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The Shadow in the Comments Section: Revealing Anonymous Online Users in the Social Media Age

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ABSTRACT

In 2018, the world is no longer outside our windows, but rather it is just behind the screens of our laptops, tablets, or smartphones. This modern shift in how our society conducts itself opened the door to a distinct sub-breed of humanity: the cyber bully, the "troll," the troubled person finding therapeutic escape by attacking others from the safety of a desk chair. The ability to post anonymously empowers this portion of society to humiliate, harass, and destroy the lives of others, often doing so with a disconnect between the real world and online.

The harm caused by anonymous postings has made its way to the courts numerous times. Plaintiffs seek retribution in some form, but in order to build their case they must first ascertain the identity of their abuser. The problem is that the First Amendment of the Constitution not only protects free speech, it also protects anonymous speech. Thus, courts must perform a balancing act: the interest in the right to speak anonymously versus a plaintiff's right to seek redress. Courts have struggled applying this balance, and the result has been a lack of consistency or certainty as to what a plaintiff and an anonymous defendant can expect in any given case. This Comment examines past decisions applying this balance, the history behind the established right to anonymous speech, and proposes a type-based method solution.

INTRODUCTION

The emergence of social media has changed the way society communicates.[1] Before social media, the major vehicles for mass communication were large corporate newspapers and television companies acting as "the press."[2] Now, social media provides an all-inclusive platform from which anyone can speak to the entire world.[3] Although social media facilitates efficient and widespread communication across the world, it also opens the door for people to abuse it at the expense of others.[4] Many people use these platforms to harass, publicly humiliate, defame, and threaten others, all while shielded by anonymity.[5] Research shows that anonymity

1. *See, e.g.*, Oscar Kimanuka, *Social media has changed the way we communicate*, NEW TIMES (May 2, 2015), https://perma.cc/DTN5-9X87.

2. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) ("When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world.").

3. *See* David Squires, *Social Media's Impact on Journalism*, SOC. CONSTRUCTION OF MEDIA (Oct. 23, 2016), https://perma.cc/MW8W-47H2?type=image ("Today, the audience expects to have a choice in what information they choose to read and most believe they should have an active role in contributing to the content and voicing their opinions. Gone is the past concept of 'media professional' that determines what the audience's needs are in readership.") (citations omitted).

4. *See* Josh Logue, *Who Should Prevent Social Media Harassment?*, INSIDE HIGHER EDUC. (Oct. 22, 2015), https://perma.cc/CQX4-NAA6.

5. Since the early 2010s, anonymous social media has been used to issue threats of mass violence on more than a dozen college campuses, including the University of North Carolina. *See UNC Chapel Hill police make arrest in social media threat,* ABC 11 EYEWITNESS NEWS (Nov. 20, 2014), https://perma.cc/7TF9-C3ZN. They have been used to post racist, homophobic and misogynist comments, and even issue gang threats and propose rape. *See* Jonathan Mahler, *Who Spewed That Abuse? Anonymous Yik Yak App Isn't Telling*, N.Y. TIMES (Mar. 8, 2015), https://perma.cc/SJP9-7AM2.

seems to be a catalyst for destructive behavior on social media platforms.[6] "When people believe their actions cannot be attributed directly to them personally, they tend to become less inhibited by social conventions and restraint."[7]

Research indicates people are more likely to act destructively when they do not perceive a threat of personal consequences.[8] The perception that anonymity shields a person from consequences is why, for example, a mask is often used as a tool to carry out criminal activity.[9] On traditional, non-anonymous social media platforms, people are still aware of the link between their online actions and their real-world identity, which provides a level of restraint. However, this deterrent is eliminated by anonymity.[10]

Issues arise when the constitutional right to anonymous speech is used to illegally harass and defame others.[11] The victims of anonymous defamation must jump through various legal hurdles to ascertain the identity of their abuser once they file a lawsuit.[12] In cases involving defamation,[13] courts are tasked with balancing the interest in protecting a defendant's right to speak anonymously[14] with the interest in protecting a plaintiff's right to seek redress.[15] Generally, this balancing act results in the courts applying

6. Michelle F. Wright, *Predictors of Anonymous Cyber Aggression: The Role of Adolescents' Beliefs About Anonymity, Aggression, and the Permanency of Digital Content*, 17 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 431, 435 (2014).

7. PATRICIA WALLACE, THE PSYCHOLOGY OF THE INTERNET 103 (2d ed. 2016). This concept is especially attractive to younger generations that have a naive disposition towards sharing content, but who have also been warned about the permanence of their digital footprint. Mahler, *supra* note 5.

8. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 57–59 (2014).

9. *Id.*

10. *Id.*

11. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); *see also Anonymity*, ELECTRONIC FRONTIER FOUND., https://perma.cc/GA7X-3R8X (last visited December 10, 2018).

12. Kenneth Linzer, *Courts Ill-Equipped to Police Cyber Threats and Cyberbullying in the Anonymous Age*, TECH CRUNCH (2014), https://perma.cc/K669-7KVX.

13. Defamation is defined as "[m]alicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person." *Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. The Court has interpreted the First Amendment right to speak freely as also implicitly encompassing the right to speak anonymously. *See McIntyre*, 514 U.S. at 357.

15. Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1226–27 (2007). "[A] court attempting to determine when an anonymous speaker can be unmasked for allegedly making defamatory statements should 'adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation.'" *Id.* (quoting Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005)).

one of three capstone standards that set what requirements a plaintiff must satisfy to reveal the anonymous defendant's identity.[16] This is a problem because no court has a uniform method to determine which of the three standards apply. The decision to choose a standard is often left to the discretion of the presiding judge and his or her own perception of the value of the speech at issue balanced against the interests of a plaintiff.[17] It is therefore difficult for plaintiffs to predict the standard a court will apply. This lack of structure ultimately serves as a disincentive to pursue viable claims.

This Comment proposes a structured method for choosing the correct standard requirements a plaintiff must satisfy to obtain the identity of an anonymous defendant in an anonymous defamation suit. Part I will provide an overview of the origins of the anonymity right as a facet of the First Amendment and in the context of defamation. Part II will justify the need for this proposed method by addressing the three standard sets of requirements that this method will seek to apply in an appropriate and consistent manner, highlighting the subjective and arbitrary determinations courts have used to apply them in the past. In addition, it will briefly analyze how one pivotal case implicitly opened the door for using a method of application that is predicated on the type of speech the case concerns.[18] Part III will analyze how the struggle to balance the opposing interests at play has led to the ever-changing social value of speech as the most determinative factor in choosing the standard requirements for revealing anonymous defendants. Finally, Part IV will conclude the analysis by expounding upon the proposed type-based method to determine the applicable standard, considering which types of speech will warrant certain standards, and addressing solutions to potential problems this new categorical approach may face.

I. ORIGINS OF THE RIGHT TO ANONYMITY AND ITS EVOLUTION IN THE INTERNET ERA

The right to speak anonymously finds its origin with the birth of the United States as an independent nation and the creation of the Constitution.[19] Although anonymous writing had been used as an expressive tool long

16. *See* Thomson v. Doe, 356 P.3d 727, 731–33 (Wash. Ct. App. 2015); *see also infra* Part II.B.

17. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176–77 (9th Cir. 2011).

18. *Id.* at 1177.

19. *See* Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Anonymous Speech During the Constitutional Debate*, 28 AM. JOURNALISM 35, 37–41 (2011).

before the Revolutionary Era in the United States,[20] anonymous writing quickly became a staple of American culture in 1787 when congressional delegates met and proposed the adoption of the United States Constitution.[21] This congressional proposal sparked a national debate between the federalists who supported the Constitution and the anti-federalists who opposed it.[22] During this national debate many manuscripts, newspaper articles, and pamphlets were published anonymously in support of, and against, ratifying the Constitution.[23] Anonymity and the use of pseudonyms became a powerful tool for both sides of the debate and were widely used for a number of reasons.[24] Some of the same reasons for the use of anonymous writing during the ratification debate have been used to justify the protection of anonymity under the First Amendment in more recent case law.[25]

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20. *See* Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084–85 (1961).

21. *See* Ekstrand & Jeyaram, *supra* note 20, at 35–36.

22. *Id.* at 36.

23. *Id.* at 35.

24. *Id.* at 37. Ekstrand and Jeyaram lay out six broad reasons for the use of anonymity during the ratification debates. *Id.* They first argue that anonymity was utilized as essentially a marketing tool due to the "longstanding European tradition for anonymous speech and a long tradition of colonial support for anonymous pamphleteers." *Id.* Second, it was used to establish a "rhetoric of fear" and preserving anonymity allowed writers to use more "forceful and inflammatory" rhetoric against the opposition in order to spur on the emotionally charged support rather than relying on the issues themselves. *Id.* at 40–41. The third more obvious reason was for their own safety in public and protecting their reputations. *Id.* at 41. Fourth, some author's desired that support for their side of the debate be genuine and rely on public agreeance with the issues, therefore they remained anonymous in order to prevent the public support to be based on support for the author as an individual or for their political affiliation. *Id.* at 45. Fifth, some authors chose to use pseudonyms collectively, as a tool for forming a core national identity apart from their own individual identities, for example key leaders, John Jay, Alexander Hamilton and James Madison, wrote together under the one pseudonym "Publius." *Id.* at 47–48. In this same respect, it allowed the writers to further the nation's unified identity by connecting the political debate of the time to the struggles of ancient civilizations and to relay longstanding ideals and virtues of history's finest, such as "Caesar" or "Mark Anthony." *Id.* at 47 (citing Eran Shalev, *Ancient Masks, American Fathers: Classical Pseudonyms During the American Revolution and Early Republic*, 23 J. EARLY REPUBLIC 151, 164 (2003)). Lastly, they argue that the writers utilized anonymity to further build the "marketplace of ideas." *Id.* at 49. It is argued that the leaders excluding their identities from debate increased the flow of discussion among the common people and "theoretically created an equal opportunity, a greater chance for equal access to the marketplace, and a more expansive sphere for participation." *Id.* at 51.

25. *See generally* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

In the 1960 Supreme Court case *Talley v. California*, the Court addressed whether a Los Angeles city ordinance prohibiting the distribution of handbills that did not have the name and address of its author or distributor displayed on the cover was an abridgement of the freedom of speech.[26] In holding the ordinance void on its face, the *Talley* Court stated, "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[27] It went on to reference other case law that established "times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified," such as when "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[28]

More recently, in *McIntyre v. Ohio Elections Commission*, the Supreme Court addressed whether an Ohio statute that prohibited the distribution of anonymous campaign literature violated the First Amendment.[29] In finding that the statute was inconsistent with the First Amendment, the *McIntyre* Court stated that anonymous speech is "an honorable tradition of advocacy and of dissent."[30] It continued to state, "Anonymity is a shield from the tyranny of the majority . . . [and] exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[31] The Court made clear that it realized the "right to remain anonymous may be abused when it shields fraudulent conduct," but it went on to say that "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."[32] Thus, the *McIntyre* Court made clear the importance of continuing the tradition of anonymous speech, while at the same time acknowledging that there are countervailing interests in protecting against defamatory speech.[33]

The *McIntyre* Court is not the only court that has acknowledged countervailing interests and their effect on the level of protection the speech is afforded. In fact, the level of protection afforded to speech has often been

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26. Talley v. California, 362 U.S. 60, 60–61 (1960).

27. *Id.* at 64.

28. *Id.* at 65 (citing Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958)).

29. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 334 (1995).

30. *Id.* at 357.

31. *Id.*

32. *Id.* Note the Court's acknowledgement of society's general tendency to afford the value of free speech greater weight than its potential misuse was in the context of political speech. *Id.*

33. *Id.* at 349–50.

decided based on the type of speech at issue.[34] In *New York Times Co. v. Sullivan*, the Supreme Court ruled that with regard to defamation, political speech would be afforded higher protection than other types of speech.[35] A public figure that wishes to recover damages from defamation related to his official conduct is required to prove the statement at issue was made with actual malice.[36] The Court reasoned that the freedom of speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[37] Therefore, protection of political speech was necessary to maintain the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[38] The Supreme Court has also acknowledged a difference in the level of protection afforded to commercial speech, ruling that it has lower protection than political speech but may have more protection in some instances over speech that is neither commercial nor political.[39] Thus, the Supreme Court has made clear that First Amendment protection of speech turns on the type of speech in question.

II. DEFAMATION ACTIONS INVOLVING ANONYMOUS DEFENDANTS

In 1997, the Supreme Court offered insight into the power of the Internet and extended First Amendment protection to online speech.[40] In the 2001 case, *Doe v. 2TheMart.com Inc.*, the United States District Court for the Western District of Washington echoed the Supreme Court's holding that First Amendment rights applied to online speech and emphasized that it must

34. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

35. *Id.*

36. *Id.*

37. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

38. *Id.* at 270.

39. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

40. Reno v. ACLU, 521 U.S. 844, 870 (1997) ("[T]he Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds . . . .This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer . . . .[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

be carefully safeguarded.[41] This Part will begin by analyzing how courts have developed the law protecting against defamation in conjunction with First Amendment anonymity and conclude by analyzing the most prevalent standards used in the United States, as well as the justifications given for applying them.[42]

A. *The Development of Defamation Law, First Amendment Anonymity, and the Internet*

In *Doe v. Cahill*, the Delaware Supreme Court addressed the First Amendment protection of anonymous online speech in the context of defamation.[43] Acknowledging that First Amendment protection does not extend to defamation or libelous speech, *Cahill* quoted the United States Supreme Court and stated, "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[44] Accordingly, the *Cahill* court stated that courts "must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation."[45]

41. Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) ("The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale. For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.").

42. Although different standards have been applied for revealing the identity of an anonymous defendant, the reasons for the lack of consistency in standard have never been explicitly due to the distinction between political or non-political. *See* Martin, *supra* note 15 at 1237 ("[C]ourts have developed standards for unmasking anonymous internet speakers without regard for the content of the speech at issue. In fact, no court has even hinted at developing different standards for cases involving political speech and cases involving non-political speech."). However, this Comment proposes that the distinction between types of speech has implicitly, perhaps even unintentionally had a profound impact on the court's decision to apply a standard. *See infra,* Part III.

43. Doe v. Cahill, 884 A.2d 451, 455–56 (Del. 2005) ("The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate . . . . Through the internet, speakers can bypass mainstream media to speak directly to 'an audience larger and more diverse than any the Framers could have imagined . . . . It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech.").

44. *Id.* at 456 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

45. *Id.* The issue is determining how to adequately balance those interests in a manner that adequately correlates with the speech at hand.

When anonymous online defamation suits were first becoming common, plaintiffs would acquire the information needed to identify the defendant from Internet Service Providers by having their attorneys issue a subpoena.[46] This method was pro-plaintiff and denied the defendant an opportunity to object to the subpoena or seek judicial intervention. However, many jurisdictions found these attorney-issued-subpoenas invalid and instead, only allowed a plaintiff to seek out the defendant's identity by court order.[47] This shift led to the development of the "show cause" requirement where a plaintiff must provide justification for identifying the anonymous defendant.[48] It is during the "show cause" determination that judges balance plaintiffs' and defendants' competing interests.[49]

B. Capstone Standards for Uncovering Anonymous Defendants in Defamation Suits

The standards applied for revealing anonymous defendants range from pro-plaintiff to ones that make revealing a defendant's identity nearly impossible.[50] This section will address the three capstone standards[51]: (1)

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46. Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 802–03 (2004).

47. *Id.*

48. *Id.* at 846.

49. Martin, *supra* note 15, at 1227. At the beginning of the balancing process, a hearing is held to determine whether or not the defendant's identity should be revealed, courts commonly apply different standards for this determination. *Id.* at 1227.

50. *Cahill*, 884 A.2d at 457 ("Before this Court is an entire spectrum of 'standards' that could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment, and beyond that, hurdles even more stringent."). Most cases have applied standards favoring the defendant's right to anonymous online speech. *See* Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132 (D.D.C. 2009); Doe I v. Individuals, 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008); McMann v. Doe, 460 F. Supp. 2d 259, 268 (D. Mass. 2006); Highfields Capital Mgmt. v. Doe, 385 F. Supp. 2d 969, 975–76 (N.D. Cal. 2005); Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 720–21 (Ariz. Ct. App. 2007); A.Z. v. Doe, No. A–5060–08T3, 2010 N.J. Super. Unpub. LEXIS 472, at *2 (N.J. Super. Ct. App. Div. Mar. 8, 2010). However, a few cases have applied more plaintiff friendly standards. *See, e.g.*, Columbia Ins. v. Seescandy.com, 185 F.R.D. 573, 576 (N.D. Cal. 1999).

51. The three standards that will be laid below have been consistently held as the capstone or pinnacle standards for revealing anonymous defendants and most courts that depart from using one of the three often apply some variation or combination of these standards. *See* Martin, *supra* note 15, at 1228–37; *see also* Thomson v. Doe, 356 P.3d 727, 731 (Wash. Ct. App. 2015) ("We now turn to the requisite showing a defamation plaintiff must make on a motion to unmask an anonymous defendant.... The two leading cases are *Dendrite*... [and] *Cahill*...."); *Id.* at 733 ("[O]ne court has significantly strayed from *Dendrite* and *Cahill*. The Virginia Court of Appeals declined to adopt either test, instead

the *Dendrite* "Prima Facie" Standard;[52] (2) the *Cahill* "Summary Judgment" Standard;[53] and (3) the *America Online* "Good Faith" Standard.[54]

1. The Dendrite "Prima Facie" Standard

One of the capstone standards for revealing anonymous defendants is known as the *Dendrite* "Prima Facie" Standard, established in the New Jersey case *Dendrite International Inc. v. Doe No. 3*.[55] In *Dendrite*, the plaintiff requested that the trial court grant it permission to conduct limited discovery for the purpose of ascertaining the identity of defendant, John Doe No. 3, from Yahoo.[56] The plaintiff alleged various claims against the defendant for breach of contract, defamation, and other actionable statements on the Yahoo bulletin board.[57] The trial court denied the plaintiff's request, and plaintiff subsequently appealed.[58] The Superior Appellate Court affirmed the trial court's decision to deny the company's request and went a step further, offering guidelines to the trial courts.[59] It set out a four-part test for plaintiffs to satisfy in order to be granted permission to seek out a defendant's identity.[60]

First, a plaintiff must make efforts to notify an anonymous defendant 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."[61] Second, a plaintiff must present "the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."[62]

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applying a state statute that required . . . a defamation plaintiff seeking an anonymous speaker's identity [to] establish a good faith basis to contend that the speaker committed defamation."); Mallory Allen, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers*, 7 Wash. J.L. Tech. & Arts 75, 81–85 (2011).

52. Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 756–61 (N.J. Super. Ct. App. Div. 2001).

53. *Cahill*, 884 A.2d at 457.

54. *See, e.g.*, *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

55. *Dendrite Int'l, Inc.*, 775 A.2d at 756.

56. *Id.* at 760.

57. *Id.* at 760 n.1.

58. *Id.* at 760.

59. *Id.* The guideline offered to the trial courts were to be used "when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters." *Id.*

60. *Id.* at 760–61.

61. *Id.* at 760.

62. *Id.*

Third, the court must carefully review all information submitted by a plaintiff to determine whether the plaintiff has produced sufficient evidence to support each element of its cause of action against the defendant, or in other words, set forth a prima facie cause of action that could survive a motion to dismiss for failure to state a claim.[63] Fourth and finally, assuming the court finds that a "plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."[64]

The *Dendrite* court failed to expound upon this final balancing of interests although it appears to be similar to the balancing of interests it mentioned before laying out the rule.[65] Before laying out its new standard, the *Dendrite* court stated:

> The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.[66]

Thus, the *Dendrite* court expressed the need to balance interests but did not establish on what basis the trial court should do so.[67] In fact, upon mentioning this needed balance and that the "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue," the court immediately referred to the underlying facts of the case.[68]

Although it was not explicitly stated, the court suggested that the standard chosen was due in large part to commercial speech.[69] The plaintiff, Dendrite International, was a publicly traded company with ties to multiple countries.[70] The anonymous defendant's alleged defamation arose from several posts criticizing the company's change in revenue recognition, admonishing the company president's tactics, and suggesting the company's competitive edge in the market was slipping, causing the president to secretly

63. *Id.*
64. *Id.* at 760–61.
65. *Id.*
66. *Id.* at 760.
67. *Id.*
68. *Id.* at 761.
69. *See id.* at 761 (describing the Web as a "sprawling mall offering goods and services").
70. *Id.* Dendrite is a publicly traded company incorporated in New Jersey with offices in 21 countries. *Id.*

but unsuccessfully look for suitors willing to buy the company.[71] Although the *Dendrite* court designed its prima facie standard within the context of commercial speech, this standard has not exclusively been applied to commercial speech.[72]

2. *The Cahill "Summary Judgment" Standard*

Since the *Dendrite* standard was first applied it has been used in multiple cases across the nation.[73] However, four years later, in *Doe v. Cahill*, the Delaware Supreme Court addressed what it considered the *Dendrite* "Prima Facie" standard and applied a revised version that has become as commonly used the *Dendrite* standard.[74] The standard set out in *Cahill*, commonly called the "Summary Judgment" standard, is perhaps the most burdensome standard for a plaintiff to meet.[75]

In *Cahill*, the John Doe defendant, operating under the pseudonym "Proud Citizen," posted two statements on an online blog sponsored by the Delaware State News.[76] The posts concerned Cahill's performance as a City Councilman of Smyrna, Delaware.[77] Doe accused Cahill of being a "prime example of failed leadership" and a "divisive impediment to any kind of cooperative movement."[78] Additionally, the post suggested that anyone who spends time with Cahill would be "keenly aware" of his "obvious mental deterioration."[79] Cahill obtained a court order requiring the Internet Service Provider, Comcast, to reveal the identity of Doe.[80] Comcast notified Doe of the court order, and Doe moved for an emergency protective order to prevent

71. *Id.* at 762–63.

72. The *Dendrite* Standard has also been used to prevent a plaintiff from moving forward in cases that involve non-political, non-commercial private speech. *See* Doe I v. Individuals, 561 F. Supp. 2d 249, 254–57 (D. Conn. 2008).

73. *See, e.g.*, *id.*; *In re* Ind. Newspapers Inc., 963 N.E.2d 534, 552 (Ind. Ct. App. 2012); Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184, 193 (N.H. 2010).

74. Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005). Note that although the summary judgment standard in this case was applied to speech likely to be considered political, the *Cahill* court made no distinction based on whether the anonymous defendant's speech was political or non-political and the summary judgment standard has since been applied in both contexts. *See id.*

75. *See id.*

76. *Id.* at 454.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 455.

Cahill from obtaining his identity.[81] The trial court applied the "Good Faith" standard and denied Doe's motion.[82]

On appeal, the Delaware Supreme Court rejected the trial court's decision to apply the "Good Faith" standard, finding it too easy for the plaintiff to satisfy.[83] Instead, the court took the opportunity to create and apply a new standard. The court held that "before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion."[84] Accordingly, it adopted "a modified *Dendrite* standard consisting only of *Dendrite* requirements one and three: the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard."[85]

Although the court purported to adopt a modified *Dendrite* standard, it barely resembles *Dendrite*'s requirements. The court completely did away with the second and fourth requirements,[86] and curiously adopted the third requirement of the *Dendrite* standard as if it required a plaintiff to provide sufficient evidence to defeat a motion for summary judgment.[87] The actual third prong of the *Dendrite* standard merely required a plaintiff to provide sufficient evidence to defeat a motion to dismiss, not a motion for summary judgment.[88]

When a defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(6), a plaintiff may survive the motion as long as a plaintiff's complaint provides well-pleaded factual allegations that are enough to raise

81. *Id.*

82. *Id.* This serves as a good example of the indecisive nature of the Court's decision to apply any given standard. There are multiple cases in which the trial court applies one standard and the appellate court applies another. *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d 1168 (9th Cir. 2011).

83. *Cahill*, 884 A.2d at 460.

84. *Id.* It went on to compare its standard to the *Dendrite* standard, and although it declined to adopt the standard, it retained portions of the *Dendrite* standard it felt were necessary to properly balance the interests of a plaintiff and defendant. *Id.* at 460–61.

85. *Id.*

86. *Id.* at 460–61. Regarding the second *Dendrite* requirement, the *Cahill* court stated that the requirement would be "subsumed into the summary judgment inquiry" because in order to survive a motion for summary judgment, the plaintiff will have to quote the defamatory statements set forth in his or her complaint. *Id.* at 460. As to the fourth *Dendrite* requirement, the trial court balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case, the *Cahill* court found it unnecessary because the "summary judgment test is itself the balance" [and it] adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis." *Id.*

87. *Id.*

88. Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 756–61 (N.J. Super. Ct. App. Div. 2001).

a right to relief above the speculative level.[89] In assessing a plaintiff's complaint, a court must ask whether it is plausible for the law to allow recovery on the basis of the factual allegations, assuming that all the allegations in the complaint are true.[90] On the other hand, in order for a plaintiff to survive a motion for summary judgment, the plaintiff must show that there is a genuine issue of material fact, or, in other words, show that the evidence is such that a reasonable jury could return a verdict for the plaintiff based on specific facts set forth by the parties without any assumption of their truth.[91]

It is clear from comparing what is required in a motion for summary judgment versus a motion to dismiss that the summary judgment standard *Cahill* established is a far more stringent standard than the *Dendrite* standard.[92] Thus, it appears the *Cahill* court was misguided in expressing the adoption of the third prong of *Dendrite*.[93] In reality, the court only adopted the first prong notification requirement, which created a new, more stringent standard a plaintiff must meet in order to obtain the identity of the anonymous defendant.

Before laying out this more stringent standard, the court addressed its justification by highlighting the interests at hand.[94] The court first started its justification by addressing the concern that a standard too low will create a chilling effect on potential posters exercising their right to speak anonymously out of fear of a future lawsuit.[95] It then compared this concern with the need for a defamation plaintiff to obtain a "very important form of relief by unmasking the identity of his anonymous critics."[96] The court reasoned that revealing the identity of an anonymous speaker risks leaving that person vulnerable to ostracism, retaliation from a plaintiff, or unwanted exposure.[97]

89. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

90. *See id.*

91. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–49 (1986).

92. *Compare* discussion *supra* Section II.B.1 (the *Dendrite* standard), *with* discussion *supra* II.B.2 (the *Cahill* standard).

93. *See Dendrite Int'l, Inc.*, 775 A.2d at 756–61. The actual third prong of the *Dendrite* standard merely required a plaintiff to provide sufficient evidence to defeat a motion to dismiss, not a motion for summary judgment. *Id.*

94. Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

95. *Id.* at 457 ("The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.").

96. *Id.* The court singles out public figures specifically when it references defamation plaintiffs. *Id.*

97. *Id.*

The fear the court expressed derived from a surge in plaintiffs seeking to reveal the identity of the defendants under an easily met standard, only to use the new found knowledge of the defendant's identity to engage in "extra-judicial self-help remedies."[98] The court stated, "This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked."[99]

Thus, the *Cahill* court revealed that its real concern was the potential chilling on public debate regarding important issues.[100] This is not always a concern in defamation cases that involve one private individual defaming the personal life of another private individual. However, this concern does make sense in the context of public figures and political speech, which was the type of speech at issue in *Cahill*.[101] The court did not specify whether the standard it created in *Cahill* should be applied broadly across the spectrum of speech types at issue in any given defamation claim, or if it should apply only to political speech. Nonetheless, it is clear the standard is aimed at political speech at the expense of a public figure.[102]

3. *The America Online "Good Faith" Standard*

The third standard, and most plaintiff friendly compared to *Dendrite* and *Cahill*, is the "Good Faith" standard established in *In re Subpoena Duces Tecum to America Online, Inc.*[103] In *America Online*, the plaintiff company subpoenaed America Online (AOL) to reveal four anonymous defendants who were subscribers.[104] The plaintiff asserted that defendants used online chat rooms to publish defamatory material, misrepresentations, and confidential insider information concerning the plaintiff company "in breach

98. *Id.* These anomalistic lawsuits came to be known as "Strategic Lawsuits Against Public Participation" or SLAPP suits, and many states adopted Anti-SLAPP laws to prevent this abuse of the system. Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 416 (2003).

99. *Cahill*, 884 A.2d at 457.

100. *Id.* ("We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously.").

101. *Id.* ("The parties inform us that we are the first State Supreme Court to address this issue, particularly in the context of a case involving political criticism of a public figure.").

102. *See id.*

103. *In re* Subpoena Duces Tecum to Am. Online Speakers., 52 Va. Cir. 26, 26 (Va. Cir. Ct. 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

104. *Id.* at 26.

of the fiduciary duties and contractual obligations owed."[105] In response, AOL moved to quash the subpoena, arguing that the subpoena "unreasonably impairs the First Amendment rights of the John Does to speak anonymously on the Internet."[106] After assessing the subpoena's burden on the defendants' First Amendment rights, the court established a new standard for revealing the identity of defendants, ruling that

> a court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.[107]

In justifying this amiable standard, the *American Online* court pointed to the potential dangers of the unlimited communicative power of the Internet.[108] It stated, "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."[109] Finally, the court held that "[t]hose 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."[110] *America Online* and *Dendrite* both deal with what would be considered commercial speech and they apply significantly different standards, yet their justification for applying different standards is essentially the same.[111]

In expounding upon the capstone standards and the cases that created them, it is clear that there is no congruency in the way courts have applied the various standards. Each court stated it must balance the interests in

105. *Id.* at 26–27.

106. *Id.* at 28.

107. *Id.* at 37.

108. *Id.* at 34 ("[T]he Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored.").

109. *Id.* at 34–35 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996). First Amendment jurisprudence has always "embodie[d] an overarching commitment to protect speech . . . but, without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems." *Denver Area Educ.*, 518 U.S. at 741.

110. In re *Subpoena Duces Tecum to Am. Online Speakers*, 52 Va. Cir. at 35.

111. *Compare supra* note 67 and accompanying text, *with supra* note 109 and accompanying text.

protecting First Amendment anonymity against the need to provide a plaintiff with a remedy, but the courts applied different standards to similar facts and the same standards to very different facts. The only justification for applying one standard over another is the particular court's view of the facts. However, in some cases such as in *Dendrite* and *Cahill*, it appears the applied standard is chosen more so due to the type of speech at issue, and not the facts.[112]

In light of this understanding, the better solution is abandoning adherence to the ambiguous balancing system these courts have attempted to apply and creating a streamlined approach under which every court can apply the standard that correlates with the type of speech at issue. This approach appreciates the courts' interest in protecting First Amendment anonymous speech, but it also acknowledges the interest of a plaintiff, not only in seeking redress, but also in the time, money, and expertise that must be applied in bringing suit against an anonymous defendant. It is unreasonable to expect a plaintiff to bring a claim before the court without knowing what amount of evidence will suffice to reveal the defendant and obtain more useful discovery.[113] Furthermore, it is unreasonable to subject a plaintiff to a heightened standard when its claim involves neither political nor commercial speech.[114]

C. *In re Anonymous Online Speakers: The Voice of Reason*

In 2011, the United States Court of Appeals for the Ninth Circuit illustrated the inconsistency in choosing a given standard and offered a solution.[115] In *In re Anonymous Online Speakers*, the issue presented was whether the identities of five anonymous speakers should be revealed to the plaintiff.[116] The plaintiff, Quixtar, Inc., alleged that a competing company, Signature Management TEAM, defamed it by creating an online smear campaign.[117] The defamation was carried out by the five anonymous authors from five different online sources, and Quixtar believed the five authors were employees of TEAM.[118] Similar to other courts facing this issue, the Ninth Circuit began its opinion by pointing to the justification for protecting

112. *See* Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 756–61 (N.J. Super. Ct. App. Div. 2001).

113. *See infra* Part III.

114. *See infra* Part III.

115. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011).

116. *Id.* at 1172.

117. *Id.*

118. *Id.*

anonymous speech.[119] It stated, "[T]he ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without 'fear of economic or official retaliation . . . [or] concern about social ostracism.'"[120]

The court then addressed the value of speech as the determining factor for the degree of scrutiny that is generally applied to the freedom of speech.[121] It presented examples of the level of scrutiny applied to the three common forms of speech: political speech, commercial speech, and unprotected speech.[122] Each category of speech is afforded a different level of protection, and, although the *Anonymous Online* court did not explicitly say it, the level of protection is in direct correlation with each particular form of the speech's social value.[123] The court went on to present an overview of the various standards that have been applied, including the "Prima Facie" standard from *Dendrite* and the "Good Faith" standard from *America Online*.[124] It then considered the lower court's decision to apply the "Summary Judgment" standard from *Cahill*.[125] While understanding the application of *Cahill*, the court stated the lower court "appropriately considered the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action."[126] Thus, operating under the premise that the lower court "has wide latitude in controlling

119. *Id.* at 1172–73.

120. *Id.* at 1173 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995)).

121. *Id.* ("The right to speak, whether anonymously or otherwise, is not unlimited, however, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue.").

122. *Id.* Such as fighting words or obscenity. *Id.*

123. *Id.* The court references political speech's importance in the history of the country as justification for it having the highest level of protection. *Id.* (citing Meyer v. Grant, 486 U.S. 414, 425 (1988)). It then addresses commercial speech's limited measure of protection based on its lower value than political speech, but then implies that the protection is lowered when the speech is misleading or unlawful, or in other words of lesser social value. *Id.* (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)). It concludes its examples by expressing that speech like fighting words and obscenity are afforded no protection at all, therefore implying that in certain circumstances, speech is given no protection because it has no social value. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

124. *Id.* at 1175–76.

125. *Id.* at 1176.

126. *Id.*

discovery," the Ninth Circuit refused to overturn the lower court's decision to apply *Cahill* unless there was clear error; it ruled there was not.[127]

Despite finding that the lower court did not err in applying the *Cahill* "Summary Judgment" standard, the court stated that "[i]n the context of the speech at issue . . . *Cahill's* bar extends too far" and then suggested "the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes."[128] The court explained by stating, "The specific circumstances surrounding the speech serve to give context to the balancing exercise."[129] Although the *Anonymous Online* court's suggestion explicitly mentions that the "nature of the speech" should be a driving force in choosing which standard to apply, it implied that this "nature" directly correlates with the type of speech at issue.[130] Thus, *Anonymous Online* implicitly suggested that the type of speech at issue should be the determinative factor in choosing which standard to apply. In contrast, Part III addresses the determinative factor that currently predominates court decisions: the social value of speech.

III. SOCIAL VALUE: AN OUTDATED DECIDING FACTOR

As previously stated, the Supreme Court has made clear that First Amendment protection of speech turns on the type of speech at issue.[131] Although courts continue to protect anonymous speech based on the *type* of speech, courts have turned from type-based consideration and opted to afford protection for speech based on the "value" of its content.[132] Arguably, type-based considerations and value-based considerations are one in the same; after all, the decisions to afford one type of speech more protection than another ultimately turned on how socially valuable it was.[133] However, as

127. *Id.* at 1176–77 (quoting White v. City of San Diego, 605 F.2d 455, 461 (9th Cir. 1979)).

128. *Id.* at 1177 (citing Doe v. Reed, 561 U.S. 186, 194–96 (2010); Perry v. Schwarzenegger, 591 F.3d 1147, 1160–61 (9th Cir. 2010)).

129. *Id.*

130. After mentioning the nature of speech as a driving force, the court went on to give the example that "in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle." In re *Anonymous Online Speakers*, 661 F.3d at 1177.

131. *See infra* Part I.

132. George H. Carr, Note, *Application of U.S. Supreme Court Doctrine to Anonymity in the Networld*, 44 CLEV. ST. L. REV. 521, 536 (1996) ("American free-speech jurisprudence has long recognized that speech is protected according to the valuation of its content by the government.").

133. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964).

society has entered into a more advanced technological age and communication across the Internet has grown, courts have struggled with applying value-based First Amendment principles in a consistent manner.

In applying the First Amendment to online defamation, some courts, as seen in *America Online*, have voiced concerns for the potential dangers of the Internet.[134] Their apprehension is based on the Internet's ability to disseminate wrongful or defamatory information broadly and at an unmatched rate of speed.[135] This problem has only intensified with the advent of social media, especially for young adults and teenagers who devote a great deal of their social interactions to online communication.[136] In an instant, a person can be the victim of pernicious defamation made publicly available to everyone they interact with online and in real life.

The argument against such dangers is the idea that online communication is often filled with "hyperbole, invective, short-hand phrases and language not generally found in fact-based documents" or "exaggeration, figurative speech and broad generalities."[137] Such speech is commonly viewed by society as lacking credibility, so the potential for online speech to result in actual harm to a plaintiff is not cause for concern.[138] However, even this view of online communication may be disputed by those who believe that society has gradually transitioned to the Internet for the bulk of its information over time, and that social media platforms have become the hubs for interpersonal communication.

Although society may still look to trusted sources for its news, it is at least arguable that information may be perceived with the same amount of credibility when it comes from an individual's social media page rather than

134. *See, e.g.*, *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

135. *See id.*

136. *See* Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), https://perma.cc/R8A2-8X9F. According to Pew Research Center surveys of social media use, "some 88% of 18- to 29-year-olds indicate that they use any form of social media. That share falls to 78% among those ages 30 to 49, to 64% among those ages 50 to 64 and to 37% among Americans 65 and older." *Id.* Among U.S. adults who say they use Twitter, 26% use the site several times daily, while an additional 20% admit to using it about once daily. *Id.* The percentages increase substantially for Instagram, Snapchat, and Facebook. *Id.*

137. *See* Glob. Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1267–68 (C.D. Cal. 2001) ("[T]hese postings . . . lack the formality and polish typically found in documents in which a reader would expect to find facts.").

138. *See id.* at 1268.

a longstanding news outlet.[139] These countervailing arguments are capable of swaying courts to assess the value of speech in different ways. In short, the value of anonymous online speech is subject to great flux which results in inconsistent determinations by courts because they have no choice but to rely on their own assessment of the speech and its effect on its audience's perception of fact.

This subjective value determination plays a decisive role in whether the identity of an anonymous defendant is revealed or protected.[140] The more socially useful the content of the speech is, the more likely a court will seek to protect the anonymity of its author under the First Amendment. Additionally, the less impactful the speech is on the audience's perception of fact, the more likely a court will find no reason to reveal the identity of the anonymous author.[141] In contrast, when the content of the speech has little to no social usefulness or when the effect on the reader's perception of fact is greater, it is more likely that a court will allow a plaintiff to obtain the anonymous author's identity.[142]

Although the court may intend to make these determinations objectively, the evolving nature of online communication, combined with debatable reliability, unavoidably causes the determination of value to be more subjective than intended. As a result, parties to a defamation action could be subjected to any one of the applicable standards for revealing the identity of a defendant. This could leave plaintiffs who have suffered reputational harm on a smaller scale subjected to a standard that is very burdensome to meet only because the anonymous defendant had a small audience or is often sarcastic in his posts. On the other hand, anonymous

139. "In a recent survey, 35 percent of respondents ages 18–29 listed social media as their most helpful source of information. For ages 30–49, social media came in third, behind news and cable TV websites." Lisa Goldsberry, *Is social media more influential than the news media?*, AXIA PUB. REL. (Dec. 28, 2016) https://perma.cc/EB8F-X8JW. "Research shows that people don't often differentiate between news that comes from a traditional outlet, such as CNN, and information that comes from questionable sources (e.g., passed on by the cousin of a friend). This makes it easier for false information to spread quickly." *Id.* "Younger [people] are often more concerned about their social networks. In fact, studies show that people ages 18–49 trust news and information shared by their friends more than from any other source." *Id.*

140. *See supra* Part II. Although the cases cited in Part II applied one of the three categorical standards to determine whether the defendant's identity should be revealed, each court still considered the value of the speech at issue in choosing a standard to apply.

141. *See Glob. Telemedia Int'l*, 132 F. Supp. 2d at 1267–71 (finding that because of the context of the posts, it is more likely to be viewed as an opinion and not a credible source of fact, and therefore the plaintiff has no actionable claim).

142. Nicosia v. De Rooy, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999) (citing Underwager v. Channel 9 Austl., 69 F.3d 361, 366–67 (9th Cir. 1995); Info. Control Corp. v. Genesis One Comput. Corp., 611 F.2d 781, 784 (9th Cir. 1980)).

defendants who voice their grievances about a company may be subject to a very low standard for revealing their identity because the court finds their speech has a detrimental effect on a plaintiff. Some scholars argue that the *McIntyre* decision wished to do away with this possibility by making value determinations irrelevant to the level of protection afforded to speech and to the standard applied in revealing an anonymous speaker's identity.[143] However, in the online speech cases following *McIntyre*, the value determination did not stay irrelevant, but instead became a component of balancing the interests of a plaintiff with the interests in the right to anonymous speech.[144]

In summary, the choice of which standard to apply when a plaintiff requests the identity of an anonymous defendant hinges on the value determination. The value determination allows a plaintiff to be subjected to any standard based on the given court's wavering view of various extenuating circumstances surrounding the speech at issue.[145] This method complicates revealing a defendant's identity and creates confusion as to what standard will apply to speech in each situation. Plaintiffs seeking redress cannot accurately gauge the standard they will have to meet in court, so they are discouraged from filing potentially legitimate claims.

IV. MOVING FORWARD FROM *ANONYMOUS ONLINE*: THE "TYPE METHOD"

The approach suggested by *Anonymous Online* implicitly considers the type of speech at issue as a basis for revealing the defendant's identity.[146] The type of speech at issue has been a determining factor for the amount of protection afforded to anonymous speech, thus it seems natural for it to also be a determining factor for the appropriate standard of revealing the defendant's identity to a plaintiff.[147] If determining the standard was based on the type of speech, the unpredictability that arises from a wide open value determination would be substantially reduced, if not cease to exist. The decisions that established the different levels of protection for the different types of speech was done based on the value determination,[148] so it is largely unnecessary to reopen Pandora's box. Therefore, this Comment proposes that the standards applied in *America Online*, *Dendrite*, and *Cahill* be

143. *See* Carr, *supra* note 133, at 536–37.

144. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011).

145. *See supra* Part II.

146. *See supra* Part II.C.

147. *See supra* notes 17–22.

148. *See supra* Part II. Although the cases cited in Part II applied one of the three categorical standards to determine whether the defendant's identity should be revealed, each court still considered the value of the speech at issue in choosing a standard to apply.

dissolved as individual standards, and instead be fused together as multiple extensions of one universally applied type-based approach that this Comment will refer to as the "Type Method."

A. Implementing the "Type Method"

Under the "Type Method," courts will begin with notifying anonymous speakers that they are subject to subpoena. This was the case in the original *Dendrite* and *Cahill* standards.[149] Once the anonymous defendants have been properly notified, the courts will assess the type of anonymous online speech at issue based on: (1) the content of the speech and (2) who or what the speech allegedly defames. The results of this assessment determine which branch of the "Type Method" the speech will fall under. As stated above, the branches will take the form of the three capstone standards from *Cahill*, *Dendrite*, and *America Online*. However, instead of allowing courts to decide the applicable standard based on a general balancing "between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously," courts will simply apply the appropriate standard to the correlating type of speech.[150]

If the speech addresses a public official or entity and the content of the message pertains to an issue that would be relevant to the public, then this should be sufficient to be considered political speech.[151] Thus, the anonymous speaker's identity should be protected under the most stringent *Cahill* standard. If the speech addresses a company, a corporate entity, or one of its agents, and the content of the message pertains to an issue involving the business decisions, financial transactions, or the public relations of that company, then the speaker's identity should be protected under the intermediate *Dendrite* standard. Finally, if the speech is addressed to a private individual or group, and the content of its message relates to issues that are not relevant to the public, then the speaker should be protected under the plaintiff-friendly *America Online* standard. Under the "Type Method," plaintiffs will be able to better prepare their claims with predictability, which will save them time, money, and effort. The "Type Method" will also continue to afford the necessary and appropriate amount of protection to the defendants' First Amendment rights.

149. Doe v. Cahill, 884 A.2d 451, 460–61 (Del. 2005); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

150. *Cahill*, 884 A.2d at 460.

151. *See generally* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

B. *Justifying the "Type Method" and Which Standard Applies to Which Speech Type*

The idea behind the "Type Method" is to streamline the process of choosing the applicable standard, create a more efficient and consistent judicial system, and adequately protect the constitutional right to anonymous speech. However, the most important issue the "Type Method" addresses is the common trend of applying a standard too high or too low for the speech at issue, which either results in an inappropriately high burden on a plaintiff's claim or a disregard for the rights of a defendant.

The *Dendrite* and *Cahill* decisions both arose out of a lower court's decision to apply a standard too low for revealing the defendant's identity based on the speech at issue.[152] The *Anonymous Online* decision arose from a lower court's decision to apply a standard too high.[153] The mistakes made in these lower court cases are a result of an improper balancing of interests. Thus, the "Type Method" seeks to eliminate the possibility of mistakes by removing the balancing mechanism that creates the issues. Each of the types of speech have already been weighed upon by the courts and the amount of protection they each deserve has already been decided.[154] Thus far, these established levels of protection based on the type of speech have, more often than not, produced just outcomes.

As explained in Part I, political speech has been set apart from all other forms of speech as having the strongest impact on society, having the greatest presence in the history and tradition of our nation, and being the most necessary to drive society forward and give a voice to every person.[155] These are important considerations that have caused the Supreme Court and various other courts to afford political speech the highest degree of protection. It is only fitting that speech that would be classified as political speech in anonymous defamation cases be afforded a highly protective standard for revealing anonymous defendants as well. Although the *Cahill* court was not explicit, its opinion implied that the political nature of the speech at issue was a driving force in creating the overly burdensome "Summary Judgment" standard.[156] The plaintiff will be considerably burdened in such cases, but it is necessary to prevent a chilling effect on political speech due to the reasons mentioned above.[157]

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152. *See supra* Part II.B.

153. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011).

154. *See, e.g.*, *N.Y. Times Co.*, 376 U.S. at 279–80; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566–71 (1980).

155. *N.Y. Times Co.*, 376 U.S. at 270–71.

156. Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005).

157. *N.Y. Times Co.*, 376 U.S. at 270.

Commercial speech on the other hand is not quite as impactful and important to our society as political speech, so it is afforded less protection.[158] However, courts have recognized that commercial speech is important to society with respect to the desire that businesses operate in an open and honest way. Therefore, speech pertaining to the business of companies, organizations, or corporations should be afforded greater protection in some instances.[159]

Any time finances are at play, the need for unencumbered communication elevates; more is at stake because society must be able to put its trust in the products or services it spends its money on. The more protection afforded to commercial speech, the more control society has over commercial business.[160] It allows the individual the power to keep an honest business honest. Because commercial speech may need more protection than regular speech, but it is not as socially valuable as political speech, it may be afforded an intermediate degree of protection. It follows suit that if commercial speech is afforded an intermediate form of protection in a general sense, then the intermediate "Prima Facie" standard for revealing anonymous defendants would appropriately apply. In *Dendrite*, the speech at issue was commercial, and the court's consideration of the type of speech weighed heavily upon its decision to apply a higher standard than the "Good Faith" standard applied by the lower court.[161] The *Dendrite* "Prima Facie" standard adequately protects the defendant, but it doesn't overly burden a plaintiff that may suffer considerable loss due to the defendant's speech.

Finally, there are defamation cases dealing with speech that is neither political nor commercial.[162] These cases involve one private individual posting online about another private individual, which is most often the case on social media. Consider the classic hypothetical case of two high school classmates who do not get along. After a feud or fallout, one decides to deal with his or her frustrations by posting malicious lies about the other under a pseudonym on Twitter or an anonymous social media site such as the late Yik Yak.[163] These types of posts or statements have little to no social value

158. *See generally* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

159. *Va. State Bd. of Pharmacy*, 425 U.S. at 764–65.

160. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980).

161. *See* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 765–69 (N.J. Super. Ct. App. Div. 2001); Doe I v. Individuals, 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008).

162. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

163. Yik Yak was an anonymous social media app that allowed users without assigned usernames or handles to post to an open forum based on proximity. Nick Statt, *Yik Yak, once valued at $400 million, shuts down and sells off engineers for $1 million*, THE VERGE (Apr.

and generally only lead to the pain and suffering of the victim.[164] Although the defendant in such a case still has First Amendment rights to speak freely, a plaintiff may become ostracized at school and be ridiculed by his or her classmates as a result of the post. It is difficult to imagine how a court could find that the constitutional right to anonymous speech would outweigh a plaintiff's right to seek redress in such a case.

The primary goal of First Amendment free speech has been to avoid a chilling effect on free expression and promote the exchange of ideas that are socially beneficial.[165] Posts like those in the high school hypothetical present no social benefit, and imposing an inappropriately high standard upon a plaintiff in such a case would promote destructive speech that could harm the lives of its subjects victims, especially children and young adults who spend much of their time on social media.[166] Thus, non-political, non-commercial speech should be afforded the baseline form of protection and thus the lowest level standard for revealing a defendant's identity. The plaintiff friendly "Good Faith" standard from *America Online* is the most exacting standard and would appropriately balance the interests at hand.[167]

Applying the standards according to the type of speech ultimately serves the ends of justice. Utilizing the "Type Method" will generally come to the same results as a court would by balancing the interests; it just substantially reduces the time-consuming process, the unpredictability, the possibility that a defendant will be unfairly revealed, or the possibility that a plaintiff will be unfairly denied the identity of a defendant.

CONCLUSION

The current manner in which courts across the nation decide whether a defendant's identity should be revealed in an anonymous defamation suit is inconsistent and often leads to unjust results. This is due to the often-subjective value determination made by the courts regarding the particular speech at issue in a given case. A court's ability to determine social value

28, 2017, 7:49 PM), https://perma.cc/PS7M-RHC2. It "largely rode to popularity based on college-aged users dishing out secrets and being cruel to one another under the protection of anonymity," but eventually shut down in 2017. *Id.*

164. *See* Rick A. Waltman, Note, *Veiling Cyberbullies: First Amendment Protection for Anonymity Per Se Strengthens the Voice of Online Predators*, 36 U. LA VERNE L. REV. 145, 146–47 (2014).

165. *See* Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

166. *See* Waltman, *supra* note 165.

167. *See, e.g.*, *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 384–85 (Va. 2001).

may lead to affording speech more or less protection than justice requires and ultimately unfairly burdening one of the parties.

To prevent unjust results and inconsistent decisions, courts should reject the balancing of interests based on the ad hoc valuation of the speech and replace it with an approach that determines the standard a plaintiff must meet to reveal the defendant's identity by referring solely to the type of speech at issue and putting aside whether the speech qualifies as defamatory in that instance. Under the "Type Method," the type of speech at issue will be determined by who or what the speech addresses and what the content of the message pertains to. This will create a streamlined approach that will impose the highest standard to reveal the identity of a speaker of political speech, an intermediate standard for the speaker of commercial speech, and the base level "Good Faith" standard for the speaker of ordinary, non-political, non-commercial speech. This approach will also create efficiency in the courts, effectively protect the First Amendment right to anonymous speech, and incentivize victimized plaintiffs to bring viable defamation claims before the courts, instead of resorting to self-help or unjust defeat.

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