

THE WHO, WHAT, WHY AND WHERE OF ONLINE ANONYMITY: TOWARD A  
JUDICIAL RUBRIC FOR CHOOSING ALTERNATIVE UNMASKING STANDARDS

By

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To Julian

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Abstract of Dissertation Presented to the Graduate School  
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Co-chair: Debbie Treise  
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An examination of the law regarding revelation of anonymous online posters' identities revealed an initial systemic application of *ad hoc* procedures to guide courts' analyses, coalescing in the general adoption of one of three unmasking tests. Yet courts failed to agree which standard should apply in a given situation, creating unacceptable confusion and uncertainty, with significant First Amendment interests at stake. The dissertation proposes and defends the application of a systematized rubric to guide courts' determinations. The rubric is created by culling and consolidating the salient factors guiding courts' adoption of an unmasking standard, ascertained through a thorough analysis of the judicial opinions citing these unmasking tests. The rubric is then applied to a hypothetical scenario to demonstrate its utility for legal analysis.

## CHAPTER 1 INTRODUCTION

Rosemary Port, a 29-year-old student at the Fashion Institute of Technology in New York City, created a blog in August 2008 called “SKANKS IN NYC” that consisted of five posts by Port and user comments about them.<sup>1</sup> Port’s posts centered on—and included sexually suggestive photographs of—model Liskula Cohen.<sup>2</sup> Port captioned the photos with derogatory terms like “skank,”<sup>3</sup> “skanky,” “ho,” and “whoring.”<sup>4</sup> Regarding two photos showing Cohen in a suggestive pose with a man, Port dubbed Cohen the “Skankiest in NYC” and a “psychotic, lying, whoring . . . skank.”<sup>5</sup>

Cohen, who was furious over Port’s characterizations, wanted to sue her for defamation.<sup>6</sup> Ordinarily, this endeavor would be simple: Cohen would file a complaint for

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<sup>1</sup> Memorandum of Law in Opposition to Application for Pre-Action Disclosure at 3, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Feb. 18, 2009) (discussing the date of the blog’s creation). The URL for the blog was originally at <http://skanksnyc.blogspot.com>. *Id.* However, Port took down her blog in March 2009. Wendy Davis, “*Skank*” Blog Shuttered, but Model Persists with Lawsuit, ONLINE MEDIA DAILY, Mar. 20, 2009, [http://www.mediapost.com/publications/?art\\_aid=102465&fa=Articles.showArticle](http://www.mediapost.com/publications/?art_aid=102465&fa=Articles.showArticle).

<sup>2</sup> Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Aug. 17, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>.

<sup>3</sup> In her Order Granting Petition for Pre-Action Disclosure, Manhattan Supreme Court Justice Joan Madden cited the *American Heritage Dictionary of the English Language 4th Edition 2009*, to define “skank” as someone who is “disgustingly foul or filthy and often considered sexually promiscuous.” *Id.* at 6–7. One California case, however, held that calling someone a “big skank” was not actionable because the term was “a derogatory slang term of recent vintage that has no generally recognized meaning.” *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 811 (Cal. Ct. App. 2002) (rejecting a reality television star’s claim she was defamed when she was called a “big skank” on a radio broadcast). The *Seelig* court, however, was motivated in part by the fact that the petitioner did not provide the court any “accepted dictionary definition” of “skank.” *Id.*

<sup>4</sup> See Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09, at 6 (N.Y. Sup. Ct. Aug. 17, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> A statement is defamatory if it “tends to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating with or dealing with him.” RESTATEMENT (SECOND) OF TORTS § 559 (1977). Typically, it is defamatory to falsely state that a woman is sexually promiscuous. See, e.g., *Montandon v. Triangle Publ’ns, Inc.*, 45 Cal. App. 3d 938, 944 (Cal.

defamation, naming herself as plaintiff and Port as the defendant. But it was not that easy for the aggrieved model because Port posted her comments anonymously. Cohen thus was forced to apply for pre-action disclosure, seeking Port's identity from Google.<sup>7</sup>

Manhattan Supreme Court Justice Joan Madden ordered Google to reveal Port's identity, finding that her words describing Cohen "carr[ie]d] a negative implication of sexual promiscuity, and as such are reasonably susceptible of a defamatory connotation and are actionable."<sup>8</sup> In deciding to order disclosure, Justice Madden adopted the rationale of *In re Subpoena Duces Tecum to America Online, Inc.*<sup>9</sup> In *America Online*, a Virginia trial court reasoned that:

the protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.<sup>10</sup>

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Ct. App. 1975) (affirming superior court's judgment that article was libelous, where the article falsely implied a television personality had become a call girl); see also *Matherson v. Marchello*, 473 N.Y.S.2d 998, 1004–05 (N.Y. App. Div. 1984) (finding actionable band member's comment during a radio interview that he used to "fool around with" a club owner's wife). *But see* *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 440–41, 443 (Wyo. Ct. App. 1982) (rejecting defamation claim brought by a Miss America contestant who was the subject of a *Penthouse* magazine article stating she performed acts of fellatio that could cause men to levitate, finding that the acts described were obviously hyperbolic).

<sup>7</sup> Order to Show Cause in Lieu of Petition, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Dec. 19, 2008).

<sup>8</sup> *Id.* at 7.

<sup>9</sup> 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Trading Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>10</sup> *Id.* at \*6, *cited by* Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Aug. 17, 2009), *available at* <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>, at 8.

Justice Madden ultimately held that Cohen had demonstrated a “strong showing that a cause of action exists” sufficient to warrant disclosure of Port’s identity<sup>11</sup> because Cohen “sufficiently established the merits of her proposed cause of action for defamation . . . and . . . the information sought [was] material and necessary to identify the potential defendant or defendants.”<sup>12</sup>

While *Cohen* involved an aggrieved individual seeking relief for inflammatory sexual comments made by another individual, other very different scenarios and controversies also arise on the Internet today involving anonymous postings. For instance, courts have considered whether to order disclosure of anonymous posters’ identities when their comments damage a person’s professional reputation. In *Ottinger v. Tiekert*,<sup>13</sup> for example, Stuart Tiekert used three pseudonyms to create four blog posts in 2007 on LoHUD, a blog hosted by the *New York Journal News*.<sup>14</sup> Tiekert’s posts suggested that Richard Ottinger (a former New York congressman) and Ottinger’s wife bribed officials to secure renovation permits.<sup>15</sup> According to the Ottingers’ complaint, Tiekert said the Ottingers lied and bribed authorities and “PAID THE RIGHT

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<sup>11</sup> See Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Aug. 17, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>, at 3, citing Siegel, Supplementary Practice Commentaries, N.Y. CPLR 3102:5, at 92 (McKinney 2006).

<sup>12</sup> Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09, at 5 (N.Y. Sup. Ct. Aug. 17, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>. citing *In re Uddin*, 810 N.Y.S.2d 198, 198 (N.Y. App. Div. 2006) (rejecting disclosure of investigative file in train accident case because petitioner’s only motivation in seeking the file was “to explore alternative theories of liability,” which was improper).

<sup>13</sup> 2009 WL 3260601 (N.Y. Sup. Aug. 27, 2009).

<sup>14</sup> Complaint, *Ottinger v. Doe*, No. 3892/08, at 2 (N.Y. Sup. Ct. Feb. 25, 2008).

<sup>15</sup> *Ottinger*, 2009 WL 3260601, at \*1.

PEOPLE OFF,” presented a “FRAUDULENT deed” to secure permits, and furthered an “illegal scam.”<sup>16</sup>

The parties ultimately stipulated to convert the action into a special proceeding to seek pre-action disclosure of Tiekert’s identity.<sup>17</sup> The court ordered disclosure in *Ottinger* based in part on persuasive authority in *Dendrite International, Inc. v. Doe*,<sup>18</sup> a New Jersey appellate court opinion.<sup>19</sup> The court found the Ottingers satisfied *Dendrite* by establishing a *prima facie* case supported by sufficient evidence, which consisted of identifying each of Tiekert’s allegedly defamatory statements.<sup>20</sup> The court also used a balancing approach set forth in *Dendrite*, weighing Tiekert’s First Amendment interest in free speech against the Ottingers’ need for redress of harm.<sup>21</sup> This analysis, said the court, tilted in favor of identity revelation.<sup>22</sup>

Although Tiekert was ordered by the court to reveal his identity, ultimately, he was awarded summary judgment in the case.<sup>23</sup> Why? Because the court found that the

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<sup>16</sup> Complaint, *Ottinger v. Doe*, No. 3892/08 at 2 (N.Y. Sup. Ct. Feb. 25, 2008) (capitalization in original).

<sup>17</sup> See Order in the Matter of the Application Pursuant to CPLR 3102 of Richard Ottinger and June Ottinger, No. 08-03892, at 2–3 (N.Y. Sup. Ct. July 1, 2008).

<sup>18</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The court also addressed *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), saying that under *Cahill*, the Ottingers were not required to prove malice at the special proceeding stage. Order in the Matter of the Application Pursuant to CPLR 3102 of Richard Ottinger and June Ottinger, No. 08-03892, at 5 (N.Y. Sup. Ct. July 1, 2008).

<sup>19</sup> 884 A.2d 451 (Del. 2005).

<sup>20</sup> Order in the Matter of the Application Pursuant to CPLR 3102 of Richard Ottinger and June Ottinger, No. 08-03892, at 5 (N.Y. Sup. Ct. July 1, 2008).

<sup>21</sup> *Id.* at 4 (employing the *Dendrite* balancing test).

<sup>22</sup> *Id.* at 5 (saying the balancing approach necessitated disclosure of Tiekert’s identity).

<sup>23</sup> *Ottinger v. Tiekert*, 2009 WL 3260601, at \*4 (N.Y. Sup. Aug. 27, 2009).

case was a Strategic Lawsuit Against Public Participation (SLAPP),<sup>24</sup> under Civil Rights Law § 76-a(1)(a), in that did not have any basis in law.<sup>25</sup> As the suit was a SLAPP, the court had the authority to award Tiekert legal fees, but it declined to do so.<sup>26</sup> In sum, Tiekert's anonymity was compromised in a suit that had no legal foundation.

Although many cases pertain to anonymous speech defamation claims, some do not. In *Enterline v. Pocono Medical Center*,<sup>27</sup> a woman sought an order to reveal the identities of several individuals who posted anonymously on *The Pocono Record's* website, claiming they had personal knowledge about facts or people associated with a sexual harassment case she had filed against a medical center.<sup>28</sup> Enterline subpoenaed *The Pocono Record* for documents revealing the posters' identities,<sup>29</sup> but the newspaper objected, claiming that Enterline sought First-Amendment protected information that was also covered by the reporter's privilege.<sup>30</sup>

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<sup>24</sup> In 1988, two University of Denver professors, George Pring (a law professor) and Penelope Canan (a sociology professor), coined the term "SLAPP." See Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Qualitative and Quantitative Approaches*, 22 L. & SOC'Y REV. 385 (1988). A SLAPP suit is a civil suit filed against an individual on a substantive issue of "public interest or social significance." GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 2, 8–9 (Temple Univ. Press 2007). A SLAPP suit may be pursued with the intent of exploiting the judicial system to keep citizens quiet, not right a perceived harm through litigation; however, the plaintiff's intent is irrelevant for making a SLAPP determination. *Id.* at 8 (rejecting the notion that the plaintiff's rationale for bringing the suit bears on the validity of the suit). The important aspect of a SLAPP suit is that it has the ultimate effect of intimidating citizens to keep quiet on public issues. George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 938 (1992).

<sup>25</sup> *Ottinger v. Tiekert*, 2009 WL 3260601, at \*3 (determining that the suit satisfied the requirements to be termed a SLAPP).

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> No. 08-cv-1934-ARC, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008).

<sup>28</sup> *Enterline v. Pocono Medical Center*, 2008 WL 5192386, at \*3 (M.D. Pa. Dec. 11, 2008).

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *Id.*

A Pennsylvania federal court first held that the newspaper had standing to assert the First Amendment rights of the anonymous posters.<sup>31</sup> In large part, this was due to practical reasons. It stressed that if the posters were required to defend themselves in the suit, they would have to reveal their identities, which would render moot the protections given by requiring a formal motion to compel.<sup>32</sup>

The *Enterline* court balanced the posters' interest in retaining anonymity against Enterline's interest in pursuing her civil sexual harassment suit.<sup>33</sup> Applying a test set forth in *Doe v. 2TheMart.com, Inc.*,<sup>34</sup> the *Enterline* court found that the material she sought was materially related to a core element of her sexual harassment suit; however, she failed to demonstrate that the material was unavailable from any other source.<sup>35</sup> The court thus denied Enterline's motion to obtain the individuals' identities.<sup>36</sup>

All three cases mentioned above involved anonymous online speech but featured different scenarios:

- a young blogger making scathing comments about a model's sexual habits;
- a newspaper reader accusing a businessman and his wife of corruption; and
- a handful of people claiming to have information about a pending lawsuit.

There is, of course, a myriad of other scenarios, involving multiple variations of: 1) *who*

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<sup>31</sup> *Id.* at \*2. The court also noted that the newspaper would vigorously defend the posters' rights and that the paper was injured in fact, satisfying the "case or controversy" requirement in Article III of the U.S. Constitution. *Id.* at \*2–3.

<sup>32</sup> *Id.* at \*3–4.

<sup>33</sup> *Enterline v. Pocono Medical Center*, 2008 WL 5192386, at \*4 (M.D. Pa. Dec. 11, 2008).

<sup>34</sup> 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

<sup>35</sup> *Enterline*, 2008 WL 5192386, at \*5–6 (M.D. Pa. Dec. 11, 2008) (applying a four-part balancing test set forth in *2TheMart.com*).

<sup>36</sup> *Id.* at \*6.

is seeking the identity of the poster; 2) *why* that poster's identity is being sought; 3) *who* the anonymous speaker is; 4) *what* the subject matter of the underlying speech is; and 5) *where* that information was posted. Courts today typically use one of three basic standards—*Cahill*,<sup>37</sup> *Dendrite*,<sup>38</sup> and *America Online*<sup>39</sup>—for determining when the identity of an anonymous online poster's identity must be revealed, with those tests providing different levels of First Amendment protection.

What courts have not done, however, is design a rubric for determining which of the current standards is most appropriate to apply in any given case. In other words, if we assume that courts today are likely to choose from variations of *Dendrite*, *Cahill* and, albeit rarely, *America Online*, then legal research should take a step backwards, as it were, and focus on the antecedent task of creating a framework to help judges choose the most appropriate test to apply in the specific situation before them. That is the goal of this dissertation.

### **Objective**

This dissertation proposes a rubric that courts can apply when deciding which unmasking test is most appropriate to employ when determining whether to order disclosure of an anonymous poster's identity. It subsequently applies the rubric to a hypothetical scenario and defends its broader applicability.

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<sup>37</sup> Doe v. Cahill, 884 A.2d 451 (Del. 2005).

<sup>38</sup> Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>39</sup> In re Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210372 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (2001).

## Statement of the Problem

When people post information online, they often have a false sense that even their deeply personal disclosures are secure, a sentiment bolstered by posting anonymously.<sup>40</sup> According to Jared Piazza and Jesse Bering of the Institute of Cognition and Culture in the United Kingdom, “increasing levels of self-disclosure have been observed in anonymous CMC [computer-mediated communication] relative to FtF [face-to-face] communication.”<sup>41</sup> The theory behind this is that people say more about themselves when they have a raised level of private self-awareness but a lowered level of public self-awareness.<sup>42</sup> The latter means that people disclose more when they have a sense that they cannot be identified by their “communicative partner.”<sup>43</sup>

The problem with this level of self-disclosure is that while the Internet paradoxically seems transient, in fact the comments people make online are available to millions<sup>44</sup> and can last forever.<sup>45</sup> This phenomenon has been referred to as “permanent digital baggage.”<sup>46</sup> These online disclosures furthermore have the ability to destroy not only an individual’s online persona, but his real life as well:

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<sup>40</sup> See, e.g., Jared Piazza & Jesse M. Bering, *Evolutionary Cyber-Psychology: Applying an Evolutionary Framework to Internet Behavior*, 25 COMPUTERS IN HUMAN BEHAV. 1258, 1266 (Nov. 2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (citations omitted)

<sup>43</sup> *Id.* (citations omitted).

<sup>44</sup> See, e.g., Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, 79 MAR WIS. L. 8, 10 (2006) (stating that “[u]nlike more traditional forms of speech . . . the ease and speed of blogging mean that a click of the mouse will potentially publish the writer’s thoughts to millions of readers,” and “every thought can be read by an Internet audience of untold millions”).

<sup>45</sup> See, e.g., Piazza, *supra* note 40, at 1266 (internal citations omitted) (noting that personal information disclosed online “persists” and is “retrievable” by search engines, and referring to that self-disclosed information as “permanent digital baggage”).

<sup>46</sup> See *id.*, citing DANIEL SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET* (2007).

On the one hand, the ability of individual users to log on the Internet anonymously, undeterred by traditional social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society. On the other, the ability of members of the public to link an individual's on-line identity to his or her physical self is essential to preventing the Internet's exchange of ideas from causing harm in the real world.<sup>47</sup>

Furthermore, the problem is compounded by the fact that *many* people online "employ pseudonymous identities, and, even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes."<sup>48</sup> With such possible negative consequences stemming from online disclosure, it is hardly surprising that aggrieved individuals and business entities take seriously the task of monitoring and seeking relief for harm caused by the statements.

Despite the possible negative consequences, the right to speak anonymously is protected by the First Amendment, with special deference given to anonymous political speech.<sup>49</sup> The U.S. Supreme Court, in fact, has encouraged individuals to speak anonymously, theorizing that the veil of anonymity allows people to speak more freely and, therefore, more truthfully. According to the Court, "Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."<sup>50</sup> This First Amendment truth-seeking function supports protection of anonymous speech online.

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<sup>47</sup> PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071–72 (D.S.D. 2001) (citations omitted).

<sup>48</sup> See Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005), citing Lyrisa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 895 (2000).

<sup>49</sup> See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (recognizing that the First Amendment protects anonymous political speech as "an honorable tradition of advocacy and dissent").

<sup>50</sup> *Id.* (discussing the rationale for First Amendment protection of anonymous speech).

As explained by University of Florida Professor Lyrrisa Lidsky, “[T]he fascination of the [I]nternet lies in its potential for realizing the concept of public discourse at the heart of the Supreme Court’s First Amendment jurisprudence. The dominant First Amendment metaphor for describing public discourse is the ‘marketplace of ideas.’”<sup>51</sup> Anonymity, therefore, is a “double-edged sword.”<sup>52</sup> Discussing the California Court of Appeal’s decision in *Krinsky v. Doe 6*,<sup>53</sup> Lidsky writes that “[a]nonymity frees speakers from inhibitions” and “makes public discussion more uninhibited, robust, and wide-open than ever before”; however, “it also opens the door to more trivial, abusive, libelous, and fraudulent speech.”<sup>54</sup>

Although the Supreme Court validated the need for anonymous speech,<sup>55</sup> the right to anonymity is not absolute.<sup>56</sup> Courts have tackled many different factual scenarios case-by-case to determine under what circumstances they should order the revelation of an anonymous poster’s identity. All of the courts addressing this issue have, for the most part, adopted one of three tests to determine whether to require a

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<sup>51</sup> Lidsky, *supra* note 48, at 893 (discussing the value of internet discourse).

<sup>52</sup> See Lyrrisa Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C. L. REV. 1373, 1383 (2009) (explaining the value of anonymous speech).

<sup>53</sup> 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008). The *Krinsky* court held non-actionable statements online to the effect that the plaintiff and corporate officers were “boobs, losers, and crooks,” and drafted what Professor Lidsky termed a “false monologue” by a vice-president claiming the plaintiff was unattractive and had a fake medical degree. *Id.* at 235. The court held that all of these statements were hyperbolic opinions. *Id.* at 246–50.

<sup>54</sup> Lidsky, *supra* note 52, at 1383.

<sup>55</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (discussed *infra* at note 45).

<sup>56</sup> See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 441 (Md. 2009) (noting that “[t]he anonymity of speech ... is not absolute,” and carving out special exceptions for defamation cases); see also *Order Granting in Part and Denying in Part Motion to Quash Deposition Subpoena*, *Chang v. Regents of the Univ. of Cal.*, 2009-00033484-CU-OE (Cal. App. Dep’t Super. Ct. Sept. 9, 2009) (granting movant’s request to discover identities of anonymous online posters for use in a separate pending action, but limiting that discovery to a list of individuals the plaintiff was required to create in advance).

poster's identity to be revealed. These tests differ specifically in how deferential the courts are to the plaintiffs' requests. These tests are outlined below, but they will be detailed in Chapter 3 of this dissertation:

- The *Dendrite* test—Under this approach, four prongs must be satisfied: (a) the plaintiff must attempt to notify the poster he is seeking to discover the poster's identity; (b) he must state which statements constitute the basis of his lawsuit; (c) he has to show his suit would survive a motion to dismiss; and (d) the court must balance the plaintiff's interest in discovering the poster's identity with the poster's right to speak anonymously.<sup>57</sup>
- The “summary judgment” standard—To satisfy this test, the plaintiff must provide enough evidence to show that there is a “genuine issue of material fact” that would defeat a motion for summary judgment.<sup>58</sup>
- The “good faith basis” standard—Under this test, an aggrieved plaintiff may be able to discover an anonymous poster's identity if the court determines his or her claim was brought in good faith and if the individual needs to discover the identity to pursue his or her suit.<sup>59</sup>

Yet courts have not come to a consensus when to apply a particular test to a given fact pattern. The inconsistent adoption of these tests has created confusion and uncertainty in the law, and thus there is a need for a rubric to help courts to determine which standard best fits a particular situation.

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<sup>57</sup> See *Dendrite Int'l v. Doe*, 775 A.2d 756, 760–763 (N.J. Super. Ct. App. Div. 2001) (discussing the various applicable tests for whether or not to order disclosure of a poster's identity, adopting the “motion to dismiss” standard, and denying disclosure of John Doe No. 3's identity in case where at least two users posted allegedly defamatory comments in response to a bulletin board comment suggesting Dendrite's business practices had raised “red flags”).

<sup>58</sup> *Doe v. Cahill*, 884 A.2d 451, 460, 463 (Del. 2005) (adopting the “summary judgment” standard in case involving allegedly defamatory statements made about a council member on a *Delaware State News* blog, and refusing to order disclosure based on finding the statements were inactionable opinion).

<sup>59</sup> *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*1, \*8 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (2001) (adopting the “good faith” test in cases where the plaintiff company claimed anonymous individuals allegedly defamed the company and posted confidential insider information in internet chat rooms).

A review of case law on this subject shows courts initially applied the tests in an *ad hoc* fashion—and, in fact, still do to some extent. More modern judicial opinions reveal increased uniformity; however “[t]he development of appropriate standards to govern the John Doe cases has been and continues to be a piecemeal process . . .”<sup>60</sup> Professor Lyrissa Lidsky argues for the application of a uniform standard once courts understand the relevant technology and how it is used.<sup>61</sup> To yield much-needed uniformity and stability in the law, while simultaneously tackling Professor Lidsky’s concerns, this dissertation develops and proposes a reliable, flexible rubric in lieu of a one-size-fits-all unmasking standard.

### **Research Question**

RQ1: What criteria and elements should a rubric include that courts can apply when selecting the most appropriate legal test to unmask the identity of an anonymous poster on the Internet?

### **Methodology**

In order to create this rubric, this dissertation reviews federal and state case law on anonymous speech generally and, more specifically, anonymous online speech. The dissertation includes both Westlaw and LexisNexis searches for relevant cases, analyzed according to the following guidelines:

- 1) *Who is seeking the identity of the poster?***
- 2) *Why is the poster’s identity being sought?***
- 3) *Who is the anonymous speaker?***
- 4) *What is the subject matter of the underlying speech of the poster?***

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<sup>60</sup> Lidsky, *supra* note 52, at 1385 (arguing that a uniform standard should eventually be accepted).

<sup>61</sup> *Id.*

### **5) *Where was the underlying speech posted?***

Which unmasking test a court should apply depends on its answers to the preceding five questions. Categorizing the case law along these lines thus allows for ascertainment of the particular categories and types of anonymous speech cases that courts have deemed qualify as high, medium or low significance. The information is compiled in a valuable rubric to guide courts' determinations, as well as clarify the law.

The dissertation also includes news articles obtained through LexisNexis Academic news searches and psychology journals obtained through the PsycNET academic database. These materials assist in two ways. First, they aid in the interpretation of background information in the cases, and second they assist in the understanding of the value of anonymity to the speaker.

### **Roadmap of Chapters**

Chapter 2 of the dissertation, titled *The Foundations of Anonymous Speech Protection in First Amendment Jurisprudence*, examines judicial precedent regarding the First Amendment right to engage in anonymous speech, covering its evolution from pamphleteering through online postings. Chapter 3, entitled *The Tests of Disclosure*, articulates the three major tests courts apply in online unmasking cases, describing the nuances and differences among them, as well as explaining their attempt to balance the First Amendment interest in anonymous speech against the need for judicial redress when that speech causes harm. Chapter 4, *Rubrics as Viable Models for Analyzing Complex Legal Issues*, draws from education literature and social science theory to analyze and describe the potential relevance of rubrics as organizational mechanisms for courts to employ systematically when confronted with complex decisions. Chapter 5,

Establishing a Rubric for Revelation Analysis, attempts to resolve the research question by developing and defending a useful and reliable rubric for courts to employ when deciding whether to order disclosure of an anonymous poster's identity. In Chapter 6, titled Application of the Rubric, the dissertation applies the rubric to a complex hypothetical factual pattern, illustrating its viability for legal analysis. Finally, Chapter 7, the dissertation's Conclusion, summarizes the findings of the previous chapters. It concludes that using the proposed rubric will yield clarity and uniformity to this area of law. It also calls on other legal scholars to critique the rubric to refine it and improve its usefulness.

## CHAPTER 2 THE FOUNDATIONS OF ANONYMOUS SPEECH PROTECTIONS IN FIRST AMENDMENT JURISPRUDENCE

The right to speak anonymously<sup>1</sup> has long been treated deferentially, from Revolutionary times, when America's founding fathers published controversial anonymous political papers, to much more recent judicial opinions extolling the values and virtues of anonymous online publications. Given this lengthy history, it is crucial to understand the rationales employed for protecting anonymous speech. This understanding will aid in the determination of which test to apply when deciding whether to reveal an anonymous poster's identity.

This chapter initially considers traditional reasons and rationales for protecting anonymous expression in both political and non-political contexts, and it also addresses the reasons some critics assert for curbing the broad constitutional protections afforded anonymous speakers. In considering this historical background, the chapter examines major cases conceptualizing and refining the right of anonymous speech, as well as influential law review articles and other publications further explaining the contours of this unenumerated right. The chapter then concludes by delving into the special considerations applicable to online discourse, including a discussion of why it warrants special consideration and how the specific protections apply to anonymous online speech.

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<sup>1</sup> Some scholars also discuss the virtue of pseudonymous speech, but the courts have not distinguished between anonymous and pseudonymous speech for the purpose of revealing a speaker's identity; the hair-splitting distinction is irrelevant for the purposes of this dissertation.

## Why Protect Anonymous Speech?

The First Amendment protects, with narrow exceptions,<sup>2</sup> the right to speak freely. As explained by University of Florida Professor Lyrissa Lidsky, courts have determinedly upheld a subset of the right to speak freely—namely, the right to speak anonymously “even when doing so interferes with audiences’ attempts to decode [the speakers’] messages.”<sup>3</sup> The notion that individuals possess a right to speak anonymously is firmly rooted within First Amendment jurisprudence,<sup>4</sup> but anonymous expression conveyed via the Internet is now testing the boundaries of constitutional protection. The Supreme Court was compelled to conceptualize a rule specifically protecting anonymous speech for a variety of reasons, and lower courts have followed suit.<sup>5</sup> Although lower courts have addressed online anonymity, the Supreme Court has yet to rule on it.

### Reasons to Protect Anonymous Speech

Courts have opted to protect anonymous speech for a variety of reasons. These include: a) supporting the truth-seeking function of free speech; b) protecting speakers

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<sup>2</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (opining that “the freedom of speech has its limits; it does not embrace certain categories of speech, including *defamation*, incitement, obscenity, and pornography produced with real children”) (emphasis added).

<sup>3</sup> Lyrissa Barnett Lidsky, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1537–1538 (2007) (citations omitted) (describing the Supreme Court’s clear position of protecting the right to speak anonymously).

<sup>4</sup> See, e.g., *Dendrite Int’l Inc. v .Doe*, 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001) (stating that “[i]t is well-established that rights afforded by the First Amendment remain protected even when engaged in anonymously”).

<sup>5</sup> Adam J. Rappaport & Amanda M. Leith, *Brave New World? Legal Issues Raised by Citizen Journalism*, 25-SUM COMM. LAW 1, 34 (2007) (stating that lower courts “generally have protected the identity of posters based on their right to speak anonymously” and citing to *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), a case involving an anonymous blogger posting about an allegedly corrupt councilman, in support of their position that most judicial opinions protect anonymous speech).

from retaliation based on the content of their speech; c) providing speakers with the ability to make personal artistic statements; and d) protecting the integrity of the speaker's personal information. Each of these rationales is addressed below.

Perhaps the most common reason for extending First Amendment protection to anonymous speech is to support the truth-seeking function of free speech, ensuring “the diversity, quantity and quality of voices in the marketplace of ideas.”<sup>6</sup> To encourage a robust search for truth in the metaphorical marketplace of ideas,<sup>7</sup> courts have rationalized that speakers must be encouraged to speak without fear of reprisal. Anonymity may further this goal.

The ability to cloak their identities can motivate speakers to speak frankly and candidly, whereas they might not if they thought their words would be associated with them.<sup>8</sup> Anonymity thus militates against self-censorship while it enables a speaker to propose “unpopular ideas without fear of retaliation”<sup>9</sup> and avoid becoming a target of

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<sup>6</sup> Lidsky, *supra* note 3, at 1538–1539 (citations omitted). The “marketplace of ideas” has been defined as the grand test of First Amendment speech protections. According to Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919), “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Id.* at 630 (Holmes, J., dissenting).

<sup>7</sup> The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2* (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 237* (California Princeton Fulfillment 1992).

<sup>8</sup> See, e.g., Tanya D. Marsh, *In Defense of Anonymity on the Internet*, 50-APR RES GESTAE 24, 25 (2007), citing A. Michael Froomkin, *Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 408 (1996) (“not everyone is so courageous as to wish to be known for everything that say, and some timorous speech deserves encouragement”).

<sup>9</sup> Marsh, *supra* note 8, at 25. See also Lidsky, *supra* note 3, at 1572 (explaining that “authors may wish to avoid the shame, humiliation, or social ostracism that might result from disclosure of their identities”). See also LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, at 80 (Basic 1999).

those who hold positions of political power. As one commentator noted, anonymity is valued because it lets the speaker

criticize the activities of public officials or corporations without fear of retaliation, to ‘blow the whistle’ on an employer who is engaging in unlawful or otherwise improper activity, to voice unpopular opinions on topical issues, to avoid harassment or even stalking by online users, or to obtain advice or counseling on difficult problems or medical conditions.<sup>10</sup>

Also supporting the truth-seeking function is the concept that speakers can share their messages while feeling confident that listeners “will not prejudge [their] message simply because they do not like its proponent.”<sup>11</sup> Speakers can have this confidence because the audience cannot color the message based on the speaker’s personal characteristics or political propensities. For instance, a Republican might automatically discount the validity and strength of the arguments made in an op-ed commentary if she knew the writer were Hillary Clinton while she would not reflexively do so if the commentary were published anonymously. In her award-winning article *In Defense of Anonymity on the Internet*,<sup>12</sup> in-house counsel for Kite Realty Group Trust Tanya D. Marsh argues that anonymity particularly benefits minorities because people cannot prejudge messages based on any of the speaker’s physical qualities.<sup>13</sup> The end result is

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<sup>10</sup> Brief Amicus Curiae of Am. Online, Inc., *Melvin v. Doe*, No. GD99-10264, at 14 (Pa. Super. Nov. 15, 2000), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2001-02-24-Brief%20Amicus%20Curiae%20of%20America%20Online%20to%20the%20Pennsylvania%20Superior%20Court.pdf> (retrieved on November 29, 2009), cited by Victoria Smith Ekstrand, *Unmasking John and Jane Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 407 (2003).

<sup>11</sup> *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 342 (1994) (asserting that even disliked speakers have a chance to be heard if they publish anonymously).

<sup>12</sup> Marsh, *supra* note 8, at 24. Marsh’s article was awarded third place in the 2005 Harrison Legal Writing competition, which bestows an award established by the Indiana State Bar Association to “recognize[ ] articles of significant subject matter, practicality and timeliness, with high-quality research and legal analysis.” See *id.* (ed. note).

<sup>13</sup> *Id.* at 25 (noting that readers cannot “prejudge her message because of her gender, race, sexual orientation, height, weight, eye color, nose ring, or any other physical characteristic that normally inspires bias”).

that the public focuses on the substance of the argument, not the “presumed qualities of the speaker.”<sup>14</sup>

Another rationale for protecting anonymous speech is that it “promote[s] individual autonomy and self-expression by enabling individuals to explore new ideas, new means of expression, and even new identities.”<sup>15</sup> On the Internet, for instance, the use of avatars or “virtual person[s]”<sup>16</sup> to cloak one’s identity allows individuals to explore new identities and express viewpoints that they otherwise might not.<sup>17</sup> This self-expressive rationale fits squarely with First Amendment theory, but is rather less persuasive than the marketplace of ideas concept discussed earlier.

Finally, one practical argument for maintaining anonymity is that it helps to combat the increasing intrusions of corporate data mining and government surveillance.<sup>18</sup> When a poster places her personal information online, companies can associate and aggregate this data with information in online databases and thus discover her identity. Anonymity at least lessens the likelihood that companies and the government can use this personal information for nefarious purposes.<sup>19</sup>

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<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> See Lidsky, *supra* note 3, at 1568–1569 (internal citations omitted). See also Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 122 (1996).

<sup>16</sup> Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J. L. & TECH. 194, 222 (2007/2008).

<sup>17</sup> Cf. Ian Gillies, *Real World Toys and Currency Turn the Legal World Upside Down: A Cross-Sectional Update on Virtual World Legalities*, 12 INT’L J. COMM. L. & POL’Y 120, 133–34 (2008) (arguing that “the anonymity and creative flexibility provided by an assumed avatar persona allows an insecure individual to ‘design away’ their self-perceived imperfections”).

<sup>18</sup> See Marsh, *supra* note 8, at 26–27 (arguing that online data can be “assembled” and “used for any purpose, most obviously employment screening and criminal profiling,” and stating that marketers could match the poster to his real identity using “established databases”).

<sup>19</sup> This fear is more than just speculative. In December 2009, for instance, the Electronic Frontier Foundation filed a lawsuit “against a half-dozen government agencies for refusing to disclose their policies for using social networking sites for investigations, data-collection, and surveillance” in light of

## Reasons Weighing Against Protecting Anonymous Speech

Despite the idealistic underpinnings guiding judicial decisions on anonymity, which will be addressed in greater detail later, there is the potential for abuse of the protection. Although the ability to speak anonymously provides a person with the “strength to state an unpopular view,” it can also act as a shield that protects speakers “from liability for a variety of torts, including defamation, invasion of privacy, fraud, copyright infringement, and trade secret misappropriation.”<sup>20</sup> Perhaps the most tragic example of the consequences of unfettered anonymous or pseudonymous online speech ultimately led to the 2006 suicide of 13-year-old Megan Meier. Meier, who had a page on the social network, MySpace, was friended by someone claiming to be a 16-year-old boy named Josh Evans.<sup>21</sup> In fact, Evans was fictitious, a persona created by Lori Drew (the mother of Meier’s schoolmate) and Drew’s assistant.<sup>22</sup> As Evans, Drew flirted with Meier for several days, then suddenly snubbed Meier and told her “the world would be a better place without her in it.”<sup>23</sup> Distraught, Meier committed suicide by hanging herself in her closet, and Drew deleted the Evans account.<sup>24</sup>

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“recent news reports [that] have publicized the government’s use of social networking data as evidence in various investigations, and Congress is currently considering several pieces of legislation that may increase protections for consumers who use social-networking websites and other online tools.” Press Release, Electronic Frontier Foundation, Lawsuit Demands Answers About Social-Networking Surveillance (Dec. 1, 2009), *available at* <http://www.eff.org/press/archives/2009/11/30>.

<sup>20</sup> Lidsky, *supra* note 3, at 1539 (addressing some of the negative possible consequences of protecting a speaker’s anonymity). See Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 394 (1978) (suggesting that privacy laws enable people to conceal “disreputable facts” about themselves).

<sup>21</sup> See *U.S. v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Because the unique circumstances presented in this case were not covered by any specific statute, Drew was arrested and charged with violating the Computer Fraud and Abuse Act<sup>25</sup> by a federal prosecutor for violating MySpace’s Terms of Service Agreement by posting a picture of a boy she claimed was Josh Evans without obtaining the boy’s consent.<sup>26</sup> Drew was acquitted of felony, but convicted of misdemeanor, Computer Fraud and Abuse Act counts.<sup>27</sup> She moved for judgment of acquittal, requesting the court find the evidence insufficient to convict her.<sup>28</sup> The court granted Drew’s motion, determining that convicting her of a misdemeanor under the Computer Fraud and Abuse Act would violate the “void-for-vagueness” doctrine, which requires any statute to inform the public “with sufficient definiteness” what conduct it prohibits.<sup>29</sup>

The *Drew* case involved some of the worst consequences of free speech. When people can post anything under the veil of anonymity, it can bring out their worst behavior. Drew used her anonymity to torment a 13-year-old girl. Worse, aside from a media blitz damning her actions, Drew even escaped criminal consequences for her behavior.

One commentator, speaking of such possibilities in broader terms, argued that anonymous speech poses a danger because it can actually increase the potential for

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<sup>25</sup> 18 U.S.C. § 1030.

<sup>26</sup> *Drew*, 259 F.R.D. at 452. The Terms of Use Agreement required those signing up for a MySpace account to provide truthful information and refrain from harassing other MySpace members, soliciting personal information from minor users, impersonating someone, or using another’s photograph without obtaining permission. *Id.* at 453–54 (outlining MySpace’s Terms of Use Agreement).

<sup>27</sup> *Id.* at 452.

<sup>28</sup> *Id.* at 455–56.

<sup>29</sup> *Id.* at 463.

even more nefarious criminal activity.<sup>30</sup> Theoretically, anonymity “reduces the risk” involved in “engaging in illegal or immoral activity: harassment, child pornography, electronic stalking, libel, hate speech and general bad manners.”<sup>31</sup> Critics feel that anonymity actually “erases accountability and encourages antisocial behavior that would normally be hindered by social norms.”<sup>32</sup>

Counterposed to the commentators who assert that anonymity supports the truth-seeking function of the First Amendment are critics who contend that anonymity should be discouraged because *disclosure* actually aids the search for truth. In theory, requiring a speaker to disclose his identity gives listeners the ability to judge the veracity of the information by being able to ferret out personal biases. In communication research, this taps into the notion of source credibility, under which the perceived expertise and trustworthiness (or lack thereof) of the source of message will influence how it is viewed.<sup>33</sup>

In a 2007 article published in *Communication Research*, Professor Stephen Rains observed:

Despite the benefits for message senders, however, the impact of anonymity on message receivers may undermine effective discussion and decision-making processes. Although message senders may feel more comfortable, receivers may perceive an anonymous source as less competent or credible than they would if he or she were identified.

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<sup>30</sup> See, e.g., Ekstrand, *supra* note 10, at 414 (stating that “anonymity can also contribute to defamation, theft, obscenity and the worst kind of hacking”).

<sup>31</sup> Marsh, *supra* note 8, at 25 (listing the negative potential consequences of anonymous speech).

<sup>32</sup> *Id.* (discussing the viewpoint of critics who oppose broad protections for anonymous online speech), citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 384 (1994) (Scalia, J., dissenting) (expressing concern that the Court “facilitate[d] wrong by eliminating accountability”).

<sup>33</sup> See Ekaterina Karniouchina et al., *Impact of Mad Money Stock Recommendations: Merging Financial and Marketing Perspectives*, 73 J. MARKETING 244, 248 (2009) (describing “the classic dimensions of perceived source credibility: expertise and trustworthiness”).

Receivers may feel that, because senders are anonymous, they are not willing to be held accountable for their contributions.<sup>34</sup>

This position was supported by Professor Lidsky, who stresses that anonymous speech is not as valuable to consumers as non-anonymous speech because consumers “often use speaker identity as an indication of a work’s likely truthfulness, artistic value, or intellectual merit.”<sup>35</sup> Without proper attribution, Lidsky asserts that the listener “must necessarily rely upon other indicia, which can be less reliable than speaker identity.”<sup>36</sup>

Thus, some critics argue that broad anonymity protections should be tempered to reflect these potential negative consequences.<sup>37</sup> However, this argument conflicts squarely with five decades of First Amendment anonymous speech jurisprudence. Thus, the impact of the criticism is, at best, uncertain.

### **The History of Anonymity Jurisprudence—Political Speech**

Anonymous speech has deep political and revolutionary roots, making it understandable why courts are compelled to respect the renegade spirit of the founding fathers by protecting modern political speech. In 1995, the U.S. Supreme Court explained that anonymity with respect to political speech carries on “an honorable tradition of advocacy and dissent.”<sup>38</sup> And one Washington federal district court said that

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<sup>34</sup> Stephen A. Rains, *The Impact of Anonymity on Perceptions of Source Credibility and Influence in Computer-Mediated Group Communication: A Test of Two Competing Hypotheses*, 34 COMM. RES. 100, 101 (2007).

<sup>35</sup> Lidsky, *supra* note 3, at 1559; *but see* Tien, *supra* note 15, at 143 (citations omitted) (“the marginal benefit of speaker identification is dubious”).

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

<sup>37</sup> See Marsh, *supra* note 8, at 25 (noting that “these concerns . . . are in conflict with a tradition of anonymity in American culture and law, and a First Amendment jurisprudence that emphasizes that anonymity strengthens free speech”).

<sup>38</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 n. 6 (1995).

“[a]nonymous speech is a great tradition that is woven into the fabric of this nation’s history.”<sup>39</sup>

Anonymous speech in America has a rich history, with its foundations traceable to the late 1700s. In 1787 and 1788, American revolutionaries John Jay, James Madison and Alexander Hamilton wrote 85 articles collectively known as *The Federalist* (more commonly known now as *The Federalist Papers*).<sup>40</sup> Writing under the pseudonym “Publius,” the authors defended the Constitution; their essays are still referred to by federal courts when deciding how to interpret the founding fathers’ intentions regarding constitutional law. Perhaps patriotism still plays into courts’ dogged defense of the value of anonymous speech. The right to speak anonymously was basically taken for granted, and the Supreme Court was not required to rule on anonymity as a constitutional issue, until 1960, when it first expressed the concept that an individual has a right to speak anonymously.<sup>41</sup>

In *Talley v. California*,<sup>42</sup> the Court invalidated an ordinance requiring handbills to state the name of their creator.<sup>43</sup> In its rationale, the Court explained that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the

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<sup>39</sup> Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (describing the “fundamental importance” of anonymous speech to the Constitution).

<sup>40</sup> JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS 11 (Isaac Kramnick ed., Penguin Books 1987) (1788) (ed. note) (explaining the history of *The Federalist Papers* and its pseudonymity).

<sup>41</sup> In 1958, the U.S. Supreme Court had the opportunity to rule on anonymity in the context of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution—a situation different from that presented in this dissertation. See NAACP v. Alabama, 357 U.S. 449, 462–63 (1958). In that case, the Court refused to compel the disclosure of documents revealing the Alabama members of the NAACP, in part because this disclosure might have motivated members to withdraw from the organization, hindering the NAACP’s efforts to share its beliefs. *Id.*

<sup>42</sup> 362 U.S. 60 (1960).

<sup>43</sup> *Id.* at 64.

progress of mankind.”<sup>44</sup> The Court recognized that this right stems from the First Amendment prohibition against prior restraints, meaning in general terms that nobody can face a government-sponsored barrier that would deter or prevent them from entering the marketplace of ideas. Requiring the disclosure of one’s identity on the handbills was clearly an unconstitutional prior restraint on speech in that it “tend[ed] to restrict freedom to distribute information.”<sup>45</sup>

Post-*Talley*, the nation’s high court decided a trio of cases that refined the protections offered for anonymous speech. Thirty-five years after *Talley*, the Court decided the first of the three cases, *McIntyre v. Ohio Elections Commission*,<sup>46</sup> which one commentator referred to as “[t]he leading Supreme Court case on anonymous speech.”<sup>47</sup> In *McIntyre*, the justices found unconstitutional an Ohio statute that prohibited individuals from distributing campaign literature anonymously.<sup>48</sup> Margaret McIntyre had published flyers opposing a school tax proposal, signing some of them from “CONCERNED PARENTS AND TAX PAYERS [sic].”<sup>49</sup> The Ohio Elections Commission fined McIntyre for violating the ordinance.<sup>50</sup> She appealed, and the Ohio

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<sup>44</sup> *Id.* at 64.

<sup>45</sup> *Id.* at 64–65.

<sup>46</sup> 514 U.S. 334 (1995).

<sup>47</sup> Lidsky, *supra* note 3, at 1541.

<sup>48</sup> See generally Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 827–828 (2004) (discussing the *McIntyre* decision).

<sup>49</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 336 (1994).

<sup>50</sup> *Id.* at 338.

Supreme Court held that the law was constitutional because it advanced an important state interest that warranted curbing some speech.<sup>51</sup>

Writing for the majority in the United States Supreme Court's 7-2 decision, Justice John Paul Stevens said "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."<sup>52</sup> Stevens applied a strict-scrutiny test,<sup>53</sup> balancing McIntyre's interest in speaking anonymously against the interest in revealing her identity, ultimately concluding that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."<sup>54</sup> The statute, the Court held, was not sufficiently narrowly tailored and was therefore unconstitutional.<sup>55</sup>

Dissenting, Justice Antonin Scalia took issue with what he perceived as the Court translating a long-standing deference to anonymous speech into a constitutional right.<sup>56</sup> According to Scalia, the Constitution does not support the Court's characterization of the value of anonymous speech. The opinion simply stretched too far.

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<sup>51</sup> *Id.* at 340.

<sup>52</sup> *Id.* at 342.

<sup>53</sup> See, e.g., *Sable Commc'ns of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989). In *Sable*, the Court applied a strict scrutiny test to invalidate a statute banning dial-a-porn. Strict scrutiny applies to statutes attempting to regulate such communications because they are fully protected by the First Amendment. *Id.* at 126. In order to restrict these communications, the statute must serve a compelling government interest and be narrowly tailored to serve its purpose. *Id.* The Court, however, found that the dial-a-porn statute failed on both grounds and was, thus, fatally deficient. *Id.*

<sup>54</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1994).

<sup>55</sup> *Id.* at 347.

<sup>56</sup> *Id.* at 373 (Scalia, J., dissenting) (claiming "to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right").

The Court next addressed anonymous speech in 1999, in *Buckley v. American Constitutional Law Foundation, Inc.*<sup>57</sup> In that case, the Court upheld limited restrictions on anonymity if they advanced a legitimate state interest.<sup>58</sup> *Buckley* involved two laws: a statute that required election petitioners to wear identifying badges<sup>59</sup> and a statute requiring them to file a public affidavit with their personal information.<sup>60</sup> The Court found that the first statute was unconstitutional while the second was not. As to the second statute, Justice Ginsberg said that it balanced the petitioners' right to speak anonymously with the state's interest in regulating elections.<sup>61</sup>

Three years later, the Court decided *Watchtower Bible & Tract Society v. Village of Stratton*,<sup>62</sup> in which Jehovah's Witnesses challenged an ordinance requiring those entering public property to obtain a permit from the mayor's office.<sup>63</sup> The ordinance was content-neutral,<sup>64</sup> and permits were denied only for technical reasons such as incomplete applications.<sup>65</sup> The Jehovah's Witnesses argued that the ordinance impermissibly curbed their First Amendment right to disseminate information, while the

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<sup>57</sup> 525 U.S. 182 (1999).

<sup>58</sup> *Id.* at 221 (finding Colorado showed a "substantial state interest" in "combating fraud and providing the public with information about petition circulation").

<sup>59</sup> *Id.* at 197.

<sup>60</sup> *Id.* at 199.

<sup>61</sup> *Id.* at 221.

<sup>62</sup> 536 U.S. 150 (2002).

<sup>63</sup> *Id.* at 154 (citing to the ordinance).

<sup>64</sup> Content-neutral and content-based statutes differ with respect to which level of scrutiny a court will apply when confronted with the statute. See Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 598 (2003). Content-based statutes, which purport to regulate "a subject matter or mode of speaking," receive strict scrutiny. *Id.* Content-neutral statutes, however, are subject to intermediate scrutiny. *Id.*

<sup>65</sup> *Watchtower Bible & Tract Soc'y of New York, Inc.*, 536 U.S. 150, at 155–156.

town said the law advanced the state interest of protecting its residents from criminal activity and invasion of privacy.<sup>66</sup>

Nonetheless, the ordinance required speakers to provide their personal information and declare their purpose for going on the property.<sup>67</sup> The Court thus held that the statute was unconstitutional, overbroad and an impermissible prior restraint.<sup>68</sup> In the majority opinion, Justice John Paul Stevens discussed the history of anonymous pamphleteering<sup>69</sup> and the need to narrowly tailor a prior-restraint statute.<sup>70</sup>

Although these four cases affirmatively protect anonymous speech, they also have slightly questionable import when it comes to anonymous speech generally because “they arise in the special, and highly disfavored, context of prior restraints.”<sup>71</sup> Courts are typically inclined to find prior restraints unconstitutional, instead tending to allow the speech and punish it afterwards when necessary. These decisions also were made in the context of speech that took place in the “real world,” i.e. not online. It was not until 2000 that any court addressed the issue of anonymous speech on the Internet.

### **Anonymous Speech Online**

Although laws generally protecting anonymous speech predate the American Revolutionary War, no court specifically extended the protection to anonymous speech

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<sup>66</sup> *Id.* at 158.

<sup>67</sup> *Watchtower Bible & Tract Soc’y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 155–156 (2002).

<sup>68</sup> *Id.* at 165.

<sup>69</sup> *Id.* at 167.

<sup>70</sup> *Id.* at 165.

<sup>71</sup> Vogel, *supra* note 48, at 837 (2004) (discussing the *Talley* line of prior restraint cases).

on the Internet until a Virginia trial court in 2000.<sup>72</sup> In *In re Subpoena Duces Tecum to America Online, Inc.*, the court adopted a new test to determine under what circumstances an Internet service provider (ISP) should disclose a chat room or message board poster's identity.<sup>73</sup> In that case, and in subsequent ones, courts have tended to recognize that the Internet is a medium with distinctive characteristics that warrant special consideration. This section discusses the nature of Internet discourse and the type of protection courts have extended to anonymous online communications.

### **Why Does Online Speech Warrant Special Analysis?**

According to University of Illinois Professor Bruce P. Smith, online discourse has four unique components that “ha[ve] dramatically altered the nature of communication”<sup>74</sup>: a) the sheer breadth of audience a poster can reach;<sup>75</sup> the “remarkably low barriers to entry” faced by posters;<sup>76</sup> c) the ability to convene in groups

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<sup>72</sup> See *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000) (extending anonymous speech protection to the medium of the Internet), *rev'd on other grounds sub nom.* *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>73</sup> Ultimately, an appellate court determined the plaintiffs satisfied the test and ordered the disclosure of five posters' identities.

<sup>74</sup> Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18-FALL COMM. L. 3, 3–4 (2000).

<sup>75</sup> Smith cited a study claiming there would be over 240 million internet users by the late 2000s. *Id.* at 3, citing Susan Mirmira, *Business Law: Lunney v. Prodigy Servs. Co.*, 15 BERKELEY TECH. L.J. 437, 437 (2000) (citations omitted). The study's estimate was woefully inaccurate. The latest statistics on this issue, published on September 30, 2009, show that a full 25% of the world's population, or 1,733,993,741 people, are online. See Miniwatts Marketing Group, *World Internet Usage Statistics News and World Population Stats*, at <http://www.internetworldstats.com/stats.htm>, retrieved November 14, 2009. Smith argued the potential audience size was relevant in particular because online postings can “be printed from a personal computer, downloaded to a diskette, or simply left on a website for years to come for persons to read.” Smith, *supra* note 74, at 3. Furthermore, the audience size means that the publication of a negative statement can have devastating consequences. *Id.* (explaining that a message can be “enduring” and “republished again and again,” which contributes to the potential nasty consequences of posting online).

<sup>76</sup> According to Smith, this means that posters do not have to spend much time or money posting online or even maintaining their own websites. Smith, *supra* note 74, at 3. Also, whereas in the real world, companies employ fact-checkers to ensure the accuracy of the information they print, such quality control

based on particularized interests;<sup>77</sup> and d) the ability for posters “to express themselves anonymously or pseudonymously.”<sup>78</sup> Individuals who speak anonymously in public, according to Smith, are considered to be “aberrations.”<sup>79</sup> Speaking anonymously in the real-life public arena is hardly a commonplace activity. In contrast, anonymous expression online is remarkably common.<sup>80</sup>

Tanya D. Marsh argues that one of the “cardinal characteristics” of speech online “is the degree to which its users enjoy anonymity.”<sup>81</sup> Anonymity “allows people to engage in legitimate and often socially beneficial activities that they wouldn't otherwise engage in for fear of embarrassment, social ostracism, retribution or persecution.”<sup>82</sup> Thus, Marsh qualifies this characteristic as a positive.

### **What Protection Does Anonymous Online Speech Receive?**

Courts typically accept that online speech is subject to the same First Amendment protections as speech in other media. As noted earlier, no court addressed this specific issue until 2000, when a Virginia trial court determined that anonymous

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does not necessarily exist on an internet forum. *Id.* (explaining that “there are essentially no editorial ‘filters’ to screen the content of online publishers”).

<sup>77</sup> Smith argued that posters could target an audience sharing similar interests and values, whereas if they opted to speak out loud on a street corner, they would “likely be met with titters or nervous glances.” *Id.* at 4. Smith was particularly concerned about this characteristic in the context of speech about corporations, in that consumer complaints can irk other consumers, and plaintiffs’ attorneys can even troll internet forums for prospective clients. *Id.* (expressing concern that plaintiffs’ attorneys will use online postings to support bringing class action suits).

<sup>78</sup> *Id.* at 4.

<sup>79</sup> *Id.* (describing them as “the terrorist in a balaclava; the racist hidden by a white hood; or the mob informant whose on-air identity is obscured by shadows”).

<sup>80</sup> *Id.* (“[i]n cyberspace . . . it is commonplace to speak without disclosing one’s true name”).

<sup>81</sup> Marsh, *supra* note 8, at 24.

<sup>82</sup> *Id.* (citations omitted).

speech should be protected in “diverse contexts,” including the Internet.<sup>83</sup> According to that court, “to fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either U.S. Supreme Court precedent or the realities of speech in the twenty-first century.”<sup>84</sup>

Professor Lee Tien argued that the Internet is such an unusual medium that online speech cannot adequately be compared to other media.<sup>85</sup> Tien proposed the position that anonymity is a vital characteristic of online discourse.<sup>86</sup> Further, because anonymity is one of the Internet’s primary functions, it must be carefully protected in a manner that it need not be in real life.<sup>87</sup> Still, nothing suggests that courts will substantially deviate from the current trend of protecting anonymous online speech similar to the way they currently protect such speech in other media.

### **The Relative Value of Anonymity**

Anonymous speech is deeply imbued in American politics, but courts have extended this protection to other contexts. Anonymity holds an important place in First Amendment jurisprudence because it helps a community to arrive at the truth, encourages speech without fear of reprisal, ensures speakers can engage in necessary self-expression, and protects speakers’ personal information from divulgement. Despite

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<sup>83</sup> In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev’d on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 385 (Va. 2001).

<sup>84</sup> *Id.* at 33–34.

<sup>85</sup> Tien, *supra* note 15, at 139 (noting “[o]nline speech . . . creates meaning differently than other forms”).

<sup>86</sup> *Id.* at 152.

<sup>87</sup> *Id.* at 184–185 (stating that the rationale of *McIntyre* did not “capture the richness of online identification and anonymity,” but arguing nonetheless that courts should apply *McIntyre*’s rationale to anonymous online speech).

a handful of characteristics suggesting anonymity can cause negative consequences, courts tend to extol the values of anonymity. As discussed in Chapter 5 of this dissertation, courts will reveal an anonymous poster's identity under certain circumstances, but even then, they will do so as an exception to the general rule of protecting anonymity. Although online discourse features several components that differentiate the Internet from other media, courts nevertheless are inclined to apply the rationale of *McIntyre* and shield the identity of anonymous speakers.

## CHAPTER 3 THE TESTS FOR UNMASKING ANONYMOUS SPEAKERS

As discussed in Chapter 1 of this dissertation, anonymous speech warrants full First Amendment protection.<sup>1</sup> Courts have extended this same protection to anonymous speech online.<sup>2</sup> In lawsuits where anonymity is an issue, courts often consider whether to order the disclosure of the anonymous poster's identity during the pleading stage.<sup>3</sup> Which test a court applies could affect whether a suit is dismissed during this stage or whether the aggrieved plaintiff will be afforded further opportunity to prove damages.<sup>4</sup> A permissive standard will deter anonymous speech, while a strict standard will leave a victim without recourse. This determination is critical because courts are reluctant to divulge an anonymous poster's identity without adequate reason;<sup>5</sup> they seek to protect

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<sup>1</sup> See, e.g., *Talley v. California*, 362 U.S. 60, 64–65 (1960) (discussing the role “[a]nonymous pamphlets, leaflets, brochures and even books have played . . . in the progress of mankind”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995) (“an author’s decision to remain anonymous . . . is an aspect of freedom of speech protected by the First Amendment”), *and at* 557 (“[a]nonymity is a shield from the tyranny of the majority”); see also *Watchtower Bible & Tract Soc’y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (characterizing anonymity as part of “our national heritage and tradition”).

<sup>2</sup> See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997) (extending full First Amendment protection to online speech); see also *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (“the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded”). Online speech is also subject to the same limitations as other forms of speech. See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 441 (2009) (explaining anonymity “is not absolute and may be limited by defamation considerations”); see also *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech”).

<sup>3</sup> Ordinarily, plaintiffs suing anonymous posters have faced a tremendous burden obtaining their identities. See Carol Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 889 (1996). Typically, plaintiffs subpoena websites and ISPs for the identities. See Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST7.

<sup>4</sup> For instance, a plaintiff with a negligible claim could satisfy an *America Online* good-faith test but fail to meet a *Cahill* summary-judgment standard.

<sup>5</sup> Pre-service discovery and the process to obtain a criminal investigation warrant have been equated. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). The latter requires the government show probable cause, which ensures innocent individuals maintain their privacy. *Id.* Similar requirements in unmasking analyses help prevent abuses of the discovery process. *Id.*

defendants from bad-faith suits brought solely for harassment and intimidation.<sup>6</sup>

Regardless of which test a court adopts, however, it will apply careful scrutiny.<sup>7</sup>

When selecting a test, courts have thus far struggled to reconcile the competing interests of the parties: the defendant's right to anonymity and the plaintiff's desire for redress. Clarity and consistency in this area of the law are critical because questions of anonymity are central to a myriad of lawsuits. While it is easy to conceive of anonymity as a relevant issue in a defamation lawsuit,<sup>8</sup> the question of whether to compromise a poster's identity could arise in a variety of hypothetical lawsuits brought by different types of aggrieved plaintiffs. As explained in the New Jersey Circuit Court's landmark case, *Dendrite International, Inc. v. Doe*,<sup>9</sup> an anonymous poster could reveal information that:

can form the basis of litigation instituted by an individual, corporation or business entity under an array of causes of action, including breach of employment or confidentiality agreements; breach of a fiduciary duty; misappropriation of trade secrets; interference with a prospective business advantage; defamation; and other causes of action.<sup>10</sup>

Thus, the potential implications of revelation analysis are broad.

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<sup>6</sup> Bad-faith lawsuits, known as Strategic Lawsuits Against Public Participation ("SLAPP" suits), are discussed in the introduction to this dissertation. See, e.g., *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (recognizing the impetus for many lawsuits is simply to unmask anonymous posters).

<sup>7</sup> Anonymous speech enjoys such strong First Amendment protection that laws threatening to compromise anonymity are presumptively invalid "content-based" speech restrictions. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345–46 (1995). These restrictions are subject to strict scrutiny. *Id.* at 347.

<sup>8</sup> The three main cases examined in this dissertation chapter involve defamation claims.

<sup>9</sup> 775 A.2d 756 (N.J. Super. 2001).

<sup>10</sup> *Id.* at 759–60.

Courts have settled on three tests that have increasingly protected the rights of anonymous speakers. These are: *In re Subpoena Duces Tecum to America Online*,<sup>11</sup> *Dendrite International, Inc. v. Doe*,<sup>12</sup> and *Doe v. Cahill*.<sup>13</sup> Because courts gravitate towards the application of these three tests, the law in this area should, theoretically, realize increased predictability.<sup>14</sup>

When analyzing whether to unmask an anonymous poster, courts typically ask themselves variations of the following four questions:

- 1) What must a plaintiff plead?
- 2) What proof must he provide to support his claims?
- 3) Do the merits of his case matter and, if so, to what extent?
- 4) Does the “nature or quality” of the anonymous speaker’s post(s) factor into the determination?<sup>15</sup>

The *Dendrite*, *Doe v. Cahill*, and *America Online* courts each contemplated some or all of these questions, ultimately adopting different tests that share one notable similarity. All three tests require the plaintiff to demonstrate a viable claim justifying unmasking the anonymous poster. *America Online* adopted a “good faith” standard;<sup>16</sup> *Dendrite* included

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<sup>11</sup> 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>12</sup> 775 A.2d 756 (N.J. Super. 2001).

<sup>13</sup> 884 A.2d 451 (Del. 2005).

<sup>14</sup> *But see* Lyrissa Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C.L. REV. 1373, 1374, 1380 (2009) (expressing concern regarding the effect of “piecemeal, state-by-state development of standards”).

<sup>15</sup> See Charles Duskow, *Peek-A-Boo I See You: The Constitution, Defamation Plaintiffs, and Pseudonymous Internet Defendants*, 5 FLA. A&M U.L. REV. 197, 202 (2010) (compiling a list of the questions courts have tended to ask when addressing the question of whether to reveal an anonymous poster’s identity).

<sup>16</sup> *In re Subpoena Duces Tecum to Am. Online*, 2000 WL 1210372, at \*8 (Va. Cir. Ct. Jan. 31, 2000).

a modified “motion to dismiss” test;<sup>17</sup> and *Doe v. Cahill* employed a summary judgment component.<sup>18</sup> These different tests establish criteria that the plaintiff must meet to show his claim justifies revelation of the poster’s identity.<sup>19</sup> Of these three, *Dendrite’s* balancing approach appears to have gained the most traction in the courts.<sup>20</sup>

Although the utilization of *Dendrite*, *Doe v. Cahill*, or *America Online* has become *de rigueur*, a review of the relevant case law and secondary materials reveals that nobody has published a detailed analysis of the factual patterns that ultimately influence a court to adopt one particular test over another. The creation of a rubric, advanced in this dissertation, will assist courts in quickly ascertaining the relevant underlying facts and weighing their value when deciding whether to order disclosure. The rubric is located in Chapter 5 of this dissertation; the current chapter analyzes the *Dendrite*, *Doe v. Cahill*, and *America Online* decisions and discusses the applicability of each test.

### **Analysis of the Unmasking Standards**

As discussed above, courts have tended to adopt one of three tests reflecting differing approaches when considering whether to reveal an anonymous poster’s

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<sup>17</sup> *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 771 (N.J. Super. 2001).

<sup>18</sup> *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005).

<sup>19</sup> See *infra*. for a discussion of each standard.

<sup>20</sup> For an analysis of the importance of *Dendrite*, see Lidsky, *supra* note 14, at 1378 (noting that balancing approaches like *Dendrite* “appear[ ] to be gaining ground as the dominant standard”).

identity. *Doe v. Cahill* proposes the strictest standard<sup>21</sup> and *America Online* the most permissive.<sup>22</sup> Each of these three approaches is analyzed more thoroughly below.

The section first analyzes *America Online*—even though it is the standard employed least frequently<sup>23</sup>—and ends with *Doe v. Cahill*, for two reasons. First, this organization maintains the chronological order of the opinions, a logical arrangement because the later opinions build on (and critique) the earlier ones. And second, this organization serendipitously creates a situation in which the permissive *America Online* test builds up to the rigid *Doe v. Cahill* test, with the more moderate *Dendrite* balancing test in between.

### **The *America Online* Good Faith Approach**

*In re Subpoena Duces Tecum to America Online, Inc.*,<sup>24</sup> a 2000 Virginia Circuit Court decision, adopted a “good faith” standard, setting a very low bar to a plaintiff’s discovery of an anonymous poster’s identity.<sup>25</sup> Under the *America Online* test, a plaintiff only must (1) satisfy the courts through the pleadings and evidence he provides; (2)

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<sup>21</sup> The *Doe v. Cahill* approach has been characterized as “substantially elevating [the] plaintiff’s burden” above *Dendrite* or *America Online* because it requires the plaintiff to demonstrate facts sufficient to defeat a motion for summary judgment before unmasking is justified. For further analysis, see Doskow, *supra* note 15, at 208 (2010) (discussing the relative stringency of the test posed in *Doe v. Cahill*).

<sup>22</sup> The *America Online* approach has been repeatedly criticized for establishing a standard so lax as to offer anonymous speakers no effective protection. See, e.g., *Doe v. Cahill*, 884 A.2d at 458.

<sup>23</sup> At one time, *America Online* was exceptionally important. In 2000, when it merged with Time Warner, AOL had 22 million subscribers. See Verne Kopytoff, *AOL Will Bounce Back, Chief Says—Really, This Time It Will; Site’s Future is Staked on Premium Content Led by the Huffington Post*, INT’L HERALD TRIB., May 9, 2011. Thus, even if the *America Online* decision enjoyed no traction outside of Virginia, it theoretically impacted the anonymity of *over 20 million people*. As of May 2011, however, its subscriber base was only 3.6 million people, and it was losing approximately 19,000 customers weekly. *Id.* As a result, the AOL decision has much smaller impact, and other courts tend to reject its permissive standards. See, e.g., *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

<sup>24</sup> 52 Va. Cir. 26 (2000), *rev’d on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>25</sup> For an analysis of *America Online*, see, e.g., Doskow, *supra* note 15, at 206 (remarking that *America Online*’s “‘good faith’ test requires very little beyond a well-pleaded complaint”).

demonstrate that his claim has a “legitimate, good faith basis,” and (3) prove he needs to discover the anonymous poster’s identity to proceed with his claim.<sup>26</sup>

Numerous courts have questioned the wisdom of *America Online’s* plaintiff-friendly approach.<sup>27</sup> Some suggest that plaintiffs might exploit this permissive standard to unmask their anonymous critics and pressure them into silence<sup>28</sup>—a result wholly incompatible with the deference courts historically have afforded to anonymous speech. This section briefly outlines the facts of *America Online* before discussing the adoption and import of the “good faith” test and its uncertain future.

## **Facts**

In *In re Subpoena Duces Tecum to America Online*, plaintiff Anonymous Publicly Traded Company (“APTC”)<sup>29</sup> sued five anonymous America Online (“AOL”) subscribers who published “certain defamatory material misrepresentations and confidential material insider information” in AOL’s Internet chat rooms.<sup>30</sup> APTC alleged that these comments caused it “to suffer immediate and irreparable injury, loss and damages including

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<sup>26</sup> *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*9. The court developed this three-part test for a court to use “when a subpoena is challenged under a rule akin to Virginia Supreme Court Rule 4:9(c),” which governs the production of documents by a non-party. *Id.* (discussing Va. Sup. Ct. R. 4:9(c)).

<sup>27</sup> See, e.g., *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

<sup>28</sup> See, e.g., *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001).

<sup>29</sup> The *America Online* case was remarkable in that the plaintiff corporation sought to maintain anonymity while demanding the revelation of the anonymous online posters’ identities. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*1 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>30</sup> The plaintiff claimed that the comments (which are not part of the public record) defamed APTC and contained confidential information in breach of fiduciary duty and contract. *Id.* at \*1 (citations omitted). The plaintiff sued in Indiana and obtained an order allowing it to conduct discovery in Virginia for the Indiana suit. *Id.*

potentially adversely affecting the value of its publicly traded stock.”<sup>31</sup> Because APTC suspected that these anonymous posters were current or former APTC employees, it sued for breach of contract, in addition to defamation and other claims.<sup>32</sup>

APTC sought to identify four of the anonymous posters. From the Indiana court, it obtained an order enabling it to request assistance from a Virginia state court to enforce subpoenas for these identities against AOL, a non-party.<sup>33</sup> In response to the order, the Clerk of the Circuit Court of Virginia directed AOL to “produce any and all documents from which the identity of the four AOL subscribers could be ascertained.”<sup>34</sup> APTC was then granted a motion in Indiana to proceed with its suit until it was able to discover the identities of the anonymous posters.<sup>35</sup> AOL filed a motion to quash APTC’s subpoena,<sup>36</sup> arguing that it impaired the anonymous posters’ First Amendment rights.<sup>37</sup> After

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<sup>31</sup> *Id.* at \*7 (citations omitted).

<sup>32</sup> *Id.* at \*1. In *Dendrite*, the Public Citizen brief warned that companies may aggressively pursue action to against their critics, even when their claims are tenuous. Brief of *Amici Curiae* Public Citizen and the American Civil Liberties Union of New Jersey, *Dendrite Int’l, Inc. v. Doe*, A-2774-00 (March 29, 2001). These companies hope the threat of being unmasked will silence critics who cannot afford embroilment in a lawsuit. *Id.*

<sup>33</sup> Specifically, the order enabled APTC to seek assistance from Virginia courts to support discovery of the posters’ identities. In re Subpoena Duces Tecum to Am. Online, 2000 WL 1210372, at \*1.

<sup>34</sup> In re Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210372, at \*1 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>35</sup> *Id.* The *America Online* court explained that it was “unwilling to blindly defer to a ruling of another court which could substantially abridge the constitutional rights of the John Does,” *id.* at \*3, but under principles of comity, it deferred to Indiana’s decision to enable APTC to maintain temporary anonymity. *Id.* at \*4.

<sup>36</sup> *Id.* at \*1.

<sup>37</sup> *Id.* at \*2. AOL sought to quash the subpoena under Virginia Supreme Court Rule 4:9(c), which governs requests for the production of documents by a non-party. *Id.* APTC argued that AOL had no standing to assert the First Amendment rights of its subscribers, but the court held that because AOL was the one required to produce documents, it had standing to challenge the subpoena. *Id.* In the interim, APTC was granted a motion in Indiana to proceed with its suit until it could discover the identities of the anonymous posters. *Id.* at \*1. The court explained that it was “unwilling to blindly defer to a ruling of another court which could substantially abridge the constitutional rights of the John Does,” *id.* at \*3, but under principles of comity, it deferred to Indiana’s decision to enable APTC to maintain temporary anonymity. *Id.* at \*4.

reviewing the pleadings and hearing counsel’s arguments, the court reviewed the chat room postings *in camera*.<sup>38</sup> Inexplicably, the court characterized its initial task as determining *whether* online communications should enjoy protection under the First Amendment<sup>39</sup>—a task that should have been obviated since the Supreme Court resolved the issue three years prior when it extended full First Amendment protection to Internet speech.<sup>40</sup>

The trial court held that because APTC brought its suit in “good faith,” it was entitled to discover the parties’ identities.<sup>41</sup> Thus, it denied the posters’ motion to quash.<sup>42</sup> However, the appellate court found the identities of the anonymous subscribers should be protected.<sup>43</sup>

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<sup>38</sup> *Id.* at \*1. The court ordered APTC to produce the allegedly damaging anonymous postings to “better determine whether there is, in fact, a good faith basis for APTC’s allegations.” *Id.* at \*8.

<sup>39</sup> *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*4 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) (“This Court must now decide whether the First Amendment right to anonymity should be extended to communications by persons utilizing chat rooms and message boards on the information superhighway.”)

<sup>40</sup> *Reno v. ACLU*, 521 U.S. 844 (1997). The *America Online* court noted that:

To fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century. This Court declines to do either and holds that the right to communicate anonymously on the Internet falls within the scope of the First Amendment’s protections.

*In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*6.

<sup>41</sup> After reviewing the Indiana pleadings and Internet postings, the trial court concluded that APTC met its burden under the “good faith” test and was entitled to discover the identities of the four anonymous posters. *Id.* at \*8.

<sup>42</sup> *Id.*

<sup>43</sup> The Supreme Court of Virginia held that APTC failed to meet “its burden to show special circumstances justifying [its] anonymity.” *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377, 385 (Va. 2001). Furthermore, the Indiana court granted APTC’s request to proceed anonymously in a “non-adversarial, *ex parte* proceeding”—without ever holding a hearing, receiving evidence or presenting reasons for its decision. *Id.* at 383. APTC also failed to show the “presence of some social stigma or the threat of physical harm” that would result from its identity being revealed. *Id.* at 364. Thus, the trial court

## Parameters of the “good faith” test

*America Online* adopted a “good faith” test that made it relatively easy for plaintiffs to obtain discovery of anonymous posters’ identities. The court realized its test should accommodate the anonymous-speech-protective language in *Talley*<sup>44</sup> and *McIntyre v. Ohio Elections Commission*,<sup>45</sup> two Supreme Court decisions balancing the right of the posters to speak anonymously against the right of the plaintiff to seek recourse.<sup>46</sup> Thus, it considered whether divesting the posters of anonymity “would constitute an unreasonable intrusion on their First Amendment rights.”<sup>47</sup> The test it adopted involved three simple components:<sup>48</sup>

- (1) The court must be satisfied by the plaintiff’s pleadings or evidence on their face;
- (2) The party requesting the subpoena “has a legitimate good faith basis” for his claim; and
- (3) The requesting party needs the poster’s identity to advance his claim.<sup>49</sup>

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should not have deferred to the Indiana court’s judgment. *Id.* at 383. The Supreme Court reversed the trial court’s order denying AOL relief and remanded. *Id.* at 385.

<sup>44</sup> *Talley v. California*, 362 U.S. 60, 64 (1960).

<sup>45</sup> 514 U.S. 334, 341–42 (1995).

<sup>46</sup> One critic of the *America Online* decision argued that the court “misstat[ed] the law and mis-cit[ed] authority” when it addressed *Beauharnais v. Illinois*, 343 U.S. 250 (1952), because the *America Online* court read *Beauharnais* to stand for the “proposition of no protection” for anonymous speakers—a proposition that “ha[d] long since been rendered obsolete by the *New York Times v. Sullivan* line of cases.” See Daskow, *supra* note 15, at 205, note 59.

<sup>47</sup> *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*5 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

<sup>48</sup> The court indicated that its test applied to guide courts’ decisions with respect to “non-party, Internet service provider[s]” facing a subpoena for posters’ identities. See *id.* at \*8. The *America Online* court referred to its test as a “two prong [sic] test,” *id.* at \*6, but analysis of the opinion reveals the court analyzed three factors to determine that the plaintiff failed to justify revelation. *Id.* at \*8.

<sup>49</sup> *Id.* (outlining the three factors).

In other words, the court will reveal an anonymous poster's identity as long as it is satisfied that the plaintiff brought his claim in good faith and needs to discover the poster's identity. In advancing this test, however, the court did not articulate how a plaintiff can meet each element.

Applying the "good faith" test, the trial court declined to quash APTC's subpoena. America Online appealed. On appeal, however, the court ultimately determined that the plaintiff's claim failed to support revelation of the defendants' identities.<sup>50</sup>

### **Critique of the *America Online* decision**

The *America Online* decision facilitated the process for aggrieved plaintiffs to discover the identities of anonymous posters who harmed them. Because the putative defendants in these suits post their invective anonymously, as a practical matter, plaintiffs cannot obtain certain important details from (or about) them to support their claims.<sup>51</sup> Under the "good faith" standard, the plaintiff can more easily meet his evidentiary burden and pursue legitimate claims beyond the pleading stage.

In crafting the "good faith" test, the *America Online* court focused heavily on two things: the plaintiff's need for relief<sup>52</sup> and the damage an anonymous online speaker could cause with his words. According to the court:

[T]he release of confidential insider information, relating to a publicly traded company, through a medium such as the Internet, is no less pernicious than the

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<sup>50</sup> *Id.* at \*7.

<sup>51</sup> For example, a public-figure plaintiff would find it exceedingly difficult to prove that a speaker was motivated by malice (a necessary element of a claim of defamation against a public figure, according to *New York Times v. Sullivan*, 376 U.S. 254 (1964)) if he cannot even ascertain the speaker's identity.

<sup>52</sup> The court explained its intent to balance anonymous speech rights against the need "to assure that those who abuse the opportunities presented by this medium can be made to answer for such transgressions." *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372, at \*6 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

libelous statements that fall outside the scope of First Amendment protections. In this age of communication in cyberspace, the potential dangers that could flow from the dissemination of such information increase exponentially as the proliferation of shareholder chat rooms continues unabated, and more and more traders utilize the Internet as a means of buying and selling stocks.<sup>53</sup>

Thus, the court felt justified in allowing a “limited intrusion” into an anonymous speaker’s rights because his words could easily damage a company’s reputation.<sup>54</sup>

The most prevalent critique of *America Online* is that plaintiffs can pierce the veil of anonymity so easily that the standard effectively leaves anonymous speakers unprotected.<sup>55</sup> Despite paying lip service to the Supreme Court’s speech-protective opinions in *Talley* and *McIntyre*,<sup>56</sup> *America Online* offers little deference to anonymity. Because it is so plaintiff-friendly, the standard could motivate bad-faith lawsuits brought by plaintiffs who have no expectation of (or even desire for) recovery—these companies merely seek to identify anonymous dissenters and bully them into silence.<sup>57</sup>

Indeed, the potential for abuse of such a permissive standard was illustrated by *Doe v. 2TheMart.com, Inc.*,<sup>58</sup> in which the plaintiff subpoenaed the identities of 23 anonymous posters, including non-parties. 2TheMart.com’s suit was so deficient it failed

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<sup>53</sup> *Id.* at \*7.

<sup>54</sup> *Id.* at \*8.

<sup>55</sup> See, e.g., *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1167 (Cal. App. 2008) (claiming the *America Online* standard “offers no practical, reliable way to determine the plaintiff’s good faith and leaves the speaker with little protection”).

<sup>56</sup> The *America Online* court stated that the right to anonymous speech “arises from a long tradition of American advocates speaking anonymously or through pseudonyms,” and discussed this right in the historical context of political speech protection. In re Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210374, at \*6.

<sup>57</sup> See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (rejecting the “good faith” standard and stating that “[p]laintiffs can often initially plead sufficient facts to meet the good faith test...even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision”).

<sup>58</sup> 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

to even meet the lax “good faith” burden.<sup>59</sup> This strongly suggests that an unworthy plaintiff with no real basis for a claim will attempt to take advantage of the “good faith” test as a tool to discover posters’ identities.

Recognizing this problem, nearly all courts facing an unmasking situation since *America Online* have distinguished or rejected its “good faith” standard in favor of an approach more protective of anonymous speech. Nevertheless, the “good faith” approach still applies in Virginia. In fact, it was codified by the Virginia General Assembly in 2002.<sup>60</sup>

### **The *Dendrite International v. Doe* Motion-to-Dismiss Approach**

In *Dendrite*, an action based on several theories of recovery including defamation and misappropriation of trade secrets,<sup>61</sup> a New Jersey appellate court adopted a four-pronged unmasking analysis.<sup>62</sup> The test attempts to balance the poster’s interest in maintaining anonymity and the aggrieved plaintiff’s need to discover the speaker’s identity to proceed with his lawsuit.<sup>63</sup> Of the three tests analyzed in this dissertation

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<sup>59</sup> The court refused to unmask the posters, finding 2TheMart.com “failed to demonstrate that the identity of the Internet users [was] directly and materially relevant to a core defense.” *Id.* at 1096.

<sup>60</sup> The Virginia code requires the party subpoenaing the anonymous poster’s identity to show either that “one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting a subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed.” Virginia Code Ann. § 8.01-401.1(a) (2002).

<sup>61</sup> *Dendrite* sued the fictitiously named defendants for breach of contract, breach of fiduciary duty, defamation, and misappropriation of trade secrets, among other things. See Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int’l, Inc. v. Doe*, MRS C-129-00, at 1 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf>.

<sup>62</sup> *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (indicating that *Dendrite*’s holding applied in a situation where a plaintiff seeks expedited discovery compelling an ISP “to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses”).

<sup>63</sup> *Id.* at 760–61.

chapter, *Dendrite* appears to be enjoying the most currency in recent state and federal opinions regarding revelation.<sup>64</sup>

## Facts

In 2001, Dendrite International, a New Jersey-based corporation servicing the pharmaceutical industry,<sup>65</sup> sued fourteen anonymous posters on a Yahoo! message board discussing Dendrite's financial health.<sup>66</sup> Dendrite claimed the anonymous posts wrongly accused it of artificially inflating its earnings and unsuccessfully "shopping" the company—mischaracterizations of factual assertions previously published in Dendrite's quarterly financial report and articles discussing that report.<sup>67</sup> It also claimed the posters

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<sup>64</sup> See, e.g., *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009) (adopting *Dendrite's* balancing approach). In adopting *Dendrite's* balancing approach, the *Independent Newspapers* court found *America Online's* good faith test overly permissive and *Cahill's* summary judgment test unduly burdensome. *Id.* at 456–57.

<sup>65</sup> The Superior Court of New Jersey characterized Dendrite as a "global provider of specialized integrated products and services for pharmaceutical customers and consumer product costumers [sic]." Decision Regarding Motion for Order to Show Cause, *Dendrite Int'l v. John Does, et als.* Docket No. MRS C-129-00 (November 23, 2000), at 2.

<sup>66</sup> See John Doe No. 3's Brief in Opposition to Plaintiff's Request for Leave to Conduct Limited Expedited Discovery for the Purpose of Obtaining Information to Identify John Doe No. 3, *Dendrite Int'l, Inc. v. Doe*, MRS-C-129-00, at 1 (July 11, 2000) (noting that plaintiff filed suit against John Does Nos. 1–14, but sought leave from the court to discover the identities of John Does Nos. 1–4). Dendrite requested expedited discovery to ascertain the names of four pseudonymous posters: "implementor\_extrodinaire, gacbar, ajcazz and xxplr." Brief on Appeal of *Amici Curiae* Public Citizen and the ACLU, *Dendrite Int'l, Inc. v. Doe*, No. A-2774-00, at 9–10 (Mar. 29, 2001).

<sup>67</sup> According to Dendrite, the posters incorrectly suggested Dendrite's revenue recognition system "masked weaknesses in the company's core segment." *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 762 (N.J. Super. Ct. App. Div. 2001). This quote, however, came from a publication by the Center for Financial Research and Analysis (CFRA) critical of Dendrite. See *id.* (discussing the CFRA article). Dendrite's policies also were criticized by Internet publication, *TheStreet.com*. See *id.* However, Dendrite never sued either publication, although the statements were substantively similar to the anonymous posters' claims. Furthermore, documents filed in *Dendrite* suggest that other Yahoo! posters – not just the four defendants – "extensively discussed" this policy. See, e.g., John Doe No. 3's Brief in Opposition to Plaintiff's Request for Leave to Conduct Limited Expedited Discovery for the Purpose of Obtaining Information to Identify John Doe No. 3, *Dendrite Int'l, Inc. v. Doe*, MRS-C-129-00, at 10 (July 11, 2000) (stating that Doe's postings "were precipitated by earlier postings on Yahoo!'s Dendrite message board").

“willfully and maliciously”<sup>68</sup> published statements constituting, among other things, “breach of contract, breach of fiduciary duty, defamation, [and] misappropriation of trade secrets.”<sup>69</sup>

Dendrite sought to unmask the anonymous posters in order to serve process on them.<sup>70</sup> The chancery court required Dendrite to notify these anonymous speakers of the action by posting a message on the Yahoo! board.<sup>71</sup> The motion judge then directed the defendants to show cause why they should not be compelled to unmask themselves.<sup>72</sup> Doe No. 3 (posting as “xxplrr”) and Doe No. 4 (“gacbar”) then filed a motion to dismiss Dendrite’s claims and requested that the court deny Dendrite’s discovery request.<sup>73</sup> After oral argument, Judge MacKenzie granted Dendrite’s motion for leave to take discovery against Does No. 1 (“implementor\_extraordinaire”) and 2

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<sup>68</sup> Verified Complaint of Dendrite Int’l, Inc., *Dendrite Int’l, Inc. v. Doe*, at ¶ 47 (May 24, 2000) (seeking punitive damages and asserting that these statements were “willful, malicious and oppressive” and “intended to harm the business reputation of Dendrite”).

<sup>69</sup> *Id.* at ¶¶ 29, 39, and 47; Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int’l, Inc. v. Doe*, MRS C-129-00, at 1 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf>. The four posters visited the Yahoo! Dendrite board with varying frequency. Although Doe No. 1 visited regularly, Doe No. 2 “posted only a couple of messages on a single day and never returned.” See Brief on Appeal of *Amici Curiae* Public Citizen and the ACLU, *Dendrite Int’l, Inc. v. Doe*, No. A-2774-00, at 7–8 (Mar. 29, 2001). Dendrite only alleged that Does Nos. 1–3 made false statements and published information protected by trade secret. See *id.* at 8.

<sup>70</sup> See Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int’l, Inc. v. Doe*, MRS C-129-00, at 5 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf>. On Yahoo!’s Dendrite board, John Doe No. 1 went by the pseudonym “implementor\_extrodinaire;” John Doe No. 2 was known as “ajcazz;” John Doe No. 3 was called “xxplrr;” and John Doe No. 4’s handle was “gacbar.” See Decision Regarding Motion for Order to Show Cause, *Dendrite Int’l v. John Does, et als.* Docket No. MRS C-129-00, at 1 (November 23, 2000). Yahoo!’s privacy policy indicated it would not disclose its subscribers’ identities except under limited circumstances, such as to comply with a court order. See *Dendrite*, 775 A.2d at 761–62 (discussing the then-applicable Yahoo! privacy policy).

<sup>71</sup> See Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int’l, Inc. v. Doe*, MRS C-129-00, at 8 (Nov. 23, 2000) (referring to the court-directed notice), available at <http://www.citizen.org/documents/dendriteappeal.pdf>.

<sup>72</sup> See *id.* at 1 (referring to the order).

<sup>73</sup> Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int’l, Inc. v. Doe*, MRS C-129-00, at 5 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf>.

("ajcazz").<sup>74</sup> However, the trial court found that Dendrite failed to establish a *prima facie* case of defamation against Doe No. 3 because it did not prove his statements caused harm.<sup>75</sup> The court also said Dendrite failed to provide evidence adequate to strip Does Nos. 3 and 4 of their First Amendment protections.<sup>76</sup> Thus, it denied leave for Dendrite to conduct discovery to obtain the identities of Does Nos. 3 and 4.<sup>77</sup> Dendrite appealed the denial only with respect to Doe No. 3.<sup>78</sup> In the interim, Public Citizen, a Washington, D.C., interest group, and the American Civil Liberties Union of New Jersey obtained permission from the court to file an *amici curiae* brief.<sup>79</sup>

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<sup>74</sup> Dendrite argued that Does 1 and 2—who identified themselves on the board as current or former employees – violated their contractual non-disparagement clause based on a handful of posts. Brief of Amici Curiae Public Citizen Litigation Group, *Dendrite Int'l, Inc. v. Doe*, Docket No. A-2774-00, at 12 (2001). First, Doe No. 1 claimed Dendrite failed to protect itself from the consequences of a mass exodus of dissatisfied employees and customers. *Id.* at 8. Second, Doe No. 2 allegedly “complained about pressure from management to produce” and intimated that management called other employees “lazy.” *Id.* The court enabled Dendrite to unmask Does Nos. 1 and 2, mostly because they never appeared to rebut Dendrite’s claims, despite sufficient notice. Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int'l, Inc. v. Doe*, MRS C-129-00, at 16 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf>. Doe No. 1’s subsequent motion to quash failed because his statements, on their face, violated his employment agreement. *Id.* at 16 n. 3.

<sup>75</sup> Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int'l, Inc. v. Doe*, MRS C-129-00, at 12 (Nov. 23, 2000) (citations omitted), available at <http://www.citizen.org/documents/dendriteappeal.pdf>.

<sup>76</sup> *Id.* at 19. The court explained that anonymous speech is protected under both the United States Constitution and the New Jersey Constitution (which affords even stronger protection). *Id.* According to the trial court, Dendrite did not provide “ample proof” of those two defendants “conduct[ing] themselves in a manner which is unlawful or that would warrant this Court to revoke their constitutional protections.” *Id.*

<sup>77</sup> *Id.* at 21.

<sup>78</sup> *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 n. 1 (N.J. Super. Ct. App. Div. 2001).

<sup>79</sup> Public Citizen and the ACLU sought permission

in order to discuss the standard that courts ought to apply in deciding whether to compel the identification of anonymous [I]nternet posters who are sued for allegedly violating the rights of the companies that they criticize.

See Brief of Amici Curiae Public Citizen Litigation Group, *Dendrite Int'l, Inc. v. Doe*, Docket No. A-2774-00, at 17 (2001). The *amici curiae* submitted an identical brief in *Immunomedics v. John Doe*, 775 A.2d 773 (N.J. Super. 2001). In *Immunomedics*, an anonymous individual (“moonshine\_fr”), calling herself a “worried employee,” posted on a Yahoo! board that Immunomedics depleted its European pharmaceutical supply and the chairman intended to fire the European manager. *Id.* at 774. The company – which

On appeal, Dendrite alleged that Doe No. 3 posted nine actionable comments over a nearly three-month period that justified revealing his identity.<sup>80</sup> These statements, according to Dendrite, were false and damaging.<sup>81</sup> First, Dendrite alleged that Doe No. 3 revealed trade secrets by disclosing concrete terms of Dendrite’s contracts.<sup>82</sup> With respect to the contracts, Doe No. 3 allegedly posted:

Bailye [Dendrite’s president] has his established contracts structured to provide a nice escalation in revenue. And then he’s been changing his revenue-recognition accounting to further boost his earnings...<sup>83</sup>

Furthermore, he said that Dendrite “signed multi-year deals with built in escalation in their revenue year-over-year” and was “able to restructure their contracts with Pfizer and [Eli] Lilly the same way.”<sup>84</sup> Doe No. 3 argued that these contractual terms were generic terms (such as disclosing escalating revenue)—not trade secrets—that Dendrite itself disclosed in its annual reports.<sup>85</sup> Finally, he asserted that was not bound by a duty of confidentiality because he was not a Dendrite employee.<sup>86</sup>

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(erroneously) believed this poster was its employee – claimed the post violated her confidentiality agreement. *Id.* at 775. Applying *Dendrite*, the appeals court held Immunomedics demonstrated that moonshine\_fr was an employee whose postings violated the confidentiality agreement. *Id.* at 777–78.

<sup>80</sup> *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 763 (N.J. Super. 2001).

<sup>81</sup> *Id.* According to the appellate court, Dendrite’s vice president, R. Bruce Savage, certified that Dendrite neither changed how it recognized revenue nor “structured [its] contracts to defer income.” *Id.* (discussing Savage’s certification in support of Dendrite’s discovery request).

<sup>82</sup> Verified Complaint of Dendrite Int’l, Inc., *Dendrite Int’l, Inc. v. Doe*, at ¶ 49 (May 24, 2000).

<sup>83</sup> *Dendrite Int’l*, 775 A.2d at 763.

<sup>84</sup> *Id.*

<sup>85</sup> See John Doe No. 3’s Brief in Opposition to Plaintiff’s Request for Leave to Conduct Limited Expedited Discovery for the Purpose of Obtaining Information to Identify John Doe No. 3, *Dendrite Int’l, Inc. v. Doe*, MRS-C-129-00, at 14 (July 11, 2000).

<sup>86</sup> *Id.* at 15–16.

Dendrite also claimed that Doe No. 3 caused significant damage by criticizing recent revenue recognition changes. According to Doe No. 3, “John [Bailye, Dendrite’s president] got his contracts salted away to buy another year of earnings – and note how [Dendrite is] changing revenue recognition accounting to help it.”<sup>87</sup> These comments – which had already been discussed by two non-party publications and other non-party Yahoo! message board posters – arguably intimated that Dendrite’s revenue recognition policy would artificially increase its reported earnings.<sup>88</sup>

Finally, Dendrite claimed Doe No. 3 stated that it was “shopping” the company with no success.<sup>89</sup> Doe No. 3 posted that Dendrite “simply does not appear to be competitively moving forward” and that Dendrite’s president “knows it and is shopping hard.”<sup>90</sup> These statements, according to Dendrite, were defamatory.<sup>91</sup>

Dendrite had presented evidence that Doe No. 3’s posts caused its stock price to decline.<sup>92</sup> The appellate court, however, was unconvinced by the conclusory nature of Dendrite’s evidence.<sup>93</sup> Thus, Dendrite failed to show it suffered any harm attributable to Doe No. 3. Analyzing Dendrite’s complaint and factual support, the appellate court

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<sup>87</sup> Dendrite Int’l, Inc. v. Doe, 775 A.2d 756, 763 (N.J. Super. 2001).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 763, n. 2 (noting that Dendrite’s application to discover Doe No. 3’s identity was based on the allegedly defamatory nature of his statements).

<sup>92</sup> Dendrite submitted its NASDAQ trading records to the court. Dendrite Int’l, Inc. v. Doe, 775 A.2d 756, 772 (N.J. Super. 2001). The records showed Dendrite “experienced gains on 32 days, losses on 40 days, and no change on two days during that period.” *Id.* Dendrite’s stock price actually increased the day after five of the eight days Doe No. 3 posted, and the stock price realized an overall increase over those days. *Id.* Its total loss over the period was only 29/32 of a point. *Id.*

<sup>93</sup> *Id.*

adopted a four-part unmasking test and determined that Dendrite failed to justify obtaining the identity of Doe No. 3.<sup>94</sup>

### **Parameters of the *Dendrite* motion-to-dismiss test**

In articulating its test for revelation, the Superior Court of New Jersey relied heavily on *Columbia Insurance Company v. Seescandy.com*<sup>95</sup> and *In re Subpoena Duces Tecum to America Online*,<sup>96</sup> although it ultimately rejected the latter court's "good faith" approach (discussed above). The *Dendrite* trial court adopted (with some modification) a four-part balancing test originally set forth in *Seescandy.com*.<sup>97</sup> This test was subsequently embraced by the appellate panel.

The *Dendrite* test requires a plaintiff to surmount four hurdles to obtain an anonymous poster's identity. First, the plaintiff must take significant steps to notify the anonymous speakers that he is seeking their identities in order to file suit against them.<sup>98</sup> These steps should include, at minimum, "posting a message of notification of the identity discovery request to the anonymous user on the ISP's message board."<sup>99</sup> The notification should give the anonymous poster a "reasonable opportunity" to

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<sup>94</sup> *Id.*

<sup>95</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>96</sup> 2000 WL 1210372 (Va. Cir. Ct. 1999).

<sup>97</sup> See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

<sup>98</sup> The notice should be aimed at informing the potential defendants that they "are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application." See *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. 2001).

<sup>99</sup> *Id.* *Dendrite* requires "the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena." *Id.*

respond to the plaintiff's assertions.<sup>100</sup> Dendrite posted notice on the Yahoo! board, which satisfied the requirement.<sup>101</sup>

Second, a plaintiff must identify with particularity each of the allegedly actionable statements made by the defendant.<sup>102</sup> This element acts as a safeguard. It gives an anonymous speaker the opportunity to defend himself against the plaintiff's claims.

Third, the plaintiff must establish a "prima facie cause of action" through his "complaint and all information provided to the court."<sup>103</sup> The *Dendrite* court expressly rejected the *America Online* "good faith" test<sup>104</sup> and embraced a modified "motion to dismiss" standard articulated in *Seescandy.com*.<sup>105</sup> It stated that:

A strict application of our rules surrounding motions to dismiss is not the appropriate litmus test to apply in evaluating the disclosure issue. We conclude that the District Court [in *Seescandy.com*] envisioned the four part test to act as a **flexible, non-technical, fact-sensitive mechanism** for courts to use as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the

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<sup>100</sup> *Id.* The court did not address what qualifies as a "reasonable" time frame.

<sup>101</sup> See Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int'l, Inc. v. Doe*, MRS C-129-00, at 8 (Nov. 23, 2000), available at <http://www.citizen.org/documents/dendriteappeal.pdf> (recognizing that because the anonymous speakers had posted their original messages on the board, they were likely to obtain notice posted on that board). *But see* Memorandum of Public Citizen as *Amicus Curiae* in Opposition to the Requested Discovery, *Dendrite Int'l, Inc. v. Doe*, MRSC-129-00, at 12 n.1 (July 11, 2000) (noting that Doe No. 2 only posted two messages to the board and so was unlikely to obtain sufficient notice via Dendrite's post).

<sup>102</sup> *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 767 (N.J. Super. Ct. App. Div. 2001) (stating that the plaintiff must "identify and set forth the exact statements" supporting his claims).

<sup>103</sup> *Id.*

<sup>104</sup> According to the court, *America Online's* "good faith" test failed to protect anonymous speakers adequately. *Id.* at 771.

<sup>105</sup> In *Columbia Insurance Company v. Seescandy.com*, a federal district court in California held that a plaintiff must establish that his suit "could withstand a motion to dismiss" before he could obtain the identity of the anonymous defendant. 185 F.R.D. 573, 579 (N.D. Cal. 1999). The motion-to-dismiss standard established in *Seescandy.com* was not a traditional standard that could be satisfied by well-pled complaint; it functioned more like a "probable cause" standard applicable to criminal warrants. *Id.* The plaintiff was required to supplement his complaint with evidence adequate to justify revealing the anonymous poster's identity, demonstrating "that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act." *Id.* at 580.

identities of unknown defendants in order to harass, intimidate, or silence critics in the public forum opportunities present on the [I]nternet.<sup>106</sup>

Under this approach, the court will analyze the particular facts a plaintiff pleads to determine whether it established an actionable case.<sup>107</sup> The trial court held that Dendrite failed to satisfy the motion-to-dismiss standard because it did not proffer sufficient support for its claims.<sup>108</sup>

*Dendrite's* final element is a balancing test, which applies only if the plaintiff satisfies the first three prongs.<sup>109</sup> This balancing test urges courts to carefully consider the parties' interests. On the one hand, it must account for the defendant's Constitutional interest in maintaining anonymity, and on the other hand, it must consider the plaintiff's need to unmask the poster to proceed with his claim.<sup>110</sup>

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<sup>106</sup> Dendrite Int'l, Inc., 775 A.2d at 771 (bold type added).

<sup>107</sup> Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 770–71 (N.J. Super. Ct. App. Div. 2001).

<sup>108</sup> *Id.* at 771. Dendrite argued – unsuccessfully – that the modified motion-to-dismiss standard improperly required it to plead elements of its claim that would ordinarily be unnecessary in a traditional motion-to-dismiss analysis. *Id.* at 766. For example, the trial court had required Dendrite to show the defamatory statements actually caused it to suffer harm. *Id.* at 771. The appellate court agreed that Dendrite's claims would survive a traditional motion-to-dismiss analysis, *id.* at 770, but found that a modified "flexible, non-technical" standard should be employed because it would accommodate Doe No. 3's anonymity interests. *Id.* at 770–71. Dendrite's conclusory statements that it had been harmed failed to satisfy this modified standard. *Id.* at 769 (stating that "[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").

<sup>109</sup> Other courts who have adopted the *Dendrite* approach have recognized that this element is critical to determining whether a case should proceed. See, e.g., Independent Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009) (establishing the importance of balancing both the plaintiff's and defendant's interests when determining whether to order revelation of the defendant's identity), and see also Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) (finding only an "exceptional case" would justify unmasking a non-party).

<sup>110</sup> The court recognized the plaintiff's interest in "protect[ing] its proprietary interests and reputation." Dendrite, 775 A.2d at 760.

## Analysis of the *Dendrite* approach

*Dendrite*'s approach was different from the other two tests, mostly because of its notice and balancing requirements (the first and fourth prongs of the test). First, although "notice" was a prong in other anonymity cases,<sup>111</sup> *Dendrite* required notification as a condition of bringing suit.<sup>112</sup> This "advance notice" represented a clear attempt by the court to protect a speaker's First Amendment right to anonymity.<sup>113</sup>

Second, the *Dendrite* approach forces courts to conduct a balancing test. A court applying *Dendrite* must balance the anonymous poster's free speech interests against the value of the plaintiff's claim before ordering revelation.<sup>114</sup> The Maryland Court of Appeals, embracing *Dendrite*,<sup>115</sup> found that its "balancing" prong fairly accounted for the plaintiff's and anonymous speaker's interests:

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<sup>111</sup> See, e.g., *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 589 (N.D. Cal. 1999).

<sup>112</sup> Memorandum of Public Citizen as *Amicus Curiae* in Opposition to the Requested Discovery, *Dendrite Int'l, Inc. v. Doe*, MRSC-129-00, at 11 (July 11, 2000).

<sup>113</sup> *Dendrite*'s approach has been called "a tremendous victory for free speech." See Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 810–11 (2004), citing Mary P. Gallagher, *Court Erects Roadblocks to Flagging Cyberspammers on the Internet: Four-Step Process Must Be Followed Before Forcing ISP to Disclose*, 165 N.J.L.J. 203 (2001).

<sup>114</sup> *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 767–68 (N.J. Super. Ct. App. Div. 2001). See, e.g., *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (adopting a four-part balancing test, on which *Dendrite* relied heavily). In *Seescandy.com*, a company sought to enjoin a John Doe defendant's use of domain names he had registered. *Id.* at 576. The injunction was granted, and the court outlined a test to balance the parties' interests. *Id.* at 578 (recognizing a proper balancing approach would consider the need to obtain redress against the "legitimate and valuable right to participate in online forums anonymously or pseudonymously").

<sup>115</sup> The court adopted *Dendrite*'s approach mostly unmodified. See *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009). However, the court additionally required – as a separate element – that the defendant be given an opportunity to defend himself from the plaintiff's assertions. *Id.* at 445. In *Dendrite*, though, this concern is addressed as a subset of the first prong "notification" requirement. See *Dendrite*, 775 A.2d at 760.

We are cognizant that setting too low a threshold would limit free speech on the Internet, while setting too high a threshold could unjustifiably inhibit a plaintiff with a meritorious defamation claim from pursuit of that cause of action.<sup>116</sup>

Because both parties' interests are weighed, the result should ideally be fair.

The flexibility and balance inherent in *Dendrite* has proven appealing to courts. Its approach appears to be gaining the most traction.<sup>117</sup> One scholar even suggests that "there appears to be a substantial reduction" in the number of lawsuits seeking to unmask a poster since *Dendrite* was decided, although that claim has not been substantiated.<sup>118</sup> Plaintiffs with meritorious causes of action should be able to meet *Dendrite's* standards, while the standard's strictness (relative to *America Online*) should deter baseless suits.

Yet even though *Dendrite* represents a moderate approach, it has attracted criticism, which can be divided into three broad categories. First, some claim that *Dendrite* fails to provide sufficient guidance to courts, such that the adoption of its test can yield inconsistency.<sup>119</sup> Second, the test requires plaintiffs to meet onerous hurdles that may practically deter him from filing even a valid claim. And third, *Dendrite* arguably protects speech that should be given no special legal deference.

**The Dendrite test fails to adopt clear guidelines.** Some critics of *Dendrite* argue that its balancing approach fails to identify the specific factors a court must consider, giving the court too much discretion when deciding whether to order

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<sup>116</sup> *Id.* at 456.

<sup>117</sup> See, e.g. Lidsky, *supra* note 14, at 1378 (stating that balancing approaches like *Dendrite* appear[ ] to be gaining ground as the dominant standard").

<sup>118</sup> See Vogel, *supra* note 113, at 799.

<sup>119</sup> This dissertation specifically aims to remedy this deficiency through the creation of a rubric to guide the courts' analysis.

revelation.<sup>120</sup> To illustrate, the Ninth Circuit discussed the adoption of a revelation standard that incorporated a balancing approach, like the one in *Dendrite*.<sup>121</sup> However, in formulating the standard, the court focused on the fact that the speech at issue was online commercial speech.<sup>122</sup> It found the online nature of the speech itself was an element to be considered in the balance<sup>123</sup>—which was never contemplated by *Dendrite*.<sup>124</sup> Furthermore, the Ninth Circuit also failed to offer any guidance to courts adopting its approach.

A similar critique regarding the lack of consistency has been leveled against the application of *Dendrite*'s "motion to dismiss" standard. Procedural hurdles such as a motion to dismiss standard inherently lead to inconsistencies in the law.<sup>125</sup> The problem with applying *Dendrite*'s standard is that different states—even different courts in the

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<sup>120</sup> See, e.g., Vogel, *supra* note 113, at 808 (stating that *Dendrite*'s balancing approach – which enables a court to dismiss a claim even after a plaintiff proves he has a supportable claim – “is an exceedingly broad level of authority to grant to a single, trial-level judge, and is inconsistent with the spirit of such rights as due process and the right to trial by jury . . .”). Vogel explains the dangers of such discretion by contrasting *Dendrite*, which refused to disclose the poster's identity because the plaintiff failed to prove sufficient damage, with *Immunomedics*, which did not even require the plaintiff to show damages. *Id.* at 809.

<sup>121</sup> In re Anonymous Online Speakers, 661 F.3d 1168, 1174 (9th Cir. 2011). In adopting the approach, the Ninth Circuit questioned the trial court's application of the *Doe v. Cahill* “summary judgment” standard, but found that it did not “constitute clear error.” *Id.* at 1177.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1173.

<sup>124</sup> Another critic suggests that *Dendrite*'s standard is inapplicable to any defamation case because the anonymity rights of a speaker are irrelevant. See Duskow, *supra* note 15, at 214. According to law professor Charles Duskow, defamation is not protected by the First Amendment, yet defamation is suddenly afforded protection by virtue of occurring online. *Id.* at 217. As Duskow notes, “Is there a reason for a medium capable of anonymous speech to insulate a speaker from liability?” *Id.* He also explains that “[a]s 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.” *Id.*

<sup>125</sup> See, e.g., Krinsky v. Doe, 159 Cal.App.4th 1154, 1170 (Cal. App. 2008) (stating that it is “unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet”).

same state—could apply the standard with different results.<sup>126</sup> One jurisdiction could theoretically apply *Dendrite*'s second prong (requiring the plaintiff to set forth his claims with particularity) differently from another jurisdiction, depending on its pleading requirements.<sup>127</sup>

***Dendrite*'s standards effectively deter suits.** Some scholars suggest that *Dendrite*'s “motion to dismiss” standard is difficult to apply consistently because of the evidence a plaintiff must present to prove his claim. According to Michael S. Vogel, whether a plaintiff can provide enough evidence to satisfy this prong “will often depend dispositively on the identity of the defendant.”<sup>128</sup> One example of this is that public figure claiming defamation would need to prove “actual malice,”<sup>129</sup> a standard that he could not prove without ascertaining the poster's identity.<sup>130</sup> Another illustration of this principle is in a case of stock manipulation, in which “the defendant's trading records will be essential to proving damages.”<sup>131</sup> Both of these are examples of situations in which the plaintiff is required to perform an effectively impossible task. His suit—even if it

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<sup>126</sup> See *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000). As that court stated, “What's sufficient to plead a prima facie case varies from state to state and, sometimes, from court to court.” *Id.* Thus, the court refused to adopt “any precedent that would support an argument that judges of one state could be required to determine the sufficiency of pleadings from another state . . .”

<sup>127</sup> See *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) (stating that in a notice-pleading state a “complaint need merely set forth a short and plain statement showing the plaintiff is entitled to relief in order to survive a motion to dismiss”). In a state without notice-pleading, the requirement could be more substantial. See *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006) (requiring “particularity in the pleading of defamation claims”).

<sup>128</sup> Vogel, *supra* note 113, at 807.

<sup>129</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing the “actual malice” standard in a defamation case involving a public figure).

<sup>130</sup> Vogel, *supra* note 113, at 807. *But see, e.g.*, *Ottinger v. Journal News*, 2008 WL 4375330 (N.Y. 2008) (adopting *Dendrite* but noting that a plaintiff should be responsible for only those elements in his control).

<sup>131</sup> Vogel, *supra* note 113, at 807–08.

would have a solid factual basis—would be doomed because he cannot yet obtain proof sufficient to overcome the modified “motion to dismiss” hurdle.

Several courts have addressed this limitation of *Dendrite*. For example, *Doe v. Cahill*<sup>132</sup> only required a plaintiff to present evidence regarding those elements of an action within his control.<sup>133</sup> Thus, the hypothetical defamed public figure would no longer be expected to prove “actual malice” because this burden is impractical.<sup>134</sup> It is highly unlikely that a plaintiff could analyze a speaker’s motivation without even knowing his identity.<sup>135</sup>

Furthermore, even if a plaintiff could eventually gather adequate support and make out a case sufficient to survive *Dendrite*’s “motion to dismiss” standard, he might still have benefitted from ascertaining the speaker’s identity at the outset. The defendant’s identity itself might have informed the plaintiff’s decision of whether to pursue a claim in the first place. Proving damages in cases like these can be an

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<sup>132</sup> 884 A.2d 451 (Del. 2005).

<sup>133</sup> *Id.* at 463.

<sup>134</sup> This narrower interpretation of the plaintiff’s burden stems from *Doe v. Cahill*, which required a plaintiff to submit evidence creating a “genuine issue of fact for all the elements of a defamation claim within [his] control.” *Doe v. Cahill*, 884 A.2d at 463. The interpretation accounts for the reality of a situation by recognizing that a plaintiff should not be required to prove elements of a claim to which he has no reasonable access. For example, in a defamation case involving a public figure, a plaintiff should not be required to prove “malice” (a required element) without having even obtained the identity of the speaker. See *Ottinger v. Journal News*, 2008 WL 4375330 (N.Y. June 27, 2008) (adopting the *Dendrite* balancing approach but indicating the plaintiff did not need to prove “malice” because it was an element out of his control).

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exceptionally expensive and time-consuming endeavor.<sup>136</sup> A plaintiff may want to know the speaker's identity to determine whether he could actually recover damages before he opts to expend money and effort on discovery.<sup>137</sup>

***Dendrite's* standards protect speech that does not warrant protection.**

Finally, some suggest that *Dendrite's* speech-protective nature poses another hurdle to assert a legitimate cause of action.<sup>138</sup> Critics claim the *Dendrite* standard negates a speaker's personal responsibility by protecting the speech of those who make "false or exaggerated" statements online.<sup>139</sup> Historically, courts have expressed the need to protect anonymous speech furthering public debate on important issues.<sup>140</sup> However, while anonymity serves that goal by "mak[ing] public discussion more uninhibited, robust, and wide-open than ever before, [ ] it also opens the door to more trivial, abusive, libelous, and fraudulent speech."<sup>141</sup>

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<sup>136</sup> This can "involve complicated (and expensive) expert testimony concerning matters such as the effect of postings on stock prices[.]" See Vogel, *supra* note 113, at 808.

<sup>137</sup> *Id.* at 808. However, this raises the question of whether practical interests such as these should be considered in a case involving such strongly protected First Amendment rights as anonymity.

<sup>138</sup> See *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 431, 457 (Md. 2009) (Adkins, J., concurring). In a similar vein, Charles Doskow asserts that anonymity can be "used to protect irresponsible speech." Doskow, *supra* note 15, at 212 (citing Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 *Comm. L. & Pol'y* 405, 414 (2003) (claiming that "anonymity can also contribute to defamation, theft, obscenity and the worst kind of hacking").

<sup>139</sup> See *Indep. Newspapers, Inc.*, 966 A.2d at 458 (Adkins, J., concurring). See *also*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting) (stating that anonymity "facilitates wrong by eliminating accountability, which is ordinarily the very purpose of anonymity").

<sup>140</sup> See *McIntyre*, 514 U.S. 334 at 341; *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (discussing the value of debate on public issues).

<sup>141</sup> Lidsky, *supra* note 14, at 1384 (citations omitted).

This speech has been dismissed as a “cosmic distance” from the political discourse at the heart of cases like *McIntyre* and *Talley*.<sup>142</sup> An egregious example of this speech – which was protected – is in *Krinsky v. Doe 6*.<sup>143</sup> In that case, the anonymous poster had referred to the plaintiff and a company’s officers as “boobs, losers and crooks.”<sup>144</sup> As explained by Lyrrisa Lidsky in her article, *Anonymity in Cyberspace: What Can We Learn From John Doe?*,<sup>145</sup> the poster also:

set up a pretend monologue by the corporation’s Vice President of Legal Affairs in which he contemplated performing oral sex on the plaintiff even though she has fat thighs, a fake medical degree, ‘queefs’ and has poor feminine hygiene.<sup>146</sup>

The California Court of Appeal adopted a modified *Brodie* approach (minus the balancing test)<sup>147</sup> and held that the plaintiff failed to meet its burden to unmask the poster.<sup>148</sup> The speech was *not* defamatory,<sup>149</sup> but it certainly appears to be a “cosmic distance” from historically protected political speech. Yet, the court explained that this

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<sup>142</sup> Doskow, *supra* note 15, at 215 (critiquing the adoption of a balancing approach), and at 216 (stating that the language of *Talley* and *McIntyre*, which protected political speech, “should not be used to limit the protection of speech by those with less sophistication”). Even the staunchest advocates of *Dendrite*’s balancing approach recognize that some posters abuse anonymity. For example, Public Citizen says that some people “treating anonymity as a license to defame adversaries, or to breach their legal duties in other ways.” Brief of Amici Curiae Public Citizen and the American Civil Liberties Union of New Jersey, *Dendrite International, Inc. v. Doe*, Docket No. A-2774-00, at 3 (2001).

<sup>143</sup> 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008).

<sup>144</sup> *Id.* at 1159.

<sup>145</sup> 50 B.C.L. REV. 1373 (2009).

<sup>146</sup> See *id.* at 1382, *citing* *Krinsky*, 159 Cal. App. 4th at 1159 (quotations in original).

<sup>147</sup> As explained above, *Brodie* effectively adopted *Dendrite*’s approach.

<sup>148</sup> *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1179 (Cal. Ct. App. 2008).

<sup>149</sup> The court held that *Doe No. 6*’s language was protected opinion, not a defamatory statement of fact. *Id.* at 1177–78.

type of “exaggeration” is “common” on the Internet, such that nobody would seriously accept these statements as fact on a Yahoo! financial board.<sup>150</sup>

Although protecting this type of invective seems a less worthy application of the First Amendment, others note that any negative effects of such online speech are easily cured. By posting a curative message online, an aggrieved plaintiff can “respond . . . immediately, and be given the same prominence as the offending message.”<sup>151</sup> Furthermore, message boards like the one dedicated to Dendrite tend to recognize repeat visits,<sup>152</sup> so “the response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers.”<sup>153</sup>

Yet despite the effects of *Dendrite* in protecting less worthy speech, the balancing approach offers a level of protection to an anonymous defendant. As noted in the *amicus curiae* brief submitted by Public Citizen<sup>154</sup> and the ACLU, a defendant could recognize severe damage from being unmasked. According to that brief, “merely by

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<sup>150</sup> See also Lidsky, *supra* note 14, at 1382–83. The *Krinsky* court also analyzed Doe No. 6’s tone to show he did not intend his statements to be taken seriously. *Krinsky*, 159 Cal. App. 4th at 1175–76.

<sup>151</sup> Brief of Amici Curiae Public Citizen and the American Civil Liberties Union of New Jersey, *Dendrite Int’l, Inc. v. Doe*, Docket No. A-2774-00, at 4 (March 29, 2001). The brief goes on to say that, with respect to companies like Dendrite, “corporations and executives can reply immediately to criticisms on a message board, providing facts or opinions to vindicate their positions, and thus, potentially, persuading the audience that they are right and their critics wrong.” *Id.* at 5. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 153 (1967) (stating that “speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest policies”).

<sup>152</sup> Although *Dendrite* involved a bulletin board system—which is effectively obsolete today—it is easy to extrapolate this statement to social networking sites like Facebook or Google Plus, or indeed any site that enables individuals to post on it.

<sup>153</sup> *Id.* at 5.

<sup>154</sup> According to its *amicus curiae* brief, Public Citizen is a Washington, D.C.-based public interest group with over 100,000 members, founded by Ralph Nader in 1971. Brief of Amici Curiae Public Citizen and the American Civil Liberties Union of New Jersey, *Dendrite Int’l, Inc. v. Doe*, Docket No. A-2774-00, at 1 (March 29, 2001).

permitting the plaintiff to learn the identity of its critics, [the Court] is affording the plaintiff very significant relief which, in some cases, may be the only substantive order that the plaintiff obtains in the case.”<sup>155</sup>

The danger of unfettered revelation would arguably cause an unacceptable “chilling effect,” deterring other posters from engaging in anonymous online discourse, even when their posts are *prima facie* protected by the First Amendment.<sup>156</sup> As explained the court in *Columbia Insurance Company v. Seescandy.com*,<sup>157</sup> an opinion relied on heavily by the trial court in *Dendrite*:

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.<sup>158</sup>

For all its flaws, the *Dendrite* test attempts to protect discourse by discouraging baseless suits, even if its application includes speech well short of weighty political discourse. Its speech-protective nature, coupled with a balancing approach that ostensibly allows genuinely aggrieved plaintiffs to pursue their claims, has motivated more courts to adopt its approach than the other two tests explained herein.

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<sup>155</sup> *Id.* at 3.

<sup>156</sup> See, e.g., Lidsky, *supra* note 14, at 1374 (noting that lawsuits against anonymous posters posed a threat of chilling speech because while “any libel action is likely to have a chilling effect, the sudden proliferation of actions against defendants of modest means merely for speaking their minds threatened to subvert the Internet’s promise of a more fully participatory public discourse”) (citations omitted).

<sup>157</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>158</sup> *Id.* at 577.

## ***Doe v. Cahill's* Summary Judgment Approach**

In *Doe v. Cahill*,<sup>159</sup> the Delaware Supreme Court<sup>160</sup> established a test requiring a plaintiff to demonstrate his claim and its supporting facts are “sufficient to defeat a summary judgment motion.”<sup>161</sup> This defendant-friendly test made it significantly tougher for a plaintiff to show that he is entitled to discover an anonymous poster’s identity.<sup>162</sup> Theoretically, the more stringent approach safeguards anonymity except in the strongest of cases.

### **Facts**

*Doe v. Cahill* differs substantively from *Dendrite* and *America Online* in that the plaintiffs were individuals—an aggrieved Smyrna, Delaware, town council member and his wife—not a multimillion dollar company.<sup>163</sup> The council member, Patrick Cahill, and his wife, Julia, sued four John Doe defendants for defamation and invasion of privacy based on allegedly defamatory statements posted to an internet website about Smyrna issues, sponsored by the Delaware State News.<sup>164</sup> Specifically, Patrick Cahill claimed

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<sup>159</sup> 884 A.2d 451 (Del. 2005).

<sup>160</sup> In *Doe v. Cahill*, the Delaware Supreme Court became the first state Supreme Court to analyze whether to order the revelation of an anonymous online poster. See Cahill, 884 A.2d at 457. The trial court also noted that this case was one of “first impression in Delaware.” Cahill v. John Doe-Number One, 879 A.2d 943, 945 (Del. Sup. Ct. 2005).

<sup>161</sup> *Doe v. Cahill*, 884 A.2d at 460.

<sup>162</sup> The *Doe v. Cahill* approach has been characterized as “rais[ing] the bar” set by *Dendrite* and *America Online*. See Doskow, *supra* note 15, at 207.

<sup>163</sup> See Verified Amended Complaint, *Doe v. Cahill*, C.A. No. 04C-11-022JRS, ¶¶1–2 (Nov. 16, 2005).

<sup>164</sup> *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005). The website, <http://newsblog.info/0405>, was active as of the time of the publication of the *Cahill* opinion, see Cahill, 884 A.2d at 454 n. 1 (stating that the blog was available, although the “statements at issue” were not), but it is now defunct. According to the trial court, the “Smyrna/Clayton Issues Blog” was “an internet bulletin board that invite[d] on-line discussion of issues facing the Smyrna/Clayton area, including political issues.” See Cahill v. John Doe-Number One, 879 A.2d 943, 946 (Del. Super. Ct. 2005).

Doe No. 1 (posting as “Proud Citizen”) defamed him in two posts.<sup>165</sup> Doe No. 1’s first post contrasted Cahill with Mark Schaeffer, the mayor of Smyrna.<sup>166</sup> It claimed Cahill lacked Schaeffer’s “leadership skills, energy and enthusiasm,”<sup>167</sup> and “has devoted all of his energy to being a divisive impediment to any kind of cooperative movement.”<sup>168</sup> The poster emphasized her point by saying, “Anyone who has spent any amount of time with Cahill would be keenly aware of [his] character flaws, not to mention [his] obvious mental deterioration.”<sup>169</sup> In a separate post, Doe No. 1 stated that “Gahill [sic] is as paranoid as everyone in town thinks he is. The mayor needs support from his citizens and protection from unfounded attacks.”<sup>170</sup>

The Cahills received all four posters’ IP addresses from the message board without opposition.<sup>171</sup> They then obtained an *ex parte* order from the trial court requiring Comcast to disclose the identities of all four anonymous posters.<sup>172</sup> Comcast notified the posters of the discovery request. In response, Doe No. 1 filed an Emergency Motion for a Protective Order to prevent discovery.<sup>173</sup>

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<sup>165</sup> See Opening Brief of Appellant John Doe No. 1, No. 266, *Doe v. Cahill* (July 28, 2005), at 3 (stating that “[t]hese are the only Internet postings attributed to Doe [No. 1]”). Neither of these statements referred to Julia Cahill. Doe No. 1 was ultimately identified as Schaeffer’s 25-year-old stepdaughter, Cristina Rawley. See *Blogger at Center of Lawsuit is Identified*, NEW YORK TIMES (Feb. 4, 2006).

<sup>166</sup> See Opening Brief of Appellant John Doe No. 1, No. 266, *Doe v. Cahill* (July 28, 2005), at 3.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Doe v. Cahill*, 884 A.2d 451, 454 (Del. 2005).

<sup>172</sup> *Cahill v. John Doe-Number One*, 879 A.2d 943, 945 (Del. Super. Ct. 2005).

<sup>173</sup> *Doe v. Cahill*, 884 A.2d at 455. Doe No. 1 was the only one of the posters to file a motion for a protective order. *Id.* The other posters’ statements forming the basis for the Cahills’ defamation claims accused Julia Cahill of prostitution and promiscuity and Patrick Cahill of alcoholism. Verified Amended

Despite Doe No. 1 urging the trial court to apply *Dendrite*,<sup>174</sup> it opted to embrace *America Online*'s "good faith" test.<sup>175</sup> Reviewing the "initial pleadings and motion papers,"<sup>176</sup> it determined that the Cahills set forth a legitimate defamation claim.<sup>177</sup> First, the court found that Doe No. 1's reference to Cahill as "Gahill" could have been "interpreted as indicating that Mr. Cahill ha[d] engaged in an extra-marital same-sex affair."<sup>178</sup> Then it found that the defamation claim was supported by Doe No. 1's comments about Cahill's mental state.<sup>179</sup> Thus, it denied Doe No. 1's motion and ordered Comcast to reveal Doe No. 1's identity.<sup>180</sup> Doe No. 1 appealed.

On appeal, the Supreme Court of Delaware reversed and rejected both the *America Online* "good faith" test and *Dendrite* "motion to dismiss" test, finding they failed to adequately protect Doe No. 1's First Amendment rights.<sup>181</sup> Discussing the *America Online* test, the *Cahill* court explained that if the bar to discovery were set too low,

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Complaint, *Doe v. Cahill*, C.A. No. 04C-11-022JRS, ¶¶ 8, 13, 15 (Nov. 16, 2005). One of the posters also revealed Patrick Cahill had Hepatitis C (a fact he had kept private), which formed the basis of a claim for invasion of privacy. *Id.* at ¶¶ 25–26.

<sup>174</sup> *Cahill v. John Doe-Number One*, 879 A.2d at 946.

<sup>175</sup> *See id.* at 953 (stating that "the standard adopted in *America Online* is the more balanced and appropriate standard by which to address the competing interests presented in cases such as this").

<sup>176</sup> The court indicated that aside from these documents "there literally [was] no other information available in the record..."). *See id.* at 954.

<sup>177</sup> *Cahill v. John Doe-Number One*, 879 A.2d 943, 954–55 (Del. Super. Ct. 2005).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 955.

<sup>180</sup> *Id.* at 946.

<sup>181</sup> *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (stating that the *America Online* test "is too easily satisfied to protect sufficiently a defendant's right to speak anonymously" and that the *Dendrite* test "falls short of providing sufficient protection to a defendant's First Amendment right to speak anonymously"). The Superior Court indicated it was adopting a "modified *Dendrite* standard," but only adopted two elements of *Dendrite*: notice and a strength-of-claim test. According to the court, *Dendrite*'s second prong is "subsumed" in a summary-judgment analysis, and its balancing approach was "unnecessary" because "summary judgment itself is the balance." *Id.* at 461.

anonymous posters would be “intimidate[d]” into “self-censoring their comments or simply not commenting at all.”<sup>182</sup> Thus, *Doe v. Cahill* elected to adopt a “summary judgment” test for unmasking an anonymous poster’s identity.<sup>183</sup> Applying the standard, the court found that Doe No. 1’s comments were mere opinion,<sup>184</sup> and thus reversed and remanded, ordering the trial court to dismiss the Cahills’ claim.<sup>185</sup>

### **Parameters of the summary judgment approach**

The summary judgment approach adopted in *Doe v. Cahill* requires a plaintiff to meet three criteria to justify unmasking an anonymous poster. First, the plaintiff must attempt to notify the anonymous poster of the discovery request—a requirement borrowed from the first prong of *Dendrite*.<sup>186</sup> Unlike *Dendrite*, however, the *Cahill* court explained that a plaintiff need only attempt to notify the posters “to the extent reasonably practicable under the circumstances.”<sup>187</sup> In cases involving Internet

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<sup>182</sup> The *Cahill* court also explained that a plaintiff can easily meet the “good faith” test – even with a deficient claim or a claim he does not intend to pursue past discovery. *Id.* at 457.

<sup>183</sup> *Id.* at 460 (“conclud[ing] that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff’s right to protect his reputation and a defendant’s right to exercise free speech anonymously”).

<sup>184</sup> See *id.* at 467. To support its holding, the court noted that another poster claimed Doe No. 1’s “tone and choice of words ... couldn’t convince me.” *Id.*

<sup>185</sup> *Id.* at 468. Ultimately, the Cahills discovered the identities of the anonymous posters through other means and filed a Verified Amended Complaint a month after the Delaware Supreme Court’s decision. See *Blogger at Center of Lawsuit is Identified*, NEW YORK TIMES (Feb. 4, 2006). The Verified Amended Complaint named as defendants Mark Schaeffer, his wife Ruby Schaeffer, and his stepdaughter Cristina Rawley. Verified Amended Complaint, *Cahill v. Schaeffer*, C.A. No. 04C-11-022JRS, at ¶¶ 4–6 (Nov. 16, 2005). A. Douglas Chervenak, a doctor, also became a plaintiff in the suit based upon allegedly defamatory comments made by the same posters to the same site. *Id.* at ¶¶ 3–8.

<sup>186</sup> See *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (stating that the court “retain[ed] the notification provision in the *Dendrite* test”).

<sup>187</sup> *Id.* (stating that a plaintiff must “undertake reasonable efforts to notify the anonymous defendant of the discovery request”). This same language was adopted in *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 719 (Ariz. Ct. App. 2007).

postings, the plaintiff must post its notice “on the same message board where the allegedly defamatory statement was originally posted.”<sup>188</sup>

Second, the plaintiff must withhold action and give the anonymous poster a reasonable time to respond after notification.<sup>189</sup> This time frame must be sufficient to “afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request.”<sup>190</sup> The time frame, however, is not specifically defined by the court.

Finally, a plaintiff must show his claim could defeat a motion for summary judgment. To satisfy this prong – and thus show they were entitled to discover Doe No. 1’s identity – the Cahills were required to submit evidence “creating a genuine issue of fact for all the elements of a defamation claim within [their] control.”<sup>191</sup> This heightened burden was designed specifically to protect the speaker’s anonymity. The *Cahill* court considered that absent this standard, a court could cause “substantial harm” by enabling a plaintiff to obtain an anonymous poster’s identity “by simply showing that his complaint can survive a motion to dismiss or that it was filed in good faith.”<sup>192</sup>

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<sup>188</sup> Doe v. Cahill, 884 A.2d at 461.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Doe v. Cahill, 884 A.2d 451, 463 (Del. 2005). Because Patrick Cahill was a city councilman—and thus a public figure—he technically would have been required to meet the defamation test set forth in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). As a public figure, Cahill would have to prove that the defendants’ statements were false and uttered with malice. *Id.* at However, because Cahill could not logically be expected to know whether the defendant—whose identity he had not yet ascertained—had acted out of malice, he was not required to show malice at this stage. Doe v. Cahill, 884 A.2d at 464.

<sup>192</sup> Doe v. Cahill, 884 A.2d at 464.

Ultimately, the Cahills were unable to meet their burden under this summary judgment standard. The statements simply did not qualify as defamation. They were non-actionable opinion.<sup>193</sup>

### **Analysis of Doe v. Cahill**

The *Doe v. Cahill* standard ostensibly deters plaintiffs from filing frivolous lawsuits to “harass or unmask” an anonymous poster.<sup>194</sup> The standard was deliberately strengthened out of fear that a plaintiff could use a weaker standard to “pursue . . . extra-judicial self-help remedies” or “seek revenge or retribution” against blameless posters.<sup>195</sup> Because plaintiffs now face such a high barrier to success, they will be discouraged from bringing unfounded SLAPPs. Only genuine claims should, in theory, survive.

As noted in Chapter 5 of this dissertation, *America Online* is falling out of favor; thus, it seems likely that whatever standard a court employs, it is likely to require a plaintiff to present a heightened level of evidentiary support for his claims. Although the majority of courts appear to be adopting the more lenient *Dendrite* approach, the speech-protective *Doe v. Cahill* test may be simpler to apply and yield more predictable results. A summary judgment approach would be straightforward, requiring a plaintiff to provide evidence for each element of his claim.<sup>196</sup> Whereas *Dendrite*'s critics claimed its

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<sup>193</sup> *Id.* at 458.

<sup>194</sup> *Id.* at 459.

<sup>195</sup> *See id.* at 457.

<sup>196</sup> *See Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005). As the court explained, under the summary judgment standard, a plaintiff would be required to “quote the defamatory statements in his complaint.” *Id.* The plaintiff would be required to provide “evidence creating a genuine issue of material fact for *all elements* of a defamation claim within the plaintiff’s control.” *Id.* at 463.

balancing approach left too much to the court's discretion,<sup>197</sup> *Doe v. Cahill's* stricter approach eliminates the subjective balancing test.<sup>198</sup>

Yet the absence of this subjective "balancing" test in *Doe v. Cahill* has invited criticism. For example, the Arizona Court of Appeals said a balancing test "is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech."<sup>199</sup> On its own, a summary judgment standard fails to account for "factors [that should] weigh[ ] against disclosure."<sup>200</sup> Without balancing, a court

would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the party to advance the requesting party's position, and the availability of alternative discovery methods.<sup>201</sup>

To support its assertion, the *Mobilisa* court provided the example of an anonymous non-party poster who has information that other witnesses also possess.<sup>202</sup> A plaintiff could demonstrate no need to unmask the anonymous poster, yet the summary judgment standard may give him that ammunition. Thus, *Mobilisa* adopted *Cahill's* notice and summary judgment factors but incorporated a *Dendrite* balancing test of the parties' interests.<sup>203</sup>

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<sup>197</sup> See *infra*. for a critique of *Dendrite's* balancing test.

<sup>198</sup> See *Doe v. Cahill*, 884 A.2d at 461 (rejecting a balancing component).

<sup>199</sup> *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007). In a defamation suit, the *Mobilisa* court adopted safeguards of both the *Dendrite* and *Cahill* tests. *Id.* Its test combined *Cahill's* notification and summary judgment standards with *Dendrite's* balancing test. *Id.* The result is very speech-protective.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 715–16 (remanding and directing the trial court to conduct a balancing analysis). *Krinsky v. Doe 6* also advocated a *Doe v. Cahill* standard that incorporated *Dendrite* elements. *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1172 (Cal. Ct. App. 2008). In *Krinsky*, the court explained that because summary

For the same reason, the rigid *Doe v. Cahill* standard has been criticized for failing to account for the qualitative nature of the statements triggering the suit. But case law suggests that different types of speech should be afforded greater First Amendment protection, a distinction lost in this procedural quagmire.<sup>204</sup> Thus, an ideal test would recognize the differences among these types of speech and weigh them accordingly in a revelation analysis.

*Doe v. Cahill* also arguably suffers from the same shortcomings as *Dendrite*, in that its summary judgment approach acts as a procedural burden on plaintiffs.<sup>205</sup> The “summary judgment” standard requires a plaintiff to provide facts within his control to support every element of his claim and, thus, defeat a summary judgment determination.<sup>206</sup> However, differing jurisdictions employ different pleading standards.<sup>207</sup> Thus, the adoption of a summary judgment standard could result in inconsistency among jurisdictions.

### Interrelationship Among the Tests

It appears that courts are increasingly gravitating toward the balanced *Dendrite* approach. *America Online*’s “good faith” test has been falling out of favor among the

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judgment standards differ among jurisdictions, it would apply *Dendrite*’s “prima facie” standard for that prong. *Id.* at 245.

<sup>204</sup> For example, political speech is “core speech” given special deference in First Amendment law. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995). Commercial speech, on the other hand, is afforded less protection. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 562 (1980).

<sup>205</sup> Some critics still suggest that inconsistency may result by virtue of *Cahill*’s incorporation of a procedural burden. There is the potential for different jurisdictions to apply *Dendrite*’s summary judgment standard differently. See, e.g., *Krinsky*, 159 Cal. App. 4th at 1170 (stating that it is “unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet”).

<sup>206</sup> *Doe v. Cahill*, 884 A.2d 451, 462–63 (Del. 2005).

<sup>207</sup> See *Krinsky*, 159 Cal.App.4th at 1170.

courts for quite some time, while *Doe v. Cahill's* “summary judgment” test is often deemed so restrictive as to effectively render recovery impossible, even for a meritorious claim. Regardless of whether a court adopts *Dendrite* or *Cahill*, however, the aggrieved plaintiff will be required to set forth factual support for his claim.

## CHAPTER 4

### RUBRICS AS VIABLE MODELS FOR ANALYZING COMPLEX LEGAL ISSUES

This dissertation involves a situation in which courts are faced with inconsistencies and a lack of uniformity in the law, triggered by the adoption of new technologies and uncertainty about how to treat the issues arising from their use. Conceptualizing and applying a structured model that accounts for the main factors influencing courts' decision-making might enable courts to systemize their legal analysis, yielding uniformity. The dissertation ultimately argues that courts should use rubrics to analyze whether to order the disclosure of an anonymous poster's identity. A review of case law and law review articles on Westlaw and LexisNexis, however, reveals an absence of cases in which courts applied a well-designed rubric to solve an emergent legal problem.

To advance the use of rubrics to simplify legal analysis, this dissertation first addresses the use of models generally. After discussing the value of models as conceptual and organizational tools, the dissertation then asserts that a model should be constructed to simplify the analysis of whether, and in what circumstances, to disclose the identities of anonymous online posters. Models, which are essentially simplified descriptions of complex processes, often in visual form, enable the viewer or user to understand and employ that process with ease. The applicable model advanced by this dissertation is the rubric, which the dissertation argues is a viable and appropriate organizational and analytical tool to employ in legal analysis.

Rubrics are tools mostly employed in social science research. Most of the literature on rubrics stems from scholarship on educational issues. The dissertation then

advances the position that courts would benefit from the adoption of formal models as tools to aid legal analysis.

Although courts have yet to embrace the widespread application of rubrics to simplify legal analysis, there is support for rubrics in some legal contexts, such as criminal sentencing.<sup>1</sup> In addition, legal analysis, to some extent, inherently authorizes the use of models. This chapter argues that while much legal analysis is conducted without formalized models, analysts essentially use non-formalized models when making decisions. Formalized models that consolidate multiple judicial opinions and their underlying rationales in an easy-to-use visual format would aid courts and practitioners in decision-making and theory-building. The dissertation then argues that courts should adopt a rubric to assist them in determining whether to order the disclosure of an anonymous poster's identity.

### **Using Models to Engage in Analytical Behavior**

As Thomas Kuhn explained in *The Structure of Scientific Revolutions*, normal scientific research involves “puzzle-solving.”<sup>2</sup> Although Kuhn focused primarily on research in the physical sciences, his statement can be applied to the social sciences as well. Social scientists similarly seek to solve puzzles. Often, to aid them in this task, scientists will initially adopt theoretical models.<sup>3</sup> This conceptual system enables researchers to organize, and thus utilize, their data appropriately.<sup>4</sup> According to Jaccard

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<sup>1</sup> See, e.g., 18 U.S.C. § 3551 *et seq.* (outlining the federal sentencing guidelines).

<sup>2</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 35 (Univ. of Chicago 1996) (orig. publication 1962) (distinguishing normal science from transformative science).

<sup>3</sup> PAMELA SHOEMAKER, *et al.*, *HOW TO BUILD SOCIAL SCIENCE THEORIES* 138 (Sage 2004) (discussing the value of models).

<sup>4</sup> See JAMES JACCARD & JACOB JACOBY, *THEORY CONSTRUCTION AND MODEL-BUILDING SKILLS* 27 (Guilford 2010), *citing* ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE* 159–61

and Jacoby, the models a researcher develops will enable him to explain “concepts . . . and the relationship between concepts.”<sup>5</sup> They assert that the need for “conceptual systems . . . cannot be overemphasized.”<sup>6</sup> They contend:

[E]ven the most applied researcher interested only in answering the question of the moment cannot escape the fact that, regardless of how latent, some form of conceptualization precedes and guides the data he or she collects and the interpretation he or she derives.”<sup>7</sup>

Jaccard and Jacoby also define “theory construction”—a process that, according to their definition, is identical to model-building—as “[t]he process of formulating conceptual systems and converting them into symbolic expressions.”<sup>8</sup>

In *How to Build Social Science Theories*, authors Pamela Shoemaker, James William Tankard, and Dominic Lasorsa explain the value to social scientists of constructing models to help them conceptualize “an object or a process,” ferreting out and/or explaining the interrelationships among the important aspects of the object or

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(Harper & Row 1964) (explaining that scientific analysis would “make little sense without a corresponding conceptual system to organize [it]”).

<sup>5</sup> Jaccard and Jacoby, *supra* note 4, at 29. Jaccard and Jacoby noted that other researchers have defined “model” differently. See CLYDE COOMBS, *et al.*, *MATHEMATICAL PSYCHOLOGY: AN ELEMENTARY INTRODUCTION* 4 (Prentice-Hall 1970) and Kaplan, *supra* note 4, at 253 (defining “models” as special types of theories); May Brodbeck, *Models, Meanings and Theories*, in *READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCES* (Brodbeck, ed.) (Macmillan 1968) (defining models as structures showing how two or more theories relate); and Allen Newell & Herbert Simon, *The Logic Theory Machine—A Complex Information Processing System*, 2(3) *TRANSACTIONS ON INFORMATION THEORY* 61 (1956) (contending that the terms “model” and “theory” are interchangeable).

<sup>6</sup> Jaccard & Jacoby, *supra* note 4, at 27 (noting the importance of both conceptual and empirical realms of science).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 28. Jaccard and Jacoby conflate the predictive aspect of traditional theory and the explanatory nature of models in one term: “theory.” Thus, their discussion of theory refers as well to model-building, relevant to this dissertation. Shoemaker, on the other hand, distinguishes between the two and discusses the explanatory nature of models. Shoemaker, *supra* note 3, at 110.

process.<sup>9</sup> The model typically breaks down complex processes in an accessible format, usually graphical. This construction makes the process easier to understand and implement.

A model can be either structural or functional. A structural model demonstrates how a “phenomenon” works.<sup>10</sup> Functional models, on the other hand, focus on the interrelationship among factors, and the influence one factor may have on another.<sup>11</sup> The selection of a model type depends on the underlying factors and relationships the researcher hopes to express.

To determine if a model is “good,” or viable for researchers to use, Jaccard and Jacoby contend that the most important criterion is whether the model is useful.<sup>12</sup> They explain that if a model helps researchers “achieve some understanding of our world,” then it provides a useful guide and, therefore, is a “good” model.<sup>13</sup> Karl Popper explained that “bad” models would be weeded out naturally, over time, as adherents died or left science.<sup>14</sup>

Marvin Shaw and Philip Costanzo explained that, to be considered “good,” a model must satisfy three criteria:

- (1) Internal logical consistency,
- (2) Agreement with known facts, and

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<sup>9</sup> Shoemaker, *supra* note 3, at 110.

<sup>10</sup> DENIS MCQUAIL & SVEN WINDAHL, COMMUNICATION MODELS 2 (Addison-Wesley 1993).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Jaccard & Jacoby, *supra* note 4, at 31.

<sup>13</sup> *Id.*

<sup>14</sup> KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (3d ed.) (Harper & Row 1968).

- (3) Empirical testability.<sup>15</sup>

The model was also subject to analysis under six additional desirable, but not critical, criteria:

- (1) Easily understood and communicable terms used in its descriptions,
- (2) Parsimony,
- (3) Consistency with other generally accepted theories,
- (4) Coverage of a wide range of data,
- (5) Creativity and novelty, and
- (6) Ability to drive research with the theory.<sup>16</sup>

The more factors a theory satisfies, the more likely it is to be deemed “useable” or “good.” These factors also support Shoemaker’s description of three purposes of a model: 1) to “highlight” the major components of a process and the connections among components, and show the relevant aspects of the process that warrant further research;<sup>17</sup> 2) to help scientists communicate relevant aspects of complex processes; and 3) to lead to new theories.<sup>18</sup>

An assortment of models is available for researchers to use to achieve their organizational and analytical goals. However, a variety of factors influence the decision of which model to adopt. Model selection can be a rather daunting task, given a “seemingly bewildering array of model typologies and [ ] different labels attached to

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<sup>15</sup> MARVIN SHAW & PHILIP COSTANZO, THEORIES OF SOCIAL PSYCHOLOGY (McGraw-Hill 1982). Although Shaw and Costanzo discussed the viability of “theories,” their analysis also applies to models. The criteria outlined by Shaw and Costanzo clearly covers model construction.

<sup>16</sup> *Id.*

<sup>17</sup> Shoemaker, *supra* note 3, at 110.

<sup>18</sup> *Id.* at 136.

what appear to be very similar types.”<sup>19</sup> The selection and usefulness of a model, however, hinge on the reasons the researcher needs to adopt it and the factors for which the researcher must account.<sup>20</sup> These determinations depend heavily on the question(s) the researcher faces. The more factors the researcher needs to depict, the more difficult it will be to create or adopt a parsimonious model.<sup>21</sup> However, the model the researcher ultimately selects must be delicately balanced – elegant and simple, but not overly so, and easily accessible.<sup>22</sup>

Courts can adopt and apply similar models—addressing salient elements and providing clear guidelines—to help them understand the circumstances warranting unmasking an anonymous poster. However, research has focused very little on adopting models for legal analysis. Instead, material from the social sciences forms much of the basis for arguing that models are excellent assistive devices.

### **The Use of Models in Mass Communication Research**

Social scientists have adopted a variety of models to organize and analyze everything from probabilistic network models used in handling survey data<sup>23</sup> to “reaction-diffusion” systems targeted at understanding how crime “hotspots” can be policed effectively<sup>24</sup> to creating a typology to study entertainment television and

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<sup>19</sup> *Id.* at 122–23.

<sup>20</sup> *Id.* at 128.

<sup>21</sup> *Id.* at 132.

<sup>22</sup> Shoemaker, *supra* note 3, at 130 (noting that the model must be “neither too unrealistically simple nor too inaccessibly complex”).

<sup>23</sup> PETER CARRINGTON *et al.*, *MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS* 40 (Cambridge University Press 2005).

<sup>24</sup> Martin Short *et al.*, *Dissipation and Displacement of Hotspots in Reaction-Diffusion Models of Crime*, 107(9) *PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES IN THE UNITED STATES OF AMERICA* 1943, 1961 (March 2, 2010).

politics.<sup>25</sup> It would be impossible to categorize every model used by social scientists in furtherance of their research goals. Instead, this section focuses on utilizing models in mass communication research, a narrower (though still broad) subset of the social sciences with a focus related to this dissertation. To narrow down the scope of this analysis, the chapter focuses on three major model sets: Lasswell's communication model, the agenda-setting model, and the Elaboration Likelihood Model (ELM). The goal in this section is to analyze how the researchers constructed their models, what factors were relevant in the construction, and why these models became widely accepted.

### **Lasswell's Communication Model**

Harold Dwight Lasswell, an American political scientist by training who was deeply interested in the communication of propaganda,<sup>26</sup> developed a "transmission" model to describe the process of communication.<sup>27</sup> The model—the earliest communication model—is exceptionally simple, elegant, and has a broad applicability. Lasswell asserted that we could describe the process of communication if we could figure out who says what in which channel to whom with what effects,<sup>28</sup> illustrated below.

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<sup>25</sup> R. Lance Holbert, *A Typology for the Study of Entertainment Television and Politics*, 49(3) AM. BEHAVIORAL SCIENTIST 436 (2005).

<sup>26</sup> Lasswell "led the study of propaganda and virtually created the communication research method of content analysis." EVERETT ROGERS, *A HISTORY OF COMMUNICATION STUDY* 203 (Simon & Schuster 1994).

<sup>27</sup> See Harold Lasswell, *The Structure and Function of Communication in Society*, in W. SCHRAMM (ed.), *MASS COMMUNICATIONS* 117–30 (U. of Illinois 1948).

<sup>28</sup> *Id.*

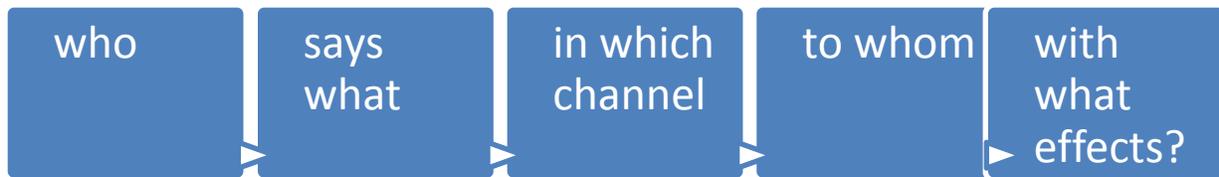


Figure 3-1. Illustration of Harold Lasswell's communication model.

The model proved remarkably effective in describing the communicative process. The reason why researchers gravitated toward adopting this model, however, was due to more than just its utility (although that was clearly a motivating factor). This model met nearly every one of Shaw and Costanzo's criteria—necessary and desirable—for what makes a “good” model. It satisfied all three necessary criteria: it was logically consistent, it agreed with known facts about communication, and it was testable.<sup>29</sup> Furthermore, it met all six of Shaw and Costanzo's six desired criteria: it was easy to understand and communicate the theory, it was parsimonious, it was consistent with other theories of the time, it could be applied to a wide range of data, it was novel, and the theory could (and did) drive research.<sup>30</sup> In other words, Lasswell's model was destined to become a hit. Lasswell's theory has been built upon and altered over the years by other researchers, but the influence of Lasswell's model is undeniable.

### **The Agenda-Setting Model**

Agenda-setting research stemmed from the work of Lasswell and Walter Lippmann, a Lasswell contemporary who “argued that the mass media are the principal connections between an event in the real world and the images in our minds of this event.”<sup>31</sup> This concept was ultimately adopted and developed into a form of agenda-

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<sup>29</sup> See Shaw & Costanzo, *supra* note 15.

<sup>30</sup> *Id.*

<sup>31</sup> Rogers, *supra* note 27, at 237.

setting theory by Bernard Cohen. He asserted that the media “may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*.”<sup>32</sup>

Nearly ten years later, Maxwell McCombs and Donald Shaw formalized the agenda-setting theory after analyzing the contents of presidential campaign coverage in the media.<sup>33</sup> Agenda-setting theory embraces the concept that there is a correlation between mass media emphasis on particular topics and the importance audience members place on those topics.<sup>34</sup> Agenda-setting theory gained widespread acceptance because it, again, aligned closely with the criteria outlined by Donald Shaw and Costanzo. McCombs and Shaw’s paper was so influential because it was novel, was internally logical, found a “spectacularly high relationship between the media agenda and the public agenda,” and was widely exposed to mass communications scholars who embraced it.<sup>35</sup>

Even more fortuitous for the theory, however, is that it arose during a period of “crisis,” as described by Kuhn.<sup>36</sup> At the time, researchers were disenchanted with direct-media-effect models and sought a new approach for analysis.<sup>37</sup> Thus, researchers were more inclined to gravitate toward this novel theory.

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<sup>32</sup> BERNARD COHEN, *THE PRESS AND FOREIGN POLICY* 13 (Princeton 1963) (italics added).

<sup>33</sup> Max McCombs & Donald Shaw, *The Agenda-Setting Function of Mass Media*, 36(2) *PUB. OPINION Q.* 176–87 (1972)

<sup>34</sup> *Id.*

<sup>35</sup> Rogers, *supra* note 27, at 242.

<sup>36</sup> See *id.* at 240 for a description of the crisis. Thomas Kuhn also suggested that major shifts in theory come after periods of crises. Kuhn, *supra* note 2, at 66.

<sup>37</sup> Rogers, *supra* note 27, at 42.

## The Elaboration Likelihood Model

In the 1980s, Richard Petty and John Cacioppo developed the Elaboration Likelihood Model (ELM) to explain how people process persuasive messages and how those messages alter the receiver's attitudes.<sup>38</sup> The model posits two persuasive channels. These are the "central route" and the "peripheral route."<sup>39</sup>

In the "central route," the receiver assesses the message carefully. If the sender opts to use this route, his message must be well-reasoned and logical. The receiver will be weighing the message carefully, so it must stand up to intense scrutiny. A message sent through the "peripheral route," however, need not be as exacting. The receiver can be persuaded by irrelevant or superficial factors associated with the message, like colors or music. The most important aspect of the ELM is this concept of a continuum indicating the degree to which the receiver is inclined to think about the message being conveyed.<sup>40</sup>

One critique of the model is that it describes a process yet fails to "explain the relationships."<sup>41</sup> However, as described in the previous section, models can be purely descriptive. Their purposes are to organize and explain underlying elements of processes or objects.

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<sup>38</sup> RICHARD PETTY & JOHN CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES (William C. Brown 1981).

<sup>39</sup> *Id.*

<sup>40</sup> See Andrew Cook *et al.*, *The Taking of a Position: A Reinterpretation of the Elaboration Likelihood Model*, 34(4) J. FOR THE THEORY OF SOC. BEHAVIOR 315, 316 (2004).

<sup>41</sup> *Id.* at 318 (citations omitted).

Interestingly, researchers from the University of Zurich subjected the ELM to computer simulation to replicate findings in available studies.<sup>42</sup> Their goal was to select an “established and empirically sound theory” (ELM), develop a model from the theory and translate it into computer language, test the model, and conduct simulation experiments.<sup>43</sup> To achieve these goals, the researchers recognized the need to create a parsimonious statement of the central elements of ELM in order to conduct a simulation.<sup>44</sup>

The interesting aspect of the University of Zurich simulation experiment is that the researchers’ goal of simplified processing aligns with the dissertation’s goal. Both seek simplicity and uniformity in legal analysis. And this goal can be achieved through the use of a rubric.

### **Rubrics as Organizational Tools**

Most academic literature on rubrics focuses on the educational context, exploring rubrics as tools educators use to grade students’ assignments and to provide valuable feedback.<sup>45</sup> Predictably, then, material discussing the construction of a rubric tends to center on how to create a rubric that standardizes and simplifies the grading of classroom assignments. However, these principles of rubric construction can be extrapolated to legal analysis, as rubrics have inherent value as an organizational

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<sup>42</sup> Hans-Joachim Moachler *et al.*, *Computer Simulation as a Method of Further Developing a Theory: Simulating the Elaboration Likelihood Model*, 5(3) PERSONALITY AND SOC. PSYCH. R. 201, 202 (2001).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The researchers settled on seven core elements: the likelihood of thoughtful scrutiny, elaboration continuum, central processing, peripheral processing, integration of new knowledge, multiple effects, and consequences of elaboration type. *Id.* at 203.

<sup>45</sup> DANNELLE STEVENS & ANTONIA LEVI, INTRODUCTION TO RUBRICS: AN ASSESSMENT TOOL TO SAVE GRADING TIME, CONVEY EFFECTIVE FEEDBACK AND PROMOTE STUDENT LEARNING 3 (Stylus 2005).

mechanism. Rubrics, after all, are simply “evaluation tools that clarify what it is important to evaluate.”<sup>46</sup>

In 2005, Portland State University professors Dannelle Stevens and Antonia Levi explicated a four-step process to create a rubric.<sup>47</sup> While their material focused on rubrics for educators, their principles of rubric construction are applicable to the creation of a rubric in any discipline, including legal analysis. Indeed, Stevens and Levi explain that while rubrics are necessarily flexible tools, their structures are essentially the same.<sup>48</sup>

First, a rubric must describe the “task” to be performed.<sup>49</sup> The purpose for including the task at the outset simply is to ensure that the rubric is read carefully.<sup>50</sup> Including a description of the rubric’s use, however, is hardly unique to the educational context. The inclusion of a task description would certainly benefit anyone in any discipline seeking to understand how to use a rubric for evaluative purposes. In this dissertation, for instance, the task is to create a rubric that allows courts to carefully and consistently pick the most appropriate legal test to apply when deciding whether the identity of an anonymous online poster should be revealed.

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<sup>46</sup> Lana Penny & Elizabeth Murphy, *Rubrics for Designing and Evaluating Online Asynchronous Discussions*, 40 BRITISH J. OF EDUC. TECH. 804, 805 (2009) (citations omitted).

<sup>47</sup> Stevens & Levi, *supra* note 45, at 5–15 (explaining the four essential parts of a workable rubric).

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 6. Stevens and Levi identified the “task” for their purposes as the assignment a student must complete. *Id.*

<sup>50</sup> *Id.* at 7.

Second, a rubric must provide a “scale” that communicates the “evaluative goal” of the document.<sup>51</sup> Typically, a rubric should narrow the scale to between three and five performance levels; otherwise, the rubric becomes too unwieldy to use effectively.<sup>52</sup> Ordinarily, then, a rubric will assign a value (often a grade) to an individual’s performance of the particular task. The values typically exist on a continuum.

This structural element similarly applies to legal analysis. The dissertation creates a scale that reflects the relative weight of variables culled from recurring factual scenarios that have influenced whether a court will order disclosure of an anonymous poster’s identity. For example, the rubric addresses whether the anonymous poster is a putative defendant or a non-party. If he is a putative defendant, this warrants imposing a lesser burden on the plaintiff to show unmasking is appropriate. If, on the other hand, the speaker is a non-party, the court must engage in another level of inquiry, addressing whether rationale for unmasking. If the requester has no intention of filing suit against the anonymous poster, then his burden to show unmasking is appropriate is significantly higher. This element is reflected on the weighted rubric and factored into the final analysis, along with other salient factors.

Third, the rubric should explain exactly which items are being scaled, a concept called dimension.<sup>53</sup> The rubric creator would list every item of importance. In the legal

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<sup>51</sup> Stevens & Levi, *supra* note 45, at 8. Stevens and Levi, focused on the educational context, explained that the scale would give students feedback on whether their work met certain pre-defined benchmarks. *Id.* For example, instructors could create a scale to judge students’ assignments as “excellent,” “competent,” or “needs work.” *Id.* at 8–9.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 9–10. In the educational context, these items would be the tasks a student must complete to demonstrate mastery. *Id.* at 10. An analysis of rubric construction found greater consistency and agreement when the rubric contained broad dimensions as opposed to detailed statements. See Mark Stellmack, *et al.*, *An Assessment of the Reliability and Validity of a Rubric for Grading APA-Style Introductions*, 36 TEACHING OF PSYCH. 102, 103–04 (2009). University of Minnesota professor Mark

context, these items would be elements that would either be present or absent in a factual scenario.

Fourth, a rubric should clarify the weight accorded to each component.<sup>54</sup> This concept of dimension description ties to scale. Describing the dimensions enables the rubric user to understand the relative importance of each scaled item. Thus, for example, the rubric addresses not only whether the anonymous speaker is an individual, but how important this item is when weighed against other items, such as whether the person seeking the information is doing so in order to further an already existing lawsuit.

As demonstrated by the process of rubric creation above, rubrics have two important components: performance criteria and definitions.<sup>55</sup> These criteria involve “guidelines, rules or principles” to judge the underlying work.<sup>56</sup> Rubrics also are fast and yield consistent results.<sup>57</sup> According to Dannelle Stevens and Antonia Levi, rubrics

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Stellmack and his colleagues created a rubric for advanced undergraduate students and research methods instructors to use to assess APA-style research paper introductions drafted by undergraduate students. *Id.* at 103. Each researcher ultimately graded 24 papers out of the total 40, meeting as a group weekly to analyze their findings and compare scores. *Id.* at 104. The reviewers only reached “perfect agreement” 37% of the time, and regarding their own earlier analysis only yielded a 78% consistency rate. *Id.* at 105. The researchers, however, attributed this to the “inherent subjectivity of evaluating student writing,” an issue that legal analysis can largely avoid.

<sup>54</sup> Stevens & Levi, *supra* note 45, at 10.

<sup>55</sup> Penny & Murphy, *supra* note 46, at 805 (citations omitted). “Performance criteria” are defined to include “a specific dimension of ... work assessed by the ratings.” *Id.* at 806. Although this nomenclature suggests that student performance, i.e. grades, are at issue, further analysis shows this dimension can be likened to content analysis. Thus, the “coder” is analyzing a document to discover particular instances that fit into a grid of preordained parameters. The situation is analogous to a judge analyzing a fact pattern to discover particular facts that he can plug into a preexisting rubric for analysis.

<sup>56</sup> *Id.*, citing JUDITH ARTER & JAY MCTIGHE, SCORING RUBRICS IN THE CLASSROOM: USING PERFORMANCE CRITERIA FOR ASSESSING AND IMPROVING STUDENT PERFORMANCE (Corwin Press 2001). Lana Penny and Elizabeth Murphy applied a rubric to determine whether “online asynchronous discussions” (meaning discussions on the Internet that do not take place in real-time) facilitated learning. Penny & Murphy, *supra* note 46, at 804.

<sup>57</sup> Stevens & Levi, *supra* note 45, at 74.

enable users to “focus [their] attention on what [they] expect ... and [ ] do it in the same way—in the same order—for each and every paper.”<sup>58</sup>

Ironically, critics of rubric use tend to classify as negative the very aspects of rubrics that are most appealing for deployment in legal analysis. For example, rubrics are criticized for promoting “conformity and standardization.”<sup>59</sup> But “conformity and standardization” are at the heart of the principles of precedent and *stare decisis*. According to Veronica Boix Mansilla, the criticisms leveled at rubric use reflect a “narrow interpretation of rubrics as tools for grading rather than supports for understanding.”<sup>60</sup> “Understanding,” according to Boix Mansilla, should be defined as “the capacity to *use* knowledge flexibly and effectively, rather than *having* or *accumulating* it.”<sup>61</sup> When viewed this way, it is clear that a rubric is precisely the mechanism courts should employ to bring clarity and understanding to the muddled area of law regarding the disclosure of anonymous posters’ identities.

These works indicate that rubrics are viable tools for legal analysis. At least tentatively, they also suggest rubrics are reliable. The challenge thus becomes to create a rubric to help guide courts through the process of evaluating which legal test is the most appropriate to apply in any given anonymous-poster unmasking scenario.

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<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., Veronica Boix Mansilla *et al.*, *Targeted Assessment Rubric: An Empirically Grounded Rubric for Interdisciplinary Writing*, 80 J. HIGHER EDUC. 334, 337 (May/June 2009) (discussing the criticism of rubrics).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis in original). Boix Mansilla and her coauthors then developed a rubric to assess students’ writing. *Id.*, *passim*.

## Adopting Models for Legal Analysis

As applied to legal analysis, this dissertation conceptualizes formalized models as graphical representations of complex legal processes regarding a particular issue, incorporating the factual and legal aspects of cases that influenced the courts' decision-making processes. This model, ideally, would cover all persuasive aspects of all decisions made on a particular issue. Here, the issue is whether, and in what circumstances, to order the disclosure of an anonymous online poster's identity.

Formal models, however, are largely absent from legal analysis. One area, however, in which courts have gravitated toward using formal modeling is criminal sentencing. After a person is found guilty of committing a crime, the judge (in almost all cases) has the ability to determine the criminal's sentence.<sup>62</sup> The judge can consider a variety of factors and determine whether these factors serve to aggravate or mitigate the punishment.<sup>63</sup> Generally, the judge will consider four overarching objectives in setting a sentence: deterrence, punishment, rehabilitation, and incapacitation.<sup>64</sup> Within these guidelines, judges will consider the factors, which differ from jurisdiction to jurisdiction, to determine what a criminal's sentence should be.<sup>65</sup> Common aggravating

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<sup>62</sup> An obvious exception to this general rule is that juries, in certain states and when presented with a certain set of circumstances, have the ability to recommend that a defendant receive the death penalty.

<sup>63</sup> "Aggravating factors" could lead a judge to increase the punishment; "mitigating factors" could have the opposite effect. See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U.L. REV. 1109, 1125 (2008). The Supreme Court has defined "mitigating factors" as those encompassing "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978).

<sup>64</sup> John L. Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative*, at 123 (1989), available at 150 PLI/CRIM 119.

<sup>65</sup> See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 414 (1992) (describing the sentencing process).

and mitigating factors are prior bad acts, such as prior convictions, and prior good acts, such as honorable military service and good reputation in the community.<sup>66</sup>

Before sentencing reform, judges could exercise nearly unfettered discretion in fashioning sentences *ad hoc* to fit each case.<sup>67</sup> The lack of a defined rule to guide sentencing determinations led to inconsistencies in the sentences courts doled out.<sup>68</sup> Reforms then led to guidelines to which judges were required to adhere when sentencing criminals.<sup>69</sup> After a series of state reforms, the federal government enacted the Sentencing Reform Act of 1984.<sup>70</sup> Section 3553 of the Act lists the factors judges must consider when determining punishment.<sup>71</sup> At the time, judges could not deviate from these guidelines.

However, this requirement changed. In 2005, the Supreme Court struck down the provision of the Sentencing Reform Act of 1984 that forced judges to impose the Federal Sentencing Guidelines.<sup>72</sup> In a rather convoluted and fractured arrangement, Justice John Paul Stevens wrote the majority opinion that the Sixth Amendment to the United States Constitution applies to the guidelines, while Justice Stephen Breyer

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<sup>66</sup> Hessick, *supra* note 63, at 1114–17.

<sup>67</sup> See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654–55 (2005).

<sup>68</sup> *Id.* at 655.

<sup>69</sup> *Id.* at 658–59 (stating that “[t]he highly-discretionary indeterminate sentencing systems that had been dominant for nearly a century have been replaced by an array of sentencing structures that govern and control sentencing decision-making”).

<sup>70</sup> 18 U.S.C. § 3551 *et seq.*

<sup>71</sup> 18 U.S.C. § 3553.

<sup>72</sup> *U.S. v. Booker*, 543 U.S. 220, 226 (2005).

delivered the majority opinion that the mandatory nature of guidelines violated the Sixth Amendment.<sup>73</sup>

In *U.S. v. Booker*, the Court was faced with two consolidated drug cases.<sup>74</sup> In both cases, the defendants' sentences were "enhanced" under the then-mandatory guidelines based on additional facts that were never presented to, nor deliberated on by, the jury.<sup>75</sup> In both cases, the "enhancements" would have resulted in the defendants serving nearly ten extra years in prison.<sup>76</sup> The Court determined that these "enhancements" violated the defendants' Sixth-Amendment right to have a jury "find the existence of [ ] any particular fact[ ] that the law makes essential to [their] punishment."<sup>77</sup> The Court noted that a defendant's Sixth-Amendment rights are "implicated" when he is sentenced based on facts that are not "reflected in the jury verdict or admitted by the defendant."<sup>78</sup>

After recognizing that the Sixth Amendment applied to the sentencing guidelines, the Court invalidated that the provision making the guidelines mandatory.<sup>79</sup> The

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<sup>73</sup> *Id.* (outlining the structure of the opinion).

<sup>74</sup> Defendant Booker was convicted of "possession with intent to distribute at least 50 grams of cocaine base (crack)," *id.*, while defendant Fanfan was convicted of "conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine." *Id.* at 228.

<sup>75</sup> Booker was convicted based on evidence that he had 92.5 grams of crack cocaine in his duffel bag. *Id.* at 226. However, the judge "enhanced" Booker's sentence based on evidence presented at the post-trial sentencing proceeding that he had an additional 566 grams of crack cocaine and had also obstructed justice. *Id.* at 227, 235.

<sup>76</sup> *Id.* at 235 (stating that Booker's enhanced sentence was almost 10 years longer than the range in the guidelines based on the jury verdict), and *id.* at 228 (saying Fanfan's enhanced sentence was now "15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone").

<sup>77</sup> *U.S. v. Booker*, 543 U.S. 220, 232 (2005) (citations omitted).

<sup>78</sup> *Id.* (discussing the Sixth Amendment rights in sentencing).

<sup>79</sup> *Id.* at 246.

sentencing court must consider the guidelines when sentencing a defendant. However, it may tailor the sentence based on “other statutory concerns.”<sup>80</sup>

The advisory nature of the sentencing guidelines does not impact the creation or use of a rubric when analyzing the whether to disclose an anonymous online poster’s identity. In fact, the rubric would serve the same basic purpose as the advisory guidelines. Courts could employ the rubric to consistently select the appropriate test for a given situation, but they ultimately would be free to alter their determination based on any number of concerns.

Although these sentencing guidelines are now only advisory, judges can still employ them in any applicable case. The application of the guidelines still informs the analysis of rubric use because the underlying composition of the schemas will be the same. The sentencing guidelines are so structured and automated, some websites even provide federal sentencing calculators.<sup>81</sup> One such calculator guides the user through four steps: (1) entering the “offense of conviction,” which leads to a checklist of the elements that could be present in the crime and “adjustments” that account for relevant factors such as the victim’s age or obstruction of justice factors; (2) a box indicating the defendant accepted responsibility for the crime; (3) a box regarding the defendant’s criminal history; and (4) a checklist indicating whether or not career offender and/or criminal livelihood provisions might apply to the defendant.<sup>82</sup> After the user inputs the information, the website provides a range of time the defendant can expect to be

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<sup>80</sup> *Id.* at 245.

<sup>81</sup> See Josh Goldfoot, *Sentencing.us: A Free U.S. Federal Sentencing Guidelines Calculator*, available at <http://www.sentencing.us/>, (last visited Feb. 18, 2012).

<sup>82</sup> *Id.*

incarcerated and a range of fines the defendant can face.<sup>83</sup> The entire process is automated.<sup>84</sup>

Sentencing guidelines function as a formalized model. Judges adhere to a list of rules when deciding upon appropriate sentences. The rubric this dissertation argues should be employed in legal analysis would serve the same function: courts could adhere to a series of guidelines when determining whether underlying factors should lead to disclosing or not disclosing an anonymous poster's identity.

In some ways, this process is reflected in *all* legal analysis, though perhaps not as rigidly as in the formalized sentencing guidelines or rubric. One author discussing precedent in legal arguments (though addressing a different proposition) provided an excellent example of how legal analysis naturally authorizes the use of models.<sup>85</sup> He noted:

[T]he applicability of legal rules for liability or guilt in a particular case depends on whether abstract, general predicates like "reasonable care", "excessive speed", "malice", or "activity in furtherance of employment" are satisfied by the facts of particular cases.<sup>86</sup>

Taking the first example he offered, the standard of "reasonable care" involves, in its most basic form, a duty to exercise "[t]hat degree of care which a person of ordinary prudence would exercise in the same or similar circumstances."<sup>87</sup> California, however, has adopted a balancing test of no fewer than eight factors a court must consider when

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> L. Karl Branting, *A Reduction-Graph Model of Precedent in Legal Analysis*, 150 J. ARTIFICIAL INTELLIGENCE 59, 61 (2003).

<sup>86</sup> *Id.* at 61.

<sup>87</sup> BLACK'S LAW DICTIONARY (9th ed. 2009).

determining if a person owes a duty of reasonable care.<sup>88</sup> Some of the standards a California court will consider are:

- The foreseeability of harm
- The degree of certainty the plaintiff was injured
- The connection between the act and the harm
- The social value of the defendant's actions, *and*
- The burden to the defendant and cost to society of imposing the duty of care<sup>89</sup>

When presented with a new negligence case involving a question of duty, courts will parse out the facts and determine how each of the facts of the case “fits” the factors.

This analysis is akin to using a model. The “model” in question here is the list of factors; the court is analyzing the facts to determine whether the factors are present and the interrelationship among the factors.

Aside from sentencing guidelines, however, the instances in which a legal analyst has specifically adopted and defended a model to use for legal analysis are scant. Perhaps the best example of modeling in legal analysis is the article *A Reduction-Graph Model of Precedent in Legal Analysis*, in which L. Karl Branting proposed the use of reduction-graph models to automate the process of legal

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<sup>88</sup> See *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 478 (Cal. 1997) (outlining the factors courts must look at when determining if the duty of care has been breached).

<sup>89</sup> *Id.* at 472–73 (citations omitted). See *Rowland v. Christian*, 69 Cal.2d 108, 112–13 (Cal. 1968) (listing a “number of considerations” to consider when addressing the “ordinary care” principle, including “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved”) (citations omitted).

reasoning.<sup>90</sup> He sought to create a graph for each case, reducing the case to a graphical representation of its facts and the rationale the court employed in its decision-making.<sup>91</sup> In essence, the graph accounts for not only the “facts and ultimate conclusion” in a case, but the “intermediate conclusions”—the details a court found relevant in making its final determination.<sup>92</sup> These graphs represent relevant precedent a practitioner can use when faced with a case with analogous facts.<sup>93</sup>

Branting recognized that a viable model would need to include a “formalism to express precedents as reduction-graphs” and “algorithms for constructing new reduction graphs from precedents and legal rules.”<sup>94</sup> After arguing that reduction-graph models were an excellent option to describe precedent “by a series of reduction-operator applications,” Branting then advocated the adoption of Generator of Recursive Exemplar-Based Explanations (GREBE), a program in which the reduction-graph model could be implemented.<sup>95</sup> First, a user must express the legal precedents as reduction graphs through “formal” language recognized by GREBE.<sup>96</sup> Next, the user can enter a series of facts from a new case. GREBE will conduct legal analysis based on comparing this new set of posed facts to the reduction graphs in its database.<sup>97</sup> GREBE generates

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<sup>90</sup> Branting, *supra* note 85, at 59.

<sup>91</sup> *Id.* at 67.

<sup>92</sup> *Id.* at 66.

<sup>93</sup> *Id.* at 67.

<sup>94</sup> *Id.* at 76.

<sup>95</sup> Branting, *supra* note 85, at 76.

<sup>96</sup> GREBE requires the facts of the case to be entered in “tuples,” which are ordered lists of elements. *Id.* at 81. The user also has to formulate problems posed by the cases “consistent[ly and] accurate[ly].” *Id.*

<sup>97</sup> *Id.*

the results—a series of legal arguments, arranged from strongest to weakest (as determined by precedent)<sup>98</sup>—and delivers them in a natural-language-format memorandum.<sup>99</sup>

Branting “tested” the weighing of precedent in GREBE by analyzing a Texas workers’ compensation law database relating to whether workers could receive compensation for injuries sustained while traveling.<sup>100</sup> He conducted an experiment in which five University of Texas law students<sup>101</sup> analyzed workers’ compensation cases, constructing legal arguments for and against liability.<sup>102</sup> The same cases were run through GREBE.<sup>103</sup> The students and GREBE memorialized their findings in a memorandum.<sup>104</sup> The results then were given to a domain expert, who analyzed whether the memoranda identified the right legal issues, discovered the correct applicable precedent(s) and developed persuasive theories.<sup>105</sup> The expert’s findings were converted to a four-point scale.<sup>106</sup>

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<sup>98</sup> GREBE assigns weights to the “facts of a precedent constituent.” *Id.* at 82. It determines the relative strength of an argument by comparing the facts in the instant case with the determinative underlying facts in the precedential cases. *Id.*

<sup>99</sup> *Id.* at 81.

<sup>100</sup> Branting, *supra* note 85, at 82. The database consisted of “57 legal and common-sense rules . . . 20 precedents, including 16 published opinions and 4 prototypical cases . . .” *Id.*

<sup>101</sup> The students were two second-year J.D. students, two students with foreign law degrees, and one student in the Master’s of Comparative Law program. *Id.* at 91.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Branting, *supra* note 85, at 91.

<sup>106</sup> *Id.*

The domain expert found, in nearly all cases, that GREBE outperformed the students.<sup>107</sup> GREBE received an average of a “C” grade (2.0) on the analyses; the students averaged only a C- (1.77, with an average of 2.77 hours invested in each problem).<sup>108</sup> Branting’s findings with respect to GREBE support the adoption of automated processes, dependent on formalized models, to yield consistent results. The legal landscape would benefit from the increased uniformity.

### **Adoption of a Rubric**

This chapter argued that a formal rubric to determine whether to disclose the identity of an anonymous online poster would yield increased uniformity and consistency in the law. In order to arrive at this statement, the chapter first discussed the value of models in general, before discussing their use in mass communication research. Turning to the use of a rubric as a formal model in social science research, the dissertation advanced the idea that rubrics are viable for more than simply educational research. Finally, the chapter considered the use of rubrics in legal inquiry.

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* GREBE, however, scored an “F” on one case analysis for failing to identify an issue turning on the distinction between independent contractors and employees because the database contained no information about this issue. *Id.*

## CHAPTER 5 ESTABLISHING A RUBRIC FOR REVELATION ANALYSIS

This dissertation thus far has examined the viability of a rubric as an organizational tool for courts to employ when analyzing whether to order the revelation of an anonymous poster's identity. This chapter now establishes an organized yet flexible rubric to simplify the courts' task and, ideally, to ensure both uniformity and judicial consistency. To accomplish these goals, multiple judicial opinions citing *America Online*,<sup>1</sup> *Dendrite*,<sup>2</sup> and/or *Doe v. Cahill*<sup>3</sup>—the three main unmasking tests courts employ<sup>4</sup>—are analyzed and consolidated, yielding a unified rubric that accommodates the salient elements of each test.

To construct the rubric, relevant opinions initially were obtained by searching the LexisNexis and Westlaw databases.<sup>5</sup> The opinions were scrutinized, and the factors that guided the courts' decisions were extrapolated and then incorporated and weighted in the rubric. Courts considering the application of an unmasking test should be able to use the rubric consistently, regardless of the factual scenarios encountered.<sup>6</sup>

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<sup>1</sup> In re Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210372 (Va. Cir. Ct. 2000), *rev'd on other grounds sub nom.*, *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (2001).

<sup>2</sup> *Dendrite Int'l, Inc., v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>3</sup> *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

<sup>4</sup> As discussed below, courts that have faced a revelation inquiry in the context of copyright infringement have typically eschewed the simple adoption of any of these three tests. Instead, they tend to gravitate towards *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004). While *Sony Music* contains many elements similar to those in *Dendrite*, it turns on the inherently “less protected” nature of copyright infringement when compared to “true speech.” *Id.* at 563.

<sup>5</sup> A more detailed explanation of the methodology appears later in this chapter.

<sup>6</sup> The adoption of a sufficiently flexible rubric should satisfy critics who claim that a “one size fits all” test would fail to accommodate the various interests at stake in a case. *Solers, Inc. v. Doe*, 977 A.2d 941, 952 (D.C. 2009).

This chapter first addresses the methodology employed to analyze and consolidate the relevant case law in order to create the rubric. Next, it describes the factors courts have determined should be persuasive when adopting an unmasking standard, and it suggests a weighting for each factor based on its relative importance. Finally, the chapter establishes a unified rubric for courts to employ in unmasking analyses.

### **Methodology**

To create an unmasking rubric, this dissertation analyzes more than five dozen opinions citing *Dendrite*, *Cahill* and/or *America Online*. To gather these citing opinions, the author performed a KeyCite search on Westlaw's online legal database and a Shepard's Citation Service search on LexisNexis. The three decisions—and their direct case histories—were excluded from the final tabulation.<sup>7</sup> Also excluded were citations to cases for propositions other than adoption of a revelation analysis.<sup>8</sup> This process yielded 64 unique, relevant opinions citing *Dendrite*, *Cahill*, and/or *America Online*.

These 64 opinions provided the data set for analysis. They were scrutinized to ascertain the elements courts deemed relevant when considering which unmasking standard to apply. The following table reveals: (1) how many times courts cited each particular combination of cases, and what percentage of the overall total that

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<sup>7</sup> For example, *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005), declined to follow *America Online*. For the purpose of establishing the rubric, *Cahill* is omitted from the final list of citing decisions under the theory that its relevant factors are already incorporated into its citing opinions. Additionally, *Cahill v. John Doe-Number One*, 879 A.2d 943, 949 (Del. Super. Ct. 2005), which cited to *America Online*, is omitted from the final list as well. This opinion is also ignored for the purpose of consolidating relevant legal opinions to create the rubric.

<sup>8</sup> Twenty-nine citations were rejected on these grounds. The majority of these rejected citations were to *Doe v. Cahill* for the proposition that inferences are drawn in favor of the plaintiff during summary judgment proceedings. See, e.g., *Jones v. Psychotherapeutic Cmty. Sys. Ass'n*, 2011 WL 2739658, at \*1 (Del. Super. Ct. Apr. 15, 2011) (citing to *Doe v. Cahill* to discuss the standards for summary judgment analysis).

represents; and (2) which test(s) the courts ultimately adopted (if any) after analyzing a particular combination of cases, and what percentage of the time that test was adopted within that subgroup.<sup>9</sup>

Cases Citing Each Opinion or a Combination of Opinions		Test Court Ultimately Adopted			
		<i>Dendrite</i>	<i>Cahill</i>	AOL	Other or neither
<i>Dendrite, Cahill</i> and AOL	9 (14.1%)	4 (44.4%)	2 (22.2%)	0 (0%)	3 (33.3%)
<i>Dendrite</i> and <i>Cahill</i>	16 (25.0%)	5 (31.3%)	3 (18.8%)		8 (50.0%)
<i>Dendrite</i> and AOL	7 (10.9%)	3 (42.9%)		0 (0%)	4 (57.1%)
<i>Cahill</i> and AOL	2 (3.1%)		1 (50.0%)	0 (0%)	1 (50.0%)
Only <i>Dendrite</i>	17 (26.6%)	9 (52.9%)			8 (47.1%)
Only <i>Cahill</i>	8 (12.5%)		4 (50.0%)		4 (50.0%)
Only AOL	5 (7.8%)			1 (20.0%)	4 (80.0%)
TOTAL	64	21 (32.8%)	10 (15.6%)	1 (1.6%)	32 (50.0%)

Figure 5-1. Chart reflecting frequency of adoption of *Dendrite*, *America Online*, and/or *Cahill* standards for unmasking online anonymous speakers.

<sup>9</sup> A number of the cases adopted none of the tests. See, e.g., *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, at \*6 (Conn. Super. Ct. Dec. 2, 2003) (indicating that a court is free to adopt whatever standards it chooses, and rejecting the application of *America Online* in favor of using Connecticut Supreme Court standards for revelation).<sup>10</sup> One of the citing opinions, *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), was decided almost three months prior to *Dendrite*.

Of the 63 relevant cases decided after *Dendrite*,<sup>10</sup> 49 (77.8%) addressed the applicability of *Dendrite*. In contrast, 35 of the 51 opinions (68.6%) decided since *Doe v. Cahill* actually cited to *Cahill*. Furthermore, 23 opinions of the possible 64 (35.9%) cited to *America Online*—and only one of those adopted a standard akin to *America Online*.<sup>11</sup> Thus, an analysis of the citing opinions indicates that courts tend to recognize and discuss the importance of *Dendrite*,<sup>12</sup> even if they ultimately applied a different unmasking standard.<sup>13</sup>

After gathering these opinions, their underlying facts were analyzed to determine the principles that guided judicial adoption of one test over another. These motivating factors were then consolidated and weighted, based on the importance of each factor. These factors are addressed below, then incorporated into the finalized rubric.

Some cases analyzed posed problems when creating the rubric. In particular, in one group of cases, the court refused to adopt any of the three main approaches;<sup>14</sup> in

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<sup>10</sup> One of the citing opinions, *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), was decided almost three months prior to *Dendrite*.

<sup>11</sup> See *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 263–64 (D.D.C. 2003) (applying Digital Millennium Copyright Act standards to govern unmasking and noting that the requirements were similar to *America Online*).

<sup>12</sup> One court characterized current case law as starting to “coalesce” around the *Dendrite* approach. *Koch Indus., Inc. v. Does*, 2011 WL 1775765, at \*10 (D. Utah May 9, 2011).

<sup>13</sup> See, e.g., *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, 2006 WL 37020, at \*9 (Pa. Com. Pl. Jan. 4, 2006) (recognizing the importance of *Dendrite* (and *Cahill*), but rejecting its application because Pennsylvania discovery rules sufficiently governed a revelation analysis); see also *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 426 n.5 (N.Y. Sup. 2009) (discussing *Dendrite* but adopting a *prima facie* standard set forth by New York law regarding pre-action discovery). The general applicability of *Cohen*—and, by extension, *Klehr*—was questioned in a Tennessee state court opinion that suggested *Cohen* lacked persuasiveness because it ultimately applied New York law. *Swartz v. Doe*, 2009 WL 7023070, at \*n.17 (Tenn. Cir. Ct. Oct. 8, 2009). In *Swartz*, the court rejected *America Online* as an unacceptably weak standard and *Cahill*'s summary judgment approach as inherently confusing given different state standards regarding summary judgment. *Id.* The court adopted *Dendrite* as the best method for resolving a revelation inquiry. *Id.*

<sup>14</sup> See, e.g., *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1211–12 (D. Nev. 2008) (declining to articulate a test, despite discussing all three tests until the defendant could notify anonymous

another cluster, the courts adopted an *ad hoc* test incorporating aspects of *all* the approaches;<sup>15</sup> and in one more, it was difficult to tell exactly what test—if any—the court ultimately adopted, whether due to circumstances within the case<sup>16</sup> or (less frequently) to a fundamental misinterpretation of the applicable law.<sup>17</sup> All of these problematic cases, however, are important in justifying the need for a rubric. Why? Because they suggest that courts recognize the gray area they face when selecting an unmasking standard and, many times, opt to avoid a definitive determination altogether. The

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posters of the pending claim); see also *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782,787 (M.D. Pa. 2008) (citing *Cahill* for the proposition that the First Amendment protects anonymous speech, but electing to adopt the unmasking test in *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); see also *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at \*8 (E.D.N.Y. Feb. 5, 2010) (citing to *Cahill* but formally adopting *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), in case involving anonymous posts made on a Yahoo! message board regarding the plaintiff company's stocks); see also *Directory Assistants, Inc. v. Does 1–10*, 2011 WL 5335562, at \*2 (D. Ariz. Nov. 4, 2011) (rejecting the application of *Dendrite*, *Cahill*, and “good faith” standards because federal pleading standards are sufficient to address issues of disclosure).

<sup>15</sup> *Brodie v. Indep. Newspapers, Inc.*, 2007 WL 6887877 (Md. Cir. Ct. Mar. 12, 2007) (adopting “*all of the suitable standards*” and finding that, under any standard, the plaintiff stated a valid defamation claim supporting disclosure of the poster's identity) (*italics in original*). The approach adopted here was effectively upheld by the Maryland Supreme Court almost two years later, in *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009). However, the Maryland Supreme Court rejected *America Online's* good faith standard as “too lenient” and adopted a mixed *Dendrite* and *Cahill* approach, retaining *Dendrite's* balancing and notification provisions and *Cahill's* summary judgment component. *Id.* at 445. See *Krinsky v. Doe*, 159 Cal. App. 4th 1154, *passim* (Cal. App. 2008) (adopting and rejecting elements from each of the three tests, advocating an *ad hoc* procedure in which it would order disclosure in circumstances where it believed defamation occurred); see also *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008) (extending *Krinsky* and adopting a similar *ad hoc* approach).

<sup>16</sup> See, e.g., *Rocker Mgmt., LLC v. John Does*, 2003 WL 22149380 (N.D. Cal. May 29, 2003). *Rocker Management* cited to *Dendrite* for the proposition that individuals online have the capability of posting and responding to online messages. *Id.* at \*1. Ultimately, however, the *Rocker Management* court elected to utilize the four-part revelation test articulated in *Columbia v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), a decision predating *Dendrite*, *Cahill*, and *America Online*. *Rocker Management, LLC*, 2003 WL 22149380, at \*1 (adopting the test in *Columbia v. Seescandy.com*). The *Seescandy.com* test contains a motion-to-dismiss element and, in many ways, mimics *Dendrite*. See *id.* for a discussion of this *Seescandy.com* factor. The similarity between the two approaches raises the question of whether *Rocker Management* implicitly accepted or rejected *Dendrite*—it adopted a test akin to *Dendrite*, but it declined an opportunity to adopt *Dendrite* specifically.

<sup>17</sup> See, e.g., *Alvis Coatings, Inc. v. John Does 1–10*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004). In *Alvis Coatings*, the court—without significant discussion—purported to apply a *prima facie* standard to order disclosure of an anonymous poster's identity. *Id.* at \*3. It cited to *America Online* as a case representative of a *prima facie* standard, when in fact, *America Online* represents a more lenient good faith standard. *Id.* The test ultimately applied in *Alvis Coatings* more closely aligns with *Dendrite's* motion-to-dismiss standard, but the court never even considered whether *Dendrite* would apply. *Id.*

resulting judicial uncertainty is precisely what this dissertation attempts to alleviate through establishment of a rubric.

Uncertainties such as these pose some problems in analyzing the relevant case law. To tackle this concern, the rubric focuses on courts' rationales for adopting a particular test, not necessarily the nomenclature they employed. Thus, the rubric incorporates the much more relevant underlying *theory* guiding judicial decision making.

### **Factors Guiding Courts' Application of the Tests**

As explained in the dissertation's introduction, the creation of a rubric is governed ultimately by five guidelines. These are: *who* is seeking the identity of the poster; *why* that poster's identity is being sought; *who* the anonymous speaker is; *what* the subject matter of the underlying speech is; and *where* that information was posted. Each of these underlying questions is analyzed below.

#### ***Who* is Seeking the Identity of the Poster?**

The identity of the requester—ordinarily the plaintiff in the dispute<sup>18</sup>—may affect a court's unmasking analysis. Surprisingly, of the five questions examined in this chapter, the plaintiff's identity is discussed least. However, some case-law commentary suggests this factor should be relevant in an unmasking analysis. Specifically, courts may be persuaded to select a particular unmasking test depending on whether the

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<sup>18</sup> Typically, the requester is the plaintiff, seeking an anonymous poster's identity to further his pending cause of action. However, it is conceivable that, under certain circumstances, an unmasked defendant could attempt to obtain the identity of a separate non-party anonymous poster to bolster his defense. Obviously, this niche situation would never arise when the initial defendant hopes to remain anonymous; his unmasking argument could provide ammunition for the argument that *he* should be unmasked. However, extending the analysis of certain unmasking cases suggests that a defendant could seek a poster's identity. For example, in *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010), a plaintiff sought to unmask seven non-party anonymous posters who he believed possessed information to bolster his wrongful termination suit. *Id.* at 93. The court rejected the plaintiff's request, finding he had a particularly high hurdle to warrant the revelation of a non-party poster. *Id.* at 95. A defendant seeking to unmask a non-party would undoubtedly face the same heightened burden.

requester is: (1) a business entity or an individual or (2) a private or public figure.<sup>19</sup>

These issues are addressed below, and ultimately are weaved into a single inquiry in the rubric.

### **Is the requester an individual or a business entity?**

Potentially, a court's unmasking determination could turn on whether the requester is an individual or a business entity. Some case law suggests that, depending on the circumstances, a business entity and an individual may be treated as fundamentally different.<sup>20</sup> Of the 64 opinions initially obtained, 53 were relevant for the purpose of rubric construction.<sup>21</sup> Of these, 27 involved business entity plaintiffs, 23 involved individual plaintiffs, and three involved joint business entity and individual plaintiffs. With respect to the opinions with business entity plaintiffs, 12 courts applied *Dendrite*, and seven applied *Cahill*; for individual plaintiffs, 12 applied *Dendrite* and five applied *Cahill*. However, none of these decisions turned specifically on the requester's corporate or human status, and the results seem to suggest that a plaintiff's corporate

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<sup>19</sup> Another potential area of distinction is whether the individual requester is an adult or minor. Theoretically a minor plaintiff lacks the same capacity to self-remedy damages done to him as an adult. However, the minor's rights are typically vindicated through lawsuits brought on their behalf by adult guardians. See, e.g., *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1199 (Cal. App. 2010) (denying defendant's anti-SLAPP motion in defamation lawsuit brought on behalf on a minor plaintiff). Similarly, courts have dismissed suits brought on behalf of minor plaintiffs for the same reasons they dismiss suits brought by adults. See, e.g., *Stone v. Paddock Publications, Inc.*, 2011 WL 5838672, at \*11 (Ill. App. Nov. 21, 2011) (denying minor plaintiff's motion to discover defendant's identity where he failed to provide allegations sufficiently specific to overcome a motion-to-dismiss standard). Under the rubric proposed in this chapters, minor and adult plaintiffs receive the same heightened level of protection. Both situations demand the requester surmount significant hurdles to prove he is entitled to revelation.

<sup>20</sup> See, e.g., *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) (finding a corporate defamation plaintiff has historically been distinguished from individual plaintiffs). *But see* *Tri-Marketing, Inc. v. Mainstream Mktg. Servs., Inc.*, 2010 WL 1924456, at \*2 (D. Minn. May 12, 2010) (citations omitted) (noting that in defamation actions, corporate plaintiffs "stand on the same footing" as individuals).

<sup>21</sup> This total omits cases involving corporate plaintiffs suing individuals for copyright infringement. As discussed later, these cases require a separate analysis under *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); the distinction in these cases will never turn on the plaintiff's corporate status.

status is of dubious relevance. Yet, although those particular opinions did not base their holding on the plaintiff's corporate status, case law revealing the relevance of that distinction cannot be ignored.

Business entities and individuals are cast as technical equals in recent First Amendment analysis. In *Citizens United v. Federal Election Commission*,<sup>22</sup> the U.S. Supreme Court in 2010 held that corporations and unions enjoy the same core political speech rights, invalidating a federal law restricting *corporate and union* political expenditures.<sup>23</sup> Although *Citizens United* equates corporations and individuals, an unmasking analysis is a wholly different consideration triggering a separate analysis. In an unmasking analysis, the plaintiff requester's First Amendment rights are not implicated—indeed, it is the putative defendant's First Amendment right to anonymous speech that lies in the balance—and the critical free speech implications of *Citizens United* are not raised. Business entities and individuals thus may enjoy similar (or even the same) First Amendment protections, yet be treated differently for other purposes, in contexts, as here, that involve another party's First Amendment interests.

In the context of defamation—a claim raised in the vast majority of the cases—business entity and individual plaintiffs may be treated differently.<sup>24</sup> Even if a business

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<sup>22</sup> 130 S. Ct. 876 (2010).

<sup>23</sup> *Id.* at 907 (finding unconstitutional a federal law restricting corporations and unions from making expenditures related to “electioneering communications” advocating the election or defeat of a political candidate, during certain times in a campaign). In *Citizens United*, a nonprofit wished to offer a documentary negatively portraying Hillary Clinton on video-on-demand; however this act violated the Bipartisan Campaign Reform Act (“BCRA”). *Id.* at 886, *citing* 2 U.S.C. § 441(b) (2000). The Court determined the BCRA unconstitutionally silenced corporations, who enjoyed First Amendment protections to the same extent as individuals. *Citizens United*, 130 S. Ct. 876 at 905 (stating, “There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations”)

<sup>24</sup> *See, e.g.*, *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) (stating that “[t]he law of libel has long reflected the distinction between corporate and human plaintiffs by

entity is treated the same as a person under the Constitution, it clearly cannot experience harm to its “human dignity,” which is distinctly in the purview of an individual.<sup>25</sup> A business entity can, on the other hand, be defamed by negative reference to its “financial soundness or business ethics.”<sup>26</sup> There is precedent suggesting, however, that an individual’s personal reputation may be more worthy of protection than the reputation of a business entity.<sup>27</sup> Given this difference, a damaged individual arguably should face fewer hurdles than a business entity when seeking to unmask an anonymous poster.

The main reason to distinguish between business entity and individual plaintiffs, however, is that businesses are better positioned to rehabilitate their images. They have the financial wherewithal and access to resources that many individuals may lack, even considering the democratizing atmosphere of the Internet.<sup>28</sup> This fundamental rationale for disparate treatment is addressed more thoroughly below in the consideration of public and private figures.

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limiting corporate recovery to actual damages in the form of lost profits”). *But see* *Tri-Marketing, Inc. v. Mainstream Marketing Servs., Inc.*, 2010 WL 1924456, at \*2 (D. Minn. May 12, 2010) (citations omitted) (noting that in defamation actions, corporate plaintiffs “stand on the same footing” as individuals).

<sup>25</sup> See *Nat’l Life Ins. Co. v. Phillips Pub’g, Inc.*, 793 F. Supp. 627, 642 (D. Md. 1992) (rejecting plaintiff’s argument that corporations should enjoy an easier burden to demonstrate defamation, in part because “it is difficult to see how the damage to the corporate bottom line is more sacrosanct than the harm defamation can cause to an individual’s human dignity,’ a quality a corporation is unlikely to have acquired even given its stature as a ‘person’ under the constitution [sic]”). The *Nat’l Life Ins. Co.* court described corporate personhood in the context of *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a precursor to *Citizens United*.

<sup>26</sup> See *Golden Palace, Inc. v. Nat’l Broad., Inc.*, 386 F. Supp. 107, 109 (D.D.C. 1974).

<sup>27</sup> See *Bose v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1270 (D. Mass. 1981), *rev’d*, 692 F.2d 189 (1<sup>st</sup> Cir. 1982), *aff’d*, 466 U.S. 485 (1984) (finding corporation qualified as limited-purpose public figure in product disparagement suit against *Consumer Reports* magazine).

<sup>28</sup> Lyrissa Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, at 915 (2000) (mentioning the “powerful democratizing effect” of Internet forums dedicated to the discussion of corporate issues).

## Is the requester a public or private figure?

Courts may be motivated to adopt a more stringent unmasking standard when the plaintiff is a public figure. Historically, public figures and private figures have been treated differently under the law.<sup>29</sup> The reason for such disparate treatment is that public officials traditionally have “significantly greater access” to outlets in which they can widely rebut falsities.<sup>30</sup> In addition, public officials voluntarily place themselves in the public spotlight and thus implicitly assume a greater risk of harm in the hurly burly of political discourse. Private individuals, on the other hand, are more vulnerable to injuries; thus the court employs a more protective, paternalistic attitude towards them.<sup>31</sup>

Furthermore, a public figure plaintiff faces far greater temptation to misuse the legal system to unmask certain anonymous posters. Unmasking a defendant is, in itself, a powerful legal remedy and may be the only remedy an aggrieved plaintiff truly seeks.<sup>32</sup> Theoretically, a public-figure plaintiff stands to gain the most benefit from unmasking his opponents and silencing them into submission.<sup>33</sup> Most public-figure plaintiffs have a distinct motivation to monitor and cleanse their public personae. As public figures, they are subjected to greater public scrutiny; their lives are carefully

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<sup>29</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (barring media liability for defamation of a public official absent a showing of actual malice); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (recognizing the distinction between public and private defamation plaintiffs, but determining the attorney plaintiff did not qualify as a public figure).

<sup>30</sup> *Gertz*, 418 U.S. 323 at 344.

<sup>31</sup> *Id.*

<sup>32</sup> See *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (explaining that unmasking can be a “very powerful form of relief” for a public figure plaintiff); LyriSSa Lidsky, *supra* note 31, at 881 (filing a lawsuit may be deemed a “victory if [it] results in ‘silencing’ the defendant and others in the defendant’s position”).

<sup>33</sup> See *Pilchesky v. Gatelli*, 12 A.3d 430, 445 (Pa. Super. Ct. 2011) (in dicta) (explaining the dangers of applying a lenient standard to unmask an anonymous speaker, particularly when the plaintiff is a public figure).

detailed and widely disseminated through numerous media outlets, including the Internet. Thus, they have an interest in maximizing positive depictions of themselves, and minimizing negative ones.

Consider the example of a politician running for election. He certainly has an interest in minimizing negative depictions of him in the media because they directly affect his electability. In 2011, erstwhile presidential candidate Herman Cain suspended his campaign after five women accused him of sexual harassment.<sup>34</sup> These allegations were never proven, but the mere implication that Cain *may* have engaged in salacious behavior irreparably tainted his campaign. Cain certainly is not the first politician whose career has been threatened by sexual scandal. In 1987, Republican Presidential candidate Gary Hart was forced to abandon his campaign after being photographed on a boat with his mistress.<sup>35</sup> And perhaps the most famous example is President Bill Clinton, who famously lied about his sexual adventures with a White House intern—an act that ultimately led to impeachment proceedings.<sup>36</sup>

Clearly these individuals have a significant stake in safeguarding their personal reputations. A casual rumor about them is not easily dismissed. Its dissemination can threaten their jobs and cause a national scandal that floods the media outlets.

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<sup>34</sup> Susan Saulny, *A Defiant Herman Cain Suspends His Bid for Presidency*, N.Y. TIMES, Dec. 3, 2011, at <http://www.nytimes.com/2011/12/04/us/politics/herman-cain-suspends-his-presidential-campaign.html?pagewanted=all>.

<sup>35</sup> Madison Gray and James S. Snyder, *Top 10 Political Sex Scandals*, TIME, Jun. 8, 2011, at [http://www.time.com/time/specials/2007/article/0,28804,1721111\\_1721210\\_1721112,00.html](http://www.time.com/time/specials/2007/article/0,28804,1721111_1721210_1721112,00.html).

<sup>36</sup> See Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES, Feb. 13, 1999, at <http://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html>.

Similar considerations arguably apply to corporations that often justify regarding them as public figures.<sup>37</sup> Corporations are similarly invested in protecting their public reputations because negative press that damages a company's public perception will directly impact its profitability. Thus, even when faced with little chance of success, a corporation may consider filing a lawsuit to be a savvy business decision.<sup>38</sup> By filing suit, the corporation may appease nervous shareholders by suggesting the negative information is baseless.<sup>39</sup> A suit "quells rumors and takes away from . . . negative press the company has been receiving—whether true or untrue."<sup>40</sup>

Furthermore, the law hardly deters corporations from filing lawsuits, even when the damage they face is minimal. First, studies indicate that plaintiffs bear only about 3 to 8.5% of the expenses in a defamation case; in contrast, defendants must cover over 90% of all expenses.<sup>41</sup> If the defendant has limited means, he is much less likely to be able to vigorously defend himself in the lawsuit. Therefore, the corporate plaintiff can effectively silence its critics "through economic coercion and threats of frivolous litigation."<sup>42</sup> Even if a defendant could successfully assert a defense under the

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<sup>37</sup> Whether a corporation qualifies as a public figure is hardly settled, but numerous persuasive arguments exist to support treating them similarly. For example, Professor Lyrissa Lidsky argued that "it is fair" to treat as publicly held corporation on the New York Stock Exchange as a public figure, particularly if it is defamed in a forum "dedicated to discussion of the corporation[.]" Lidsky, *supra* note 31, at 909.

<sup>38</sup> *Id.* at 880–81.

<sup>39</sup> *Id.* at 881.

<sup>40</sup> *Id.*

<sup>41</sup> David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U.L.J. 1201, 1207 (1995).

<sup>42</sup> Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 138 (2008).

Communications Decency Act,<sup>43</sup> which immunizes users who publish statements others made, the Act fails to include the possibility for recovery of attorneys' fees and court costs.<sup>44</sup> The danger inherent in this result is that people may fear embroilment in a lengthy, expensive trial and ultimately losing their anonymity—even if the suit is ultimately baseless, such as a SLAPP (strategic lawsuit against public participation) suit.<sup>45</sup> Instead, they may censor themselves, refusing to partake in their First Amendment right to anonymous speech.<sup>46</sup>

Imposing a lenient unmasking standard (such as the *America Online* good faith test) exacerbates the problem. The more easily an anonymous poster's identity can be compromised, the less likely he will be inclined to speak and risk a lawsuit. Lawsuits involving public-figure plaintiffs should adopt a more stringent standard (such as *Dendrite* or *Cahill*, depending on the circumstances) to ensure the appropriate balance between encouraging speech and enabling recovery in well-founded cases. An excellent example of this is *Lassa v. Rongstad*,<sup>47</sup> adopting *Cahill's* stringent summary judgment standard when a public official candidate argued she was defamed by a mailer claiming she had engaged in sexual acts with a senator to further her career.<sup>48</sup> Even though the underlying speech in *Lassa* was egregious and harmful, and likely

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<sup>43</sup> 47 U.S.C. § 230.

<sup>44</sup> *Id.*

<sup>45</sup> This result is certainly a possibility. See *Ottinger v. Tiekert*, No. 16429/08, 2009 WL 3260601, at \*3 (N.Y. Sup. Aug. 27, 2009) (finding lawsuit was a SLAPP after ordering the revelation of an anonymous poster's identity).

<sup>46</sup> *Doe v. Cahill*, 884 A.2d at 457 (discussing the dangers of unrestrained unmasking).

<sup>47</sup> 718 N.W.2d 673 (Wis. 2006).

<sup>48</sup> *Id.* at 679.

supported a defamation claim, the plaintiff's public-figure status required her to satisfy additional requirements before revelation would be deemed appropriate.<sup>49</sup>

### **Why Is the Poster's Identity Being Sought?**

The plaintiff's motives for unmasking an anonymous poster are relevant in adopting a standard.<sup>50</sup> The crux of this section is *why* the plaintiff is pursuing a particular cause of action, and whether the underlying claim affects (or should affect) an unmasking analysis. This inquiry ties closely to the plaintiff's public or private-figure status. They are weaved together in the final rubric. As outlined in the rubric, a private figure suffering this type of personal harm bears a significantly reduced burden to show entitlement to unmasking an anonymous defendant.

A review of the cases indicates that the most frequently asserted causes of action can be divided into three broad categories: (1) personal harm, such as defamation, invasion of privacy, and harassment; (2) interference with business practices, such as breach of duty, unfair competition and/or tortious interference; and (3) copyright infringement. In some cases, there is overlap among these categories (particularly between category 1 and 2), especially where the plaintiff is a corporation.<sup>51</sup> The importance of these categories of claims is addressed below.

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<sup>49</sup> *Id.* However, the court ultimately found in favor of the plaintiff due to irrelevant procedural errors committed by the defendant. *Id.* at 716.

<sup>50</sup> In some respects, this consideration is addressed elsewhere in this chapter. For example, this chapter already discussed how a corporate plaintiff's status may more readily impel him to file a lawsuit to protect his interests – even when he recognizes little chance of success. It also will address the argument that cases should be assessed differently depending on whether they involve the unmasking of a non-party or a party.

<sup>51</sup> See, e.g., *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 774 (N.J. Super. 2001) (asserting causes of action for breach of contract, breach of duty of loyalty, negligence (regarding the revelation of confidential and proprietary information), tortious interference with economic gain, and defamation).

## Personal harm

Plaintiffs asserting these causes of action typically seek judicial remedy for harm an anonymous poster causes them to suffer with respect to their reputation or overall well-being.<sup>52</sup> Courts considering these claims appear to structure their unmasking analyses to reflect the strength of the underlying claim and the egregiousness of the factual pattern. This reflects an unwillingness to leave truly damaged individuals without redress—particularly when the information sought is unavailable through alternative means.<sup>53</sup>

For example, one court confronted a truly appalling series of anonymous posts made about two female law students on AutoAdmit.com, a largely unmoderated network for graduate and law students.<sup>54</sup> The posters suggested one of the students fantasized about her father raping her, had sex while family members watched, carried a sexually transmitted disease, abused heroin, and encouraged an individual to punch her in the stomach when she was seven months pregnant.<sup>55</sup> One poster concluded that he “hope[s] she gets raped and dies.”<sup>56</sup> Recognizing speech’s brutality, the court rejected

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<sup>52</sup> See, e.g., *id.* (involving a corporation seeking recovery for defamation); *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897 (Pa. Com. Pl. Jan. 28, 2004) (individual seeking recovery for harassment); *McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006) (individual seeking to recover for invasion of privacy and defamation); *Juzwiak v. Doe*, 2 A.3d 428 (N.J. Sup. 2010) (intentional infliction of emotional distress and harassment).

<sup>53</sup> See, e.g., *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897, at \*7, \*11 (Pa. Com. Pl. Jan. 28, 2004) (adopting *Dendrite* and granting plaintiff’s petition to obtain anonymous subscribers’ identities, in part because the information was unavailable from any other source). *But see In re Baxter*, 2001 WL 34806203, at \*7 (W.D. La. Dec. 20, 2001) (finding “unnecessary” the requirement that the information be unavailable elsewhere).

<sup>54</sup> *Doe I v. Individuals*, 561 F. Supp. 2d 249, 251 (D. Conn. 2008).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

portions of both *Cahill* and *Dendrite* as unduly burdensome, adopting a much more easily satisfied *prima facie* approach.<sup>57</sup>

Similarly, the case of model Liskula Cohen—discussed in the dissertation’s introduction—involved particularly egregious claims that Cohen was a “psychotic, lying, whoring skank,” which warranted the application of a *prima facie* unmasking standard under New York law.<sup>58</sup> As the court explained, the standard it adopted “appear[ed] to address the constitutional concerns” in the case.<sup>59</sup>

In contrast, in less overtly troubling or shocking scenarios, courts express reluctance to disclose a poster’s identity unless a heightened burden is met, even where the plaintiff establishes a need to obtain the identity to proceed with his lawsuit. For example, recognizing the substantial First Amendment interests in “purely expressive” speech, one court hesitated to reveal the identities of posters who criticized Best Western hotels.<sup>60</sup> Although Best Western appeared to have asserted its claim in good faith, it failed to meet its significant burden (by providing sufficient supporting information) to warrant unmasking the posters.<sup>61</sup>

The results suggest courts are subtly swayed to select standards that benefit the party who appears most in need of relief under an egregious fact pattern. In the AutoAdmit.com case and *Cohen*, the plaintiffs suffered significant damage as evidenced by the complaint on its face; thus, the court was compelled to afford them protection by

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<sup>57</sup> *Id.* at 255–56.

<sup>58</sup> *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 427 (N.Y. Sup. 2009).

<sup>59</sup> *Id.* at 427 n.5.

<sup>60</sup> *Best Western Int’l, Inc. v. Doe*, 2006 WL 2091695, at \*4 (D. Ariz. Jul. 25, 2006).

<sup>61</sup> *Id.* at \*6.

employing a less stringent unmasking standard. In the Best Western case, however, revealing the defendant's identity would significantly impact his First Amendment interests and potentially chill speech.

### **Interference with business practices**

The second category of cases involves business entity plaintiffs seeking to unmask posters that published information threatening some aspect of the plaintiffs' business.<sup>62</sup> Theoretically, as discussed above, business entities are better equipped than humans to protect their interests. They also more likely have the resources to rebut falsities.

Unlike the cases involving personal harm, the fact patterns for interference with business practices tend to be far less juicy. Courts tend to analyze the patterns with an apparent degree of detachment absent from the more salacious, personal-harm cases. For example, one court applied *Dendrite* in a case where a corporate plaintiff claimed he was damaged by the publication of a chart characterizing his business as "at risk."<sup>63</sup> In assessing the underpinnings of the corporate plaintiff's assertions, the court simply recited the facts and applied the test. There was no indication that the particular causes of action swayed it to adopt one test over another. And even in one case involving serious actionable accusations of bribery, the plaintiffs were two small business owners

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<sup>62</sup> See, e.g., *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. 2001) (breach of contract, breach of duty of loyalty, negligent revelation of confidential and proprietary information, tortious interference and defamation); *Reunion Indus., Inc. v. Doe 1*, 2007 WL 1453491 (Pa. Com. Pl. Mar. 5, 2007) (commercial disparagement); *Koch Indus., Inc. v. Does*, 2011 WL 1775765 (D. Utah May 9, 2011) (federal and common law trademark infringement, federal and common law unfair competition, anticybersquatting provision of Consumer Protection Act, Computer Fraud and Abuse Act violations, breach of website terms).

<sup>63</sup> *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010).

who, thus, conceptually had suffered personalized harm warranting redress.<sup>64</sup> Thus, the court's tailoring of the unmasking standard to the facts of the case is wholly unsurprising.

### **Copyright infringement**

As discussed later—and outlined in the rubric itself—copyright infringement claims trigger a separate, unique analysis that typically applies *Sony Music Entertainment Inc. v. Does 1–40*.<sup>65</sup> As the *Sony* court explained, infringers do not engage in “true speech” warranting full protection under the First Amendment<sup>66</sup> because their speech is tainted by their commercial interest in obtaining materials unlawfully for free.<sup>67</sup> Thus, a plaintiff (in this context, the plaintiff always has been a corporation) must clear a lesser hurdle to be entitled to unmask the downloader's identity.<sup>68</sup> Although the plaintiff still must demonstrate a *prima facie* case against the defendant, his burden to satisfy this requirement is minimized.<sup>69</sup> In fact, in every copyright infringement case reviewed in this analysis, the corporate plaintiff satisfied its unmasking burden.

### **Who Is the Anonymous Poster?**

In selecting an unmasking standard, courts have indicated they are strongly swayed by the identity of the anonymous defendant speaker. In many cases, although the poster is anonymous, enough information is revealed in the post(s) to support

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<sup>64</sup> Maxon v. Ottawa Pub'g Co., 929 N.E.2d 666 (Ill. App. 2010).

<sup>65</sup> 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

<sup>66</sup> *Id.* at 564.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 564–65.

creating a higher—or lower—burden on the plaintiff to prove entitlement to the poster’s identity. Specifically, courts are guided by the consideration of: (1) whether the poster is a *party* to the dispute; and (2) whether the poster is bound by a *preexisting agreement* in which he/she has ceded expectations of privacy and/or agreed to adhere to specific standards of conduct.

### **Is the poster a party or non-party?**

A number of opinions turned largely on whether the anonymous poster is a party or non-party to the pending dispute.<sup>70</sup> When the anonymous poster is a party, courts seem more inclined to adopt a standard that facilitates unmasking.<sup>71</sup> On the other hand, if he is not a party, courts appear less likely to order identity disclosure.<sup>72</sup> Courts thus tend to demand the plaintiff satisfy a higher burden when the anonymous poster is a non-party. A more lenient unmasking standard, such as *America Online’s* low threshold,

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<sup>70</sup> See, e.g., *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009) (applying a test that “closely resembles” *Cahill* and noting that the requirement that the information sought be directly related to the litigation is “easily satisfied when the anonymous speaker is the defendant and the litigation cannot proceed without serving him in the process”).

<sup>71</sup> See, e.g., *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 192 (N.H. 2010) (noting that *Dendrite* is the “seminal case” providing the appropriate unmasking standard “when a plaintiff requests the disclosure of the identity of an anonymous defendant who has allegedly posted defamatory material on the Internet”).

<sup>72</sup> See, e.g., *Cornelius v. Deluca*, 2011 WL 977054, at \*5 (D. Idaho Mar. 15, 2011) (finding the plaintiff must meet an “extra-high hurdle” to discover the identity of an anonymous non-party where the plaintiff did not need to obtain the identity in order to serve process); see also *Sedersten v. Taylor*, 2009 WL 4802567, at \*2 (W.D. Mo. Dec. 9, 2009) (denying plaintiff’s motion to compel production of documents related to an anonymous online poster to establish a negligent hiring/retention claim against the City of Springfield and a police chief because the information requested was available from another source and this was not an “exceptional case” warranting disclosure of a non-party’s identity). However, even if the party manages to show it needs the identity in order to proceed with a suit, this may not be insufficient on its own to persuade the court to order revelation. See *Best Western Int’l, Inc. v. Doe*, 2006 WL 2091695, at \*6 (D. Ariz. Jul. 25, 2006); see also *McMann v. Doe*, 460 F. Supp. 2d 259, 270 (D. Mass. 2006) (denying plaintiff’s discovery request, despite his inability to proceed with his suit absent discovery of Doe’s identity, because the underlying statements plaintiff proffered to support his defamation claim were “bland, vague and subjective”).

good-faith approach, seems unsatisfactory in non-party disputes because it fails to adequately protect the anonymous poster's privacy interests.

This critical distinction between party and non-party was first articulated in *Doe v. 2TheMart.com Inc.*,<sup>73</sup> a decision predating both *Dendrite* and *Cahill* that adopted *America Online*.<sup>74</sup> In *2TheMart.com*, a federal court in Washington state explained that “[t]he standard for disclosing the identity of a non-party witness must be higher than that articulated in *Seescandy.com* and *AOL*.”<sup>75</sup> Thus, it implied that while *America Online* may safeguard the interests of a party, it fails to protect non-parties sufficiently. Instead, *2TheMart.com* adopted a four-part test to ensure a poster's identity was revealed only under the proper circumstances.<sup>76</sup>

Consistent with *2TheMart.com*, courts demonstrate an inclination to reject *America Online* and apply the more stringent *Dendrite* test when deciding whether to order disclosure of a putative defendant's identity.<sup>77</sup> Establishing a higher plaintiff's burden in this context is particularly interesting when the plaintiff demonstrates a need to obtain the poster's identity in order to proceed with his lawsuit. In many cases, the plaintiff would be precluded from securing relief unless he obtained the poster's identity.

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<sup>73</sup> 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

<sup>74</sup> *Id.* at 1095 (adopting the *America Online* good faith standard but articulating a strengthened burden when the anonymous poster is a non-party).

<sup>75</sup> *Id.*; accord *McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010) (finding a plaintiff must “clear a higher hurdle” where he seeks the identity of a non-party).

<sup>76</sup> The court indicated that the information must be (1) sought in good faith; (2) relative to a core claim or defense; (3) directly and materially relevant; and (4) unable to be obtained from an alternative source. 140 F. Supp. 2d at 1095–97.

<sup>77</sup> See, e.g., *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897, at \*7 (Pa. Com. Pl. Jan. 28, 2004) (eschewing the adoption of an *America Online* good faith test in favor of a modified *Dendrite* approach and holding that the plaintiff was entitled to discover an anonymous poster's name where the discovery was “fundamentally necessary to secure relief”).

Nevertheless, one New York state court implicitly recognized that a lenient standard would be inadequate.<sup>78</sup> A more stringent standard than *America Online's* good-faith test must apply in order to ensure that a party does not misuse the preaction discovery process to ascertain whether he can maintain a cause of action.<sup>79</sup>

### **Are the poster's expectations of privacy governed by a preexisting agreement?**

If the poster is bound by a relevant pre-existing agreement, then the court is likely to defer to the effect of that agreement before settling on an unmasking standard. Typically, courts consider the effect of pre-existing agreements in two separate contexts: (1) employee confidentiality agreements, and (2) Internet subscriber agreements. When either of these agreements exists, courts tend to find the poster's expectation of privacy is diminished and, thus, so is the plaintiff's burden to show entitlement to the poster's identity.

When the information seeker is a company,<sup>80</sup> courts assess whether an employment agreement governs the unmasking analysis. For example, in *Immunomedics, Inc. v. Doe*,<sup>81</sup> a New Jersey court applied *Dendrite* to unmask an anonymous poster whose posts suggested she was a former employee who breached a duty of loyalty to the company.<sup>82</sup> If she were, in fact, an ex-employee, her conduct would

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<sup>78</sup> Pub. Relations Soc'y of Am. v. Road Runner High Speed Online, 799 N.Y.S.2d 847 (N.Y. Sup. 2005). In *Public Relations Society of America*, the court opted not to apply the *America Online* good faith test in favor of *Sony Music*, a modified *Dendrite* test that courts have typically applied in copyright infringement cases. *Id.* at 853–54. The court, in fact, never discussed the applicability of *Dendrite*.

<sup>79</sup> *Id.* at 849 (noting that “it is well settled that preaction disclosure may not be used to discover whether or not a claim exists”).

<sup>80</sup> The relevance of the plaintiff's identity in an unmasking analysis is discussed later in this chapter.

<sup>81</sup> 775 A.2d 773 (N.J. Super. A.D. 2001).

<sup>82</sup> *Id.* at 777. The plaintiff company also sued the anonymous poster for breach of contract, negligent revelation of confidential and proprietary information about the company, tortious interference with economic gain and defamation. *Id.* at 774.

have been governed by a standard confidentiality agreement all employees signed requiring her to keep certain company information confidential.<sup>83</sup> She publicly revealed details, however, regarding Immunomedics' diminished European product stock and employee retention plans—confidential information that likely would be known only by someone intimately involved in the company's operations.<sup>84</sup> Assuming she was an employee, her postings clearly violated the confidentiality agreement.<sup>85</sup> The facts of the case, considered *in totum*, established a *prima facie* cause of action under *Dendrite*, which supported unmasking the poster.<sup>86</sup> Accordingly, it appears that her purported right to engage in anonymous commentary regarding Immunomedics was negated when she agreed to be bound by a confidentiality agreement.<sup>87</sup>

The rationale of *Immunomedics* was extended in at least one other case.<sup>88</sup> In *H.B. Fuller Co. v. Doe*,<sup>89</sup> a California court determined that unmasking an anonymous poster was appropriate where the poster disclosed confidential information about H.B. Fuller Co. on a Yahoo! message board.<sup>90</sup> The information was revealed at a closed company meeting, so it must have been disclosed by an employee, whether that employee was the Doe defendant or another individual who shared the information *with*

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<sup>83</sup> *Id.* at 777.

<sup>84</sup> *Id.*

<sup>85</sup> *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777 (N.J. Super. Ct. 2001).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *H.B. Fuller Co. v. Doe*, 2006 WL 6080949 (Cal. Super. Ct. Mar. 15, 2006).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

the Doe defendant.<sup>91</sup> Although the poster executed a declaration insisting he was neither a current nor former employee of H.B. Fuller, the court held that the plaintiff established a *prima facie* claim against the anonymous poster.<sup>92</sup> Thus, because the poster was likely an employee (or, at least, learned the information from an employee) bound by the agreement, his identity could not remain shielded.<sup>93</sup>

Similarly, courts find an anonymous individual's privacy interests diminished when he enters into an Internet provider agreement. Most cases supporting this point, however, are in the realm of commercial speech—namely, cases involving illegal downloads and shared digital media.<sup>94</sup> As explained later, this type of commercial speech typically triggers the adoption of a modified *Dendrite* approach articulated in *Sony Music Entertainment Inc. v. Does 1–40*.<sup>95</sup> Nonetheless, the body of case law suggests that courts confronted with similar pre-existing agreements typically defer to those agreements' terms in assessing the parties' expectations.

Extending the theory behind these cases, courts may consider the effect of any agreements in which the anonymous poster appears to have voluntarily compromised his privacy interests in exchange for some benefit. If he has entered into such an agreement, courts are likely to find the traditional rationales for protecting anonymous

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<sup>91</sup> *Id.*

<sup>92</sup> *H.B. Fuller Co. v. Doe*, 2006 WL 6080949 (Cal. Super. Mar. 15, 2006).

<sup>93</sup> *Id.*

<sup>94</sup> See, e.g., *Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 559, 565–66 (S.D.N.Y. 2004) (adopting an unmasking standard for use in a commercial speech context, including an analysis of whether a Terms of Service agreement governed the anonymous individual's expectations of privacy); see also *Third Degree Films, Inc. v. Does 1–2010*, 2011 WL 4759283, at \*4 (N.D. Ind. Oct. 6, 2011) (determining that the defendant "relinquished any privacy interest" in the information by providing his personal information to Purdue University for the purpose of accessing the Internet).

<sup>95</sup> *Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

speech less persuasive. Thus, the plaintiff should need to meet a lower burden to demonstrate the anonymous poster's identity must be disclosed.

### **What Is the Subject Matter of the Underlying Speech of the Poster?**

The subject matter of the underlying speech is exceptionally important when guiding courts in selecting an unmasking test. In fact, it may be dispositive. For example, one decision stated that courts must contend with the nature of speech *first* when deciding which unmasking test to adopt.<sup>96</sup> This, of course, suggests that the “what” factor deserves heavy weighting in a rubric.

In addressing the relevance of the subject matter of the underlying speech, case law generally focuses on two issues. First, selecting an unmasking standard may turn on whether the speech is characterized as commercial or non-commercial. Second, if the speech is particularly egregious on its face—or so over-the-top as to be hyperbole and inactionable—courts occasionally dispense with formal adoption of a test and simply base their determination on the facts.

### **Is the underlying speech commercial in nature?**

If the underlying speech is commercial—as opposed to non-commercial political speech receiving the utmost First Amendment protection<sup>97</sup>—then courts are reluctant to

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<sup>96</sup> *SI03, Inc. v. Bodybuilding.com, LLC*, 441 Fed. Appx. 431, 432–33 (9th Cir. 2011) (refusing to apply the stringent *Cahill* standard until a determination could be made regarding whether the nature of the underlying speech was commercial); *Art of Living Found. v. Does* 1–10, 2011 WL 5444622, at \*2 n.4 (N.D. Cal. Nov. 9, 2011) (adopting *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005)—a slightly modified *Dendrite* test—in lieu of *Sony Music*, because the crux of the inquiry involves the underlying nature of the speech, which, here, was anonymous critical commentary worthy of strong First Amendment protection, and also noting that for the purposes of the dispute, *Dendrite* and *Highfields* would yield the same result).

<sup>97</sup> Commercial speech receives less First Amendment protection than non-commercial speech (with the exception of such categories as obscene speech or hate speech). In fact, historically, commercial speech was excluded from the ambit of the First Amendment altogether. See, e.g., *Valentine v. Christensen*, 316 U.S. 52, 54 (1942) (noting that there is no constitutional “restraint on government as respects purely commercial advertising”). As the law presently stands, truthful commercial speech is entitled to limited

impose a significant burden on the plaintiff to prove he is entitled to discover an anonymous poster's identity. When facing certain forms of commercial speech, courts are inclined to adopt a modified *Dendrite* standard, such as that in *Sony Music Entertainment, Inc.*<sup>98</sup> To obtain discovery of an anonymous poster's identity, *Sony Music* requires a plaintiff to:

- (1) State a "cognizable claim" under the relevant applicable law;
- (2) Show the information directly relates to his claim and is "fundamentally necessary" to secure relief;
- (3) Indicate he seeks the information in good faith;
- (4) Demonstrate he cannot obtain the information by alternative means; and
- (5) Notify the anonymous defendants he seeks their identities.<sup>99</sup>

*Sony Music* obviously shares several elements with *Dendrite*, but it differs in one fundamental respect: it lacks *Dendrite*'s balancing component.

Courts adopting *Sony Music* typically confront copyright or trademark infringement claims, usually involving college students illegally downloading or seeding

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First Amendment protection, whereas false commercial speech is unprotected. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 593 (1980). The Supreme Court changed the historical conception of commercial speech when it held that commercial speech was entitled to some level of First Amendment protection. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779 (1976) (invalidating a statute prohibiting the advertisement of prescription drug prices, in part because the underlying speech had social value).

<sup>98</sup> 326 F. Supp. 2d 556 (S.D.N.Y. 2004); see, e.g., *Elektra Entm't Group, Inc. v. Does 1–9*, 2004 WL 2095581, at \*2 (S.D.N.Y. 2004) (adopting *Sony Music* in a copyright infringement case because Elektra's need to obtain the defendants' identities outweighed their First Amendment interests); see also *SI03, Inc v. Bodybuilding.com, LLC*, 441 Fed. Appx. 431, 432 (9th Cir. 2011) (stating that *Cahill* is an inappropriate standard when applied to commercial speech because it "extends too far"). *But see* *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 263–64 (D.D.C. 2003) (adopting standards of the Digital Millennium Copyright Act in a copyright infringement case, and noting that they are akin to the "good faith" standard of *America Online*), and *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011) (stating that the lower court's application of the *Cahill* standard did not constitute "clear error" even though the case appeared to involve commercial speech).

<sup>99</sup> *Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 564–66 (S.D.N.Y. 2004).

digital content such as music or movies.<sup>100</sup> Infringement fails to warrant strong First Amendment protection because, while there is a communicative element to piracy (an individual engages in self-expression by downloading or offering certain materials and excluding others), the core purpose of engaging in that expression is commercial: to obtain goods gratis.<sup>101</sup> Given this nefarious motivation, courts are reluctant to afford infringers the same constitutional protections as they would to individuals engaging in “core” First Amendment communication, such as expressive political speech. Furthermore, as explained above, infringers often cannot claim strong anonymity interests because they typically are bound by agreements enabling their ISPs to disclose their identities if so ordered by the court.<sup>102</sup>

In contrast to commercial speech, purely expressive speech tends to warrant full First Amendment protection, triggering the application of the stricter standards of *Dendrite* or *Cahill*.<sup>103</sup> To illustrate the distinction between the two types of speech, an Arizona federal court contrasted the facts of its case—anonymous posters allegedly defaming Best Western hotels on a message board—with copyright infringement

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<sup>100</sup> See, e.g., *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 164, 164 n.12 (D. Mass. 2008) (applying *Sony Music* in an infringement case, and noting that *Dendrite* would apply to a different set of facts “much more clearly in the wheelhouse of the First Amendment’s protections”). *But see* *Public Relations Soc’y of Am. v. Road Runner High Speed Online*, 799 N.Y.S.2d 847, 853–54 (N.Y. Super. Ct. 2005) (applying *Sony Music* to deny discovery of the identity of an anonymous e-mail sender).

<sup>101</sup> See, e.g., *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d 332, 349–50 (D.D.C. 2011) (finding the First Amendment interest of an anonymous downloader “exceedingly small” because the real aim in downloading is not self-expression but obtaining materials for free).

<sup>102</sup> See, e.g., *Third Degree Films, Inc. v. Does 1–2010*, 2011 WL 4759283, at \*4 (N.D. Ind. Oct. 6, 2011) (finding the anonymous defendant, a student at Purdue University, relinquished his privacy interests when he disclosed his personal information to Purdue).

<sup>103</sup> *But see* *Brodie v. Indep. Newspapers, Inc.*, 2007 WL 6887877 (Md. Cir. Ct. Mar. 12, 2007) (adopting “all of the suitable standards used in other jurisdictions” and finding that under any standard, the underlying claims that plaintiff’s establishment was “dirty” and “unsanitary” were actionable defamation and the claim that plaintiff failed to act with “decency” was inactionable opinion on its face).

cases.<sup>104</sup> The Arizona court adopted *Cahill*'s stringent motion-to-dismiss standard because the underlying speech was "purely expressive" commentary entitled to "substantial First Amendment protection," and *Cahill* satisfactorily protected the interests of the anonymous speakers.<sup>105</sup>

**Does the speech contain particular characteristics that warrant (or fail to warrant) disclosure?**

If the underlying speech is so egregious that it supports a defamation claim, or so obviously hyperbolic as to be inactionable, then courts may decide not to adopt a particular test.<sup>106</sup> The theory behind this action is that the application of *any* standard would yield the same result. Thus, the formal adoption of a test is an unnecessary formality.

For example, *Sinclair v. TubeSockTedD*<sup>107</sup> involved a YouTube video in which Lawrence Sinclair claimed President Barack Obama sold him drugs, which they then shared before engaging in a sexual act.<sup>108</sup> Anonymous individuals responded to Sinclair's video with scathing commentary, ridiculing him.<sup>109</sup> One poster called Sinclair a "liar" and asserted Sinclair was in a mental hospital when he purported to engage in

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<sup>104</sup> *Best Western Int'l, Inc. v. Doe*, 2006 WL 2091695, at \*4 (D. Ariz. Jul. 25, 2006).

<sup>105</sup> *Id.* The court ultimately determined that even though Best Western asserted its cause of action in good faith, it failed to satisfy its substantial burden under *Cahill* to deprive the anonymous posters of their First Amendment right to engage in discourse anonymously.

<sup>106</sup> *But see A.Z. v. Doe*, 2010 WL 816647, at \*7 (N.J. Super. Mar. 8, 2010) (adopting *Dendrite* even where the underlying cause of action was so deficient it did not warrant disclosing the defendant's identity). Courts may also fail to adopt a test on purely theoretical grounds.

<sup>107</sup> 596 F. Supp. 2d 128 (D.D.C. 2009).

<sup>108</sup> *Id.* at 130.

<sup>109</sup> *Id.* at 130–31.

these acts with the President.<sup>110</sup> In Sinclair’s subsequent defamation case, the court refused to adopt either *Dendrite* or *Cahill* because Sinclair’s claims failed under either standard.<sup>111</sup> Even the strongest factual assertions by the commenters—intimating that Sinclair was insane—did not qualify as an attack on his character; according to the court, they were attacks on the video.<sup>112</sup>

At the other extreme, an Illinois appellate court declined to adopt *Dendrite* or *Cahill*’s “additional protections” because it found the underlying speech was facially unprotected defamation.<sup>113</sup> Anonymous posters on an *Ottawa Times* website accused the plaintiffs of taking “[m]oney under the table” and accepting bribes.<sup>114</sup> These words were, in themselves, actionable defamation that failed to trigger *Dendrite* or *Cahill*’s protections.<sup>115</sup>

### **Where Was the Underlying Speech Posted?**

This fifth and final inquiry appears less persuasive to courts than either the party status of a poster or a post’s subject matter. However, the forum or venue on which speech is posted may affect the test a court adopts. For instance, is the information posted on a newspaper website, a moderated chat room or a website devoted to gossip?

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<sup>110</sup> *Id.* at 130–31.

<sup>111</sup> *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009).

<sup>112</sup> *Id.* at 133.

<sup>113</sup> *Maxon v. Ottawa Pub’g Co.*, 929 N.E.2d 666, 675 (Ill. App. 2010).

<sup>114</sup> *Id.* at 670.

<sup>115</sup> *Id.* at 675. The court’s judgment was also bolstered by a finding that the plaintiffs had satisfied an Illinois Supreme Court Rule 224 requirement to establish all elements of their causes of action. *Id.* at 675–76. Thus, a balancing test was extraneous. *Id.* at 676.

This inquiry is relevant because forum-specific factors impact whether a reader may believe or disbelieve the veracity of posted statements. If no reasonable person would believe the statements are true given the forum in which they are, then the plaintiff should bear a heightened burden to show damage. In other words, a plaintiff who claims he has been maligned on an untrustworthy website should face more difficulty unmasking a poster. The inquiry can be divided into two broad groups: (1) the level of control the provider exercises over the forum content, and (2) the forum's communicative style.

### **What control is exercised over forum content?**

The greater the degree of control a provider retains over the substantive content on a forum or venue, the more likely a reader may ascribe veracity to that content. The majority of fora are policed in some respect. If that were not the case, then "spammers" would flood them with unrelated commercial content and basic civility would dissipate, rendering the fora useless.

A provider can restrict a forum's content to varying degrees. He can: (1) decline to moderate posts altogether; (2) moderate posts before they appear online; or (3) remove offensive posts through moderation after they appear online. However, the more substantive control he retains, the more likely the content will be interpreted as truthful.

ISPs and content providers enjoy immunity from liability under section 230 of the Communications Decency Act<sup>116</sup> if they merely publish information that other third

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<sup>116</sup> 47 U.S.C. § 230 (2011).

parties provide.<sup>117</sup> Hypothetically, if a content provider includes a user comment section on his website, he would likely be immune from liability for any defamatory comments posters subsequently make. The provider also is immune if he conducts limited moderation of the site to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” content.<sup>118</sup> Beyond this, if a provider exercises a significant degree of control over the *content* of his site, he could lose section 230 immunity. Thus, when a content provider elects to control content—at the risk of lawsuit exposure—readers may believe he is only interested in providing true, vetted content.

A provider may also restrict who posts on his forum. For example, some fora are invitation only, while others require an involved sign-up process. Depending on the extent to which he exercises control over forum participants, this may also lead casual observers to assume the information has, likewise, been vetted.

### **What is the context of the forum?**

A forum’s particularities may impact the selection of an unmasking standard. When analyzing Internet discourse during an unmasking analysis, a court should consider statements contextually. Absent contextualization, statements taken at face value could yield liability in cases where no reasonable person who actually reads them in context would deem them true. This section presents a non-exhaustive list of factors courts may wish to consider when addressing context.

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<sup>117</sup> *Id.*

<sup>118</sup> 47 U.S.C. § 230(c)(2) (2011).

**Communicative style.** One aspect of context is purely stylistic. Readers are much more likely to “give less credence” to Internet communications because they are naturally imbued with a “freewheeling, anything-goes writing style.”<sup>119</sup> Illustrating this point, a federal court in California declined to find actionable defamation based on postings claiming the plaintiff threatened analysts who were “bullish” on certain stocks.<sup>120</sup> The court’s refusal was motivated, in part, by the venue on which the postings appeared: a Yahoo! message board.<sup>121</sup> Boards such as Yahoo! contain significant grammatical and spelling errors (including in the defendant’s messages), which even casual readers know should not be taken at face value.<sup>122</sup> No rational person considering the “context and content” of the statements could possibly have believed they were true, which would be necessary to support a defamation claim.<sup>123</sup>

Similarly, another California federal court refused to find that Yahoo! message board posts supported a defamation claim.<sup>124</sup> Specifically, a poster using the pseudonym “highfieldscapital” sarcastically suggested Silicon Graphics would soon experience significant financial gains resulting in its executives purchasing “a new

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<sup>119</sup> *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 414 (N.Y. App. Div. 2011). In *Sandals*, which did not discuss the application of *Dendrite*, *Cahill*, or *America Online*, the court found that an anonymous e-mail constituted inactionable opinion. *Id.* at 412 (stating that Sandals failed to show that any of the e-mail’s underlying statements were false and that the statements were constitutionally protected opinion). The e-mail, which was sent to numerous undisclosed recipients, claimed that Sandals Resorts mistreated Jamaican natives by accepting subsidies from the Jamaican government but refusing to hire Jamaicans for upper-level positions. *Id.* at 409. The tone and purpose of the e-mail suggested that the author was simply expressing his opinion in an “exercise in rhetoric,” which could not support a defamation claim. *Id.* at 414.

<sup>120</sup> *Rocker Mgmt. LLC v. John Does*, 2003 WL 22149380, at \*3 (N.D. Cal. May 29, 2003).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005).

corporate jet . . . [a] Gulfstream IV” that would have “custom zebrano wood trim and Corinthian leather seats with plasma TVs.”<sup>125</sup> Shortly after this post, Silicon Graphics’ stock price dropped.<sup>126</sup> After explaining that the “only relevant way” to analyze these communications was contextually, the court relied on *Dendrite* to conclude that the anonymous posts were tongue-in-cheek and would not support unfair competition or confusion-of-source claims.<sup>127</sup> The court was persuaded here because the Yahoo! board was so uncivilized that “no even remotely rational investor would take messages posted here at face value or base investment decisions on them.”<sup>128</sup>

Although case law on the “where” factor is scant, it suggests courts are reluctant to apply a lenient unmasking standard when the context of the messages is particularly relevant. If the standard were too lenient, posters could be unmasked even when the context of their statements suggests they should not be accepted at face value. Thus, the particular forum—and its communicative style—should be a relevant factor in an unmasking determination.

**Forum topic.** The topic of a forum can affect whether readers reasonably believe its content is trustworthy. For example, certain topical forums inherently are deemed more trustworthy than others. This section addresses four very different forums that trigger different analyses according to the rubric.

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<sup>125</sup> *Id.* at 973.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 975.

<sup>128</sup> *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 978–79 (N.D. Cal. 2005) (refusing to find an anonymous poster’s statements supported a *prima facie* likelihood of confusion cause of action because the general tenor of the board was full of “irreverence and jocularly,” “mockery,” “venting,” and “indecent and play,” often made via “impersonations”).

On one end of the spectrum is R/AskScience, a subforum of Reddit.com, which is a social news website based on user-submitted content.<sup>129</sup> Anyone can browse any content on Reddit, but must first sign up for an account before obtaining posting privileges.<sup>130</sup> Reddit is divided into over 112,000 various “subreddits” focused on different content.<sup>131</sup> The subfora are varied, including the frivolous (r/Awww, which enables users to share adorable pictures of animals), the social (r/music, where users can share opinions regarding any musical issue), and the political (r/politics, on which users can discuss current political issues and engage in debate).

One particular subreddit, r/AskScience, provides a unique forum for members to seek answers to their science questions. R/AskScience, boasting nearly 420,000 subscribers,<sup>132</sup> verifies Reddit members as experts. These experts volunteer to become panelists and answer users’ questions. Panelists’ names are followed by a color code indicating their field of expertise. If the color is bright purple, for example, the panelist is a physics expert, while light green indicates a neuroscience expert. Twelve fields are represented on r/AskScience. Forum guidelines inform users that discussion must be scientific, and avoid speculation and anecdotes.<sup>133</sup>

The unique features of R/AskScience suggest the subforum is credible. Experts are vetted to possess proper credentials. The site’s guidelines suggest that participants should adhere to rational discourse on scientific issues. Furthermore, the academic

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<sup>129</sup>Reddit, *Reddit.com*, <http://www.reddit.com> (last visited Feb. 18, 2012).

<sup>130</sup>Reddit Moderators, *Reddit FAQ*, <http://www.reddit.com/help/faq> (last visited Feb. 18, 2012).

<sup>131</sup>Metareddit, *Metareddit*, <http://www.metareddit.com> (last visited Feb. 18, 2012).

<sup>132</sup>*Id.*

<sup>133</sup>R/AskScience, *R/AskScience*, <http://www.reddit.com/r/askscience> (last visited Feb. 18, 2012).

topic of the site itself—science—naturally attracts visitors drawn to intellectual debate. The rigid nature of R/AskScience means that a plaintiff claiming he was maligned on the site would need to satisfy the *lowest* burden to unmask a defendant. The rationale for this is that site visitors are more inclined to find statements on such a rigid site to be credible and true; thus, the plaintiff faces a greater likelihood of suffering actual damage and, in turn, should face an easier time in unmasking.

A second example, which triggers a slightly increased burden on the plaintiff, is BlindGossip.com, a moderated site that consolidates and posts “blind item” gossip entries about celebrities, withholding their names. The site is clearly more frivolous than R/AskScience. One example of a BlindGossip post is:

Guess which troubled teen just got pulled out of reh\*b for the second time in two weeks? Multiple PR fiascoes have failed to quash stories about her relapse, so her handlers will be trotting her out in public and forcing her to perform this weekend in order to convince naïve fans that all is well.<sup>134</sup>

Readers are asked to leave comments guessing to which celebrity the blind item refers. However, only registered forum members can actually post comments. If an unregistered reader attempts to post, he is redirected to a screen to sign up for free membership. Particularly juicy blind items may yield hundreds of member comments. These comments are strictly monitored on the site; the comments remain hidden until they have been personally vetted. Moderators also monitor the site to remove any uncivilized discourse.

Even considering the layers of proof and moderation present on BlindGossip.com, no rational person would believe *every* blind item—or even every guess, no matter how measured—is true. Guesses are usually contradictory, and the

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<sup>134</sup> BlindGossip, *And She’s Out Again*, <http://blindgossip.com/?p=38847> (last visited Feb. 18, 2012).

site's nature is speculative. The site contains a disclaimer stating that it "makes no warranties or guarantees about the accuracy or reliability of the site's content."<sup>135</sup>

Nevertheless, site creators ensure that even though posters may make random (possibly defamatory) guesses regarding celebrities, the posters' content regarding *one another* will remain civil. Uncivilized discourse is moderated and removed immediately. Thus, an individual who claims he is damaged on the site would have to satisfy an extra layer of burden to show entitlement to revelation.<sup>136</sup>

Certain newspaper comment sites may trigger an additional layer of burden. For example, CNN's website invites users to comment on its news stories. Although CNN is generally considered to be a reputable news provider, a perusal of user comments quickly reveals that commenters are not governed by the same journalistic (or ethical) standards. CNN's guidelines—posted directly above the user comment box and below each story—state, "CNN welcomes a lively and courteous discussion here, so we do not pre-screen comments before they post." Although CNN may not screen its posters, the resulting comments are sometimes far from "courteous."

For example, one CNN story, *Authorities: Suicide Attack on U.S. Capitol Foiled*, detailed the arrest of Amine El Khalifi, a 29-year-old Moroccan man who allegedly attempted to bomb the U.S. Capitol building.<sup>137</sup> Two comments to the story made by a pseudonymous user, "ozonepark," said, "Cut his head off and mail it back to the

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<sup>135</sup> BlindGossip, *BlindGossip*, [http://blindgossip.com/?page\\_id=3022](http://blindgossip.com/?page_id=3022) (last visited Feb. 18, 2012).

<sup>136</sup> This analysis would be different if a celebrity brought suit based on site comments. The celebrity could sue for defamation, but the blind item would need to clearly refer to her. The celebrity could also sue for invasion of privacy—a *very* hard standard for a public figure to meet—which would require her to admit the truth of the statements. Neither outcome is likely to happen as a practical matter.

<sup>137</sup> Carol Cratty, *Authorities: Suicide Attack on U.S. Capitol Foiled*, CNN.COM, Feb. 17, 2012, at [http://www.cnn.com/2012/02/17/justice/us-dc-security-threat-arrest/index.html?hpt=hp\\_t1](http://www.cnn.com/2012/02/17/justice/us-dc-security-threat-arrest/index.html?hpt=hp_t1).

shiiithole [sic] he came from” and “behead him.” Another comment by “harryman2th” says, “We should 86 his family's house in Morrocco [sic], Isreali [sic] style.” Yet one more comment by “IndiaRocks31” spans more than a page, lambasting “parasitic whites” who survived by “exploiting and plundering the wealth and lands of other races,” and encouraging Iran to complete a nuclear bomb to “counter the threat of these parasites.”

Clearly, the analysis of the *comment section* must be different from the analysis of CNN's news article. Although the article maintains journalistic standards, the comment section invites intolerance, hatred, and conjecture. A rational person could not view the comment section and believe the statements contained within were trustworthy.

Finally, 4chan.com represents a wholly unmoderated site that triggers the highest level of burden on the plaintiff. 4chan bills itself as “an image-based bulletin board where anyone can post comments and share images.”<sup>138</sup> Users need not register to post comments on 4chan – in fact, 4chan has no user registration process.<sup>139</sup> All posters appear on the site as “Anonymous.” Casual users have immediate access to a variety of work-safe boards; for example, there is an all-purpose board, an image board for food and cooking, and an image board dedicated to “Sexy Beautiful Women.” However, by clicking on one of the boards, users are directed to accept a legal disclaimer, which opens up a variety of adult materials. Although 4chan is a moderated

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<sup>138</sup> 4chan, *4chan.com*, <http://www.4chan.com> (last visited Feb. 18, 2012).

<sup>139</sup> 4chan Moderators, *4chan.com FAQ*, <http://www.4chan.org/faq> (last visited Feb. 18, 2012).

site, the moderation is minimal at best—content is (theoretically) removed if it violates copyright laws.

As a result, 4chan is uniquely unrestrained, usually offensive, and typically contentious. No rational person would take as true *anything* posted on 4chan without independent verification. Thus, a plaintiff who claims harm caused by a 4chan post should satisfy the highest possible hurdle if he seeks to unmask the poster.

In summary, a plaintiff maligned in an *untrustworthy* forum should be required to satisfy a heightened standard to unmask an anonymous poster. A plaintiff who claims injury based on posts in a *trustworthy* forum, on the other hand, should face a lesser burden. Individuals are more likely to give credence to statements on the trustworthy forum, and, in turn, the plaintiff is more likely to suffer actual damage.

### **Establishing a Rubric**

The above elements were consolidated and incorporated into a rubric. The finalized version appears below. Courts should be able to apply the rubric to any factual pattern and eliminate much of the uncertainty and inconsistency inherent in the current system.

Additionally, the rubric incorporates a “miscellaneous” provision, giving courts the ability to weight case-specific elements defying easy categorization. The miscellaneous provision is deliberately assigned a low weight (10%) in the rubric. The inclusion of the provision, tempered by its relatively low weight, ensures the requisite balance between thoroughness and utility is maintained.

To illustrate the rationale for including a miscellaneous provision in the rubric, consider this hypothetical scenario. A court is confronted with a litigious—indeed, a vexatious—plaintiff with a significant history of unmasking anonymous posters. This

hypothetical plaintiff repeatedly pursues causes of action until unmasking, then withdraws his lawsuit, seemingly for the purpose of harassment and annoyance. A review of the plaintiff's pattern suggests he abuses the discovery process to silence his critics in SLAPP-like fashion – not to obtain any further remedy for his alleged damage. Absent a miscellaneous provision, a court would simply conduct a rote exploration of the facts – the plaintiff's business or human identity, the context of the forum where the anonymous speech occurred, etc. However, the miscellaneous provision enables a court to consider aberrations specific to the lawsuit at bar.

### **How the Rubric Functions**

The rubric (Fig. 5-2) is broken into relevant questions, discussed in this chapter. The first question directs the court to consider the critical issue of whether the underlying speech is commercial in nature. If the speech can be characterized as commercial speech warranting additional particularized limitations (such as downloading or seeding digital content), then the inquiry ends immediately: the court should apply the established standard in *Sony Music*.<sup>140</sup> If the speech at issue does not fall under this category, however, then the court should complete the remainder of the rubric. With this exception (shown on the rubric as a red box), every other inquiry will eventually trigger the application of one of the main tests: *Dendrite*, *Cahill*, or *America Online*.

The rubric contains seven questions (eight total criteria, including the miscellaneous section), a number reflecting a balance between thoroughness (incorporating every salient element) and simplicity. The answers to each question are

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<sup>140</sup> *Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 565–66 (S.D.N.Y. 2004).

weighted from “1” to “4.” A “1” on the scale represents those situations in which the plaintiff would bear little to no burden to prove the anonymous poster should be unmasked. For example, if a clear preexisting agreement, such as an employee confidentiality agreement, governs the pending dispute, then the plaintiff should not be required to satisfy a heightened burden. An anonymous poster in that circumstance has little expectation of privacy or anonymity before making the posting; he previously ceded it by executing the agreement.

The scale represents an ordinal numbering system. In the case of close calls, courts must decide which number to assign. For example, if the court is uncertain about the level of moderation on a forum, it may waver between applying a “2” or “3” for the relevant category on the rubric. In this case, a court should not attempt to sidestep the inquiry by applying a “2.5.” Reasonable minds may approach the same set of facts and come to different interpretations—one person may choose to assign a “2” while another would have assigned a “3.” The goal of the rubric, however, is not to force a particular determination. It is to create a uniform *process* for courts to employ. Thus, ensuring consistency in application is the critical focus.

Every question is weighed according to importance. The importance of a particular question is reflected by its weight. Two of the rubric’s categories are worth twice as much as the other categories (each effectively accounts for 20% of the rubric’s weight).

To briefly illustrate the application, the question of party status will be tackled.<sup>141</sup> As discussed above, courts are strongly swayed by whether the anonymous poster was a party to the dispute. This inquiry, therefore, is worth double, or 20% of the total. If a court answered “4” for this question—finding that the poster is a non-party and unlikely to become a party—then the court would enter that value beside that question. It would then *double* the value, as directed by the rubric. Thus, the inquiry would ultimately be counted as an “8.” After answering each question, a court will arrive at a final total. Theoretically, if the court answered a “4” for every question—and engaged in doubling when necessary under the rubric—it would arrive at a score of 40. The higher the score, the greater burden the plaintiff faces to support disclosure of the anonymous poster’s identity. In brief, *the higher the score, the more stringent the standard the court will apply.*

A low score (0–13) supports the application of *America Online’s* lenient good-faith standard, while a high score (27–40) supports *Cahill’s* stringent summary judgment approach. The dissertation posits that this rubric will result in the application of *Dendrite*, the approach most largely embraced by the courts, more frequently than the other standards. As a result, the application of the tests will reflect reality in a more systematized manner.

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<sup>141</sup> A far more exhaustive application of the rubric appears in the next chapter.

	1	2	3	4	TOTAL
What is the nature of the speech?	<i>Illegal downloading of digital media</i> <i>Apply Sony Music</i>	Commercial speech <i>Advertising</i>	Expressive speech <i>Product reviews; general blog posts</i>	“Core” speech <i>Political discourse; social commentary</i>	
Who posted the information?	Putative Defendant in present suit	Non-party; requester seeking information to ascertain claims in present suit	Non-party; individual is unlikely to become a party; seeking information for purpose other than instant suit <b>(4 points)</b>		(x2)
Is there a preexisting applicable agreement?	Yes; agreement clearly governs the pending dispute <i>Employee confidentiality agreement, Terms of Service agreement, Terms of Use agreement</i>	Yes; minor aspects of agreement terms are unclear	Yes; terms in the agreement show a marked lack of clarity, or the applicability of the agreement is uncertain	No	(x2)
Where is the information posted?	Strictly moderated, formal forum; rigid rules governing communication <i>Site for experts in field; moderated sites; R/AskScience</i>	Less moderated, otherwise formal forum; community appears rule-driven <i>BlindGossip.com</i>	Informal forum; relaxed style of communication; generally closed to the public <i>CNN or local paper comments section</i>	Informal forum; relaxed style of communication; generally open to the public <i>Grammatical and spelling errors; casual forum style; 4chan.com</i>	
How can the speech be characterized?	Obviously actionable; in defamation, clearly a false factual attack on one’s reputation <i>Direct attacks; statements can be proven true or false</i>	Appears actionable, but requires additional discovery	Appears inactionable, but requires additional discovery	Obviously inactionable; in defamation, clearly exaggerated or false statements <i>Overt satire; rhetorical hyperbole; imaginative expression</i>	
Who is the requester?	Private figure individual suffering personal harm <i>Individuals claiming defamation, invasion of privacy; mom-and-pop companies asserting damages</i>	Public figure individual <i>Celebrities, political figures; limited purpose public figures claiming defamation, invasion of privacy</i>	Public business entity asserting “personalized” harms <i>Prominent businesses claiming defamation; commercial disparagement</i>	Public business entity claiming harm to business practices <i>Prominent businesses claiming tortious interference, breach of contract</i>	
Is the information available elsewhere?	No, the information cannot be obtained from another source	Yes, the information can be obtained with significant difficulty from another source	Yes, the information is available from an alternative source	Yes, the information is readily available from an alternative source	
Miscellaneous	<i>Facts warrant significantly decreasing requester’s burden</i>	<i>Facts warrant minimally decreasing requester’s burden</i>	<i>Facts warrant minimally heightening requester’s burden</i>	<i>Facts warrant significantly heightening requester’s burden</i>	
<b>FINAL TOTAL:</b> 0–13—apply <i>America Online</i> ; 14–26—apply <i>Dendrite</i> ; 27–40—apply <i>Cahill</i>					

Figure 5-2. Sample blank rubric for unmasking test analysis.

The relative importance of each inquiry addressed in the rubric is reflected in a pie chart (Fig. 5-3). This chart indicates in a clearer visual format exactly how each factor is weighed in a determination under the rubric. As evidenced by the chart, the identity of the poster and the existence (or non-existence) of a governing agreement strongly influence the adoption of a test.

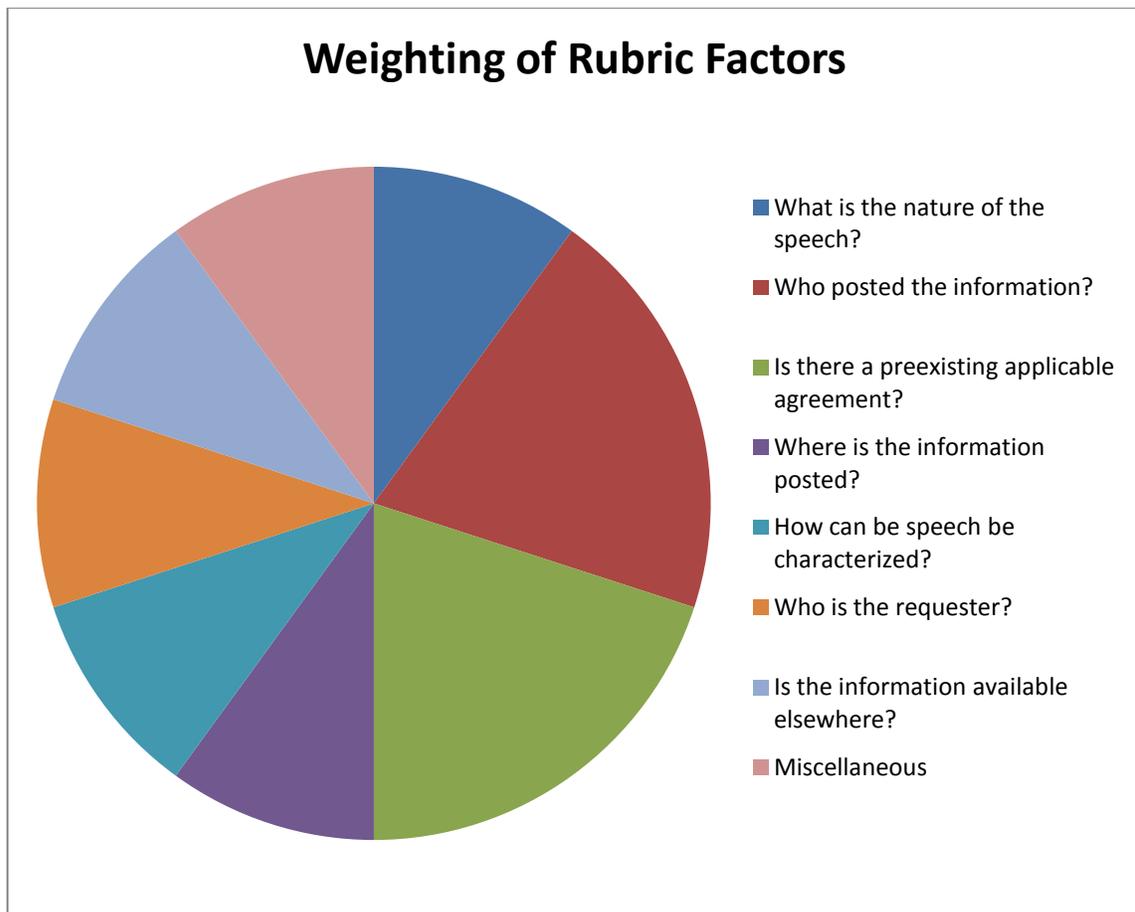


Figure 5-3. Chart showing weighting of factors for unmasking rubric.

### **Advocating a Rubric for Analytical Purposes**

This chapter initially explained the methodology used to lay the foundation for a rubric to guide the courts in unmasking analyses. After establishing salient factors that

have persuaded prior courts to apply a particular standard, the dissertation then advanced a unified rubric for courts to utilize. If adopted, it ideally should simplify the courts' task while simultaneously increasing uniformity in the law.

One practical implication of adopting the rubric is clarification of the specific circumstances in which a lenient unmasking standard should be applied. This alleviates much of the chilling effect some courts have recognized as a negative consequence of applying standards such as the *America Online* good-faith test. Utilizing the rubric should minimize the circumstances in which a lenient test is erroneously applied. Anonymous speakers, in turn, need not silence themselves for fear their identity will be unmasked in a baseless suit.

## CHAPTER 6 APPLYING THE RUBRIC

To demonstrate the rubric's functionality, it is applied here to a complex—but realistic—hypothetical situation. The hypothetical involves joint corporate and individual plaintiffs asserting various causes of action and attempting to unmask six anonymous posters. The facts, which are culled from numerous opinions citing *Dendrite*, *Cahill*, and *America Online*, are weaved into a unified narrative. Finally, the rubric advanced in the previous chapter is applied to the hypothetical systematically, revealing which test(s) a court should adopt.

### **The Hypothetical: Computer Disrepair Despair**

CompuTime is a New York City technology firm listed on the New York Stock Exchange. A small branch of the firm handles business and personal computer repairs. The store averages approximately 400 service requests daily, fairly equally divided among its 100 technicians. Additionally, the branch employs 30 support staff. As a condition of employment, all employees enter into confidentiality agreements, promising to keep CompuTime's internal business practices confidential. The agreement persists beyond termination of employment.

William Smith, the branch manager, receives notice from his superiors that profits for the repair unit are subtly declining. Reviewing the data, he realizes that repair profits are down 4% for personal computers and nearly 12% for business computers. During a brainstorming session, a team member suggests the branch should increase its Web presence to attract new customers and, in turn, boost profits. Before implementing this suggestion, Smith searches Google to ascertain its viability.

During the search, Smith is shocked to discover a website called “DOWN WITH COMPUTATIME!!!” which bills itself as “Your One-Stop VENTING Destination.” The site features a full-face photograph of Smith captioned “THIEF AND BASTARD” in large, bright red font.

The home page also contains several links, one of which called “Horror Stories” leads to a repository of overwhelmingly negative stories site visitors shared regarding their experiences with ComputaTime. Another link, “Cautionary Tale,” leads to a biography of the site creator and his own ComputaTime story. The site’s creator, using the pseudonym “IHateComputaTime,” (Doe 1), claims that ComputaTime:

- (1) Overcharges customers for parts;
- (2) Provides inferior parts during repairs;
- (3) Encourages customers to purchase services they don’t need; and
- (4) Routinely bills customers for services it doesn’t actually provide.

The page ends with a warning: “BUYER BEWARE! ComputaTime will steal your hard-earned money at every turn. And when they’re done, you get a busted piece of junk you just need to fix again!!!”

A final link on the site, “Current Events,” reveals, “SMITH is screwing EMPLOYEES just like he screws customers. COMPUTATIME’S SELLING! Doesn’t surprise me all. The bastard only cares about himself.” In fact, ComputaTime *is* in final negotiations to sell off the repair branch, a fact Smith disclosed at a closed-management meeting one week prior. IHateComputaTime’s post is date-and-time-stamped, indicating it was made less than three hours after the meeting.

Stunned, Smith peruses the remainder of the site. He clicks on “Horror Stories” again and sees posts from five different pseudonymous individuals claiming to have had horrible experiences with ComputaTime:

- **“businessperson” (Doe 2):** “*If what you’re saying is true, ComputaTime’s business practices are illegal. We should strengthen the laws to punish businesses like this for their shady practices. Call your legislators TODAY!*” Doe 2 then includes the names and contact information for New York Congressional representatives.
- **“LOLcatz4930” (Doe 3):** “COMPUTATIME SUX N SO DO SMITH. DON’T BRING UR PUTER HERE. WORST PLACE EVAR!!!! RUN!!!!”
- **“BillNyeTheComputerGuy” (Doe 4):** “As a former ComputaTime employee, I can attest to every shady thing IHateComputaTime says. Smith told us to ‘cut corners’ during repairs to save money. I, personally, overcharged almost every customer who came through the ComputaTime doors for repair work. They’ll do a better job fixing your computers at Computer Shack.”
- **“UseYourHead” (Doe 5):** “I know BillNyeTheComputerGuy. You can’t trust what he says! Sounds like bitter grapes!”
- **“computershack” (Doe 6):** Uploads a photograph of ComputaTime’s offices with a red “X” over it, and links to the website for Computer Shack, ComputaTime’s main competitor.

Smith is outraged. His initial reaction, after yelling several expletives unsuitable for print in any dissertation, is to respond to these comments on the website, but when he clicks a button marked “Leave a Comment,” he is redirected to a page with a form

explaining that he must create an account in order to post. The form requires posters to select a pseudonym, then to enter their legal name, e-mail address and date of birth. The page also links to a “Terms of Use” document, which registered users must accept in order to post on the site. The agreement promises to maintain the confidentiality of members’ information unless disclosure is mandated by a court. The website’s FAQ also explains that moderators will “occasionally review the site’s posts to remove objectionable or irrelevant content.” Research reveals that the site is hosted by Google.

At this juncture, Smith declines to create an account and opts to exercise his legal rights. He confers with ComputaTime’s chief executive officer; together, they decide to sue each anonymous poster except Doe 5 (“UseYourHead”). However, they recognize that Doe 5’s testimony might be helpful to discredit the scathing claims made by Doe 4 (“BillNyeTheComputerGuy”). In the end, ComputaTime sues Does 1–4 (“IHateComputaTime,” “businessperson,” “LOLcatz4930,” and “BillNyeTheComputerGuy”) and Doe 6 (“computershack”) for defamation; Does 1 (“IHateComputaTime”), 4 (“BillNyeTheComputerGuy”) and 6 (“computershack”) for tortious interference with prospective business relations; and Does 1 (“IHateComputaTime”) and 4 (“BillNyeTheComputerGuy”) for breach of confidentiality. Smith also asserts his individual rights, suing Does 1 (“IHateComputaTime”) and 4 (“BillNyeTheComputerGuy”) for defamation.

ComputaTime and Smith are in a bind at this point. They must unmask the anonymous speakers in order to pursue their causes of action, but Google’s policy prevents it from revealing the names absent a valid court order. Lacking the ability to serve the proper defendants, ComputaTime and Smith opt to file suit against “John

Doe” speakers and seek leave to subpoena Google for their identities. At a hearing, the court considers which test to apply and whether to order revelation.

### **Application of the Rubric to the Hypothetical**

The court faces six separate unmasking inquiries in this hypothetical. Because the plaintiffs asserted no copyright infringement claims—or other claims that might trigger the unique application of *Sony Music*<sup>1</sup>—the court must systematically use the remainder of the rubric. An explication of that process is presented below.

#### **What is the Nature of the Speech? (10%)**

Courts initially must decide if the underlying speech constitutes one of four things: “lesser protected” commercial speech,<sup>2</sup> commercial speech, expressive speech or core speech. In the hypothetical, all but one poster engaged in either expressive or core First Amendment-protected speech. The stronger First Amendment protection speech enjoys, the higher the hurdle a plaintiff must face for revelation.

#### **Core speech (4 points)**

The speech of Doe 2 (“businessperson”) constitutes reasoned commentary regarding theoretical unsavory business practices and thus is “core” speech worthy of maximum First Amendment protection. The speech expresses no opinion about ComputaTime’s *actual* business dealings; it merely comments on the facts as presented on the website. Regarding the website’s contentions, Doe 2 responds, “*If* what you’re

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<sup>1</sup> The rubric initially requires a court to consider whether the nature of the speech at issue is akin to “lesser protected” commercial speech, such as the illegal downloading of digital media. If it is, then the court must apply *Sony Music Entm’t Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004). The remainder of the rubric may be ignored.

<sup>2</sup> This type of speech would trigger the application of *Sony Music* under the rubric, and as noted above, is not addressed here.

saying is true, ComputaTime’s business practices are illegal.”<sup>3</sup> The inclusion of the initial dependent clause indicates that Doe 2 engaged in a purely hypothetical exercise regarding acceptable business practices. Furthermore, Doe 2 uses this opportunity as a political platform, calling for a revision of the laws and facilitating that process through the inclusion of contact numbers. Thus, Doe 2’s speech receives the utmost protection under the First Amendment. ComputaTime should be required to satisfy a particularly strong burden to unmask Doe 2.

### **Expressive speech (3 points)**

The speech of Does 1 (“IHateComputaTime”), 3 (“LOLcatz4930”), 4 (“BillNyeTheComputerGuy”), and 5 (“UseYourHead”) involves differing degrees of substantive content and vastly disparate communicative styles, but it shares a core characteristic: it qualifies as expressive speech warranting significant First Amendment protection, which translates into a heightened burden imposed on the plaintiff during an unmasking analysis. This burden is heightened, although the protection of this speech does not rise to the same level as “core” political speech.<sup>4</sup>

Doe 1 and Doe 4’s speech shares similarities because it offers measured—if damning—commentary on ComputaTime’s business practices. Doe 4’s assertion that ComputaTime required him to “cut corners,” and Doe 1’s claim that the company encouraged the purchase of unnecessary parts, are *protected* consumer commentary warranting strong First Amendment protection. Valid consumer *commentary* transcends

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<sup>3</sup> Emphasis in original.

<sup>4</sup> See *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011) (finding comments that company “regularly, but secretly, acknowledged that its products are overpriced and not sellable” and evidenced “systemic dishonesty” did not qualify as “core” political speech, but declining to decide whether the comments qualified as commercial speech).

subject matter; it is not classified as “commercial” merely because it reflects on commercial issues.<sup>5</sup>

Similarly, Doe 5’s warning that customers should distrust Doe 4 is expressive opinion entitled to First Amendment protection. The substance clearly is deficient with respect to this particular unmasking analysis, but those concerns are addressed elsewhere in the rubric. For *this* facet, his speech is protected expression.

Additionally, Doe 3’s speech is First Amendment-protected expression, although its content is comparatively slight. Doe 3’s plea for consumers to avoid ComputaTime because it is a deficient establishment is protected expressive opinion, even when the entreaty is cast as “COMPUTATIME SUX N SO DO SMITH. DON’T BRING UR PUTER HERE. WORST PLACE EVAR!!!! RUN!!!!!!” Concerns raised due to Doe 3’s formatting are addressed elsewhere in the rubric.

### **Commercial speech (2 points)**

The speech of Doe 6 (“computershack”) is commercial, warranting less First Amendment protection than expressive or “core” speech, but still receiving greater protection than the illegal speech covered by *Sony Music*. Although the act of posting ComputaTime’s picture with a red “X” through it could qualify as expressive commentary (or even an unprotected “true threat,” depending on the particular circumstances<sup>6</sup>), the totality of the posting suggests it is fundamentally commercial. By disparaging

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<sup>5</sup> See, e.g., *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1016 (9th Cir. 2004) (finding that negative consumer commentary about Nissan transcended commercial speech because it did “more than propose a commercial transaction”); see also *Best Western Int’l, Inc. v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (explaining that commentary regarding Best Western qualified as purely expressive speech warranting substantial First Amendment protection).

<sup>6</sup> See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002) (holding that a “true threat” existed, obliterating free speech interests, where a website posted a “WANTED” poster encouraging readers to take violent action against abortion providers).

CompuTime and including a link to Computer Shack’s website, Doe 6’s expression amounts to an endorsement of Computer Shack. This type of commercial speech implicates fewer First Amendment interests—which is the main rationale for affording such strong protection to anonymity. Thus, CompuTime should bear a lesser burden to unmask Doe 6.

### **Who Posted the Information? (20%)**

The second element of the rubric courts must address is the identity of the anonymous poster (often a defendant or putative defendant). A plaintiff must satisfy an increasingly heightened burden correlating to how far removed the anonymous poster is from the pending lawsuit. This inquiry is critical because courts are far less likely to unmask a non-party than a party to a pending dispute.

### **Non-party; unlikely to become a party (4 points, doubled to 8 points)**

In this case, Doe 5 (“UseYourHead”) is not a putative defendant. The plaintiffs only seek to unmask him in order to discredit the statements of Doe 4 (“BillNyeTheComputerGuy”). The plaintiffs’ rationale is, at best, unpersuasive. Doe 5’s relationship to the present lawsuit is tenuous and thus CompuTime must face a high burden to unmask Doe 5.

### **Non-party; requester seeking information to ascertain claims (2 points, doubled to 4 points)**

None of the posters falls into this category, which is reserved for discovery of a non-party’s identity where the poster believes he may ultimately file suit. Plaintiffs, however, cannot use discovery as a “fishing expedition.”<sup>7</sup>

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<sup>7</sup> See *Public Relations Soc’y of Am. v. Road Runner High Speed Online*, 799 N.Y.S.2d 847, 850 (N.Y. Sup. May 27, 2005) (explaining that plaintiffs cannot use pre-action discovery as a mechanism to determine whether a valid claim exists).

### **Putative defendant (1 point, doubled to 2 points)**

Most unmasking analyses involve putative defendants that plaintiffs must unmask to pursue their claims. Here, the plaintiffs seek to obtain the identities of Does 2 (“businessperson”), 3 (“LOLcatz4930”), 4 (“BillNyeTheComputerGuy”), and 6 (“computershack”) from Google in order serve process on them. The plaintiffs’ burden should be minimized to the extent they demonstrate a genuine need for the identities to proceed with the lawsuit.

### **Is There a Preexisting Applicable Agreement? (20%)**

A fact in the hypothetical is that each Doe agreed to be bound by a Terms of Use agreement to post on the website. Google, in turn, agreed to maintain the confidentiality of the posters’ identities *unless* disclosure is ordered by a court. Thus, while the posters ordinarily might enjoy an expectation of privacy, they assented to disclosure in the face of a valid legal claim. The plaintiff’s burden to unmask the posters thus is minimized on this facet of the rubric; this inquiry should yield 1 point under the rubric, which is then doubled to 2 points.

If, however, the agreement’s terms are unclear or the applicability of the agreement is uncertain, a court may elect to impose a stricter burden on the plaintiff consistent with the rubric.

### **Where Is the Information Posted? (10%)**

All of the posters’ comments appear on the same forum: the website of Doe 1 (“IHateCompuTime”). This facet of the rubric thus involves the same analysis for each poster. Although guests can view posts on Doe 1’s website, they cannot *create* posts until they register and accept the site’s Terms of Use agreement. Posting on the site is, therefore, generally closed to the public. The content of Doe 1’s website is also

moderated, in that posts are periodically policed, and offensive posts removed. Additionally, the general tenor of Doe 1's website is informal, as evidenced by the impassioned post made by Doe 3 ("LOLcatz4930"), replete with misspellings and punctuation errors. Given the factual scenario presented in the hypothetical, Doe 1's website likely qualifies as an informal forum, generally closed to the public, with a relaxed communication style, yielding 3 points under the rubric.

The ultimate determination of how Doe 1's site should be characterized, of course, is subject to an analysis of the *entire* context of the site—which is beyond the scope of this chapter's hypothetical. The site may, for instance, entail a communicative style suggesting comments should not be taken seriously. Conversely, the structure of Doe 3's comment may be an anomaly. The interpretation of site moderation may depend on the frequency with which Doe 1 reviews site comments—it could be multiple times per day (highly moderated) or once a year (barely moderated). This inquiry is, again, very fact-specific.

### **How Can the Speech Be Characterized? (10%)**

This inquiry directs courts to consider the egregiousness (characterized by a conspicuously bad nature or shocking offensiveness) of the posters' underlying speech. If the post is particularly egregious, courts may be inclined to minimize the plaintiff's burden and order disclosure. If, on the other hand, it is clearly inactionable, then the plaintiff's burden is maximized and disclosure is unlikely. The application of this portion of the rubric is outlined below.

### **Obviously inactionable speech (4 points)**

Plaintiffs must satisfy a significant burden to warrant revelation where the underlying speech is clearly inactionable. If a plaintiff's claims are fundamentally

baseless, then the impetus to order revelation is minimized. The speech of Doe 2 (“businessperson”) is clearly inactionable opinion that fails to support revelation. ComputaTime sued him for defamation—a claim, at its heart, requiring the plaintiff to incur damage from a *false* statement. However, Doe 2’s assertion is couched in uncertainty—hardly the unequivocal statement of fact to support a defamation action. The statement, “*If* what you’re saying is true, ComputaTime’s business practices are illegal,” expresses no falsifiable expression regarding ComputaTime’s actual business practices.

Similarly, the assertions of Doe 3 (“LOLcatz4930”), on their face, do not support a defamation claim. He says, “COMPUTATIME SUX N SO DO SMITH. DON’T BRING UR PUTER HERE. WORST PLACE EVAR!!!! RUN!!!!!!” The second and fourth sentences are imperatives, utterly incapable of a true/false reading. Claims that ComputaTime or Smith “SUX” or is the “WORST PLACE EVAR”—the first and third sentences—may be assertions, but they are clearly hyperbolic, non-defamatory opinions.<sup>8</sup>

Finally, the statements made by Doe 5 (“UseYourHead”) are clearly inactionable because they refer neither to ComputaTime nor to Smith. Further, the plaintiffs have no intention of suing based on these statements.

### **Appears inactionable, but requires additional discovery (3 points)**

Speech in this category appears inactionable, but a final determination requires additional discovery. The speech by Doe 6 (“computershack”)—posting ComputaTime’s image with an “X” through it—likely is not defamatory. However, because it may

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<sup>8</sup> See *Brodie v. Indep. Newspapers, Inc.*, 2007 WL 6887877 (Md. Cir. Ct. Mar. 12, 2007) (finding assertions that small business owner had “no sense of decency” to be inactionable hyperbole).

constitute tenuous support for ComputaTime’s tortious interference claim, ComputaTime must satisfy a heightened burden, minimized slightly because it has a potential cause of action.

**Appears actionable, but requires additional discovery (2 points)**

This category covers causes of action that, on their face, appear well-founded, but additional discovery is required to ascertain the strength of those claims. The comments of Doe 4 (“BillNyeTheComputerGuy”) fall here, as he first states that “every shady thing” asserted by Doe 1 (“IHateComputaTime”) is true. To bolster his assertion, Doe 4 then reveals he is a former employee who personally “overcharged almost every customer” and was directed by Smith to “cut corners.” If Doe 4’s statements were false, they likely would constitute defamation. However, the meaning of “cut corners” and “shady” are subject to interpretation. Further discovery on this issue is warranted to tease out the extent of his assertions.

Furthermore, ComputaTime’s claim that Doe 4breached his confidentiality agreement is supported by Doe 4’s own revelation that he is a former ComputaTime employee. Evidence indicates all employees—including Doe 4—are bound by confidentiality agreements. Yet whether Doe 4’s comments actually breach the terms of the agreement is a question of fact for the court.

**Obviously actionable on its face (1 point)**

If statements are clearly actionable, the plaintiff’s burden is minimized. The claim of Doe 1 (“IHateComputaTime”) that Smith is a “THIEF” is, on its face, an actionable, falsifiable statement of fact.<sup>9</sup> However, his assertion that Smith is a “BASTARD” is likely

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<sup>9</sup> See *Gross v. New York Times Co.*, 623 N.E.2d 1163, 1169 (N.Y. App. 1993) (in dicta) (citations omitted) (noting that calling someone a “thief” may constitute actionable defamation); *but see Mathis v. Cannon*,

inactionable hyperbole—even though the word “bastard” is capable of a dictionary interpretation.<sup>10</sup> Similarly, Doe 1’s claims that ComputaTime overcharges its customers, provides inferior parts, encourages unnecessary sales, and bills customers for services they did not receive—if false—all support a defamation action.<sup>11</sup>

ComputaTime’s breach of employment claim also is actionable on its face.

Although Doe 1 does not explicitly identify himself on the website as a current or former ComputaTime employee, he revealed information only ComputaTime management knew—within a shockingly short time frame after it was disclosed in a closed meeting. This coincidence suggests Doe 1 is, more likely than not, a current or former employee. Such a coincidence has been sufficient to support a claim for breach of confidentiality and, by extension, the unmasking of an anonymous poster.<sup>12</sup>

### **Who Is the Requester? (10%)**

The identity of the requester (usually the plaintiff) is relevant to a determination of whether an anonymous poster should be unmasked. The hypothetical presents *both* an

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573 S.E.2d 376, 382–83 (Ga. 2002) (finding comments on a Yahoo! board calling a business owner a “crook” and “thief” were inactionable because a reasonable reader viewing them in the context of the board—with numerous misspellings and poor punctuation—would find them to be hyperbolic, not “assertions of fact constituting malicious and personal attacks on [the business owner’s] character and reputation”).

<sup>10</sup> See, e.g., *Lovings v. Thomas*, 805 N.E.2d 442, 447–48 (Ind. Ct. App. 2004) (stating that “obnoxious remarks” are not defamatory *per se*, and proffering an exhaustive list of examples including the word “bastard”); *but see Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 951 (N.Y. Sup. 2009) (stating that “the explicit use of the words “skank,” “skanky,” “ho” and “whoring” are reasonably susceptible to a defamatory connotation, since a communication that states or implies that a person is promiscuous is defamatory.”) (internal quotations omitted).

<sup>11</sup> Comments like the one suggesting Smith will “screw his employees out of a job” appear speculative and inactionable. Nevertheless, the other claims *are* almost certainly actionable, so the analysis under the rubric remains the same; the plaintiff’s burden is minimized.

<sup>12</sup> *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777 (N.J. Super. A.D. 2001) (ordering the revelation of an anonymous poster who disclosed confidential information and proprietary information, mere access to which suggested she was a former employee).

individual and a corporate plaintiff. Theoretically, under this section of the rubric, Smith's burden should be less than ComputaTime's.

To the extent these categories overlap, the rubric demands the plaintiff shoulder the higher burden. Thus, if a small business owner asserts personal and corporate causes of action, he must bear the heightened burden associated with corporate claims. The opposite result would be untenable. In cases involving joint individual and corporate plaintiffs, the individual could satisfy his unmasking burden while the corporate plaintiff cannot. It would be inherently unfair to deprive a poster of anonymity in the corporate plaintiff context when that plaintiff could not prove entitlement.

This category may also be inapplicable in certain situations. For example, ComputaTime seeks to unmask Doe 5—a person against whom no cause of action has been asserted. Clearly, Doe 5 does not fit into any of the subcategories outlined on the rubric. To the extent this unique situation occurs, the burden imposed on the plaintiff should default to the maximum possible; here, that would yield a score of 4 points.

**Public corporate figure claiming harm to business practices (4 points)**

Plaintiff ComputaTime qualifies as a public figure. It employs 100 technicians in its repair branch alone, and it is listed on the New York Stock Exchange—both elements suggesting that the company is a public figure. ComputaTime asserted a tortious interference claim against Does 1 (“IHateComputaTime”), 4 (“BillNyeTheComputerGuy”) and 6 (“computershack”), and a breach of contract claim against Does 1 and 4. These causes of action involve business harms. Thus, with respect to Does 1, 4, and 6, the plaintiff must bear a heavier burden to warrant disclosure. This result issues with respect to Doe 1 *despite* Smith's pending individual claim.

### **Public corporate plaintiff suffering “personalized” harms (3 points)**

This category involves situations where public-corporate figures assert “personalized” claims, such as defamation or commercial disparagement. Such injuries should be distinguished from the pure economic business injuries outlined above because they are reputational or invasive in nature. In this hypothetical, ComputaTime sued Doe 3 (“LOLcatz4930”) and Doe 2 (“businessperson”) for defamation, a claim that warrants placement in this category.

### **Public individual plaintiff (2 points)**

This category involves cases where public individual figures (for example, political figures or celebrities) assert causes of action. In this hypothetical, Smith (the only individual plaintiff) does not qualify as a public figure. Thus, the inquiry does not apply.

### **Private figure suffering personal harm (1 point)**

Ordinarily, Smith’s individual defamation claim against Doe 1 (“IHateComputaTime”) would fall in this category. However, ComputaTime’s pending causes of action against Doe 1 subsume this inquiry. This is because ComputaTime should not be able to take advantage of Smith’s reduced burden for revelation.

### **Is the Information Available Elsewhere? (10%)**

The identities of the putative defendants are not available from another source. Thus, ComputaTime’s unmasking burden is significantly minimized, yielding 1 point under the rubric. On the other hand, ComputaTime seeks to unmask Doe 5 (“UseYourHead”) solely to discredit Doe 4 (“BillNyeTheComputerGuy”). This information doubtless is available from an alternative source, without needing to compromise Doe

5's privacy interests. Thus, the plaintiff's burden should be heightened, yielding 4 points under the rubric.

### **Are There Any Other Relevant Fact-Specific Considerations? (10%)**

This discretionary category ensures the court accounts for all relevant, case-specific facts when selecting an unmasking standard. Because the stakes are so high—potentially depriving an individual of his First Amendment anonymity rights—the rubric must thoroughly consider each relevant factor. However, it is impossible to conceive of every possible motivating factor a court may encounter. Indeed, unforeseeable technological and legal changes could impact an unmasking analysis. Thus, the rubric must be flexible enough to accommodate these circumstances. This “miscellaneous” category provides an extra layer of flexibility for courts to employ.

In the particular case, for example, a judge could decide to minimize the plaintiffs' burden to show entitlement to the identity of Doe 1 (“IHateCompuTime”) because he created and moderated the forum on which the speech appeared. His actions, furthermore, facilitated the communication of other possibly defamatory speech. The status of “site creator” is not an issue so prevalent it warrants permanent inclusion on the necessarily flexible rubric. However, a court could find this fact very persuasive in an unmasking analysis. Thus, the rubric enables this discretionary judicial exercise. As such, the court could decide to minimally decrease the plaintiffs' burden, yielding a “2” on the rubric.

Theoretically, a court may decide that the facts are sufficiently straightforward and warrant no additional exercise of judicial discretion. In that event, it may decline to utilize this field. Thus, the court could adjust the overall possible point value of the rubric from 40 points to 36.

## Final Analysis

The next chart (Figure 6-1) demonstrates the functionality of the rubric by applying it to an unmasking analysis of Doe 1 (“IHateCompuTime”). The rubric, of course, applies equally to every poster whose anonymity is similarly threatened. Demonstrating its application to Doe 1 sufficiently illustrates how the rubric works. He is a defendant in each of the causes of action discussed in the complaint, so the application of the rubric regarding the various causes of action is demonstrated thoroughly. Furthermore, he, as the website creator, has the strongest connection to the facts in this dispute. As such, showing the application of the rubric to Doe 1 encompasses the same inquiries that apply to the other Does.

The bottom right of the rubric indicates the final score. The score translates directly into which test the court should apply, as indicated below the rubric. A low score triggers the application of *America Online’s* lax standard, a moderate score yields *Dendrite*, and a high score warrants *Cahill’s* more stringent standard.

	1	2	3	4	TOTAL
What is the nature of the speech?	<i>Illegal downloading of digital media</i> <b>Apply Sony Music</b>	Commercial speech <i>Advertising</i>	Expressive speech <i>Product reviews; general blog posts</i>	“Core” speech <i>Political discourse; social commentary</i>	3
Who posted the information?	Putative Defendant in present suit	Non-party; requester seeking information to ascertain claims in present suit	Non-party; individual is unlikely to become a party; seeking information for purpose other than instant suit <b>(4 points)</b>		1 (x2) = 2
Is there a preexisting applicable agreement?	Yes; agreement clearly governs the pending dispute <i>Employee confidentiality agreement, Terms of Service agreement, Terms of Use agreement</i>	Yes; minor aspects of agreement terms are unclear	Yes; terms in the agreement show a marked lack of clarity, or the applicability of the agreement is uncertain	No	1 (x2) = 2
Where is the information posted?	Strictly moderated, formal forum; rigid rules governing communication <i>Site for experts in field; moderated sites; R/AskScience</i>	Less moderated, otherwise formal forum; community appears rule-driven <i>BlindGossip.com</i>	Informal forum; relaxed style of communication; generally closed to the public <i>CNN or local paper comments section</i>	Informal forum; relaxed style of communication; generally open to the public <i>Grammatical and spelling errors; casual forum style; 4chan.com</i>	3
How can the speech be characterized?	Obviously actionable; in defamation, clearly a false factual attack on one’s reputation <i>Direct attacks; statements can be proven true or false</i>	Appears actionable, but requires additional discovery	Appears inactionable, but requires additional discovery	Obviously inactionable; in defamation, clearly exaggerated or false statements <i>Overt satire; rhetorical hyperbole; imaginative expression</i>	1
Who is the requester?	Private figure individual suffering personal harm <i>Individuals claiming defamation, invasion of privacy; mom-and-pop companies asserting damages</i>	Public figure individual <i>Celebrities, political figures; limited purpose public figures claiming defamation, invasion of privacy</i>	Public business entity asserting “personalized” harms <i>Prominent businesses claiming defamation; commercial disparagement</i>	Public business entity claiming harm to business practices <i>Prominent businesses claiming tortious interference, breach of contract</i>	4
Is the information available elsewhere?	No, the information cannot be obtained from another source	Yes, the information can be obtained with significant difficulty from another source	Yes, the information is available from an alternative source	Yes, the information is readily available from an alternative source	1
Miscellaneous	<i>Facts warrant significantly decreasing requester’s burden</i>	<i>Facts warrant minimally decreasing requester’s burden</i>	<i>Facts warrant minimally heightening requester’s burden</i>	<i>Facts warrant significantly heightening requester’s burden</i>	2
<b>FINAL SCORE:</b> 0–13—apply <i>America Online</i> ; 14–26—apply <i>Dendrite</i> ; 27–40—apply <i>Cahill</i>					<b>18/40</b>

Figure 6-1. Completed unmasking analysis rubric for Doe 1, yielding the application of *Dendrite*.

### **Applicability of the Finalized Rubric**

The application of the rubric reflects the reality described in the case law.

Applying this rubric, courts should find that *Dendrite* covers the majority of the factual scenarios it confronts. However, in circumstances under which the plaintiff's unmasking argument is more tenuous, the rubric leads to the application of *Cahill*. On the other hand, where the plaintiff's argument is very strong, it leads to the (rare) application of *America Online*.

## CHAPTER 7 CONCLUSION

This dissertation proposed and defended a rubric for judicial use when deciding the proper standard that should govern the revelation of an anonymous poster's identity. Before constructing the rubric, it explained the foundational importance of anonymity in American jurisprudence in order to convey a thorough understanding of the critical constitutional rights at stake every time an unmasking analysis is undertaken. It also argued for the application of a rubric—an elegant mechanism under-utilized in legal analysis—to simplify and systematize the courts' task and to add uniformity and consistency to judicial decision making.

To construct the rubric, the dissertation analyzed case law citing the three main tests employed in this area—*Dendrite*,<sup>1</sup> *Cahill*,<sup>2</sup> and *America Online*<sup>3</sup>—in order to ascertain which factors courts deemed relevant in an unmasking analysis. Salient factors were incorporated in a finalized rubric, weighted according to their relevance in unmasking analyses in the case law, and applied in Chapter 5 to a tangled yet realistic hypothetical, demonstrating the rubric's utility. The result of the rubric's employment is twofold: simplifying a task that previously consternated the courts, and creating uniformity in an area of the law historically marred by chaos.

First, this chapter answers the Research Question presented in Chapter One. This is: What criteria and elements should a rubric include that courts apply when selecting the most appropriate legal test to unmask the identity of an anonymous poster

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<sup>1</sup> *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>2</sup> *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

<sup>3</sup> *In re Subpoena Duces Tecum to Am. Online, Inc.*, 2000 WL 1210374 (Va. Cir. Ct. Jan. 31, 2000).

on the Internet? Finally, the chapter proposes areas for future research and summarizes the dissertation's findings.

### **Research Question**

The dissertation sought to answer one research question: “What Criteria and Elements Should a Rubric Include That Courts Apply When Selecting the Most Appropriate Legal Test to Unmask the Identity of an Anonymous Poster on the Internet?” This research question involves two broad components. First, the dissertation advanced an analytical mechanism—the rubric—that is largely absent from legal interpretation. Chapter 4 of this dissertation explained the use of the rubric to systematize unmasking analyses. After arguing that rubrics are precisely suited to conduct this type of inquiry, Chapter 5 then addressed the elements that should be in the particular unmasking rubric based on a thorough analysis of the relevant legal opinions, and presented the unified rubric. In Chapter 6, the rubric was applied to a hypothetical situation to demonstrate its utility. These considerations are addressed below.

### **Rubrics are Viable Models for Legal Analysis**

Because rubrics are associated so strongly with social science research (particularly education), the dissertation first overcame the hurdle of applying this analytical mechanism to legal analysis. Models, in general, help researchers organize, and thus utilize, their data properly.<sup>4</sup> They also can help researchers conceptualize “an object or process” to make clear important interrelationships.<sup>5</sup> The adoption of a *model*,

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<sup>4</sup> JAMES JACCARD & JACOB JACOBY, THEORY CONSTRUCTION AND MODEL-BUILDING SKILLS 27 (Guilford 2010), *citing* ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 159–61 (Harper & Row 1964) (explaining scientific research needs an organizational system to make sense).

<sup>5</sup> PAMELA SHOEMAKER, *et al.*, HOW TO BUILD SOCIAL SCIENCE THEORIES 110 (Sage 2004).

in general, posed no issues with respect to mass communications research.<sup>6</sup> It did, however, raise unique concerns when applied to legal analysis—a field in which formal models are largely absent.<sup>7</sup> Focusing on the rationale for the rubric, however, validated its choice when applied to legal analysis. Indeed, the entire purpose of selecting a rubric for analysis was to promote conformity and standardization—aspects of rubrics that often are criticized.<sup>8</sup> To simplify and systematize unmasking analyses—an area of law marred by chaos and inconsistency—a rubric was the ideal mechanism.

### **Structure of the Rubric**

After adopting a rubric as a tool for legal analysis, the dissertation analyzed the proper *structure* for the rubric. Rubrics typically contain four core components, the application of which is discussed below:

- A description of the court’s task;
- A list of questions the court will ask in its unmasking analysis;
- A series of answers to each question, with a weight assigned to each answer; and
- An indication of how much each individual variable is worth in the overall analysis.<sup>9</sup>

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<sup>6</sup> See Harold Lasswell, *The Structure and Function of Communication in Society*, in W. SCHRAMM (ed.), MASS COMMUNICATIONS 117–30 (U. of Illinois 1948) (adopting a communication model); see also RICHARD PETTY & JOHN CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES (William C. Brown 1981) (adopting the Elaboration Likelihood Model).

<sup>7</sup> An exception to this rule is federal sentencing guidelines, which employ mechanistic approaches to determine appropriate sentencing ranges. See Josh Goldfoot, *Sentencing.us: A Free U.S. Federal Sentencing Guidelines Calculator*, available at <http://www.sentencing.us/>, (last visited February 18, 2012).

<sup>8</sup> See Veronica Boix Mansilla *et al.*, *Targeted Assessment Rubric: An Empirically Grounded Rubric for Interdisciplinary Writing*, 80 J. HIGHER EDUC. 334, 337 (May/June 2009) (discussing the criticism of rubrics).

<sup>9</sup> These elements are referred to in the literature as: task description, scale, dimension and dimension description. See DANIELLE STEVENS & ANTONIA LEVI, INTRODUCTION TO RUBRICS: AN ASSESSMENT TOOL TO SAVE GRADING TIME, CONVEY EFFECTIVE FEEDBACK AND PROMOTE STUDENT LEARNING 5 (Stylus 2005) (describing the elements of a rubric).

These considerations were analyzed carefully; they guided the construction of the rubric.

### **Substance of the Rubric**

In addition to structure, a rubric must have substance. Here, an analysis of case law decided in the wake of *Dendrite*, *Cahill*, and *America Online*, revealed five broad guidelines informing the courts' adoption of a particular standard: 1) *who* seeks the poster's identity; 2) *why* the poster's identity is being sought; 3) *who* posts the anonymous information; 4) *what* the subject matter of the underlying speech is; and 5) *where* the information was posted. In addition to these elements (discussed below), the rubric includes a "miscellaneous" provision, enabling judges to exercise discretion in cases involving facts that defy easy categorization. The result is a rubric balancing thoroughness with simplicity.

#### **Who is seeking the poster's identity?**

In conducting an unmasking analysis, courts may find the identity of the *requester* persuasive. Typically, courts will address one of two things: whether the requester is (1) a corporation or individual or (2) a private or public figure.

**Is the requester a corporation or an individual?** Recent case law recognized that corporations are treated like humans in First Amendment analysis. In *Citizens United v. Federal Election Commission*,<sup>10</sup> the Supreme Court treated invalidated a law imposing additional hurdles on corporations and unions to engage in political speech (in the form of political expenditures).<sup>11</sup> Corporations and unions enjoy the same First

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<sup>10</sup> 130 S. Ct. 876 (2010).

<sup>11</sup> *Id.* at 907.

Amendment speech protections as humans.<sup>12</sup> An unmasking analysis, however, does not implicate the same First Amendment concerns—the putative defendant’s speech rights are at stake, *not* the rights of the plaintiff corporation. Thus, courts may—and do—address the parties’ corporate status in the context of an unmasking analysis. Corporate plaintiffs are typically better equipped than individual plaintiffs to protect their interests—they generally have deeper pockets and access to self-rehabilitative mechanisms. Therefore, corporate plaintiffs ordinarily bear a greater burden to show entitlement to revelation.

**Is the requester a public or private figure?** Plaintiffs must meet a minimal burden to warranting unmasking if they are private figures suffering personal harms, such as damage to their reputation (defamation) or harassment. At the other extreme, public-figure corporations suffering purely business-related harms (tortious interference, breach of contract) must meet a strict burden. The differentiation is because the latter group is perceived as significantly more able to protect its interests than the former.

***Why is the poster’s identity being sought?***

Plaintiffs typically seek to unmask an anonymous poster to vindicate harms occurring in three broad categories: (1) personal harm, such as defamation, invasion of privacy, and harassment; (2) interference with business practices, such as breach of duty, unfair competition and/or tortious interference; and (3) copyright infringement. The inquiries tie closely to the plaintiff’s public or private-figure status, and are weaved together in the rubric.

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<sup>12</sup> *Id.*

**Personal harm plaintiffs.** This category of plaintiffs seeks redress for harm to their reputation or overall well-being.<sup>13</sup> If the factual scenario is particularly egregious,<sup>14</sup> courts are more likely to order revelation. In theory, a court would prefer not to deny recovery to a truly damaged plaintiff.

**Interference with business practices.** These corporate plaintiffs seek remedy for harm caused to their business practices by the anonymous speaker.<sup>15</sup> The factual patterns presented in these cases tend to be far less shocking; thus, unmasking analyses are applied dispassionately. These plaintiffs must bear a significant burden to unmask defendants because they are perceived to have access to finances and other resources to self-rehabilitate.

**Copyright infringement.** The assertion of a cause of action for copyright uniformly leads to the adoption of a modified *Dendrite* standard, *Sony Music Entertainment Inc. v. Does 1–40*.<sup>16</sup> Plaintiffs in this must satisfy a minimal burden to prove entitlement to the anonymous poster's identities, but this determination hinges mainly on the type of speech at issue—*illegal* downloading of digital material—commercial speech warranting little to no First Amendment protection.

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<sup>13</sup> See, e.g., *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897 (Pa. Com. Pl. Jan. 28, 2004) (individual seeking recovery for harassment); *Juzwiak v. Doe*, 2 A.3d 428 (N.J. Sup. 2010) (intentional infliction of emotional distress and harassment).

<sup>14</sup> *Doe I v. Individuals*, 561 F. Supp. 2d 249, 251 (D. Conn. 2008) (enabling unmasking where anonymous poster graphically described graphic sexual practices plaintiff enjoyed).

<sup>15</sup> See, e.g., *Koch Indus., Inc. v. Does*, 2011 WL 1775765 (D. Utah May 9, 2011) (federal and common law trademark infringement, federal and common law unfair competition, anticybersquatting provision of Consumer Protection Act, Computer Fraud and Abuse Act violations, breach of website terms).

<sup>16</sup> 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

### **Who posts the anonymous information?**

Courts were strongly swayed to adopt a particular test based on the anonymous defendant's identity. The status of the defendant often supported altering the plaintiff's burden in a revelation analysis—in fact, this element was most persuasive to the courts. Specifically, courts indicated that two subcategories particularly informed the adoption of an unmasking standard: whether the poster was a party, and whether the poster was bound by a preexisting agreement that altered his expectations of privacy.

**Is the poster a party or non-party?** If the poster is a party to the underlying dispute, the court is much more likely to order revelation.<sup>17</sup> Ordinarily, in these circumstances, the requester can demonstrate a *need* to unmask the defendant to serve him with process and proceed with his lawsuit. Without knowing the defendant's identity, the plaintiff cannot secure relief in the courts.

On the other hand, when the poster is a *non-party*, the requester typically must satisfy a much more significant burden for revelation.<sup>18</sup> Courts are reluctant to violate the First Amendment anonymity rights of a poster with only a tenuous relation to the underlying dispute.

**Is there a preexisting agreement?** Courts will defer to the effect of relevant preexisting agreements. Thus, if a poster has ceded his anonymity rights under a Terms

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<sup>17</sup> See, e.g., *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777–78 (N.J. Super. A.D. 2001) (denying motion to quash where anonymous poster was a defendant).

<sup>18</sup> See *Cornelius v. Deluca*, 2011 WL 977054, at \*5 (D. Idaho Mar. 15, 2011) (finding “extra-high hurdle” to unmask a non-party).

of Service agreement,<sup>19</sup> or violated a confidentiality agreement by disclosing sensitive business information,<sup>20</sup> a court will be more inclined to order revelation.

### **What is the subject matter of the underlying speech?**

This inquiry is exceptionally important and may, in fact, be dispositive.<sup>21</sup> In conducting this analysis, courts address whether the underlying speech is (1) commercial, expressive, or “core” political speech, and (2) whether the claims are so egregious—or so inactionable—they warrant adoption of a particular test.

**Is the speech commercial, expressive or “core” political speech?** This inquiry turns on the protection afforded the particular category of speech under the First Amendment. These speech types occur on a continuum from least protected to most protected. While commercial speech enjoys *limited* First Amendment protection, expressive speech enjoys significant protection. “Core” political speech enjoys the strongest protections under the First Amendment.

Courts are unlikely to unmask a poster whose speech is “core” First Amendment discourse—or even purely expressive speech<sup>22</sup>—whereas unmasking a purveyor of commercial speech presents little constitutional concern.<sup>23</sup>

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<sup>19</sup> See, e.g., *Third Degree Films, Inc. v. Does 1–10*, 2011 WL 4759283, at \*4 (N.D. Ind. Oct. 6, 2011) (finding no expectation of privacy where a student provided personal information to university to access the Internet).

<sup>20</sup> *Immunomedics, Inc.*, 775 A.2d at 777 (applying *Dendrite* to unmask a poster who breached a contractual duty of loyalty).

<sup>21</sup> If the underlying speech is “lesser protected” commercial speech, such as illegal downloading of digital materials, then courts must apply *Sony Music Entm’t Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), disregarding the remainder of the rubric.

<sup>22</sup> *Best Western Int’l, Inc. v. Doe*, 2006 WL 2091695, at \*4 (D. Ariz. Jul. 25, 2006) (declining to unmask a poster critical of Best Western).

<sup>23</sup> See *Sony Music Entm’t, Inc.*, 326 F. Supp. 2d at 564–65 (unmasking an alleged illegal downloader after finding his speech warranted little protection).

### **Are the underlying claims particularly egregious—or wholly inactionable? If**

a claim is so egregious on its face that refusing to unmask the poster would constitute an injustice<sup>24</sup>—or so facially deficient that unmasking the poster would itself be unjust<sup>25</sup>—then courts may dispense with a formal unmasking inquiry because under *any* test, the same result would occur. The dissertation hopes to alleviate *ad hoc* decision-making in favor of uniformity; a method for accomplishing this goal is ensuring the rubric is simple enough so as not to deter its use.

### **Where is the information posted?**

The characteristics of the particular forum where the speech occurs may yield the application of a particular unmasking test. In selecting an approach, courts will consider: (1) the extent to which the speech is moderated, and (2) the context of the forum (including its communicative style and topic).

**Is the forum moderated?** The more moderated a forum, the more trustworthy the content on it appears, particularly when the moderator retains a significant amount of control over forum content. Moderators can restrict access to a forum, or restrict the type or characteristics of speech on the forum. Moderators face several options regarding forum control. They may: (1) wholly decline to moderate content<sup>26</sup>; (2) moderate the speech *before* it appears on the forum; or (3) moderate the speech *after* it appears on the forum. The more a moderator controls the *substance* of the forum, the

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<sup>24</sup> In re Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) (declining to upset the lower court's application of *Cahill*, but finding that the plaintiffs' assertions that anonymous posters defamed through sexually charged, vulgar posts warranted unmasking).

<sup>25</sup> See, e.g., Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (finding Sinclair's claims failed under any applicable standard because they were facially deficient).

<sup>26</sup> Few website owners would choose the first option, as the site would soon be overrun by "spam" and incivility.

more he risks waiving his immunity under section 230 of the Communications Decency Act and incurring liability.<sup>27</sup> Because the moderator's act is clearly not in his self-interest, the content he risked liability to protect is perceived as true.

**What is the context of the forum?** Courts may also find persuasive the context of the forum. If the forum is structured such that no reasonable reader would believe its content is *true*, then the plaintiff would suffer a heightened burden to prove entitlement to revelation. If, however, the forum's structure would suggest to a reader that its content were reliable, then the plaintiff's burden would be lessened. Falsities appearing on a reliable forum are more likely to be misread as truths; thus, the plaintiff is more likely to realize harm from the post.

**What is the forum's communicative style?** The style of the forum is relevant in an unmasking analysis. Internet discourse is already somewhat discredited because speakers perceive these communications as naturally imbued with a "freewheeling, anything-goes writing style."<sup>28</sup> However, certain sites rehabilitate this perception by providing proven reliable content, while others—such as Yahoo! message boards<sup>29</sup>—are structured to feed into that negative reputation.

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<sup>27</sup> 47 U.S.C. § 230 (2011).

<sup>28</sup> *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 414 (N.Y. App. Div. 2011). In *Sandals*, which did not discuss the application of *Dendrite*, *Cahill*, or *America Online*, the court found that an anonymous e-mail constituted inactionable opinion. *Id.* at 412 (stating that Sandals failed to show that any of the e-mail's underlying statements were false and that the statements were constitutionally protected opinion). The e-mail, which was sent to numerous undisclosed recipients, claimed that Sandals Resorts mistreated Jamaican natives by accepting subsidies from the Jamaican government but refusing to hire Jamaicans for upper-level positions. *Id.* at 409. The tone and purpose of the e-mail suggested that the author was simply expressing his opinion in an "exercise in rhetoric," which could not support a defamation claim. *Id.* at 414.

<sup>29</sup> *Rocker Mgmt. LLC v. John Does*, 2003 WL 22149380, at \*3 (N.D. Cal. May 29, 2003) (refusing to find actionable defamation because the speech occurred on a Yahoo! message board and, thus, no reasonable person would believe it was true).

**What is the topic of the forum?** Fora dedicated to particular topics—specifically esoteric topics—may bear hallmarks of reliability that more casual forums do not. This inquiry is website-specific, but some factors may suggest a forum is reliable: whether it is geared toward discussion of academic topics; whether experts are used to generate or further discussion; and whether forum rules guide discussion toward reasoned, supported discourse.

### **Potential Limitations of the Research**

The rubric proposed the adoption of a rubric to systematize and simplify unmasking analyses, a goal that breaks relatively untrodden ground in legal research. To accomplish this goal, it consolidated existing case law and “described” the legal landscape in a structured rubric. However, because the dissertation’s approach *is* novel, there are no other “legal” rubrics against which to compare it. Thus, the creation of this rubric could not—of necessity—hinge on analyzing rubric applications that had worked (or failed) below. Because the rubric was created from scratch, future application may eventually reveal unforeseeable weaknesses. Additionally, some elements included in the rubric—in order to maximize flexibility and, by extension, utility—are subjective. For example, the rubric invites courts to consider the “egregiousness” of a poster’s speech, but there are a multitude of individualized definitions of what constitutes egregious speech. Finally, the illustration of the rubric’s applicability was considered in the context of a single (albeit multifaceted) rubric. Systematic application of the rubric across a multitude of factual scenarios should occur to demonstrate it achieves its goals.

### **Future Research**

This dissertation simplified the approach courts should take when determining which unmasking standard should apply when analyzing anonymous speech online.

Given the relative novelty of research involving online communication, numerous questions—albeit ones tangential to this dissertation—remain:

- Does the democratizing nature of the Internet—which enables even disenfranchised people to have a platform—minimize the relevance of the public/private figure distinction, as private figures can more easily rectify falsities?
- Should the Communications Decency Act include an attorney’s fees provision to deter baseless lawsuits?
- What compromise, if any, would enable individuals to maintain anonymity while accommodating lawmakers’ interests in protecting minors online, given that so many proposed bills require users to disclose personal information?
- Does the broad protection of online anonymity devalue the protection of anonymity in the context of “core” political speech?
- Is the concept of “shaming” users by bringing their falsities to light a viable method for forum participants to regulate speech on a particular forum?
- Could a systematic rubric be employed in a different area with convoluted, seemingly subjective, such as copyright infringement?

These questions involve a variety of methodologies—quantitative, qualitative and legal research—that can extend and build upon the research presented in this dissertation.

### **Overview**

Chapter One presented a scenario in which a court was confronted with whether to unmask an anonymous online poster. A discussion of that task revealed that case law largely is settled on three main tests, but the application of those tests appears inconsistent and sometimes *ad hoc*. Recognizing a need for uniformity and clarity in this area of law, this dissertation proposed and defended a rubric to handle that task and then demonstrated how its application would work in a hypothetical situation. The result of the rubric’s application was consistent with case law, indicating that *Dendrite* would

be the most-applied standard, while *America Online* and *Cahill* would be applied less frequently, depending on the unique facts in a case. This rubric should simplify the unmasking task and bolster consistency. Ideally, rubrics can enjoy wider application in legal analysis, bringing increased predictability to judicial decisions.

To transform the rubric from theoretical construct to working guideline for judges to employ, the natural next step is to repackage elements of this dissertation to facilitate dissemination. One possibility is distributing the work as a monograph. Another more realistic possibility is extracting relevant portions of the dissertation and drafting a law review article. Yet another idea is writing a column regarding the rubric in *ABA Communications Lawyer*. Either of these options would enable the work in this rubric to reach the hands of judges for application and, in turn, streamline legal analysis with respect to this issue.

## LIST OF REFERENCES

### Primary Sources

#### Cases

- A.Z. v. Doe, 2010 WL 816647 (N.J. Super. Mar. 8, 2010)
- Abrams v. United States, 250 U.S. 616 (1919)
- Alvis Coatings, Inc. v. John Does 1–10, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004).
- America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001)
- Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)
- Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)
- Best Western Int'l, Inc. v. Doe, 2006 WL 2091695 (D. Ariz. Jul. 25, 2006)
- Bose v. Consumers Union of U.S., Inc., 508 F. Supp. 1249 (D. Mass. 1981)
- Brodie v. Indep. Newspapers, Inc., 2007 WL 6887877 (Md. Cir. Ct. Mar. 12, 2007)
- Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999)
- Cahill v. John Doe-Number One, 879 A.2d 943 (Del. Super. 2005)
- Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332 (D.D.C. 2011)
- Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, (1980)
- Citizens United v. Federal Election Comm'n, 130 S. Ct. 876 (2010)
- Cohen v. Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. 2009)
- Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999)
- Cornelius v. Deluca, 2011 WL 977054 (D. Idaho Mar. 15, 2011)
- D.C. v. R.R., 182 Cal. App. 4th 1190 (Cal. App. 2010)
- Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)
- Directory Assistants, Inc. v. Does 1–10, 2011 WL 5335562 (D. Ariz. Nov. 4, 2011)
- Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001)
- Doe v. Cahill, 884 A.2d 451 (Del. 2005)
- Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008)

Elektra Entm't Group, Inc. v. Does 1–9, 2004 WL 2095581 (S.D.N.Y. 2004)

Enterline v. Pocono Medical Center, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008)

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

Golden Palace, Inc. v. Nat'l Broad., Inc., 386 F. Supp. 107 (D.D.C. 1974)

Gross v. New York Times Co., 623 N.E.2d 1163 (N.Y. Ct. App. 1993)

H.B. Fuller Co. v. Doe, 2006 WL 6080949 (Cal. Super. Ct. Mar. 15, 2006)

Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005)

Immunomedics v. Doe, 775 A.2d 773 (N.J. Super. 2001)

In re Anonymous Online Speakers, 2011 WL 61635 (Jan. 7, 2011)

In re Baxter, 2001 WL 34806203 (W.D. La. Dec. 20, 2001)

In re Subpoena Duces Tecum to Am. Online, Inc., 2000 WL 1210372 (Va. Cir. Ct. 2000)

In re Uddin, 810 N.Y.S.2d 198 (N.Y. App. Div. 2006)

In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D.D.C. 2003)

Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432 (Md. 2009)

Jones v. Psychotherapeutic Cmty. Sys. Ass'n, 2011 WL 2739658 (Del. Super. Ct. Apr. 15, 2011)

Juzwiak v. Doe, 2 A.3d 428 (N.J. Sup. 2010)

Klehr Harrison Harvey Branzburg & Eilers, LLP v. JPA Dev., Inc., 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006)

Koch Indus., Inc. v. Does, 2011 WL 1775765 (D. Utah May 9, 2011)

Krinsky v. Doe 6, 159 Cal.App.4th 1154 (Cal. App. 2008)

La Societe Metro Cash & Carry France v. Time Warner Cable, 2003 WL 22962857 (Conn. Super. Ct. Dec. 2, 2003)

Lassa v. Rongstad, 718 N.W.2d 673 (Wis. 2006)

Lockett v. Ohio, 438 U.S. 586 (1978)

London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008)

Lovings v. Thomas, 805 N.E.2d 442 (Ind. Ct. App. 2004)

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976)

Matherson v. Marchello, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984)

Mathis v. Cannon, 573 S.E.2d 376 (Ga. 2002)

Maxon v. Ottawa Pub'g Co., 929 N.E.2d 666 (Ill. App. 2010)

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)

McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006)

McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010)

Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. Ct. App. 2007)

Montandon v. Triangle Publ'ns, Inc., 45 Cal. App. 3d 938 (Cal. Ct. App. 1975)

Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184 (N.H. 2010)

NAACP v. Alabama, 357 U.S. 449 (1958)

Nat'l Life Ins. Co. v. Phillips Pub'g, Inc., 793 F. Supp. 627 (D. Md. 1992)

New York Times v. Sullivan, 376 U.S. 254 (1964)

Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002 (9th Cir. 2004)

Ottinger v. Journal News, 2008 WL 4375330 (N.Y. June 27, 2008)

Ottinger v. Tiekert, 2009 WL 3260601 (N.Y. Sup. Aug. 27, 2009)

Parsons v. Crown Disposal Co., 15 Cal. 4th 456 (Cal. 1997)

PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001)

Pilchesky v. Gatelli, 12 A.3d 430, 445 (Pa. Super. Ct. 2011)

Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002)

Polito v. AOL Time Warner, Inc., 2004 WL 3768897 (Pa. Com. Pl. Jan. 28, 2004)

Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (Wyo. Ct. App. 1982)

Public Relations Soc'y of Am. v. Road Runner High Speed Online, 799 N.Y.S.2d 847 (N.Y. Super. Ct. 2005)

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)

Reunion Indus., Inc. v. Doe 1, 2007 WL 1453491 (Pa. Com. Pl. Mar. 5, 2007)

Rocker Mgmt., LLC v. John Does, 2003 WL 22149380 (N.D. Cal. May 29, 2003)

Rowland v. Christian, 69 Cal.2d 108 (Cal. 1968)

SI03, Inc. v. Bodybuilding.com, LLC, 441 Fed. Appx. 431 (9th Cir. 2011)

Sable Communications of Calif., Inc. v. F.C.C., 492 U.S. 115 (1989)

Sandals Resorts Int'l Ltd. v. Google, Inc., 925 N.Y.S.2d 407 (N.Y. App. Div. 2011)

Sedersten v. Taylor, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009)

Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798 (Cal. Ct. App. 2002)

Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132 (D.D.C. 2009)

Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009)

Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004)

Stone v. Paddock Publications, Inc., 2011 WL 5838672 (Ill. App. Nov. 21, 2011)

Swartz v. Doe, 2009 WL 7023070 (Tenn. Cir. Ct. Oct. 8, 2009)

Talley v. California, 362 U.S. 60 (1960)

Third Degree Films, Inc. v. Does 1–10, 2011 WL 4759283 (N.D. Ind. Oct. 6, 2011)

Tri-Marketing, Inc. v. Mainstream Mktg. Servs., Inc., 2010 WL 1924456 (D. Minn. May 12, 2010)

U.S. v. Booker, 543 U.S. 220 (2005)

U.S. v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009)

Valentine v. Christensen, 316 U.S. 52 (1942)

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)

Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton, 536 U.S. 150, (2002)

### **Court Orders/Decisions**

Decision Regarding Motion for Order to Show Cause, *Dendrite International v. John Does, et als.* Docket No. MRS C-129-00 (November 23, 2000)

Decision of Superior Court of New Jersey, Chancery Division, *Dendrite Int'l, Inc. v. Doe*, MRS C-129-00, at 1 (Nov. 23, 2000), *available at* <http://www.citizen.org/documents/dendriteappeal.pdf>.

Order Granting in Part and Denying in Part Motion to Quash Deposition Subpoena, Chang v. Regents of the University of California, 2009-00033484-CU-OE (Cal. App. Dep't Super. Ct. Sept. 9, 2009)

Order Granting Petition for Pre-Action Disclosure, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Aug. 17, 2009), *available at* <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-08-17-Order%20Granting%20Cohen's%20Petition.pdf>

Order in the Matter of the Application Pursuant to CPLR 3102 of Richard Ottinger and June Ottinger, No. 08-03892 (N.Y. Sup. Ct. July 1, 2008)

Order to Show Cause in Lieu of Petition, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Dec. 19, 2008)

### **Court Rules**

Illinois Supreme Court Rule 224

Virginia Supreme Court Rule 4:9(c)

### **Federal Statutes**

Authorized Sentences, 18 U.S.C. § 3551

Bipartisan Campaign Reform Act, 2 U.S.C. § 441(b)

Communications Decency Act, 47 U.S.C. § 230

Computer Fraud and Abuse Act, 18 U.S.C. § 1030

Imposition of a Sentence, 18 U.S.C. § 3553

### **State Statutes**

Virginia Code § 8.01-401.1(a) (2002)

## **Secondary Sources**

### **Books and Book Chapters**

JUDITH ARTER & JAY MCTIGHE, *SCORING RUBRICS IN THE CLASSROOM: USING PERFORMANCE CRITERIA FOR ASSESSING AND IMPROVING STUDENT PERFORMANCE* (2001)

BLACK'S LAW DICTIONARY (9th ed. 2009)

May Brodbeck, *Models, Meanings and Theories*, in *READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCES* (Brodbeck, ed.) (1968)

MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* (2001)

PETER CARRINGTON *et al.*, MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS (2005)

BERNARD COHEN, THE PRESS AND FOREIGN POLICY (1963)

CLYDE COOMBS, *et al.*, MATHEMATICAL PSYCHOLOGY: AN ELEMENTARY INTRODUCTION (1970)

JAMES JACCARD & JACOB JACOBY, THEORY CONSTRUCTION AND MODEL-BUILDING SKILLS (2010)

ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE (1964)

THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 35 (Univ. of Chicago 1996) (orig. publication 1962)

Harold Lasswell, *The Structure and Function of Communication in Society*, in W. SCHRAMM (ed.), MASS COMMUNICATIONS (1948)

LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999)

JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS (I. Kramnick ed., 1987) (1788)

DENIS MCQUAIL & SVEN WINDAHL, COMMUNICATION MODELS (1993)

RICHARD PETTY & JOHN CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES (1981).

KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (3d ed.) (1968)

LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 237 (1991)

GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (2007)

EVERETT ROGERS, A HISTORY OF COMMUNICATION STUDY 203 (1994)

MARVIN SHAW & PHILIP COSTANZO, THEORIES OF SOCIAL PSYCHOLOGY (1982)

PAMELA SHOEMAKER, *et al.*, HOW TO BUILD SOCIAL SCIENCE THEORIES (2004)

DANIEL SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET (2007)

DANNELLE STEVENS & ANTONIA LEVI, INTRODUCTION TO RUBRICS: AN ASSESSMENT TOOL TO SAVE GRADING TIME, CONVEY EFFECTIVE FEEDBACK AND PROMOTE STUDENT LEARNING (2005)

## **Court filings (Briefs, motions, etc.)**

Brief of *Amici Curiae* Public Citizen and the American Civil Liberties Union of New Jersey, *Dendrite Int'l, Inc. v. Doe*, Docket No. A-2774-00 (March 29, 2001)

Brief Amicus Curiae of Am. Online, Inc., *Melvin v. Doe*, No. GD99-10264 (Pa. Super. Nov. 15, 2000), at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2001-02-24-Brief%20Amicus%20Curiae%20of%20America%20Online%20to%20the%20Pennsylvania%20Superior%20Court.pdf>

Complaint, *Ottinger v. Doe*, No. 3892/08 (N.Y. Sup. Ct. Feb. 25, 2008)

John Doe No. 3's Brief in Opposition to Plaintiff's Request for Leave to Conduct Limited Expedited Discovery for the Purpose of Obtaining Information to Identify John Doe No. 3, *Dendrite Int'l, Inc. v. Doe*, MRS-C-129-00 (July 11, 2000)

Memorandum of Law in Opposition to Application for Pre-Action Disclosure, *In re Cohen*, No. 100012/09 (N.Y. Sup. Ct. Feb. 18, 2009)

Memorandum of Public Citizen as *Amicus Curiae* in Opposition to the Requested Discovery, *Dendrite Int'l, Inc. v. Doe*, MRSC-129-00 (July 11, 2000)

Opening Brief of Appellant John Doe No. 1, No. 266, *Doe v. Cahill* (July 28, 2005)

Verified Complaint of Dendrite International, Inc., *Dendrite Int'l, Inc. v. Doe*, (May 24, 2000)

## **Journal Articles**

Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005)

David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U.L.J. 1201 (1995)

L. Karl Branting, *A Reduction-Graph Model of Precedent in Legal Analysis*, 150 J. ARTIFICIAL INTELLIGENCE 59 (2003)

Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Qualitative and Quantitative Approaches*, 22 L. & SOC'Y REV. 385 (1988)

Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008)

Andrew Cook *et al.*, *The Taking of a Position: A Reinterpretation of the Elaboration Likelihood Model*, 34(4) J. FOR THE THEORY OF SOC. BEHAVIOR 315 (2004)

Charles Duskow, *Peek-A-Boo I See You: The Constitution, Defamation Plaintiffs, and Pseudonymous Internet Defendants*, 5 FLA. A&M U.L. REV. 197 (2010)

- Victoria Smith Ekstrand, *Unmasking John and Jane Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405 (2003)
- Michael Froomkin, *Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395 (1996)
- Mary P. Gallagher, *Court Erects Roadblocks to Flagging Cyberspammers on the Internet: Four-Step Process Must Be Followed Before Forcing ISP to Disclose*, 165 N.J.L.J. 203 (2001).
- Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595 (2003)
- Ian Gillies, *Real World Toys and Currency Turn the Legal World Upside Down: A Cross-Sectional Update on Virtual World Legalities*, 12 INT'L J. COMM. L. & POL'Y 120 (2008)
- Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U.L. REV. 1109 (2008)
- R. Lance Holbert, *A Typology for the Study of Entertainment Television and Politics*, 49(3) AM. BEHAVIORAL SCIENTIST 436 (2005)
- Ekaterina V. Karniouchina et al., *Impact of Mad Money Stock Recommendations: Merging Financial and Marketing Perspectives*, 73 J. MARKETING 244 (2009)
- Lyrissa Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C.L. REV. 1373 (2009)
- Lyrissa Lidsky, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007)
- Lyrissa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000)
- Veronica Boix Mansilla et al., *Targeted Assessment Rubric: An Empirically Grounded Rubric for Interdisciplinary Writing*, 80 J. HIGHER EDUC. 334 (May/June 2009)
- Tanya D. Marsh, *In Defense of Anonymity on the Internet*, 50-APR RES GESTAE 24 (2007)
- Max McCombs & Donald Shaw, *The Agenda-Setting Function of Mass Media*, 36(2) PUB. OPINION Q. 176 (1972)
- Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992)
- Susan Mirmira, *Business Law: Lunney v. Prodigy Servs. Co.*, 15 BERKELEY TECH. L.J. 437 (2000)

- Hans-Joachim Moachler *et al.*, *Computer Simulation as a Method of Further Developing a Theory: Simulating the Elaboration Likelihood Model*, 5(3) PERSONALITY AND SOC. PSYCH. R. 201 (2001)
- Allen Newell & Herbert Simon, *The Logic Theory Machine—A Complex Information Processing System*, 2(3) TRANSACTIONS ON INFORMATION THEORY 61 (1956)
- Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J. L. & TECH. 194 (2007/2008)
- Lana Penny & Elizabeth Murphy, *Rubrics for Designing and Evaluating Online Asynchronous Discussions*, 40 BRITISH J. OF EDUC. TECH. 804 (2009)
- Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, 79 MAR WIS. L. 8 (2006)
- Jared Piazza & Jesse M. Bering, *Evolutionary Cyber-Psychology: Applying an Evolutionary Framework to Internet Behavior*, 25 COMPUTERS IN HUMAN BEHAV. 1258 (Nov. 2009)
- Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978)
- George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation (“SLAPPS”): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937 (1992)
- Stephen A. Rains, *The Impact of Anonymity on Perceptions of Source Credibility and Influence in Computer-Mediated Group Communication: A Test of Two Competing Hypotheses*, 34 COMM. RES. 100 (2007)
- Adam J. Rappaport & Amanda M. Leith, *Brave New World? Legal Issues Raised by Citizen Journalism*, 25-SUM COMM. LAW 1 (2007)
- Carol Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883 (1996)
- Martin Short *et al.*, *Dissipation and Displacement of Hotspots in Reaction-Diffusion Models of Crime*, 107(9) PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES IN THE UNITED STATES OF AMERICA 1943 (March 2, 2010)
- Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18-FALL COMM. L. 3 (2000)
- Mark Stellmack, *et al.*, *An Assessment of the Reliability and Validity of a Rubric for Grading APA-Style Introductions*, 36 TEACHING OF PSYCH. 102 (2009)
- Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996)
- Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795 (2004)

## News Articles

Associated Press, *Blogger at Center of Lawsuit is Identified*, NEW YORK TIMES, Feb. 4, 2006

BlindGossip, *And She's Out Again*, <http://blindgossip.com/?p=38847>

Carol Cratty, *Authorities: Suicide Attack on U.S. Capitol Foiled*, CNN.COM, Feb. 17, 2012, at [http://www.cnn.com/2012/02/17/justice/us-dc-security-threat-arrest/index.html?hpt=hp\\_t1](http://www.cnn.com/2012/02/17/justice/us-dc-security-threat-arrest/index.html?hpt=hp_t1)

Wendy Davis, *"Skank" Blog Shuttered, but Model Persists with Lawsuit*, ONLINE MEDIA DAILY, Mar. 20, 2009, [http://www.mediapost.com/publications/?art\\_aid=102465&fa=Articles.showArticle](http://www.mediapost.com/publications/?art_aid=102465&fa=Articles.showArticle)

Madison Gray and James S. Snyder, *Top 10 Political Sex Scandals*, TIME, Jun. 8, 2011, at [http://www.time.com/time/specials/2007/article/0,28804,1721111\\_1721210\\_1721112,00.html](http://www.time.com/time/specials/2007/article/0,28804,1721111_1721210_1721112,00.html)

Verne Kopytoff, *AOL Will Bounce Back, Chief Says – Really, This Time It Will; Site's Future is Staked on Premium Content Led by the Huffington Post*, INTERNATIONAL HERALD TRIBUNE, May 9, 2011

Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES, Feb. 13, 1999, at <http://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html>

Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST7

Susan Saulny, *A Defiant Herman Cain Suspends His Bid for Presidency*, N.Y. TIMES, Dec. 3, 2011, at <http://www.nytimes.com/2011/12/04/us/politics/herman-cain-suspends-his-presidential-campaign.html?pagewanted=all>

## Practice Materials

John L. Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative* (1989), available at 150 PLI/CRIM 119

David Siegel, *Supplementary Practice Commentaries*, N.Y. CPLR 3102:5, at 92 (McKinney 2006)

## Press Releases

Press Release, Electronic Frontier Foundation, *Lawsuit Demands Answers About Social-Networking Surveillance* (Dec. 1, 2009), available at <http://www.eff.org/press/archives/2009/11/30>

## Restatements of the Law

RESTATEMENT (SECOND) OF TORTS § 559 (1977)

## Website references

4chan, *4chan*, <http://www.4chan.com> (last visited Feb. 18, 2012)

4chan Moderators, *4chan.com FAQ*, <http://www.4chan.org/faq> (last visited Feb. 18, 2012)

BlindGossip, *And She's Out Again*, <http://blindgossip.com/?p=38847> (last visited Feb. 18, 2012)

BlindGossip, *BlindGossip*, [http://blindgossip.com/?page\\_id=3022](http://blindgossip.com/?page_id=3022) (last visited Feb. 18, 2012)

Metareddit, *Metareddit*, <http://www.metareddit.com> (last visited Feb. 18, 2012)

R/AskScience, *R/AskScience*, <http://www.reddit.com/r/askscience> (last visited Feb. 18, 2012)

Reddit, *Reddit*, <http://www.reddit.com> (last visited Feb. 18, 2012)

Reddit Moderators, *Reddit FAQ*, <http://www.reddit.com/help/faq> (last visited Feb. 18, 2012)

Josh Goldfoot, *Sentencing.us: A Free U.S. Federal Sentencing Guidelines Calculator*, available at <http://www.sentencing.us/> (last visited Feb. 18, 2012)

Miniwatts Marketing Group, *World Internet Usage Statistics News and World Population Stats*, available at <http://www.internetworldstats.com/stats.htm> (last visited Feb. 18, 2012)

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