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Peek-a-Boo I See You: The Constitution, Defamation Plaintiffs, and Pseudonymous Internet Defendants

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PEEK-A-BOO I SEE YOU: THE CONSTITUTION, DEFAMATION PLAINTIFFS, AND PSEUDONYMOUS INTERNET DEFENDANTS

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A donut shop in Queen Anne's County, Maryland, found itself defamed on the Internet by allegations of unsanitary conditions. The speakers were identified only by their web names. The shop owner's defamation suit named as defendants, the sponsor of the website on which the defamation occurred, and as "John Does," the individuals who did the actual posting under their web names. It then sought to determine the posters' actual identities.[1]

The website defended its own position, successfully asserting that the federal statute immunizing Internet service providers,[2] re-

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1. Ind. Newspapers, Inc. v. Brodie, 966 A.2d 432 (MD. 2009).
2. 47 U.S.C. § 230 (1998).

sisted discovery of the identity of the posting individuals.[3] The website is presumably the sole source of that information. When a defamation plaintiff seeks to ferret out the true identity of those maligning him, constitutional doctrine comes into play. As a result, the United States Supreme Court has, in a series of decisions, found a First Amendment right to speak anonymously.[4] Accordingly, that right includes anonymous Internet speech.[5]

The defense of this right, in the *Independent Newspapers, Inc.* (hereinafter "INI") case, ultimately resulted in a decision by the Maryland Court of Appeals, which sought to establish definitively the procedural requirements and standards for breaching Internet anonymity. Resolution of the issue involves the collision of two conflicting interests: the right of the defamation plaintiff to redress, and constitutional protection of the right to anonymous speech.

This article will review the United States Supreme Court's anonymity jurisprudence, consider the approaches taken by different state courts to this issue, and review the Maryland case in detail. This article will also conclude that the Maryland court's requirement (that the decision on disclosure include a balancing test as one element of a decision whether to breach anonymity) is unworkable, unnecessary, and inappropriate.

I. THE ISSUE

On March 21, 2006, defamatory postings of the Dunkin Donuts store in Centreville, Maryland were made on "Newszap.com," a website operated by Independent Newspapers, Inc. (herein "INI").[6] The posters were identified as "RockyRaccoonMD" and "Suze." The allegations were that the establishment failed to meet appropriate sanitary standards.[7] Furthermore, various negative remarks about the shop owner surrounded the offending statements.[8]

Zebulon J. Brodie, the owner of the shop, filed suit on May 26, 2006 in Maryland state court against INI and individuals identified by their web names. INI's motion to dismiss was granted, as were the suits against the three named defendants, other than the two identi-

3. *Id.*
4. See infra Part II.
5. *Id.*
6. *Ind. Newspapers, Inc.*, 966 A.2d at 442-443.
7. *Id.* at 446.
8. *Id.*

fied above.[9] INI was, however, required by the court to comply with plaintiff's subpoena directing it to identify the posters, RockyRaccoonMD and Suze.[10] The court made the following order:

> ORDERED, that the requested protective order is denied as to statements regarding Plaintiff's businesses to the extent providing [sic] available discovery regarding the identity of those individuals who made statements that the Plaintiff's food service was maintained in a "dirty and unsanitary-looking" manner, and was permitting trash from its business to pollute the nearby waterway.[11]

Plaintiff's counsel provided the requested Internet thread and served a second subpoena on INI ordering discovery of "any and all documents and tangible things identifying and/or relating to. . . 'RockyRaccoonMD' and 'Suze.'"[12] INI filed a motion to quash and/or for a protective order, arguing that anonymity should be protected, and it asserted that plaintiff had not stated an actionable claim for defamation.[13] The motion was denied, INI filed a notice of appeal, and the Maryland Court of Appeals, the state's highest court, granted certiorari before the case could be heard in the intermediate state appellate court.[14]

The Court of Appeals ruled that INI was correct in its assertion that plaintiff had not stated a valid defamation claim.[15] It ruled on the case, despite the fact that the statute of limitations had in fact run on the claim against the two posting individuals.[16] In doing so, the court explained that it "granted certiorari in this case not merely to sort out the record, but to provide guidance to the trial courts in defamation actions, when the disclosure of an anonymous Internet communication is sought."[17]

The court then surveyed out-of-state decisions on the issue.[18] It concluded, by holding that the trial court had abused its discretion in denying INI's motion for a protective order, that when the court ordered the identification of the John Does, plaintiff had not yet "pleaded

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9. *Id.* at 449.
10. Id.
11. *Id.* at 446.
12. *Id.* at 447.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Ind. Newspapers, Inc.*, 966 A.2d at 449.
17. *Id.*
18. *Id.* at 449-53.

a valid defamation claim against any of them."[19] Most significantly, the court then adopted a five-step test to be employed by the Maryland trial courts in deciding motions in similar cases.[20]

II. ANONYMITY, THE FIRST AMENDMENT, AND THE INTERNET

The First Amendment right to speak anonymously is well established in Supreme Court doctrine.[21] In *Talley v. California*, a Los Angeles ordinance required that any handbill distributed in the city contain the name and address of the person preparing, distributing, or sponsoring it. The Supreme Court held the ordinance "void on its face," finding it an inhibition to freedom of expression.[22] The argument that the requirement could be justified as a prevention of "false advertising and libel" was rejected, noting that the ordinance was "in no manner so limited."[23]

In *McIntyre v. Ohio Elections Commission*, the Supreme Court reached the same result, invalidating a law (then common in many states) that prohibited anonymous leaflets in an election campaign. Writing for the majority, Justice John Paul Stevens found that "an author's decision to remain anonymous" is "an aspect of the freedom of speech protected by the First Amendment."[24] Moreover, the Federalist Papers were cited as an example of anonymity (more precisely pseudonymity) in a writing of historic importance.[25] The Court imposed strict scrutiny, even though the restriction was narrower than the ban in *Talley*.[26] Waxing eloquent, Justice Stevens said that anonymous writing was "not a pernicious fraudulent practice, but an honorable tradition of advocacy of dissent."[27]

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19. *Id.* at 447.

20. *Id.* at 457; *See generally infra* Part IV.

21. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES, AND POLICIES, 973-74 (3d ed. 2006); John B. Morris, Jr. & Julie M. Carpenter, *Free Speech on the Internet*, 2 INTERNET LAW AND PRACTICE §24.41 (2008).

22. *Id.* at 65.

23. *Id.* at 63.

24. *Id.* at 341.

25. *Id.* at 342.

26. *Id.* at 347.

27. *Id.*; *See also* Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 205 (1999) (invalidating a Colorado requirement that all persons circulating petitions wear a badge bearing their name); see also Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150, 166 (2002) (overturning a municipal ordinance regulating door-to-door solicitation on multiple grounds, the Court noted that the permit requirement inhibited anonymous speech).

The Supreme Court expressly held in 1997 that First Amendment protection applied on the Internet.[28] A 2001 district court opinion specifically held that the right of anonymous speech on the Internet "must be carefully safeguarded."[29] These cases remain established constitutional doctrine.

The arguments offered in defense of anonymity include the assumption that this protection encourages speech, that speakers may believe that acceptance of their message will be colored by knowledge of the speaker's identity, and that the speaker may want to disclose confidential information without revealing the speaker's identity.[30] The cases cited above have helped preserve Internet anonymity. To illustrate, *Reno* is one of a series of cases finding unconstitutional federal legislation aimed at protecting children from offensive material on the Internet, the Supreme Court emphasized that there was no reason to apply a reduced level of First Amendment protection to Internet communications.[31]

A. Anonymity and the Defamation Plaintiff

The First Amendment has something to say about all speech; it leaves only five categories without constitutional protection.[32] Early case law included defamation as an unprotected category, but *New*

28. *Id.* at 870; Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997). "Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that '[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.'"[footnote omitted] 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. As the District Court found, "the content on the Internet is as diverse as human thought." Id. at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."

29. Doe v. 2THEMART.com Inc., 140 F.Supp.2d 1088, 1097 (Wash. 2001).

30. *Ind. Newspapers, Inc., supra* note 6, at 431.

31. *Reno*, 521 U.S. at 870; *see generally* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L.J. 855(2008).

32. *Id.* at 224; *see also* United States v. Stevens, 533 F.3d 218 (3d Cir. 2008), *cert. granted* 129 S. Ct. 1984 (2009)(listing as unprotected categories of speech: child pornography, when actual children are involved in its production, fighting words, incitement, obscenity and threats. The case points out that the Supreme Court has not found a category of speech to be unprotected since 1982.).

York Times v. Sullivan and its progeny have imposed a set of constitutional limitations on defamation plaintiffs.[33]

The plaintiff attempting a defamation suit against a pseudonymous defendant thus faces two constitutional doctrines: the right of anonymity and the protections afforded under *New York Times*. The latter are only peripherally involved in this discussion, although the courts do refer to them when discussing pleading requirements;[34] in contrast, the right of anonymity cannot be absolute. Virtually any analysis of the balance of societal interests would conclude that the law cannot allow the Internet to become a sanctuary for defamation.

The courts, faced with motions to disclose a defendant's identity, have considered four related questions: What must a plaintiff plead, to reach behind the screen name of the offending party? Is any element of proof required, at the point that, plaintiff requests disclosure of defendant's identity? Do the merits of the plaintiff's case enter into the decision at this preliminary stage? Finally, is the nature or quality of defendant's speech a relevant factor?

Speaking generally, the Constitution does not sufficiently safeguard tort plaintiffs. The Supreme Court's defamation jurisprudence protects defendants in the interest of shielding free expression from undue burdens.[35] Moreover, the Court has held that plaintiffs have no constitutional interest in reputation.[36] Justices Douglas and Black have dissented in defamation cases, asserting that the First Amendment absolutely protects expression with respect to government officials.[37] That view has never prevailed; and it can be questioned whether state law, which completely eliminates defamation actions for a specific category of individuals, would be constitutional.[38] Therefore, resolution of the conflict boils down to defining the process and standard required to reach trial in a tort claim, when the constitutional protection of anonymous speech is asserted as a barrier.

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33. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see generally* CHEMERINSKY, supra note 21, at 1044-1055.

34. *See* Doe v Cahill, 884 A.2d 451 (Del. 2005); see infra Part III.

35. CHEMERINSKY, *supra* note 16, at 1044-45.

36. Paul v. Davis, 424 U.S. 693 (1976) (holding that plaintiff could not invoke section 1983 as a deprivation of liberty by injury to his reputation).

37. New York Times Company v. Sullivan, 376 U.S. 254, 293 (Black, J., concurring).

38. In that sense the federal intervention into state tort law in the defamation area is parallel to the Court's punitive damages jurisprudence, which is entirely protective of defendants, with no constitutional interest in punitive damage claimants visible. See Charles S. Doskow, *The State Farm Punitive Damage Multiplier in the Courts: Early Returns*, 17 ST. THOMAS L. REV. 61 (2004).

III. THE CASE

Zebulon J. Brodie, the owner of a local Dunkin Donuts franchise, sued the INI website and the anonymous speakers on the basis of the following online statements:

> RockyRaccoonMD:[39] I wouldn't go to that Dunkin' Donuts . . . anyway . . . have you taken a close look at it lately? One . . . most dirty and unsanitary-looking food-service places I . . . seen.
>
> Suze: I haven't seen the inside of a DD in a while, but have you seen the outside? I drove th . . . through not long ago and was completely and utterly SHOCKED at the amount of trash that is . . . and sides of that building. It's apparent no one is cleaning the outside oft he [sic] building and the . . . wafting into the river that runs right alongside. [smiley face symbol]
>
> RockyRaccoonMD: I wouldn't go to that Dunkin' Donuts of Brodie's anyway . . . take a close look at it lately? One of the most dirty and . . . looking food-service places I have seen. . . I bought coffee . . . couple of times but quickly lost my appetite. . .[40]

Plaintiff Brodie sought discovery that would disclose the identities of the two speakers. INI moved to quash and for a protective order, arguing to maintain anonymity, and contending that plaintiff failed to state an actionable claim for defamation.[41] The trial court denied the motion and INI appealed. The Court of Appeal granted certiorari, precluding intermediate review by the Court of Special Appeals.[42] The court expressly stated that it was issuing its opinion to guide trial courts in future cases.[43]

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39. RockyRaccoonMD should not be confused with "Rookie Raccoon," the mascot of the Hudson Valley Renegades baseball team of the New York-Penn League.

40. *Ind. Newspapers, Inc.*, 966 A.2d at 446-47. The ellipses resulted from words being cut off on the right hand side of the page.

41. The "Policies and Disclaimers" of the ISP provided in part: "PRIVATE POLICY: While we preserve one's right to anonymity on the forum pages, we do require each individual to register a user name, email address and password. This protects newszap.com AND the individual from false representations. Individuals posting libelous or defamatory comments are not welcome at this site and are granted no right of anonymity should a court of law seek a poster's identity." Id. at 444 n.13. A federal statute requires such notification. 47 U.S.C. 551(c)(2). [In light of this statement, was INI obligated to defend the posters' identity?] INI also argued its immunity under 47 U.S.C. § 230 (c)(1)(2000), The Federal Communications and Decency Act. The trial court granted INI immunity on this basis, while ordering it to disclose the requested information; see also Ind. Newspapers, Inc., 966 A.2d at 445.

42. *Id.* at 447.

43. *Id.* at 435.

A. *The Approaches*[44]

INI addressed the issue in detail.[45] After finding the law to be as set forth in part III above, the Maryland Court of Appeals reviewed the approaches that sister courts had taken.[46] The court correctly stated the issue: Web posters have a First Amendment right to remain anonymous, but viable causes of action for defamation should not be defeated by their anonymous postings on the Internet.[47] It then reviewed several out of state cases which had attempted to resolve the conflict.[48]

1. Early Cases Set Forth a "Good Faith" Test

Two cases claimed to be the first to address the issue of piercing Internet anonymity in a litigation context; each minimized the burdens for plaintiff to discover defendants' true identity.[49] In the earlier of the two cases, in 1999 the District Court for the Northern District of California was faced with demands by SeesCandy for disclosure of the identity of a party advertising its products on the Internet under an allegedly infringing name.[50]

The district court decided the case by creating its own four-part test: (1) The defendant must be identified sufficiently to assure federal jurisdiction of the case; (2) plaintiff must disclose all steps taken to identify the posting party; (3) plaintiff must satisfy the court that it could survive a motion to dismiss; and (4) plaintiff must file its discovery request with the court, with reasons, and identification of persons who might provide the required information.[51]

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44. The cases analyzed by the INI court were not all the cases previously decided on the issue, but they included all the issues and considerations required for the court's analysis; see also Krinsky v. Doe, 72 Cal. Rptr. 3d (Cal. App. 2008).

45. *Ind. Newspapers, Inc.*, passim.

46. *Id.* In acknowledging that anonymity may be limited by "defamation considerations" the court cites two entirely inapposite cases, Beauharnais v. Illinois, 343 U.S. 250 (1952) which makes the outdated and overruled blanket statement that libel is completely unprotected, and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) which makes the same generalization. Both cases antedate New York Times Co. v. Sullivan and its progeny, which have established current constitutional doctrine limiting defamation recovery.

47. *Ind. Newspapers, Inc.*, 966 A.2d at 449.

48. *Id.* at 449-50.

49. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) and I*n re Subpoena Duces Tecum*, 52 Va. Cir.26 (2000).

50. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

51. *Ind. Newspapers, Inc.*, 966 A.2d at 446-47 (quoting Columbia Ins. Co. v. Seescandy.com, 185 F.R.D 573 at 578-80).

Under barebones federal pleading rules, surviving a motion to dismiss requires only a statement of the claim.[52] Thus, the third aforementioned requirement turns the plaintiff's attempt to learn the identity of his defamer into a Rule 12(b)(6) motion.[53] To illustrate, the court in *Columbia* satisfyingly held that plaintiff had made a factual submission sufficient to meet the burden, pleading actual infringement of its trademarks, and submitting thirty-one instances of actual confusion.[54]

A Virginia circuit court reached a similar result in *In re Subpoena Duces Tecum to America Online, Inc.*[55] Anonymous individuals had posted defamatory information about plaintiff in violation of fiduciary duties and contractual obligations in chat rooms on AOL.[56] AOL moved to quash the subpoena, but its motion was denied. The court first asked a constitutional question: "Whether the subpoena would unreasonably burden the anonymous rights of the John Does."[57] After citing *Talley* and *McIntyre* the court found that the right of anonymity must be balanced against the need to assure that abusers may be called to account; but the court answered the question by misstating the law and mis-citing authority.[58] Citing *Beauharnais*, the court said that defamatory statements are outside constitutional protection, as would be the release of confidential information about a publicly traded company.[59] It avoids this question by finding a compelling interest in the state of Indiana in protecting "companies operating within its borders.[60]

The court then framed a "two [sic] prong test" for piercing anonymity:[61] (1) the Court must be satisfied by the pleadings or evidence;

52. *See* FED. R. CIV. P.12.

53. *See Ind. Newspapers, Inc.*, 966 A.2d at 446–47; *see also* Fed. R. Civ. P. 12(b)(6).

54. *Columbia Ins. Co.*, 185 F.R.D. at 579-80.

55. In re Subpoena Duces Tecum to Am. Online, Inc.,52 Va. Cir. 26, 37(2000), *rev'd on other grounds sub nom.*, America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001). The appellate court reversed on the ground that plaintiff corporation was not entitled to proceed anonymously. *Id.* at 8. The case involved the anomaly of an anonymous plaintiff attempting to sue anonymous defendants, with additional issues of comity. *Id.* at 1. It is of interest partly because the court, like the Seescandy court, stated that it was the first to address the Internet anonymity issue in this context. *Id.* at 3.

56. *See id* at 1.

57. *Id.* at 8.

58. *Id.* at 5.

59. *Id.* at 7 (citing *Beauharnais* for the proposition of no protection, although that precedent has long since been rendered obsolete by the New York Times v. Sullivan line of cases. It misstates the date of *Beauharnais* in citing it, attributing it to 1992 rather than 1952).

60. *Id.*

61. *Id.* at 6.

(2) the party requesting the subpoena has a "legitimate, good faith basis to contend that it [has been] the victim of conduct actionable in the jurisdiction" in which the suit was filed; and (3) that the subpoenaed identity information is "centrally needed to advance that claim."[62] The court found the interest in protecting companies' reputations outweighed the "limited intrusion" into the anonymous speaker's rights.[63] This "good faith" test requires very little beyond a well-pleaded complaint, but this plaintiff flunked even this test.[64] What is missing is a definition of what the plaintiff must show to proceed with his case. The court did not require a showing of efforts to identify the speaker as a condition of disclosure.

2. New Jersey Raises the Bar – Somewhat

In contrast, a New Jersey appellate court denied plaintiff's motion to discover identities, using a different standard.[65] Pseudonymous statements on a website accused Dendrite International, Inc., a developer of marketing systems largely for the pharmaceutical industry, of inflating its earnings report, and "shopping" the company.[66] The company brought suit against the John Doe defendants accused of web posting the statements. The trial court granted Dendrite's motion to ascertain the identities of two defendants, Doe 1 and Doe 2, but denied it as to Doe 3.[67]

On Dendrite's appeal of the Doe 3 dismissal, the appellate panel found that the plaintiff was first required, under these circumstances, to establish facts "sufficient to maintain a prima facie case."[68] It reasoned that revelation of defendant's identity depended on whether or not the statements were defamatory.[69] The court said that if the statements were lawful, they merited constitutional protection;[70] but it found that that standard provided inadequate protection for defendants.[71] Like the Maryland court in *INI*, the court stated that it was

62. *In re Subpoena Duces Tecum,* 52 Va. Cir. at 37.

63. *Id.*

64. *Id.*

65. Dendrite International, Inc. v. Doe, 775 A.2d 756 (N.J. Super. 2001).

66. *Id.* at 763.

67. *Id.* at 760.

68. Doe I v. Individuals, 561 F. Supp. 2d 249 (D.Conn. 2008)A federal district court recently reviewed the alternative approaches taken by the courts, and expressly adopted the Dendrite approach.

69. *Dendrite*, 775 A.2d at 766.

70. *Compare In re Subpoena Duces Tecum,* 52 Va. Cir. 26 (mistating the standard for protected speech. The court is making the same error).

71. *See Dendrite*, 775 A.2d 764.

establishing guidelines for the lower courts to follow.[72]The court acknowledged that the prima facie standard was more onerous than the motion to dismiss standard.[73] Adopting the Virginia analysis, the court found that the third prong of that test required a "flexible, nontechnical application of the motion to dismiss standard."[74] As the court explained, a fact-sensitive inquiry was required: "Here, although Dendrite's defamation claims would survive a traditional motion to dismiss for failure to state a cause of action, we conclude the motion judge appropriately reviewed Dendrite's claim with a level of scrutiny consistent with the procedures and standards we adopt here today. . ."[75]

The trial judge had relied on the *SeesCandy* holding to require a prima facie case of defamation against Doe 3, and denied Dendrite the limited discovery it sought, on the ground that it had not shown that the statements caused it any harm.[76] The court concluded, "[a]lthough Dendrite alleges that it has been harmed and that it will continue to be harmed by the defendants' statements, saying so does not make the alleged harm a verifiable reality."[77] The court emphasized that it was striking a balance between the competing interests, including "the right of the plaintiff to protect its proprietary interests and reputation."[78] Nonetheless, there is no mention of the Constitution on plaintiff's side of the equation.

3. Delaware Adopts a New, Higher Standard

The Delaware Supreme Court was the first state Supreme Court to address the attempt to pierce the veil and identify an offending poster, and its holding raised the bar that the earlier cases had set. For instance, in *Doe v. Cahill*, a town councilman and his wife sued Comcast, the ISP, to require it to identify an alleged defamer.[79] The trial court found "good faith" on the part of the plaintiff and held that the plaintiffs met the requirements of (1) a legitimate good faith basis for their claim, (2) the information being required to prosecute the suit, and (3) there being no other source.[80]

72. *Dendrite*, 775 A.2d at 760.
73. *Id.* at 771.
74. *Id.* at 770.
75. *Id.* at 771.
76. *Id.* at 768.
77. *Id.* at 769.
78. *Dendrite*, 775 A.2d at 760.
79. Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005).
80. *Id.* at 455.

On appeal by the pseudonymous defendant, asserting that his First Amendment rights had been violated, the Delaware Supreme Court found that the trial court's standard provided inadequate constitutional protection.[81] The court then held that a defamation plaintiff, seeking to determine the speaker's identity, must be required to support his claim with "facts sufficient to defeat a summary judgment motion."[82] That ruling constituted a rejection of the *Dendrite* standard, which required balancing, stating, "[t]he fourth *Dendrite* requirement, that the trial court balance the defendant's First Amendment rights against the strength of the plaintiff's *prima facie* case is also unnecessary. The summary judgment test is itself the balance."[83]

The court found that to meet that standard, the plaintiff must submit evidence "creating a genuine issue of material fact for all the elements of a defamation claim *within the plaintiff's control.*"[84] Since the defendant in the case was a city councilman, and thus a public official, the plaintiff would be required, under *New York Times v. Sullivan* to show falsity and malice.[85] Since these facts were not necessarily within plaintiff's knowledge, the court did not require the element of showing malice to be met at this stage.[86]

According to the Delaware court, the higher burden was required because "substantial harm may come from allowing a plaintiff to compel the disclosure of an anonymous defendant's identity by simply showing that his complaint can survive a motion to dismiss or that it was filed in good faith."[87] The higher summary judgment standard more appropriately protects against "the chilling effect on anonymous First Amendment Internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or unmask their critics."[88] Moreover, the Delaware ruling substantially elevates plaintiff's burden. The court justifies the burden by derogatory comments on the nature of Internet dialog.[89] Lack of editorial control and reliability,

81. *Id.* at 457.

82. *Id.* at 460(requiring that the plaintiff must give the posting defendant sufficient notice to allow him to fight the discovery request).

83. *Id.* at 461.

84. *Id.* at 463.

85. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (mandating, as a constitutional matter, that a defamation plaintiff suing a public official demonstrate that the defendant acted with "actual malice" if the defamed party is a public official); *see also* Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE. L.J. 320, 336, (2008).

86. *Doe*, 884 A.2d at 464.

87. *Id.* at 459.

88. *Id.*

89. *Id.* at 465-66.

and the ease of plaintiff's reply through the same medium, are among the considerations cited by the court in requiring scrutiny of the claim.[90]

Ultimately the court reviewed the complaint, and found that it could not meet the state law requirement of elements for a defamation cause of action.[91] The offending statements would be interpreted as opinion and therefore, not actionable.[92] This Delaware rule of law is to be binding on their state trial courts, whereas a plaintiff at his peril must not just plead, but must go forward with sufficient evidence to show no triable issue of fact with respect to five prima facie elements.[93] It is questionable whether any other cause of action outside the class action area must meet this standard at the starting gate.[94]

IV. MARYLAND ELECTS THE MIDDLE GROUND, WITH BALANCING

The Maryland Court of Appeals reviewed each of these holdings in detail, to assist it in formulating a policy for the trial courts. In *INI* it identified three distinct tests from the foregoing cases: a "good faith" test, a "prima facie" test, and a "summary judgment" test.[95] First, the court found the *AOL* "good faith" or "motion to dismiss" tests too weak, and insufficiently protective of speech.[96] These tests, it decided, would inhibit use of the Internet by unduly exposing web posting parties to defamation suits.[97] On the other hand, the Maryland court found the

90. *Id.*

91. *Id.* at 467.

92. Among the court's reasons for imposing a strict requirement are the state's permissive pleading standards, which follow the federal model, which preclude dismissal on motion unless the trial court determines that there is no set of facts that would entitle plaintiff to judgment. Following that rule would render the "good faith standard" too easy to satisfy. *Id.* at 458.

93. Del. Super. Ct. Civ. R. 56; Id.at 457.

94. *See* Bell Atlantic Corporation v. Twombley, 550 U.S. 544 (2007); *see* Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (suggesting that gatekeeper issues may take on increasing significance); *see generally* Nathaniel Gleicher, *supra* note 88, at 351.

95. Two cases reviewed by the Maryland court without classifying them illustrate that the holdings do not always fit into one category or another. *Id.* at 453-457; *see* In Mobilisa v. Doe, 170 P.3d 712 (Ariz. 2007) (adopting an amalgam of *Cahill* and *Dendrite*, requiring that plaintiff provide facts sufficient to defeat a summary judgment motion, and then balanced the strength of plaintiff's case against the need for disclosure of the defendant's identity); *see also* Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (utilizing elements of both *Seescandy* and *Dendrite*).

96. Ind. Newspapers, Inc., supra note 1, at at 456.

97. *Id.* (observing that McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) involved political speech, which should receive the highest degree of First Amendment protection. The defamation cases often involve a class of speech which receives questionable protection, if any. McIntyre involved a municipal ordinance limiting anonymity. Internet

"summary judgment" test of *Doe v. Cahill* too stringent, and an imposition on plaintiff's right to pursue justice. It would "undermine personal accountability and the search for truth, by requiring plaintiffs essentially to prove their case before even knowing who the commentator was."[98]

The Maryland Court of Appeals instructed their trial courts the following:[99]

> "In a defamation action where plaintiff seeks to unmask pseudonymous defendants, the lower court must:
>
> (1) Require plaintiff to make an attempt to notify the anonymous posters of the motion for discovery; a message must be posted on the message board involved in the contested posting;
>
> (2) Allow the posters time to respond;
>
> (3) Require plaintiff to identify with precision the offending statements;
>
> (4) Determine whether the complaint contains a prima facie defamation case against the anonymous posters; and
>
> (5) If the first four are satisfied, "balance the anonymous poster's First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity."[100]

Under these instructions, the fifth element is the key. The trial court is required to balance competing interests against one another, and make a decision whether the case can go forward.

Notwithstanding, the test is faulty: unless unprotected, or in a category specifically limited by Supreme Court doctrine, such as commercial speech, all speech receives First Amendment protection, and its regulation is subject to strict scrutiny. The "strength" of prima facie cases cannot readily be determined on motion practice; the necessity for disclosure is obvious, or there would be no attempt to pierce the veil. Three of the seven court members disagreed with this analysis,

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defamation cases involved individual statements, and subsequent litigation); *see generally* Caroline E. Strickland, *Applying McIntyre v. Ohio Elections Commission to Anonymous Speech on the Internet and the Discovery of John Doe's Identity*, 58 WASH. & LEE L. REV. 1537 (2001).

98. Ind. Newspapers, Inc., supra note 1, at 456-457.

99. The court's instructions can be considered obiter dicta, in that the actual case had been mooted by dismissal of the subject defendants. The Court of Appeals is, however, the head of the state court system, and charged with the duty, under usual constitutional principles, of supervision of all lower courts.

100. *Supra* note 102, at 457 (citing *Dendrite*, 775 A.2d at 760-61).

although not with the court's result. The question presented is whether a balancing test is appropriate.

A. *Balancing: Pro and Con*

Balancing competing interests, as a method of constitutional analysis, is a fairly recent tradition.[101] Decisions based on balancing are based on "the identification, valuation, and comparison of competing interests."[102]Balancing can exist on an *ad hoc* basis in each case, in which the competing elements are present, or it can rest on a *macro* basis, when the court determines that between two competing interests, one is always, absent unusual circumstances, to be given priority.[103] By not making that determination, the Maryland court is leaving it to the trial courts to decide individual cases, by balancing the interests in each case.

What factors should the trial courts consider in determining whether a plaintiff is entitled to the information needed for its case to go forward, satisfying the fifth element? In balancing the interests in the *INI* case, the court would consider the interest of the plaintiff, a business, in protecting its reputation. A restaurant accused of violating sanitary regulations would have a strong argument in its favor. The defendants are simply two citizens exercising their First Amendment rights. Those rights, of course, do not include the right to injure another by false statements. Without saying more, plaintiff's interest in being allowed to proceed with the case clearly should prevail.

Another common scenario involves unhappy shareholders badmouthing management of the corporation. There is a clear interest of the shareholders in commenting on management and an equally valid interest of management in protecting its reputation and in not having the value of its stock damaged. The only acceptable basis for finding in favor of one party or the other on disclosure would appear to be the merits of the critical statements. These constitute the key issues in such a case, and one not readily resolved on pretrial motion practice.

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101. T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943 (1987). "In recent years the Court has resorted to balancing in First Amendment cases with increasing frequency."*Id.* at 967. The author contrasts balancing with "categorization," a decision whether the government act in question falls within a given constitutional category. *Id.* at 950–51.

102. *Id.* at 945.

103. This macro balancing amounts to stating a rule of law.

There are other questions that could be asked when a trial court is asked to balance interests before ordering disclosure of the defendant's identity: (1) Is the offending speech of the kind that receives a high degree of constitutional protection? Here the distinction could be made on the basis of high level political or intellectual discussion, measured against adolescent twaddle or rumor mongering;[104] (2) How serious is the damage to plaintiff likely to be, based on the nature of plaintiff's interest and the likely effect of the speech on that interest?; (3) What is the extent of the circulation? There is a likelihood that the defamation will reach a large audience with a common interest (or familiarity with the plaintiff), enhanced by the protection of anonymity and the lack of any editorial control. These are cited as the characteristics of Internet speech which enable abuse to be exploited[105]; and (4) What is the prospect of bullying by the plaintiff, or the filing of a SLAPP suit?[106]

The unlikelihood of plaintiff being able to anticipate substantial damages would affect this side of the equation.[107] On the other hand, defamation actions are attacked as SLAPP suits, intended not to collect damages or achieve public vindication, but to silence criticism.[108] This point is also made in commentary on the issue. Strickland discusses one aspect of "cybersmear" as the frequent practice of dissident shareholders vilifying the corporation and its directors.[109] Anonymity in these cases can be used to protect irresponsible speech.[110] Each of these questions, however, relates to the substance of the cause of action itself, and is ill-suited for a decision at this early stage of litigation.

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104. Aleinikoff, *supra* note 105, at 967-68 (citing cases in which the Court has deemed certain speech, e.g. commercial or private matters, to be of "lower constitutional value."); *see generally*, Cass Sunstein, *Words, Conduct, Caste*, 60 U.CHI.L.REV 795 (1993).

105. *See, e.g. Ind. Newspapers, Inc., supra* note 1 at 458 (Adkins, J. concurring.)

106. A SLAPP ("Strategic Litigation Against Public Participation") suit is one brought to intimidate a defendant, particularly one commenting on an issue of public interest, rather than for any proper purpose; *see Strickland, supra* note 101, at 1552-53.

107. Gleicher, *supra* note 88, at 362, would balance thus: ("If the first three factors do not yield a clear outcome, the court should balance the hardships and the relative First Amendment interests of the plaintiff and defendant, and give preference to whichever party bears the greater burden under this test.") *Id.* The first three factors are (1) that reasonable efforts have been made to notify the defendant and give him an opportunity to respond, (2) evaluation of the strength of plaintiff's case (public/private figure enters this consideration) and (3) plaintiff must identify each element of information needed with specificity.

108. Lidsky, *supra* note 33, at 860 n.11; *see also* Strickland, *supra* note 101, at 1553.

109. *See generally Dendrite, supra* note 67.

110. Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POLY. 405, 414 (2003). (holding, "But anonymity can also contribute to defamation, theft, obscenity and the worst kind of hacking.").

Among those who reject balancing are three justices of the Maryland Court of Appeals in *INI*, who concur in the result of the case, but disagree with the court's ultimate inclusion of balancing. The concurring opinions of the three justices have suggested another method of resolution on the issue.[111] The concurring justices have no quarrel with points (1), (2) and (3). In addition, they have no serious quarrel with point (4), although more specificity would be appreciated.[112] Nonetheless the last point, the balancing test, brings forth a strong statement of disagreement.

The three justices, speaking through Justice Adkins, first opine that the wide-open internet encourages an "anything goes" mindset, highlighting the danger of individuals with no responsibility being free to make "false or exaggerated statements."[113] Justice Adkins further explained:

> I would venture to guess that on the internet, defamation occurs more frequently and is broadcast to more people than via any other medium, past or present. With this in mind, I am reluctant to set forth additional barriers that would hinder a person seeking to assert a legitimate cause of action in order to remedy the damage inflicted by a defamatory internet communication.[114]

The concurring opinion found that no balancing test is needed because the law of defamation itself balances the interests involved.[115] Privileges, both absolute and qualified, protect defendants in some contexts. Other sources of protection include the barriers imposed by *New York Times v. Sullivan*, requiring malice on defendant's part as a constitutional matter in cases involving public officials or public figures, and the limitations placed on damages in state libel cases are another.[116]

The substantive rules applicable to defamation actions represent a judicial balancing of the competing interests.[117] Missing from the concurring analysis is the recognition that the internet speech, which it denigrates, is constitutionally protected. There is always a constitutional right on the defense side of the equation, no

111. *Ind. Newspapers, Inc., supra* note 1, at 457.

112. *Id.*

113. *Id.* at 458.

114. *Id.*

115. *Ind. Newspapers, Inc.*, 966 A.2d at 460.

116. *Id.* at 458-59.

117. Another approach to balancing would be to characterize both sides of the suit in light of the abuses of Internet speech: Is it likely that plaintiff is seeking only to silence the defendant speaker? Or is it likely that the defendant is engaging in irresponsible cybersmear? Do the facts point to either of these conclusions? One problem with this approach is that it involves as much fact-finding as the defamation suit itself.

matter how trivial the speech in question. Ultimately, balancing analysis gives the trial court the discretion to nonsuit a plaintiff, although all the pleading requirements imposed by law have been met. Assuming procedural compliance and accepting the concurring viewpoint, involves allowing the plaintiff to identify the defendant and allowing the lawsuit to proceed.

V. PROTECTED SPEECH SHOULD NOT BE STRATIFIED

The question remains: where is the Constitution in this law? The courts' references to defendants' constitutional right to anonymous speech, as one side of the balancing equation, are off the mark.[118] The court is in fact determining whether anonymity is to be preserved, which is an entirely different question. The right to speech is not impacted. A defamation suit is not an invasion of free speech. Each of the cases discussed, acknowledges the constitutional doctrine protecting anonymity. In each case except for *AOL*, the court simply recites the operative doctrine and does not incorporate it in the *ratio decidendi*. This follows logically from the fact that only a negative doctrine is in play. Finding constitutional protection for anonymity is simply a finding that the speech at issue does not lose its constitutional protection because it is anonymous. Anonymity merely becomes an additional adjective describing protected speech.

When the court decides to pierce the veil, it allows a case to move forward under state defamation law. State substantive law, as limited by the *New York Times* doctrines and the fact that the speech was initially anonymous, becomes legally irrelevant. Subsequently, this suggests that the question of whether speech is characterized as high level or low level should not be a factor of significance, and that Justice Stevens' language in *McIntyre* has been given undue weight.

All speech that falls outside five unprotected categories is protected, although specific rules govern certain categories of speech.[119] The protection given to unattractive speech, when subjected to content discriminatory legislation, is illustrated by *United States v. Stevens*, where the Third Circuit gave full strict scrutiny protection to videos graphically showing pit bulls fighting to the death.[120] Cases such as Stevens show that while the courts may talk of political speech as receiving the highest level of protection, it is only in extremely limited

118. In *Dendrite* and *INI*.

119. Commercial speech is judged by a lower standard than other speech. *See* CHEMERINSKY, *supra* note 21, 1085 et.seq.

120. 533 F.3d 218 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 1984 (2009).

areas like erogenous zoning that the evaluation has constitutional teeth.[121] Nevertheless, the *McIntyre* case was decided in 1995, and the Supreme Court has not decided a case involving the constitutional protection of anonymity since then. At that time the internet was active, but its growth since that date has been exponential.

There appears to be a cosmic distance between the political speech protected by *McIntyre* and the dialog between aforementioned web posters RockyRaccoonMD and Suze, some of which derives from Justice Stevens's expansive language; but characterizing the Maryland Internet speech in *INI* as requiring lesser protection involves a judgment with respect to its innate worth. RockyRaccoonMD and Suze may lack the sophistication of Hamilton and Madison, but their dialog in part expressed their distress regarding a structure that should have been historically preserved had been demolished.[122] In any event, they were individuals exercising their First Amendment rights of free speech.

In comparison, cases such as *Stevens* should emphasize for the public that the fewer distinctions required in First Amendment analysis, the better.[123] Moreover, in *McIntyre*, Justice Stevens expressly noted that "[w]hen a law burdens core political speech we apply 'exacting scrutiny' and" its regulation must be "narrowly tailored to serve an overriding state interest."[124] Nothing in that statement assists us in classifying speech as either political/nonpolitical, or high/low level. By the same token, Internet speech can range from the highest to the lowest level of social value; but unless the speech falls into a specific category, the Supreme Court will consign to a lower standard, whereas content-based regulation will be based on strict scrutiny.[125]

Denigration of Internet speech occurs in virtually all the cases cited by the Maryland court. The volume, universal quality, and ease of access to the Internet are commented on by the courts in formulating doctrine for piercing the veil.[126] Additionally, the internet is a ubiquitous modern phenomenon, and constitutional protection should not be based on the apple pie image Justice Stevens projects in *McIntyre*: a community where public issues are intelligently debated by anony-

121. *Id.*

122. *Ind. Newspapers, Inc.*, 966 A.2d at 444.

123. *See* Young v. American Mini-Theaters, 427 U.S. 50 (1976); *see* Renton v. Playtime Theaters, Inc. 475 U.S. 41 (1986) (holding that cities were permitted to zone movie theaters on the basis of their content, non-obscene "adult" films. The judgment of municipalities between classes of protected speech was upheld, in what is essentially a zoning case.).

124. *McIntyre*, 514 U.S. at 347.

125. CHEMERINSKY, *supra* note 21, at 987.

126. *Id.*

mous pamphleteers learned in the history of the Greek democracies. That language is unfortunate in suggesting that the fact that the speech in question was of a high level helped the Court to its decision.

Talley and *McIntyre* were both undoubtedly correctly decided and are correct to note the high level of speech ostensibly being protected; but, that language should not be used to limit the protection of speech by those with less sophistication. The unchallenged acceptance of these dicta by the lower courts has led to a lack of analysis of its proper limitations. A rule that invites state courts to consider the value of protected speech, and to discriminate among expression, unduly limits speech.

VI. CONCLUSION

The first four of the steps in the Maryland court's procedure are entirely appropriate. The requirement that defamation plaintiffs state a viable cause of action demonstrates their efforts to identify their defamer and assures that notice and an opportunity to reply to the defendant are entirely defensible requirements of motion practice. It further demonstrates the conditions of the plaintiff's discovery of defendant's identity; but they are matters of motion practice, not of constitutional dimension.

The Supreme Court cases cited above, and many lower court decisions, invoke the historic pseudonymous writers such as Tom Paine, the Federalist authors (Madison, Hamilton, Jay) and John Marshall, all of whom wrote at a time when debate on public issues took place through such publications. Often, the author was known to the public, or at least to the *cognoscenti*. Notwithstanding, not all pamphleteers were at the level of those writers. The anonymous leaf-letters of that era can be compared with the men who signed the Declaration of Independence with their real names, and pledged their "lives, their fortunes and their sacred honor" to the cause of American independence.[127] Whatever the influences on the founders by anonymous writings, their acts to which they were willing to sign their names, are far more important to our history.

127. Historic lore notes the boldness of John Hancock's signature, and Charles Carroll's appending his address ("of Carrollton") to his signature so that King George would have no doubt of his identity. Consider citing to more than mere historic lore. For example, "the bold flourish with which he signed the Declaration of Independence has made his name synonymous with 'signature.'" http://www.britannica.com/EBchecked/topic/254053/John-Hancock.

Ultimately the word "responsibility" should enter into the conversation. When a court is asked to decide a case by balancing the competing interests, it essentially takes two rules of law or status, and applies each to the facts of the case. The judge must make a fact-specific value judgment. The factors that lead to that judgment define the law. The First Amendment right to speak anonymously is an important one. The right of a defamed plaintiff to redress, if that speech is defamatory, is analytically the other side of the same coin, and in that sense equally important. Ultimately the question posed by cases like *INI* will turn on the burden borne by the plaintiff. The law of defamation imposes its own burdens on the plaintiff's recovery.

Take the Internet out of the equation and where does the case come down? Does a defendant have the right to defame at will, taking no responsibility for her statements? Is there a reason for a medium capable of anonymous speech to insulate an anonymous speaker from liability? Do fundamental canons of personal responsibility not mandate that speakers be willing to stand behind what they say? Are the Supreme Court's leaflet precedents particularly relevant to cases involving anonymous defamation? Should they be? The courts have assumed that they do, but the high court's jurisprudence evolved not from defamation cases, but from attempts by the government to limit private speech and censor Internet content.

If we simply acknowledge that speech does not gain protection from the speaker's anonymity, we come closer to a sound constitutional policy. Anonymous speech should receive the same protection it would receive if it were identified with the speaker, no more and no less. Furthermore, the rights of plaintiffs, as noted above, do not derive from the Constitution. Plaintiffs in Internet cases are subject to the same limits as plaintiffs in *New York Times* or other defamation cases; however, they should not be denied access to the courts when they fail an ill-defined and probably unworkable balancing test. Consequently, every person should be responsible for his or her actions. There is nothing commendable about anonymous libel or slander and scant reason to protect it. As long as pleading rules embody the concept of the courts being open to the assertion of rights, they should not be fortified to hinder cases because modern modes of communication have facilitated anonymity.

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