which have “no Constitutional value.” Distinguishing public officials and public figures from private officials, the Court recognized that public officials and
public figures have greater access to channels of communication to challenge false statements than private individuals. Additionally, the Court recognized that private individuals do not open themselves up for criticism the way that one does when they run for political office. Ultimately, the Court determined that the states could decide what standard of liability to impose on a publisher of speech that concerned a private individual and a matter of public concern. The Court’s only restriction on the states was that they could not impose a strict liability standard. In other words, plaintiffs must show at least negligence.

Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court ruled that the First Amendment’s protection of free speech did not apply to matters of private concern with private plaintiffs. This meant that states could apply any standard that they wanted. In *Dun*, a credit agency falsely claimed that a construction company had filed for bankruptcy. The credit agency later corrected its assertion that the construction company had filed for bankruptcy. However, it did not correct its mistake until after the plaintiff had suffered damage. In distinguishing *Dun & Bradstreet, Inc. from Gertz*, the Court drew a line between speech related to public concerns that was “at the heart of the First Amendment’s protection” and speech related to private concerns that is of less First Amendment concern.

**PART II: THE INTERNET AS A NONTRADITIONAL MEDIUM.**

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75 *Id.* at 344.  
76 *Id.* at 345.  
77 *Id.* at 347.  
78 *Id.* at 348.  
79 472 U.S. 749, 761 (1985)  
80 *Id.* at 763.  
81 *Id.* at 752-753.  
82 *Id.* at 752.  
The internet presents a unique challenge for plaintiffs in defamation suits. The internet creates a unique landscape where the competing interests of plaintiffs to guard their reputations is met with defendants’ desire to speak freely and anonymously online.

To understand the benefits that the internet provides, it is necessary to understand the concept behind the term “marketplace of ideas.” The role of the free speech under the First Amendment has often been described as advancing a “marketplace of ideas.” The foundation for the concept of the “marketplace of ideas” comes from Justice Holmes’ dissenting opinion in Abrams v. United States.84 He wrote:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."85

The “marketplace of ideas” as a concept has come to represent a forum where ideas are discussed. The validity of these ideas is tested through the free discourse that the forum provides. The online “marketplace of ideas” is enhanced by two qualities unique to the internet. First, much of the speech online is anonymous. One benefit of anonymous speech online is that it can provide more openness. This openness can foster richer discussion on the internet that would not otherwise occur. As the Supreme Court explained in McIntyre, anonymity allows people to express minority viewpoints without fearing persecution for these viewpoints.86 If the anonymity that the internet grants to its users is removed, there could be a chilling effect on users’ speech. A chilling effect is a form of self-censorship where speakers silence themselves.

85 Id. at 630. (Holmes, J. dissenting)
86 McIntyre, 514 U.S at 357
to avoid any potential liability. Chilling effects are contrary to the “marketplace of ideas” because self-censorship prevents ideas from entering the marketplace where there worth can be determined through public discourse. As the court in *Doe v. 2theMart.com, Inc.* recognized, anonymity should not be carelessly removed to avoid a chilling effect.\(^87\)

The second unique quality of the internet that enhances the online “marketplace of ideas” is that it offers more access to the channels of communication than traditional media outlets offer. Anyone with access to a computer and an internet connection can express his or her views online. This increased access offers a more democratic approach to communication where everyone’s opinion has the same access to the marketplace.

The anonymity and increased access to the channels of communication that the internet provides can enhance the “marketplace of ideas,” but these qualities can also have a dark side. This dark side can lead to more defamation. Behind the anonymous masks of their screen names, people may be more willing to say things that they would not ordinarily, and this uninhibited communication can produce more defamation. People, believing that they cannot be caught, can use the internet to damage the reputation of others. As one commentator has proclaimed, “[i]ndividuals say and do things online that they would never consider saying or doing offline because they feel anonymous.”\(^88\)

Increased access to the channels of communication can also make online defamation more damaging. Greater access to the internet means that lies about a person’s reputation can spread further than they would with traditional channels of communication. As one

\(^{87}\) *Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

commentator points out, “The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie.’”

The case, *Doe I v. Individuals (AutoAdmit.com)* illustrates the far-reaching effects that online content can have. The plaintiffs were two female Yale law students who claimed that they were defamed on a college forum by an anonymous poster using the screen name AK47. The first thread targeted a plaintiff identified as *Doe II* and asked other AutoAdmit users to “Rate this HUGE breasted cheerful big tit girl from YLS.” Others responded to the thread with comments about her breasts and their desires to have sex with her. Later, other threads included statements that she fantasized about being raped by her father, enjoyed having other family members watch her have sex, encouraged others to punch her in the stomach while seven month pregnant, had a sexually transmitted disease, and abused heroin. Other posters on the AutoAdmit.com forums wrote that they “hope[d] [she] gets raped and dies.” The posters escalated by sending an e-mail to the entire faculty of Yale law school that described Doe II’s father’s alleged criminal history. Another post included a picture of Doe II with the caption “… .... [Doe II] and me: GAY LOVERS.” Once the lawsuit was filed AK47 escalated with a post entitled “Women named Doe II should be raped.” The content on the AutoAdmit forum was so discussed that it could easily be found by a search engine search of the plaintiffs’

91 *Id.* at 251.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
names. One plaintiff reported that she felt forced to explain the AutoAdmit comments to potential employers. Ultimately, the court found that AK47 was not entitled to proceed anonymously.

Of course, the increased access to channels of communication that internet provides also allows victims of defamation to quickly respond to their online defamers. This aspect of the internet may disrupt the categorical approach used for defamation law that distinguishes between public officials and public figures on one end of the spectrum and private figures on the other. Under the categorical approach, The Supreme Court gave greater deference to those who made false statements about public officials and public figures than to those who made false statements about private persons. Justice Powell explained in *Gertz* that the rationale for classifying these two groups differently was that the former have more access to the channels of communication. This greater access to the channels of communication provided public officials and public figures with more opportunities to correct false remarks that are damaging to their reputations. The internet removes these disparities in access to the channels of communication that public officials and figures and private figures have. Private figures have the same access to the internet to correct disparaging remarks as public officials and figures.

PART III. SUBPOENA AS THE FIRST STEP TOWARDS IDENTIFYING AN ANONYMOUS DEFENDANT.

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98 *Id.* at 256.
99 *Id.* at 257.
100 *Id.*
101 *Gertz*, 418 U.S. at 344.
102 *Doe No. 1 v. Cahill*, 884 A.2d, 451, 464 (Del. 2005)

In addition to legal remedies, the Delaware Supreme Court acknowledges that victims of defamation online can respond to the defamatory content in the same chat room or blog where the comments occurred.
Courts have struggled with how to apply defamation law online. The first problem that courts confronted was who should be responsible for policing content online. In 1995, in the case *Stratton Oakmont, Inc. v. Prodigy Services Corporation.* The New York Superior Court found that operators of computer networks could be considered publishers of defamatory content that was posted on its message boards.

In response to the court’s decision in *Stratton Oakton,* Congress enacted section 230 to the Communications Decency Act. Section 230 of the Communications Decency Act states that, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The effect is that internet service providers are immune from federal liability for information that originated from a third party user.

For plaintiffs in defamation actions, this means that they must directly sue the person that posted the derogatory comments about them. To accomplish this, plaintiffs must identity their online defamer. Plaintiffs initiate this process by subpoenaing an anonymous poster’s internet service provider to acquire his or her Internet Protocol (IP) address.

Each internet user has a unique IP address that can be traced back to the user through the internet service provider. IP addresses are a series of numbers that refer to a specific machine that is connected to the internet. IP addresses can be used to locate a specific computer, such as one that was used to make defamatory comments. In turn, the location of the computer can reveal the identity of the poster.

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105 47 U.S.C § 230 (c)(1) (1997)
108 *Id.* at 575
Ordinarily, a plaintiff will subpoena an internet service provider for the identity of an anonymous poster. The internet service provider will inform the poster that a plaintiff has filed a subpoena to identify them. The anonymous poster then has the opportunity to file a motion to quash the subpoena to protect their identity from exposure. Upon the entry of an anonymous poster’s motion to quash, the courts will apply one of four balancing tests to see if the plaintiff has presented a compelling case that the defendant’s identity should be exposed.

PART IV: THE FOUR TESTS COURTS APPLY TO DETERMINE IF ANONYMOUS POSTERS IN DEFAMATION CASES SHOULD BE IDENTIFIED.

There are possible three components to any test a court implements, notice, an evidentiary showing, and a First Amendment balancing test requirement. As a preliminary matter, most courts require that the plaintiff or defendant’s internet service provider notify the anonymous poster that there is litigation pending to identify him or her. Courts will then apply one of the following four tests: a good faith test, a motion to dismiss test, a prima facie evidentiary showing, or a summary judgment test. Some courts require an additional element that balances the interest of the plaintiff to have the defendant’s identity exposed so the plaintiff can bring a defamation suit against the anonymous defendant’s interest in his or her anonymity.

A. NOTICE

Before applying one of the three tests, most courts require that the plaintiff or the Internet Service Provider attempt to notify the anonymous poster. Notice serves the function of making the anonymous poster aware that someone is trying to identify him or her. Courts typically advocate that plaintiffs use one of two means to notify anonymous posters. The first,  

and majority position, is that the plaintiff should notify the anonymous poster by posting on the same forum or message board where the allegedly defamatory comments were made.\textsuperscript{110} Other courts advocate notifying the defendant through his or her internet service providers.\textsuperscript{111} The rationale for notifying defendants through their internet service providers is that by the time the suit goes to court the message thread or chat room where the defendant’s content appeared may no longer exist.\textsuperscript{112} Under this model, the plaintiff would subpoena an internet service provider and request that it reveal the identity of an anonymous poster.\textsuperscript{113} The internet service provider, who has more precise information about anonymous posters such as their full names, addresses, and phone numbers, will then pass the information along to the anonymous poster. After notification, an anonymous defendant can move to quash the plaintiff’s subpoena.

\section*{B. THE FOUR MAIN TEST}

Courts have developed four main evidentiary tests that they use when deciding to identify a defendant so that a plaintiff can sue him or her for defamation.

\textit{i. Good Faith}

The good faith test has the lowest threshold for protecting the anonymous speaker. While the specifics of each court’s test vary, the good faith test allows a person’s identity to be exposed so long as the plaintiff sought the anonymous poster’s identity in good faith. This test was first used by the Circuit Court of Virginia in the 2000 case \textit{In Re Subpoena Duces Tecum to America Mobilisa Inc.}, 170 P.3d at 719; \textit{Doe v. Cahill}, 884 A.2d at 461.\textit{Dentrite}, 755 A.2d at 760

\textit{Solers Inc.}, 977 A.2d at 954.

\textit{Krinsky}, 159 Cal. App. 4th at 1171.

\textit{Id.}
Online, Inc.\textsuperscript{114} The plaintiff in the case was an anonymously traded public company that attempted to subpoena the identity of five unknown defendants who allegedly made defamatory remarks in an America Online chat room.\textsuperscript{115} The court advocated a three part test where a court should reveal a person’s identity if: (1) the court is satisfied by the evidence provided to it; (2) the party requesting the anonymous defendant’s identity has presented a good faith basis that it may be the victim of a tort in the jurisdiction where they filed suit; and (3) the requested information is central to the plaintiff’s claim.\textsuperscript{116} The court found that the plaintiff had met all of these elements had been met and that the identity of the plaintiffs could be revealed.\textsuperscript{117}

A year later, the Washington District Court applied a good faith standard in \textit{Doe v. 2themart.com, Inc.} 2themart was involved in a shareholders’ deviation suit in California federal court.\textsuperscript{118} As part of its defense, 2themart alleged that “no act or omission by [2themart] caused the [shareholders’] injuries.”\textsuperscript{119} As a related matter to the shareholders’ derivative suit, 2themart subpoenaed an internet service provider to uncover the identity of twenty-three unknown posters, including Doe, who posted on a website called Silicon Investor.\textsuperscript{120} The anonymous posters that 2themart wanted to identify had made posts online that claimed that 2themart was a company full of liars and cheats.\textsuperscript{121}

The court outlined its good faith test by requiring that a plaintiff’s subpoena attempting to expose an anonymous poster must be brought in good faith and not for any improper purpose.\textsuperscript{122}

The court then identified three reasons why it believed that the subpoena was brought in bad

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\textsuperscript{114} \textit{In Re Subpoena Duces Tecum to America Online}, 52 Va. Cir. 26 (Va. Cir. 2000).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 29.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Doe v. 2themart.com Inc.} 140 F. Supp. 2d at 1098.
\textsuperscript{119} \textit{Id.} at 1096.
\textsuperscript{120} \textit{Id.} at 1090.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 1095.
\end{flushleft}
faith. The subpoena was initiated because 2themart was defending against a shareholder derivative suit. The allegedly defamatory posts claimed that 2themart was full of liars and cheats. The court determined that these posts were relevant, but that the subpoena was broad and did not raise any relevant issues. The court acknowledged that this was not bad faith per se, but that the over-breadth and lack of relevance weighed against the 2themart. The second element required to reach an anonymous poster’s identity was that the identity related to a core claim or defense. In other words, the identifying information must be directly and materially related to the claim or defense. The court found that because 2themart had raised numerous defenses, the identity of the anonymous posters was not central to its case. Therefore, 2themart could not prove that the posters identities were directly and materially related. Finally, the last element that the court required 2themart to prove was that the requested information was sufficient to establish or disprove the claim or defense and was unavailable from any other source. The requested information was the anonymous poster’s identities. The court determined that 2themart did not need the anonymous poster’s identities to prove its defense. 2themart had claimed that the anonymous posts had caused the company’s stock price to drop. Because the chat logs were dated, the court ruled that the company could compare the chat logs to the dates the stock price dropped to see if the posts caused 2themart’s stock prices to

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123 Id. at 1095-1096.  
124 Id. at 1095.  
125 Id. at 1090.  
126 Id. at 1096.  
127 Id. at 1097.  
128 Id. at 1096.  
129 Id.  
130 Id.  
131 Id.  
132 Id. at 1097.  
133 Id. at 1090.  
134 Id. at 1096.  
135 Id.
The court reasoned that this allowed the plaintiffs to make their claim without infringing on the First Amendment rights of the posters by removing their anonymity.\textsuperscript{137}

\textit{ii. Motion to Dismiss}

Several courts have adopted a motion to dismiss test. A motion to dismiss test requires that a party to prove that its claim can survive a motion to dismiss before the court will reveal the identity of an anonymous defendant. Generally, a claim that is not adequately plead by providing enough facts will be dismissed. In other words, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.”\textsuperscript{138}

The first court to use a motion to dismiss standard was the United States District Court for the Northern District of California in \textit{Colombia Insurance Company. v. Seescandy.com.} Although this case involved copyright and trademark infringement claims instead of defamation, the same test can be, and has, been applied to defamation claims.

See’s Candy Shops, Inc. assigned the plaintiff Colombia Insurance the right to use its trademark.\textsuperscript{139} Someone other than the plaintiff registered the domain name Seescandy.com.\textsuperscript{140} Colombia Insurance sought an injunction to prevent the defendant from using the name of See’s Candy Shops and damages.\textsuperscript{141} In order to get any relief from the defendant, Colombia Insurance needed to locate him or her. This required Colombia Insurance to have the defendant’s real name and address so that it could serve him or her

Under the test that the United States District Court for the Northern District of California developed in \textit{Colombia Insurance Co.}, a party seeking the identity of an anonymous person on

\textsuperscript{136} \textit{Id.} \\
\textsuperscript{137} \textit{Id.} at 1097-1098. \\
\textsuperscript{138} \textit{Bell Atlantic Corp. v. Twombly}, 550 U.S. 544, 555 (2007). \\
\textsuperscript{139} \textit{Colombia Insurance Co.}, 185 F.R.D. at 575. \\
\textsuperscript{140} \textit{Id.} \\
\textsuperscript{141} \textit{Id.} at 575.
the internet should first identify that there is a person or entity that committed tortuous conduct and attempt to locate the tortfeasor.\textsuperscript{142} If a plaintiff has satisfied these steps, and its claim can withstand a motion to dismiss, then the court should reveal the anonymous poster’s identity.\textsuperscript{143}

The plaintiff satisfied the first step by identifying the aliases and e-mail addresses that the defendant used to acquire Seescandy.com.\textsuperscript{144} The plaintiffs satisfied the second step by serving notice on the e-mail addresses associated with the domain registrations.\textsuperscript{145} The plaintiff also attempted to search for the phone numbers of people with the names of the aliases.\textsuperscript{146} Because the plaintiff had completed all of these steps, the court examined whether the plaintiff’s claims could withstand a motion to dismiss.\textsuperscript{147} This called for an analysis of trademark law.\textsuperscript{148} Ultimately, the court found that the plaintiff’s claim could withstand a motion to dismiss and decided the case in the plaintiff’s favor.\textsuperscript{149} Thus, the anonymous defendant’s identity was revealed.\textsuperscript{150}

\textit{iii. A Prima Facie Evidentiary Showing}

The prima facie evidentiary standard test was first adopted by the Superior Court of New Jersey in \textit{Dendrite International}. Under this test a plaintiff must make a prima facie showing that the defendant defamed him or her online. \textit{Dendrite International}, the plaintiff, was a corporation.\textsuperscript{151} The defendant was an anonymous poster who used message boards on Yahoo to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 577.
\item Id. at 579.
\item Id.
\item Id.
\item Id. at 576.
\item Id. at 579.
\item Id. at 580.
\item Id. at 580.
\item Id.
\item Dendrite Intl., v. Doe 3, 755 A.2d at 760.
\end{enumerate}
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attack Dendrite.\textsuperscript{152} At the time of the lawsuit Yahoo, an internet service provider, had a message board devoted to Dendrite.\textsuperscript{153} To post on the message boards, Yahoo required users to provide their name full names, e-mail addresses, and mailing addresses.\textsuperscript{154} Yahoo’s privacy policy stated that this information would remain confidential.\textsuperscript{155} The unknown defendant accused Dendrite’s president of structuring contracts to raise revenue and shopping the company around because Dendrite was no longer competitive.\textsuperscript{156}

The court in \textit{Dendrite} advocated a three prong test to determine if the defendant’s identity should be revealed.\textsuperscript{157} First, the plaintiff was required to notify the anonymous defendant and allow the defendant time to respond.\textsuperscript{158} Then, the plaintiff was required to document the specific statements that it believed constituted a cause of action.\textsuperscript{159} The court should examine these statements to determine if the plaintiff has shown a prima facie case.\textsuperscript{160} The court elaborated that this meant more than a plaintiff merely showing that he or she has stated a claim that could withstand a motion to dismiss.\textsuperscript{161} Instead, a plaintiff was required to prove sufficient evidence that supported each element of his or her cause of action.\textsuperscript{162} Finally, if the plaintiff makes a prima facie showing of defamation, the court will balance the defendant’s First Amendment interests against the strength of the plaintiff’s initial case and the plaintiff’s need to have the defendant’s identity.\textsuperscript{163} The court began its analysis by determining that if the comments were
lawful that they would be constitutionally protected under the First Amendment.\textsuperscript{164} The case then turned on whether Dendrite could establish a prima facie case that it had been defamed.

Ultimately, the court in \textit{Dendrite} determined that the unknown defendant should remain anonymous because the plaintiff could not prove that the anonymous defendant’s statements harmed it.\textsuperscript{165} The court reasoned that there was no harm because there was no visible connection between the defendant’s posts and drops in Dendrite’s stock prices.\textsuperscript{166} The lack of harm meant that the plaintiff’s claim would fail even a motion to dismiss test, which is the test that the lower court applied.\textsuperscript{167} The plaintiff’s failure to meet the motion to dismiss test meant that it would fail the prima facie test, which required a slightly higher burden of proof.\textsuperscript{168}

The Sixth District Court of California also applied a prima facie evidentiary standard in \textit{Krinsky}. The plaintiff, Lisa Krinsky, was the President and chair of the board of SFBC Intl, Inc.\textsuperscript{169} An unknown defendant identified in the suit as Doe 6 made posts online that targeted, in particular, an executive named Jerry Seifer.\textsuperscript{170} Posts about Jerry called him a “mega scum bag” and a “cockroach.”\textsuperscript{171} Another post claimed to be Jerry’s New Year’s resolutions, which asserted “I will perform fellation [sic] with Lisa even though she has fat thighs, a fake medical degree, ‘queefs,’ and has poor feminine hygiene.”\textsuperscript{172} The court adopted a prima facie evidentiary standard.\textsuperscript{173} Although the court did not outline specific elements of its test, it required that a

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\textsuperscript{164} \textit{Id.} at 766.  \\
\textsuperscript{165} \textit{Id.} at 772.  \\
\textsuperscript{166} \textit{Id.} at 770.  \\
\textsuperscript{167} \textit{Id.} at 771.  \\
\textsuperscript{168} \textit{Id.}  \\
\textsuperscript{169} \textit{Krinsky}, 159 Cal. App. 4th at 1158-1159.  \\
\textsuperscript{170} \textit{Id.}  \\
\textsuperscript{171} \textit{Id.}  \\
\textsuperscript{172} \textit{Id.}  \\
\textsuperscript{173} \textit{Id.} at 1171. \\
\end{flushleft}
plaintiff notify a defendant and make a prima facie showing. In a footnote, it clarified that a prima facie showing was,

prima facie evidence is that which will support a ruling in favor of its proponent if no controverting evidence is presented. It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences.174

Applying Florida defamation law, the court found that while the messages that Doe 6 posted were offensive, they did not create a cause of action because they were opinions and not facts.175 The finding that the messages were opinions meant that the plaintiff could not discover the defendant’s identity.176

iv. Summary Judgment

The summary judgment test requires plaintiffs to prove the highest evidentiary burden. The first case to apply a summary judgment standard was Doe no. 1 v. Cahill. In Cahill, a blogger using the pseudonym “Proud Citizen” anonymously posted comments about a Smyrna, Delaware, city councilman named Cahill.177 “Proud Citizen” alleged in his posts that Cahill was “paranoid” and suffered from “an obvious mental deterioration.”178 The Delaware Supreme Court adopted the same test as the Superior Court of New Jersey in Dendrite, but added an additional element that required a plaintiff to meet a summary judgment standard.179 This means that the plaintiff must be able to survive a motion for summary judgment. Generally, summary judgment will be granted when “there is no genuine issue of material fact.”180 The materiality of a fact is defined by the substantive law.181 Applying the summary judgment standard, the

175 Id. at 1178.
176 Id. at 1180.
177 Doe no. 1 v. Cahill, 884 A.2d 454.
178 Id.
179 Id. at 460.
181 Id.
Supreme Court of Delaware found that the plaintiff’s claims did not meet the summary judgment standard, and thus Proud Citizen’s identity remained unexposed. The court found that Proud Citizens statements were opinions rather than facts. The court’s classification of the posts as opinion was based on the fact that the forums where Proud Citizen’s posts were made included a statement that all content published in the forums were opinion. Additionally, other commentators responded to Proud Citizen that his posts were unpersuasive.

The Arizona Court of Appeals also applied a summary judgment test in *Mobilsa, Inc. v. Doe 1*. The CEO and founder of Mobilsa sent an intimate message to his girlfriend from his work e-mail account. He also sent a copy of the message to his personal e-mail account. Nearly a week later, members of his team received a copy of the e-mail from an anonymous e-mail provider. Mobilisa sued the unnamed defendant for trespass to chattels. The court held that it had satisfied the burden of meeting a summary judgment claim. Mobilisa was able to survive a summary judgment challenge because the facts indicated that there was no way for anyone to have stumbled upon the e-mail. Therefore, the unnamed defendant must have found the e-mail by accessing Mobilsa’s president’s e-mail. Since the court did not know the outcome of the First Amendment balancing step, it declined to identify the person who sent the e-mail until a decision as to the third step was reached by a lower court.

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182 *Doe no. 1 v. Cahill*, 884 A.2d at 468.
183 *Id.* at 467.
184 *Id.* at 466.
185 *Id.* at 467.
186 *Mobilsa, Inc.*, 170 P.3d at 715.
187 *Id.*
188 *Id.*
189 *Id.* at 716.
190 *Id.* at 724.
191 *Id.* at 723.
192 *Id.*
193 *Id.* at 724.
C. ADDITIONAL FIRST AMENDMENT BALANCING STEP.

In addition, to the requiring notice and the procedural tests outlined above, some courts require that the defendant’s First Amendment interest be balanced against the plaintiff’s right to recover and need for the defendant’s identity. The inclusion of a First Amendment balancing step to protect a defendant’s identity has been acknowledged in both online and offline settings. In the case Independent Newspapers v. Brodie, the Maryland Court of Appeals adopted a prima facie evidentiary test that included an additional First Amendment balancing element. If the plaintiff could make a prima facie case, then his or her interest in recovering from defamation should be balanced against the defendant’s Constitutional rights. Ultimately, the court found that the plaintiff could not sustain a prima facie defamation case so the First Amendment balancing step was never reached.

The Court in Mobilisa, Inc. also adopted a balancing test where the defendant’s First Amendment interest was balanced against “the strength of the requesting party’s case against the need for disclosure of the anonymous poster’s identity.” Like the court in Indep. Newspapers, the court in Mobilisa, Inc. never determined the balancing step because it decided that the application of the First Amendment balancing step was a function for the trial court.

V. COURTS SHOULD ADOPT A UNIFORM STANDARD THAT REQUIRES PLAINTIFF TO PROVE NOTICE AND MEET A PRIMA FACIE EVIDENTIARY STANDING.

A. NEED FOR A UNIFORM STANDARD

194 Id. at 723; Indep. Newspapers, 966 A.2d at 454.
195 Lassa v. Rongstad, 718 N.W. 2d 673, 689 (Wis. 2006)
196 Indep. Newspapers, 966 A.2d at 454.
197 Id.
198 Id. at 457
199 Mobilisa, Inc., 170 P.3d at 719-720.
200 Id. at 724.
The different standards used by each jurisdiction have created a lack of predictability for when a defendant will be exposed. This lack of predictability allows plaintiffs to engage in forum shopping\textsuperscript{201} and meritless litigation aimed only at revealing anonymous posters. The main problem with forum shopping is that plaintiffs who engage in the practice might bring Strategic Lawsuits Against Public Participation (SLAPP) suits in jurisdictions with the lowest procedural burdens to silence their critics. SLAPP suits are suits that are aimed at silencing critics through exposure. Proponents of SLAPP suits want to chill the speech of their critics, not recover damages for their injuries.\textsuperscript{202} SLAPP suits are especially problematic in cases where there is great disparities in wealth, such as when the plaintiff is a corporation attempting to unmask an ordinary citizen.\textsuperscript{203} The unequal distribution of wealth gives the corporation an enormous advantage against an ordinary citizen.\textsuperscript{204} The case \textit{HealthSouth Corporation v. Krum} illustrates the motives a plaintiff might have in filing a SLAPP to unmask an alleged defamer.\textsuperscript{205} The defendant, Krum, was a disgruntled former employee of HealthSouth.\textsuperscript{206} Assuming the screen name I AM DIRK DIGGLER, Krum’s posts ranged from attacking the management of HealthSouth as “self-serving” to detailing the affair that he was allegedly having with the CEO’s wife.\textsuperscript{207} These statements were facially defamatory, but HealthSouth’s motive in suing Krum was questionable.\textsuperscript{208} At the time of the lawsuit, Krum was employed as a food service worker with a meager salary of $35,000 a year, and it was unlikely that Krim would have been able to

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\item Forum shopping is the process where a plaintiff choses to file his or her suit in a jurisdiction most favorable to his or her case.
\item \textit{Id.} at 865
\item \textit{Id.}
\item \textit{Id.} at 866.
\item \textit{Id.}
\item \textit{Id.} at 866-867.
\item \textit{Id.} at 868.
\end{enumerate}
\end{footnotesize}
pay damages. Instead Professor Lidsky reasons that HealthSouth, like other corporations, brought this SLAPP suit because it was advantageous from a business standpoint because it was aimed at silencing critics whose comments could damage the company. The danger of SLAPP suits is they can silence legitimate criticism. It precisely this line between legitimate suits brought by defamed plaintiffs and non-legitimate SLAPP suits brought to silence critics that necessitate a uniform standard.

A savvy plaintiff who is aware of jurisdictional discrepancies could exploit them through forum shopping. For example, if a plaintiff’s real aim was to embarrass his or her alleged defamer by unmasking him or her, the plaintiff’s best course of action would be to file the suit in a state that applied a good faith test. In these states, which require plaintiffs to satisfy the lowest procedural burden, a plaintiff will have the easiest time unmasking a defendant. Obviously, if a plaintiff’s only aim is to expose a defendant, then his or her suit is not brought in good faith. However, the plaintiff will succeed so long as he or she can create at least an appearance of good faith.

Although there have been no identified incidents of forum shopping arising from online content, the jurisdictional boundaries of the internet increase the number of jurisdictions where a plaintiff can litigate. The forum shopping that a plaintiff might engage in can be compared to instances of forum that resulted from offline conduct. The case Keeton v. Hustler Magazine illustrates an example of forum-shopping that can be compared to the forum shopping that an victim of alleged online defamation could duplicate. The plaintiff, Kathy Keeton brought a defamation action against Hustler Magazine, a nationally circulated publication, in New

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209 Id.
210 Id. at 877.
Hampshire.\textsuperscript{212} New Hampshire was an odd choice for the suit because Keeton was a New York resident and Hustler was an Ohio corporation with its principal place of business in California.\textsuperscript{213} However, New Hampshire offered the plaintiff a longer statute of limitations than any other state.\textsuperscript{214} New Hampshire also had a single publication rule, which meant that the defendant could be liable for damages in all fifty states.\textsuperscript{215} The Supreme Court upheld Keeton’s right to sue in New Hampshire.\textsuperscript{216} It found that plaintiffs are not required to have minimum contacts with the forum state, and that the defendant had minimum contacts because its magazine was sold in New Hampshire.\textsuperscript{217} There is great potential for online defamation cases to parallel the forum shopping that was present in \textit{Keeton}. Because the Supreme Court decided in \textit{Keeton} that plaintiffs are not required to have minimum contacts with the forum where they bring their lawsuit, a victim of online defamation could sue in any state. The internet is also comparable to a nationally circulated magazine because online content can be accessed anywhere in the country, which increases the number of forums where a defendant can be required to litigate. While it is true that anomalies among the jurisdictions can result in slightly different results, a uniform standard would provide at least some consistency so that plaintiffs do not have the option of filing SLAPP suits in jurisdictions with lower evidentiary standards.

\textbf{B. ADOPTION OF A PRIMA FACIE STANDARD AS THE IDEAL STANDARD}

The ideal standard for balancing the plaintiff’s interest to recover for his or her defamation and the defendant’s interest in remaining anonymous would consist of notice and a

\textsuperscript{212} \textit{Id.} at 772.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.} at 773.
\textsuperscript{215} \textit{Id.} at 774.
\textsuperscript{216} \textit{Id.} at 774-775.
\textsuperscript{217} \textit{Id.} at 775.
prima facie evidentiary standard. An additional step that balances a defendant’s First Amendment interest in remaining anonymous is unnecessary.

i. **Requirement of Notice**

Most courts have included a notice requirement in their analysis of when an anonymous defendant should be exposed.\(^{218}\) The use of a notice standard should be retained. Aside from the traditional benefits associated with notice, in these internet cases notice provides the defendant with an opportunity to respond to pending litigation and attempt to protect their identity.

Most courts allow defendants to file a motion to quash a plaintiff’s subpoena to an ISP seeking their identity. This step is important because defendants deserve a chance to prove that the plaintiff’s claims are unfounded.

The majority position is that notice should be provided by posting a message on the same message board of in the same chat room where the defendant’s messages occurred. However, as some commentators and courts have acknowledged, the internet’s fluid nature can cause the message board or chat room where the defendant’s messages occurred to be destroyed by the time of the lawsuit.\(^{219}\) The best way to achieve notice is through the internet service provider. The benefit of requiring an internet service provider to pass notice along is that it is more likely to reach the defendant because the internet service provider can contact the defendant at his or her house. This avoids any problem that may occur if notice is posted in a chat room or on a message board that no longer exists, or the defendant no longer frequents.

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ii. Prima Facie Standard

The evidentiary standard needs balance to the interests of the plaintiffs to unmask their online assailants and defendants to shield themselves from meritless litigation aimed only at unmasking them. A prima facie standard is the ideal approach for determining when a defendant’s identity should be exposed. It offers a middle ground between the good faith and motion to dismiss test, which do not adequately protect defendant’s anonymity and the summary judgment test, which is overly burdensome on plaintiffs who have been harmed by online defamation.

The good faith and motion to dismiss tests offer too little protection for defendant’s anonymity. There is value in anonymous speech on the internet, and people expect to use the internet anonymously. As the court in Columbia Insurance Co. acknowledged,

People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one’s mind without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.

Protecting anonymous speech also protects the ability of insiders with valuable information to share it. One reason that people might assume pseudonyms on the internet is that they fear their comments could harm their offline lives. In particular, their employment might be negatively affected if they expose flaws in places where they work. For example, one

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220 In Re Subpoena Duces Tecum to America Online, 52 Va. Cir. At 32.
221 Columbia Insurance Co., 185 F.R.D. at 578
Microsoft worker was fired after he posted a photo of Apple computers on Microsoft’s lot, even though it was Microsoft’s policy to test its competitors’ products.\textsuperscript{223}

Another benefit of anonymous speech is that it can conceal identifying features such as race, religion, or age that could cause others to discriminate against the poster or disregard his or her message. As the court in \textit{Doe v. 2themart.com, Inc.} points out “‘[t]he ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.’”\textsuperscript{224}

Additionally, people may be reluctant to discuss embarrassing ideas on the internet if they knew that their identities could be exposed. For example, the internet can provide online support groups that unite people with physical or mental conditions that they would not want to be associated with in their offline lives. If people feared that their identities could easily be exposed, the result might be a chilling effect. As Professor Fredrick Schauer has remarked that “The very essence of a chilling effect, is an act of deterrence.”\textsuperscript{225} Professor Lidsky has observed that these libel suits might not only chill the speech of defamers, but, “it may also chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular of novel ideas.”\textsuperscript{226}

This diversity of discussion is beneficial and is the very essence of the “marketplace of ideas.” The “marketplace of ideas” is based on a search for the truth. But, the competing interests of plaintiffs to prevent defamatory remarks and defendants to remain anonymous are different

\textsuperscript{224} \textit{Doe v. 2themart.com, Inc}, 140 F. Supp. at 1092 quoting \textit{Colombia Insurance Co.}, 185 F.R.D.at 578.
\textsuperscript{225} Frederick Schauer, \textit{Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"}, 58 B.U. L. Rev. 685, 689 (1978)
facets of the “marketplace of ideas.”\textsuperscript{227} According to Weirland the main argument in favor of identifying anonymous internet users is that their defamatory content spreads lies.\textsuperscript{228} At the same time, the loss of their anonymity might chill their speech.\textsuperscript{229} And, in this way, damage the “marketplace of ideas” because less information is being entered into the marketplace.\textsuperscript{230} By allowing plaintiffs to remove the cloak of anonymity from libelous defendants truth is enhanced, which in turn, provides credibility to the online marketplace.

In striking a balance between these two competing values, the prima facie test offers the most protection for beneficial anonymous speech. In contrast to the low burden good faith and motion to dismiss standards, a prima facie standard limits meritless suits. Only 13\% of plaintiffs ultimately prevail in a defamation suit, and when they do prevail they “owe more to their good fortune than ‘to their virtue, their skill, or the justice of their cause.’”\textsuperscript{231}

As the court in \textit{Solers v. Doe} recognized,

\begin{quote}
The good faith test 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.\textsuperscript{232}
\end{quote}

The low burdens set by the good faith and motion to dismiss tests can lead to the chilling effect that was previously described. People may silence themselves because they are afraid of exposure. In the Delaware Supreme Court’s rejection of the good faith test, it reasoned that plaintiffs could,

\begin{quote}
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{232} \textit{Solers Inc.} 977 A.2d at 952.
\end{quote}
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.\(^{233}\)

While the summary judgment standard offers similar protection for defendant’s anonymity as the prima facie evidentiary standard, it is too burdensome to be the ideal standard. One benefit of a summary judgment test is that often avoids the need for a costly trial. Professor Fairman has described summary judgment standard as one that “deals with claims lacking merit.”\(^{234}\) A summary judgment standard “provides an efficient end to meritless litigation, lifting the final burden from the shoulders of the pleadings.”\(^{235}\) The obvious benefit to forcing a plaintiff to meet this high burden is that it weeds out SLAPP suits.\(^{236}\) As the court in Krinsky recognized “requiring at least [a summary judgment standard] ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism.”\(^{237}\)

The prima facie standard offers a similar protection as the summary judgment standard because it will also weed out SLAPP suits. However, the summary judgment standard is too high for plaintiffs to meet and fails to protect the victims of online defamation.\(^{238}\) As Professor Molloy describes requiring the plaintiff to meet a summary judgment standard does not account for the reputational harm that a plaintiff might suffer from. In a world where employers frequently do a Google search before hiring potential employees, unproven assertions on the

\(^{233}\) Doe v. Cahill, 844 A.2d at 457.
\(^{234}\) Christopher M. Fairman, They Myth of Notice Pleading, 45 Ariz. L. Rev. 987,993 (2003).
\(^{235}\) Id. at 994.
\(^{237}\) Krinsky, 159 Cal. App. 4th at 1171.
internet could deprive a person of a job.\textsuperscript{239} The standard should not be so high as to deprive plaintiffs who have been harmed from unmasking their attackers because they cannot meet a procedural threshold.

\textbf{iii. No Need for a First Amendment Balancing Element}

Some courts have included a First Amendment balancing element in their tests. This step requires that anonymous defendant’s interest be balanced against the strength of the plaintiff’s case and the necessity of the plaintiff to know the defendant’s identity. If the plaintiff’s interest outweighs the defendant’s then the defendant can be unmasked. This step is unnecessary.

Supporters of the First Amendment balancing step argue that an in camera conference with a judge is needed so a defendant can argue “that the magnitude of harm she faces if her identity is revealed outweighs the plaintiff’s need for her identity.”\textsuperscript{240} They also argue that a benefit of First Amendment balancing step is that it provides flexibility for each case to be decided based on its unique facts.\textsuperscript{241} But, as Professor Vogel warns a balancing step outweighs the rest of a standard. He writes, “[i]n effect, the court acknowledges that, even if plaintiff has alleged a viable legal claim against the defendant . . . the court may still exercise discretion to stop the case in its track.”\textsuperscript{242} The fact that judges could have discretion in deciding these cases can lead judges to apply the standard without any uniformity or predictability. This leads to the same lack of consistency that is already present under the current jurisdictional dependent approach.

\textsuperscript{239} Id. at 1191.
\textsuperscript{240} Lyrissa Barnett Lidsky and Thomas F. Cotter, Authorship, Audiences, and Anonymous Speech, 82 Notre Dame L. Rev. at 1601-1602.
\textsuperscript{241} Mobilisa, Inc. 170 P.3d at 720.
\textsuperscript{242} Michael S. Vogel, Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards, 83 Or. L. Rev. 795, 808 (2004).
iv. The Existing Defamation Laws should be Maintained.

Some commentators have argued that there should be different standards for unmasking anonymous defendants based on whether their speech is political or non-political. In their view, political and non-political speech should receive different treatment because all of the protections for anonymous speech have concerned political speakers. However, this is unnecessary. Establishing different standards for political and non-political speech may be compelling, but it fails to consider that even political speech that is defamatory should not be protected.

Additionally, a prima facie evidentiary standard would still require plaintiffs to plead facts that are specific to his or her case. This incorporates the existing framework of actual malice standard from New York Times Company v. Sullivan along with the Gertz and Dunn & Bradstreet decisions and allows a court to give more deference for political speech and other matters of public concern. Of course, one argument for abandoning the categorical approach to defamatory speech that differentiates between public officials and figures and private is that online they all have the same access to the channels of communication. But greater access to the channels of communication does not mean that their message will spread farther. Public officials and figures can still use their traditional media connections to correct lies. Additionally, public officials and figures often have online networks, including blogs, twitter, and social networking.

243 Ryan M. Martin, Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits, 75 U. Cin L. Rev. 1238.
244 McIntyre, 514 U.S at 349.
pages devoted to public relations that they could use to respond. In contrast a private figure might have the same membership to blogs, twitter, and social networking sites, but his or her message is unlikely to reach as many people as a celebrity’s message will.

VI. CONCLUSION

The competing rights to have one’s reputation untarnished by malicious lies and to express one’s views anonymously have been fundamental values since the origin of American law. The internet is a new medium where protection for anonymous speech needs to be balanced with the right to protect one’s reputation from lies. The internet is a virtual “marketplace of ideas” that enhances the flow of information through anonymity and increased access to the channels of communication for all. With the expansion of this virtual “marketplace of ideas” the possibility for defamation also increases. Courts need to strike a balance between protecting the anonymity that can foster rich discussion and allowing plaintiffs access to the identity of those who defame them so that they can recover for their injuries. The initial process is one where plaintiffs subpoena internet service providers to expose the defendants’ identities and defendants attempt to quash these subpoenas to protect their anonymity. The decision in this procedural battle has fallen on courts to balance the interests of both parties. Courts have adopted four evidentiary tests to decipher when an anonymous defendant’s identity should be exposed: a good faith test, a motion to dismiss test, a prima facie evidentiary standard, and a summary judgment test. The time has come for courts to apply a uniform standard for determining when an anonymous internet user should be unmasked. This uniform standard will offer protection from savvy plaintiffs who use jurisdictional disparities to file meritless SLAPP suits aimed only at chilling speech. The ideal standard combines notice through the defendant’s internet service provider with a prima facie evidentiary standard. A prima facie evidentiary standard strikes the
balance between the good faith and motion to dismiss tests, which can result in careless removal of a defendant’s anonymity, and the summary judgment test, which can be too burdensome for a defamed plaintiff to meet. Finally, the First Amendment balancing element required by some jurisdiction does nothing to enhance protections for a defendant’s anonymity because it allows judges to use their discretion. The effect is the same lack of predictability that is present in the current jurisdictional dependent system.