

Unmasking Anonymous Bloggers: A Balanced Legal Standard for Defamation Lawsuits in Cyberspace

Laura Kolat
Cleveland-Marshall College of Law

INTRODUCTION

The freedom to speak anonymously is an established principle of American jurisprudence. Currently, the courts' approaches to an Internet blogger's ability to blog anonymously are threatening the future of this sacrosanct principle. Anonymous blogging is an important First Amendment issue that reflects major shifts within the field of defamation law. Unlike traditional defamation defendants, the anonymous blogger remains unidentified because the blogger's screen name is the only ascertainable information. When plaintiffs sue anonymous bloggers because of defamatory comments, courts must first determine whether to reveal the blogger's identity. The recent increase in these claims places this important judicial inquiry in uncharted territory. As a result, courts have adopted four standards to decide whether to protect an anonymous blogger's free speech rights or a plaintiff's interest in redressing online defamation. The application of these varying standards has been confusing, unpredictable, and unfair to defendants. This Note articulates a new standard, the "Equilibrium Standard," that appropriately balances a defendant's First Amendment right to speak anonymously and a plaintiff's right to protect his reputation. In contrast to the four standards, the "Equilibrium Standard" reconciles both the important issues facing defamation victims and anonymous bloggers and the uncertainty that courts face in the area of anonymous Internet defamation.

I. THE ISSUES

In recent years, the Internet has expanded opportunities for people to post their views for the world to see in the form of anonymous blogs. Although many provide useful information, some bloggers use their blogs and the cover of anonymity to mask postings that are intended only to be crass, insulting, and defamatory. Like many who use the Internet to disseminate information, some bloggers choose to remain anonymous due to a fear of a potential defamation action.¹ These anonymous bloggers, however, cannot always avoid the unfavorable outcome of legal consequences because plaintiffs continue to bring civil suits to silence them and reveal their identities.²

In defamation cases brought against bloggers who anonymously post defamatory comments, the court, at the very outset, is required to determine whether to reveal the identity of the blogger.³ Unmasking anonymous bloggers should be difficult to do in order to protect the blogger's First Amendment right to speak anonymously on the Internet.⁴ On the other hand, when deciding whether to reveal the identity of the blogger, the court must be cautious not to compromise the plaintiff's right to due process. These competing arguments have complicated the application of First Amendment rights to anonymous bloggers because the blogger's identity is material to any defamation suit.

In deciding whether to protect a blogger's anonymity, courts have adopted a wide

¹ Jennifer O'Brien, *Putting A Face To A (Screen) Name: The First Amendment Implications of Compelling ISPS to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 *FORDHAM L. REV.* 2745, 2748 (2002).

² Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 *DUKE L.J.* 855, 860 (2000) (illustrating that defamed victims continue to bring legal action). *See also id.* at 876 (discussing plaintiffs seeking vindication).

³ Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 *OR. L. REV.* 795, 859 (2004).

⁴ *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("The right to speak anonymously extends to speech via the Internet.").

spectrum of standards. A Virginia trial court, for example, adopted the “good faith standard” when determining whether to unmask the identity of an anonymous defendant.⁵ This standard requires the Internet Service Provider (ISP), a third party, to disclose the anonymous defendant’s identity only when the court is satisfied with the pleadings, the plaintiff has a good-faith basis for the claim, and the defendant’s identity is necessary to advance the claim.⁶

Other courts employ a “summary judgment standard.”⁷ This standard requires the court to “[c]arefully review the complaint, and all the information provided to the court in addition to the complaint, to determine if the plaintiff has set forth a *prima facie* cause of action against the fictitiously named anonymous defendants.”⁸ If the plaintiff has met this burden, then the court will unmask the blogger.

A third standard used by courts is the “*Dendrite* standard.”⁹ This standard requires the plaintiff to identify the exact language believed to be actionable and “provide sufficient evidence supporting each element of its cause of action.”¹⁰ Upon satisfaction of these requirements, the court balances the necessity of disclosure against the First Amendment right to speak anonymously.¹¹

A final standard is the “opinion-centered standard.”¹² Courts utilize a “totality of the circumstances” approach and first consider whether the alleged defamatory statement is fact or

⁵ See *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, 52 Va. Cir. 26, *2 (2000), *rev’d* on other grounds, 261 Va. 350, 542 S.E.2d 377 (2001).

⁶ *America Online*, 2000 WL 1210372 at *8.

⁷ *Doe v. Cahill*, 884 A.2d 451, 459 (Del. 2005).

⁸ *Id.* at 459-60.

⁹ *Dendrite Int’l, Inc. v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

¹⁰ *Id.* at 760.

¹¹ *Id.* The anonymous defendant posted defamatory comments about the plaintiff, a corporation, on the Internet. The court held that the plaintiff failed to meet the requirements, specifically, providing evidence to support each element, and thus the plaintiff could not learn the identity of John Doe. *Id.*

¹² *Rodrigues v. Panayiotou*, 314 F.3d at 986 (9th Cir. 2002).

opinion.¹³ Then courts look at the alleged defamatory statement in general as well as the specific context of that statement while considering its subject matter, hyperbolic language, and audience.¹⁴ The court also questions whether the statement is susceptible to being proven true.¹⁵ If the court concludes the statement could reasonably be construed as fact or as opinion, a jury should resolve the issues.¹⁶

Each of the four standards that courts currently employ in defamation actions against anonymous Internet authors has useful elements, but these varying standards have ultimately led to confusion, lack of uniformity, and unfairness to defendants. Similarly, each test places a drastically different burden on plaintiffs making it too hard or too easy to unmask their particular anonymous defendant.

This Note proposes that courts implement a new standard that which combines elements of the “opinion-centered” and the “Dendrite” standard before unmasking the anonymous defendant through a compulsory discovery process. Compared to the previous standards, the new standard will balance the defendant’s First Amendment right to speak anonymously against the plaintiff’s right to protect his reputation from potentially defamatory communications.

Part II discusses why Internet blogging is different from newsprint media and why the law should treat it differently. Part III provides an overview of the act of blogging and why anonymity is attractive to bloggers. Part IV explains the basics of defamation law. Part V

¹³ *Campanelli v. Regents of the Univ.*, 44 Cal. App. 4th 891, 894 (1996).

¹⁴ *Rodrigues*, 314 F.3d at 986.

¹⁵ *Id.*

¹⁶ *Campanelli*, 44 Cal. App. 4th at 895 (explaining that the Court looked at the totality of the circumstances and held that the defendant’s identity should remain anonymous because the “plaintiff has not identified any specific statement which, in the context it is made, would be viewed by a reasonable reader as a defamatory statement of fact”).

discusses the protection of anonymous speech.¹⁷ Part VI discusses the civil procedural complications involved in protecting the defendant’s identity. Part VII defines each standard. Part VIII discusses and analyzes the strengths and weaknesses of the four standards that plaintiffs must meet in order to unmask the anonymous defendant. Part IX proposes that courts should adopt a new standard requiring plaintiffs to satisfy the following elements: (1) the court must reasonably determine if the statement on its face is fact or opinion;¹⁸ (2) the plaintiff is required to notify the anonymous defendant that he is the subject of a subpoena; and (3) the plaintiff must satisfy a *prima facie* standard. Part X discusses why the new standard is better than the four current standards.

II. WHY BLOGGING IS DIFFERENT FROM OTHER MEDIUMS OF COMMUNICATION

A. Newspapers and the Blogosphere

The main difference between blogs and newspapers is authority.¹⁹ The blogosphere “is a low-trust culture”²⁰ that “tends to encourage, among those who want to be credible, a belt-and-suspenders attitude toward factual assertions that makes claims of recklessness harder to maintain.”²¹ Newspapers, on the other hand, operate in a “high-trust” culture.²² Traditionally, newspapers articulate stories with a different kind of authority than blogs do today.²³

¹⁷ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is protected by the First Amendment.”).

¹⁸ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2700 (1990) (explaining that the following factors determine if a statement is fact or opinion: “(1) the specific language used; (2) whether the statement is verifiable; (3) “the general context of the statement; and (4) the broader context in which the statement appeared.”).

¹⁹ Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1164 (2006).

²⁰ *Id.* at 1159.

²¹ *Id.*

²² *Id.* (explaining newspapers “more commonly require readers to take their word regarding factual assertions”).

²³ *Id.* at 1164.

Making up your own mind is key, and the lack of the voice of authority is a characteristic of the blogosphere. If we police defamation more severely than slander because we think that people will believe what they read in the newspaper more than what they hear over the water cooler, then blogs might better be analyzed under slander than defamation. How often does anyone really change an opinion of another person, famous or obscure, solely because of something read on a blog? The Web really does put a premium on speed and spontaneity over painstaking accuracy. Bloggers instantly print what [sic] they learn, and what they believe to be true. They sometimes—often, actually—get it wrong. But even those errors prompt swift corrections that take the story asymptotically closer to the truth. In the meantime, other bloggers and other sources are activated, which advances the story further, quicker²⁴

Therefore, as a new medium that is substantially different from newsprint, blogs ought to be analyzed under a new set of rules.”²⁵

Compared to Internet communication, newsprint publication is a slower communication medium. For example, “at least a day would pass between the publishing of a defamatory statement and a later edition, meaning that many who read the first statement wouldn't even see the issue with the correction.”²⁶ Most corrections are published “in a separate and little-read section dedicated to them, further reducing the likelihood that readers would recognize the change.”²⁷ Bloggers, on the other hand, can correct errors within “minutes.”²⁸ Moreover, unlike newspaper corrections, blog corrections are generally appended to the original website or post.²⁹

Anonymous defamatory postings require different standards than traditional media because the Internet has its own distinct culture, norms, and readership; therefore, defamation

²⁴ Reynolds, *supra* note 19, at 1165 (discussing blogs, compared to traditional newspapers, exist in a low-trust culture).

²⁵ *Id.* at 1163. The author explained that “[fo]r more substantive errors, my basic rule is that I always put in an update correcting the post where the original error was, so that anyone who follows a link to it (or finds it on Google) will see the correction.” *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

claims should be interpreted in its own unique context.³⁰ For example, the rapid nature of blogging will likely result in the circulation of defamatory comments, even if later corrected, because technology allows other bloggers to limitlessly republish the statement in new forums.³¹ Additionally, a blogger may terminate or discontinue his site, which would prohibit correction entirely. On the other hand, after circulation traditional newsprint is permanent. In the future, “many of these technological and cultural factors will . . . apply to more traditional media as well.”³² Today, however, the law must reflect the differences between traditional newsprint and Internet blogging.

B. Newspapers and Anonymous Sources

The communications of online speakers, unlike traditional newspapers, are generally not subjected to any kind of editorial or “filtering” device.³³ Internet speech is comparatively “spontaneous and unbridled.”³⁴ Unlike bloggers, “traditional media sources, aware of the risk of corporate liability, employ fact checkers and lawyers to screen publications for potential misstatements.”³⁵

Traditional newsprint provides writers the opportunity to take only some responsibility for one's actions because the newspaper acts as a filter. The potential source for true anonymity is an editorial page, and even then there are significant barriers to publication and filters.³⁶ Therefore, the issue is not anonymous articles but anonymous sources.

³⁰ Reynolds, *supra* note 19, at 1167.

³¹ *Id.* at 1164 (explaining many readers do not scroll through each comment posted, and therefore can miss the correction).

³² *Id.* at 1167

³³ Bruce P. Smith, *Cyberspace and the Problem of Anonymous Online Speech*, 18-FALL COMM. LAW. 3, 3 (2000).

³⁴ *Id.*

³⁵ *Id.*; *see also Reno*, 521 U.S. at 853 (“Any person or organization with a computer connected to the Internet can ‘publish’ information.”).

³⁶ *See Smith, supra* note 33, at 3.

C. Journalistic Privilege

In *Branzburg v. Hayes*, the Supreme Court rejected an absolute privilege for confidential journalistic sources, but recognized a qualified privilege.³⁷ In *Branzburg*, journalists challenged grand jury subpoenas requiring them to identify anonymous sources under the First Amendment.³⁸ The issue focused on the reporter's obligation to respond to grand jury subpoenas and answer questions. Justice White explained "[t]he use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request."³⁹ The Court reasoned that the privilege claimed is not the source's, but rather the reporter's.⁴⁰

Furthermore, the Supreme Court in *Branzburg* did not establish that the First Amendment imposes a limitation on discovery in the anonymous blogger context.⁴¹ On the other hand, *Branzburg* does "reflect a sufficient concern for the First Amendment-type interests involved [and] it is reasonable for courts to consider those interests."⁴² Absent a First Amendment mandate to go beyond existing rules, courts should implement standards that "seek to consider defendants' arguments that their anonymity should not lightly be disturbed."⁴³

III. THE ACT OF ANONYMOUS BLOGGING

³⁷ *Branzburg v. Hayes*, 498 U.S. 655, 709-10 (1972).

³⁸ *Id.* at 679-81.

³⁹ *Id.* at 681-82 (discussing that First Amendment 'privilege' does exist to protect journalists to some extent from having to disclose confidential sources).

⁴⁰ *Id.* at 695.

⁴¹ Vogel, *supra* note 3, at 837.

⁴² *Id.*

⁴³ *Id.*

The advent of the Internet has revolutionized modes of communication.⁴⁴ The increase in blog usage stems from continuous technology advancements, savvy Internet users, and the low cost of starting and maintaining blogs.⁴⁵ As a result, bloggers can retrieve and disseminate a large array of information in the seemingly boundless world of cyberspace.⁴⁶

Blogs were originally created to make Internet research more efficient through information sharing.⁴⁷ Now, the act of blogging has morphed into a social activity where bloggers post messages for others to read and respond.⁴⁸ The purpose of blogging is to share personal views far and widely.⁴⁹ Blogs are a “gathering place that is openly and clearly outfitted with a giant microphone.”⁵⁰

Internet bloggers desire to communicate anonymously for a number of reasons. First, bloggers choose to communicate anonymously because it allows them to be blunt and candid about issues.⁵¹

[A]nonymity in cyberspace is not just different in degree from anonymity in real space. As cyberspace presently is, it gives an individual a kind of power that doesn't exist in real space. This is not just the ability to put on a mask; it is the ability to hide absolutely who one is. It is not just the ability to speak a different, or encoded, language; it is the ability to speak a language that is (practically) impossible to crack. Cyberspace is a place

⁴⁴ O'Brien, *supra* note 1, at 2748.

⁴⁵ Jason Boulett, *Commerce & Technology Ethical Considerations For Blog-Related Discovery*, SHIDLER JOURNAL OF LAW (2008).

⁴⁶ O'Brien, *supra* note 1, at 2748.

⁴⁷ See Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J. L. & ARTS 145, 145 (2003); see also *id.* at 145-46 (“Simply put, the first blogs listed websites visited by the writer . . . guided a reader to favored sites . . . when high-speed access was rare and users paid an hourly fee—visiting these “content filters” could save dial-up time over aimlessly surfing the internet.”).

⁴⁸ *Id.* at 145.

⁴⁹ Anne Eisenberg, *So, Who Says That a Blog Has to Blare?*, N.Y. TIMES, February 18, 2007, at 1.

⁵⁰ *Id.*

⁵¹ Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1198-99 (2006) (“The most frequently articulated rationales for why we protect free speech are that it promotes individual autonomy, is necessary for a robust political discourse, and is essential for truth to win out in the ‘marketplace of ideas.’”); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 455 (1980) (“Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.”).

that maximizes both social and individual plasticity, which means it is a place that determines very little about what others must know about you.⁵²

Privacy enhances autonomous public discourse regarding political, economic, and social issues.⁵³

Thus, a blogger's individual ideas should be treated with great deference.

Additionally, some bloggers explain that they choose to spread information anonymously out of concern that their statements will result in legal consequences.⁵⁴ Other bloggers wish to remain anonymous out of fear for their safety.⁵⁵ More commonly, bloggers choose to remain anonymous because their online statements may negatively affect their employment.⁵⁶ For example, a high school bus driver was terminated from his job because of the information posted on his blog.⁵⁷ The school board explained that the bus driver was terminated "because he directed students of the Davie schools to his webpage which contained comments related to 'adult,' 'perverse,' 'profane,' and 'sexually explicit' themes"⁵⁸

Notwithstanding the reasons that individuals conceal their identity online, overall anonymous speech has furthered differing social values, such as fostering the ability to seek information on sensitive controversial topics and encouraging speech regardless of the fear of economic retaliation or social ostracism.⁵⁹ The opportunity to communicate individual ideas anonymously on the Internet "fosters open communication and robust debate."⁶⁰ People should

⁵² VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS, 877 (10th ed. 2000).

⁵³ S. Elizabeth Malloy, *Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1188 (2006).

⁵⁴ Vogel, *supra* note 3, at 797.

⁵⁵ *Id.*

⁵⁶ *Id.*; *see also* Vogel, *supra* 3, at 837 ("For example, an employee might be afraid to post a comment unfavorable to his employer for fear that the employer will allege it to be defamatory and seek to learn his identity to terminate him.").

⁵⁷ *Shaver v. Davie County Public Schools*, No. 1:07cv00176, 2003 WL 943035, at *1 (M.D.N.C. April 7, 2008).

⁵⁸ *Id.* at 2.

⁵⁹ SCHWARTZ, ET AL., *supra* note 52, at 236-37.

⁶⁰

be able to freely post information online without fear that the court will expose their identity.

IV. THE BASICS OF DEFAMATION

Recently, courts are observing an increase in the number of defamation suits brought against anonymous online bloggers.⁶¹ A statement, including a blog post, is defamatory if it has a propensity “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁶² The blog post does not have to “prejudice the other in the eyes of everyone in the community,”⁶³ but rather “in the eyes of a substantial and respectable minority”⁶⁴

For a defendant to be liable for defamatory speech, each of the following elements must be satisfied:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁶⁵

The Supreme Court applies an “actual malice” standard when a “public figure”⁶⁶ brings a defamation suit.⁶⁷ “Public figures” are people who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to

⁶¹ Shelbie J. Byers, *Untangling the World Wide Weblog: A Proposal For Blogging Employment-At-Will and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245, 253 (2007).

⁶² RESTATEMENT (SECOND) OF TORTS § 559 (1977); *see generally* Romaine v. Kallinger, 109 N.J. 282, 289, 537 (1988) (discussing that a defamatory statement is false, damages another’s reputation, subjects that person to contempt, or causes people to lose good will in that person).

⁶³ *See* RESTATEMENT (SECOND) OF TORTS § 559 at cmt. e (1977).

⁶⁴ *Id.*

⁶⁵ *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

⁶⁶ A public figure is “[a] person who has achieved fame or notoriety or who has voluntarily become involved in a public controversy.” BLACK’S LAW DICTIONARY 1265 (8th ed. 2004). *See also* Wolston v. Reader’s Digest, 443 U.S. 157, 167 (1979) (“A private individual is not automatically transformed into a [limited-purpose] public figure just by becoming involved in or associated with a matter that attracts public attention.”).

⁶⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 260 (1964).

society at large.”⁶⁸ The “actual malice” standard applies to state and federal law and requires the plaintiff to prove that the defendant had knowledge of the falsity of the statement or a “reckless disregard for the truth.”⁶⁹ Public figures are more easily exposed to media outlets, and therefore, have a greater likelihood of reputation vitiation.⁷⁰

For hundreds of years, judges have attempted to obtain a balance between protecting an individual’s reputation and another’s freedom of speech.⁷¹ Society’s pervasive and strong interest in preventing attacks upon one’s reputation does not stop in the physical realm but rather transcends into the blogging world of cyberspace.⁷²

IV. PROTECTION OF ANONYMOUS SPEECH

When speakers’ anonymity is challenged, courts protect the ideology underlying anonymity. In 1960, the Supreme Court, in *Talley v. California*,⁷³ held that a local ordinance requiring handbills to disclose the names of their creator and distributor was unconstitutional. The plaintiffs challenged a Los Angeles ordinance requiring handbills to include the name and address of the author on its cover.⁷⁴ The Court held that the statute was unconstitutional

⁶⁸ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967). *See also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions.

⁶⁹ *See* RESTATEMENT (SECOND) OF TORTS § 580 cmt. a (1977) (explaining the rule).

⁷⁰ *New York Times*, 376 U.S. at 344-45 (explaining that public figures have “voluntarily exposed themselves to increased risk of injury from defamatory falsehood”).

⁷¹ *See* SCHWARTZ, ET AL., *supra* note 52, at 833-34 (discussing the jurisprudence behind defamation during the sixteenth and seventeenth centuries).

⁷² *Freedlander v. Edens Broadcasting, Inc.*, 734 F. Supp. 221, 224 (E.D. Va. 1990) (discussing an individual’s right to free speech against the right to restrain speech for the enjoyment of one’s reputation).

⁷³ *Talley*, 362 U.S. at 65.

⁷⁴ *Id.* at 61.

because “there can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”⁷⁵ The Court noted that, historically, “anonymous speech has played an important role in the progress of mankind.”⁷⁶ The decision in *Talley* “marked the beginning of the Court’s jurisprudence on protection of anonymous communication.”⁷⁷ The Court’s holding was a starting point for later decisions.⁷⁸

After *Talley*, the Court revisited the issue again in 1995, in *McIntyre v. Ohio Elections Commission*.⁷⁹ The Supreme Court struck down a statute that prohibited the distribution of unsigned brochures regarding an election or ballot issue.⁸⁰ In *McIntyre*, Margaret McIntyre anonymously distributed leaflets opposing a proposed school tax levy.⁸¹ McIntyre printed some of the leaflets on her home computer and others on a professional printer.⁸² Moreover, “some of the handbills identified her as the author; others merely purported to express the view of ‘CONCERNED PARENTS AND TAX PAYERS.’”⁸³

The Court explained that anonymous speech has played a historically important role and “exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular.”⁸⁴ The Court found the statute to be contrary to the First Amendment’s protection of anonymous

⁷⁵ *Id.* at 64 (discussing that leaflets and pamphlets “indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest”).

⁷⁶ *Id.* at 64.

⁷⁷ Peter J. Dugan, *National Security Checks are in the Mail: A First Amendment Analysis of Intelligent Mail and Sender Identification*, 12 COMM.LAW CONSP. 265, 275 (2004).

⁷⁸ Vogel, *supra* note 3, at 826 (“[T]he Court took as its starting point prior decisions holding that it violated the First Amendment to prohibit the distribution of handbills, which were the particular form of speech at issue in *Talley*.”); *see also* *Bates v. City of Little Rock*, 361 U.S. 516, 527-28 (1960) (discussing the protection of anonymity through due process in the majority opinion).

⁷⁹ Vogel, *supra* note 3, at 826 (discussing after *Talley*, the court revisited the issue three times).

⁸⁰ *McIntyre*, 514 U.S. at 357.

⁸¹ *Id.* at 337.

⁸² *Id.*

⁸³ *Id.* (emphasis in the original).

⁸⁴ *Id.* at 357.

political speech⁸⁵ and reasoned that the First Amendment protects expression broadly “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁸⁶ The Court further noted that “anonymity is a shield from tyranny of the majority” and it protects the unpopular opinion from an intolerant society.⁸⁷ In a concurring opinion, Justice Thomas stated “[i]nstead of asking whether ‘an honorable tradition’ of anonymous speech has existed throughout American history, or what the ‘value’ of anonymous speech might be, we should determine whether the phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting. I believe that it did.”⁸⁸

Consequently, other courts look to the principles applied in *Talley* and *McIntyre* when deciding cases involving anonymous Internet speech. For example, a federal district court struck down a Georgia law criminalizing anonymous online communications.⁸⁹ The court found that the statute was a restriction of speech.⁹⁰ The court’s decision protects “[t]he use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy, as well as the use of trade names or logos in non-commercial educational speech, news, and commentary--a prohibition with well-recognized first amendment problems.”⁹¹

The courts’ rulings solidify the importance of protecting anonymous speech. Anonymity provides the opportunity to fearlessly voice unpopular opinions.⁹² “It is important not to silence

⁸⁵ *Id.* at 344.

⁸⁶ *McIntyre*, 514 U.S. at 346 (quoting *Roth v. United States*, 345 U.S. 476 (1957)).□

⁸⁷ *Id.* at 357.

⁸⁸ *Id.* at 359.

⁸⁹ *Id.* (“any person . . . knowingly to transmit any data through a computer network . . . for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name . . . to falsely identify the person”)

⁹⁰ *Id.* at 1232.

⁹¹ *Id.* at 1233.

⁹² Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. POLY. 405, 407 (2003) (“The Internet has emerged as a true marketplace of ideas, where through the use of

communication on the Internet, but it is just as important not to silence victims of defamation.”⁹³

A. First Amendment and Anonymous Speech

The First Amendment protects anonymous speech including anonymous speech on the Internet.⁹⁴ When anonymous speakers invoke First Amendment protections in a defamation action, the issues must be remedied by balancing the benefits of secrecy against the need for disclosure.⁹⁵ As mentioned above, there are currently four inconsistent standards and no bright-line rule for determining when courts should compel disclosure of an anonymous blogger’s identity in a defamation suit.⁹⁶

A person’s right to speak anonymously in a blog is rooted in American history. In the case of *McIntyre*, not only did the Court overturn an Ohio law that prohibited the distribution of political handbills that did not include the name and address of the person issuing the literature, but the Court also held that “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.”⁹⁷ Governmental restrictions on such speech are entitled to “exacting scrutiny,” and are upheld only where they are “narrowly tailored to serve an overriding state interest.”⁹⁸

Unlike in *McIntyre*, in *Buckley v. American Constitutional Law Foundation, Inc.*, the Court applied a looser standard and struck down a requirement that paid petition-circulators

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...’”).

⁹³ Malloy, *supra* note 53, at 1193.

⁹⁴ *McIntyre*, 514 U.S. at 342; *see also Reno*, 521 U.S. at 870 (1997) (“The right to speak anonymously extends to speech via the Internet.”).

⁹⁵ Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 941 (2d ed. 2002).

⁹⁶ *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425, 2006 WL 37020, at *4 (Pa. Com. L. Jan. 4, 2006) (discussing courts differing standards when determining the disclosure of an anonymous Internet user).

⁹⁷ *McIntyre*, 514 U.S. at 357.

⁹⁸ *Id.*

concerning ballot issues wear identification badges when soliciting signatures.⁹⁹ Moreover, the Court upheld a provision within the same statute that required petition circulators to complete an identifying affidavit when the circulators submit the collected signatures to the state.¹⁰⁰ The Court reasoned that “[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives, responds to that substantial state interest.”¹⁰¹ Justice O’Connor, in her concurrence, explained that “[k]nowing the names of paid circulators and the amounts paid to them [will] allo[w] members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them.”¹⁰² The Supreme Court in *Buckley* relied on *McIntyre* to invalidate the law on First Amendment grounds.¹⁰³

A federal district court further protected anonymous Internet communication by applying a high threshold on subpoena requests that infringe on the First Amendment right to speak anonymously.¹⁰⁴ In that case, the anonymous blogger successfully challenged a subpoena to identify twenty-three anonymous bloggers.¹⁰⁵ The court weighed a variety of factors and found that the defendant “has failed to demonstrate that the identity of these Internet users is directly and materially relevant to a core defense”¹⁰⁶ The court reasoned that the “Internet is a truly

⁹⁹ *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 200 (1999).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 202-03.

¹⁰² *Id.* at 203, FN 22.

¹⁰³ *Buckley*, 525 U.S. at 199. *See also* Vogel, *supra* note 3, at 828 (“As Justice Ginsberg explained, the affidavit requirement, by separating the identification in time from the speech, strikes an acceptable balance between the First Amendment right of the circulator to speak without “‘heat of the moment’ harassment” and the legitimate state interest in regulating elections.”).

¹⁰⁴ *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001).

¹⁰⁵ *Id.* at 1090, 1095. An anonymous Internet blogger challenged a subpoena in an attempt to identify twenty-three anonymous speakers who posted comments about defendant, 2TheMart.com, operated by ISP Infospace. *Id.* at 1089-90.

¹⁰⁶ *Id.* at 1097.

[T]he party seeking the information must demonstrate, by a clear showing on the record, that four requirements are met: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4)

democratic forum for communication,”¹⁰⁷ and thus the “First Amendment right to speak anonymously must be carefully safeguarded.”¹⁰⁸

Online defamation acts have placed “First Amendment principles in uncharted territory.”¹⁰⁹ First Amendment protection of a blogger’s right to communicate anonymously is a “sacrosanct aspect of American jurisprudence.”¹¹⁰ Since the rise of the Internet, courts continue to grapple with a remedy that is properly suited for this medium.¹¹¹

The Court’s jurisprudence reveals that society values anonymous speech. The Court’s holdings establish that the First Amendment “provides its greatest protections when the government seeks to impose a prior restraint on anonymous speech.”¹¹² The Supreme Court has explicitly validated the right to communicate anonymously.

V. PROCEDURAL COMPLICATIONS FOR ANONYMOUS BLOGGERS

Ruling on discovery motions seeking to identify the defendant presents difficult decisions for judges.¹¹³ In effect, at the commencement of an action judges must make outcome-dispositive decisions before the discovery process.¹¹⁴ Anonymous defendants who allegedly participated in defamatory statements present challenging choices for judges “because often both the plaintiff and the defendant can articulate clear and important interests in the favorable

information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See O’Brien, supra* note 1, at 2745.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Vogel, *supra* note 3, at 831 (discussing the “cases also establish that, even in the context of prior restraints, the right to speak anonymously may yield to legitimate interests. In particular, the right to speak anonymously offers little or no protection to those whose speech is actionable, whether as fraud, defamation, or otherwise”).

¹¹³ *See Vogel, supra* note 3, at 859 (“Some states provide express procedures for obtaining discovery of unidentified defendants, but in most states it is the responsibility of the plaintiff’s lawyer to navigate through rules that were usually not designed with such cases in mind.”).

¹¹⁴ *Id.*

resolution of the discovery dispute.”¹¹⁵

For example, New Jersey expressly authorizes discovery to proceed at any time ‘after commencement of the action,’ but also requires ‘[I]eave of court, granted with or without notice, . . . if the plaintiff seeks to take a deposition prior to the expiration of thirty-five days after service of the summons and complaint.’ Under the federal rules (and the rules of states adopting those rules), the plaintiff must obtain court approval to take discovery prior to the initial party conference concerning discovery, which obviously cannot occur if the defendant has not been identified.¹¹⁶

The discovery process involving an anonymous defendant is complicated and expensive for the plaintiff and may act as a deterrent to proceed with the claim.¹¹⁷ “The existence of these heavy burdens under existing law suggests that imposing additional hurdles is likely to over-deter this kind of action (if they are not over-deterred already).”¹¹⁸

Thus, defamation actions do not deter and punish anonymous defamatory Internet speech unless the defendants are identified.¹¹⁹ Moreover, the “casual discovery of the identity of individuals acting anonymously on the Internet is a serious and legitimate First Amendment concern.”¹²⁰ These difficulties have resulted in courts and commentators acknowledging the need for a new standard, even though courts currently possess standards to weigh both parties’ competing interests.¹²¹

VI. DEFINING THE FOUR STANDARDS

¹¹⁵ *Id.* See also *id.* at 843 (“[u]ncertainty burdens plaintiffs, it also burdens defendants, because as a practical matter lawyers often avoid the arcane exercise of determining the proper procedure and, instead, choose ‘short cuts’ that can deprive defendants of their opportunity to be heard”).

¹¹⁶ *Id.* at 846 (discussing “[t]he need for court approval derives from the prohibition in most states against the plaintiff seeking discovery without court approval prior to service of the answer (and, by extension, service of the complaint).”).

¹¹⁷ *Id.* at 845. The plaintiff must first submit an order to show cause to the court with jurisdiction over the claim. The order must state the reasons why the defendant should be identified. The defendant, through his attorney, can challenge the show cause order. Then the court will hold a hearing to determine whether the defendant’s identity must be disclosed so that discovery can continue. *Id.*

¹¹⁸ *Id.* at 859.

¹¹⁹ *Id.* at 856.

¹²⁰ *Id.* at 858.

¹²¹ *Id.* at 859 (explaining John Doe proceedings have created confusion among judges and lawyers and the need for an effective standard).

Thus far, courts have applied inconsistent standards when determining whether to identify bloggers who engage in online anonymous defamatory speech.¹²² In addition to this lack of uniformity, each standard places a drastically different burden on plaintiffs making it either too hard or too easy to unmask their particular anonymous defendant. The courts varying standard of review ranges from a “permissive approach-allowing discovery freely to a more restrictive approach that substantially restricts discovery.”¹²³

A. The “Good-faith” Standard

The “good faith” standard, developed in the case of *In re Subpoena Duces Tecum to America Online, Inc.*¹²⁴, requires a court to order the Internet Service Provider, a non-party, to provide information revealing the identity of the defendant only when the following elements are met:

- (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.¹²⁵

In other words, the court is weighing the right of anonymous speech against “[t]hose persons who choose to abuse the opportunities presented by this medium”¹²⁶

¹²² See, e.g., *Rocker Mgmt. LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, at *3 (N.D. Cal. May 29, 2003) (applying a totality of circumstances approach to plaintiff’s efforts to unmask the defendant’s identity); *Dendrite*, 775 A.2d at 771 (applying a series of elements that the plaintiff must prove in addition to the court balancing the need for disclosure against the defendant’s First Amendment right to speak anonymously); *America Online*, 2000 WL 1210372, at *2 (applying a “good faith” standard); See also *Cahill*, 884 A.2d at 455.

¹²³ See Vogel, *supra* note 3, at 802.

¹²⁴ See *America Online*, 2000 WL 1210372 (2000).

¹²⁵ *Id.* at *8

¹²⁶ *Id.* at *6. In the case, *In re Subpoena Duces Tecum to America Online, Inc.*, the Circuit Court of Virginia created and implemented the “good faith” standard that requires the plaintiff to have a good faith belief that the defendant did engage in defamation. Here, the plaintiff, an anonymous corporation, sued five anonymous Internet users for allegedly posting defamatory comments in a chat room hosted by America Online. The plaintiff obtained an order that required American Online to disclose all the information regarding the defendants’ identity. American Online refused to follow the order. The court held that the identity of all five anonymous defendants should be

B. The “Opinion-centered” Standard

The “opinion-centered” standard, developed in the case of *Rocker Management*, requires courts to look to the “totality of the circumstances” in order to determine if the anonymous defendant should reveal himself.¹²⁷ More specifically, courts look at the statement both “in its broad context,” considering “the general tenor of the entire work, the subject of the statements, the setting, and the format of the work,” and in its “specific context,” noting the “content of the statements, the extent of figurative or hyperbolic language used, and the reasonable expectations of the audience in that particular situation.”¹²⁸ The court must “place itself in the position of the ... reader, and determine the sense of meaning of the statement according to its natural and popular construction and the natural and probable effect [it would have] upon the mind of the average reader.”¹²⁹ Finally, courts inquire whether the statement itself is “sufficiently factual to be susceptible of being proved true or false.”¹³⁰ The court also looks to spelling, spacing, and capitalization when determining if the statement is a fact or opinion.¹³¹

C. The “Dendrite” Standard

The *Dendrite* standard, developed in the case of *Dendrite International, Inc. v. John*

revealed because the plaintiff had a “good faith basis.” *Id.* at *8.

¹²⁷ *Rocker Mgmt.*, No. 03-MC-33, 2003 WL 22149380, at *2.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *3. In order to determine if a defamatory statement is a factual assertion or opinion, courts look at the “totality of the circumstances.” *Id.* at *2. In *Rocker Management*, the court protected the defendant’s identity. *Id.* at *1, 2. The plaintiff sued fifteen anonymous defendants who allegedly posted defamatory comments on a message board. *Id.* The plaintiff served Yahoo, a third party, with a subpoena seeking the disclosure of the identity of “harry3866,” one of the fifteen defendants. *Id.* The anonymous defendant then moved to quash the subpoena. *Id.* The defendant claimed that the postings were his opinions, rather than statements of fact. *Id.* The defendant’s statements are immune because “[p]ure opinions-‘those that do not imply facts capable of being proved true or false’-are protected by the First Amendment.” *Id.* The reasonable reader would not interpret the defendant’s comments as factual. *Id.* The court did not disclose the defendant’s identity because under the totality of the circumstances, the plaintiff would not have a successful defamation claim. *Id.*

*Doe*¹³², requires a court to impose four guidelines before unmasking the defendant. First, the plaintiff must notify the defendant that he is subject of a subpoena.¹³³ Second, the court must require the plaintiff to provide the exact statements that are alleged as defamatory and the basis of his claim.¹³⁴ Third, the court must decide if the complaint would survive a motion to dismiss based on the evidence and if the plaintiff has set forth a *prima facie* case.¹³⁵ Fourth, assuming that the plaintiff has satisfied the third requirement, 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 disclosure of the anonymous defendant’s identity in determining whether to allow the plaintiff to properly proceed.”¹³⁶

D. The “Summary Judgment” Standard

¹³² *Dendrite Int’l, Inc. v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

¹³³ *Id.* at 767-68 (quoting *Cahill*, 884 A.2d at 460). “These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP’s pertinent message board.” *Id.* at 760-61.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

(1) to undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application. In the internet context, the plaintiff’s efforts should include posting a message of notification of the discovery request to the anonymous defendant on the same message board as the original allegedly defamatory posting; (2) to set forth the exact statements purportedly made by the anonymous poster that the plaintiff alleges constitute defamatory speech; and (3) to satisfy the *prima facie* or ‘summary judgment standard.’ Finally, after the trial court concludes that the plaintiff has presented a *prima facie* cause of action, the *Dendrite* test requires the trial court to: (4) 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 in determining whether to allow the plaintiff to properly proceed. *Id.*

□ In *Dendrite International, Inc. v. John Doe*, the plaintiff claimed that the statements posted by the anonymous defendant constituted materially false assertions. *Id.* at 763. The defendant filed a motion to quash a subpoena to disclose his identity. *Id.* at 770. In response, the Dendrite court developed a standard that balances the defendant’s First Amendment right to speak anonymously and the plaintiff’s interest in protecting its reputation. *Id.* The Superior Court held that the plaintiff did in fact prove that the defendant posted false defamatory statements, but failed to establish that the defamatory statements injured his reputation. *Id.* at 771. In other words, the plaintiff did not satisfy the third prong of the proposed standard. *Id.* Therefore, the plaintiff could not learn the identity of the defendant. *Id.*

The “Summary Judgment” standard, developed in *Doe v. Cahill*¹³⁷, requires plaintiffs to notify the anonymous Internet speaker that he is subject to subpoena and establish a *prima facie* case.¹³⁸ The Delaware Supreme Court developed the “Summary Judgment” standard by modifying the “*Dendrite*” standard.¹³⁹ The Court did not adopt all four elements set forth in *Dendrite*, but rather held that the plaintiff must prove the first and third prongs.¹⁴⁰ The Court reasoned that the second prong, which requires the plaintiff to identify the exact defamatory statements, is included in the summary judgment inquiry.¹⁴¹ The fourth prong, balancing the “defendant's First Amendment rights against the strength of the plaintiff's *prima facie* case is also unnecessary.”¹⁴² The Court explained that the fourth prong is too complicated and adds no additional protection.¹⁴³

VII. DISCUSSION OF EACH STANDARD

A. The “Good-faith” Standard Discussion

With respect to the “good faith” standard, the court in *In re Subpoena Duces Tecum to America Online, Inc* sets forth a vague and instinctive standard, possibly in hope that a later court would define the test. However, the “good faith” standard tips the scale too much in favor of the

¹³⁷ 884 A.2d 451, 459 (Del. 2005).

¹³⁸ *Id.* at 460-61 (discussing that the “summary judgment” adequately protects the plaintiff’s reputation compared to the “good faith” standard).

¹³⁹ *Cahill*, 884 A.2d at 460.

¹⁴⁰ *Id.* at 461 (“Accordingly, we adopt 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.”).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (“The fourth requirement adds no protection above and beyond that of the summary judgment test and needlessly complicates the analysis.”). In *Doe v. Cahill*, the plaintiff sued four John Doe defendants for allegedly posting defamatory comments on “Smyrna/Clayton Issues Blog,” a political message board. *Id.* at 454. The court concluded that the plaintiff did not show that the defendant's statements were statements of fact and that they were capable of a defamatory meaning, and thus failed to meet his *prima facie* burden. *Id.* at 464. Thus, the defendant’s motion to quash the subpoena was granted. *Id.* at 467. The Court was mindful that public figures in defamation cases must show actual malice. *Id.* at 464. The Court explained that without knowledge of the defendant’s identity, proving actual malice is “impossible.” *Id.* Therefore, the Court held that a plaintiff is not required to prove actual malice. *Id.* The Court reasoned that the plaintiff should only prove facts “that are within his control.” *Id.*

plaintiff.¹⁴⁴ The “good-faith” standard should be abandoned because it fails to protect anonymous Internet speech. The standard is too low, therefore making it too easy for plaintiffs to satisfy its elements.

More importantly, it is impossible for a court to decide if the plaintiff truly had a good faith belief or an alternative motive.¹⁴⁵ It is likely that the plaintiff may abuse the system for financial reasons. Additionally, “corporations that sue John Doe may never recover money damages, they may still deem it economically rational to sue the pseudonymous posters who make negative statements about them on financial message boards.”¹⁴⁶ There is reason to believe that a plaintiff may file suit simply to discover who posted the defamatory statement.¹⁴⁷ Therefore, the test lacks protection of anonymous speech and will likely result in inconsistent holdings deterring anonymous speech as a whole.¹⁴⁸

Additionally, the “good faith” standard is too quick to reveal the anonymous defendant’s identity. In *Cahill*, the trial judge applied the “good faith” standard and held that the third party must disclose the defendant’s identity.¹⁴⁹ On appeal, the plaintiffs urged the Supreme Court of Delaware to adopt the “good faith” standard as the standard for the state, but the Court reversed the judgment because the “good faith” standard failed to protect the First Amendment right to speak anonymously.¹⁵⁰ The Court explained that, according to the “good faith” standard, “plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the

¹⁴⁴ See *supra* notes 129-35.

¹⁴⁵ See generally *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (explaining that a strict motion to dismiss standard is incapable of weeding out trivial defamation suits, therefore a less stringent “good faith” standard is even less capable of doing so). See also *Cahill*, 884 A.2d at 459.

¹⁴⁶ Lidsky, *supra* note 2, at 877

¹⁴⁷ *Cahill*, 884 A.2d at 457.

¹⁴⁸ *Id.* “We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.” *Id.*

¹⁴⁹ *Id.* at 454.

¹⁵⁰ *Id.* at 457.

Superior Court”¹⁵¹

The standard is inadequate because proving a good faith belief does not prove the strength of the case.¹⁵² “A plaintiff may well be in actual subjective good faith in filing [a defamation] suit believing he has a strong case when, in fact, he may have no case at all.”¹⁵³ Therefore, the “good-faith” standard fails to balance the defendant’s First Amendment right to speak anonymously against the plaintiff’s right to protect his reputation from potentially defamatory communications.

B. The “Opinion-centered” Standard Discussion

With respect to the “opinion-centered” standard, the District Court found that First Amendment rights apply to statements of opinion that do not “imply a false assertion of fact,” either because they “cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual,” or because they are provably false.¹⁵⁴ For example, satires, parodies, misspellings, grammatical errors, and hyperboles are provably false.¹⁵⁵ The “opinion-centered” standard leaves many questions unanswered, including: Can misspellings or grammatical errors satisfy the element? Should future courts consider the conversational nature of a blog? How deferential is the standard? Lower courts do not have a uniform test when deciding opinion claims.¹⁵⁶ This test most likely oversimplifies the analysis and has the potential to lead to unreasonable results..¹⁵⁷ The law governing defamation seeks to protect one’s reputation and must “diminish the respect, good will, confidence or esteem in which [the plaintiff] is held, or . . . excite adverse

¹⁵¹ *Id.*

¹⁵² Cahill v. Doe-Number One, 879 A.2d 943, 945-46 (Del. Super. Ct. 2005), *rev’d*, 884 A.2d 451 (Del. 2005).

¹⁵³ *Id.*

¹⁵⁴ O’Brien, *supra* note 1, at 2752 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

or unpleasant feelings about him.”¹⁵⁸ In most situations, it seems unlikely that “slang and grammatical errors found in many bulletin board postings would have this effect.”¹⁵⁹ Therefore, the law should not consider spelling and grammatical errors when deciding whether to unmask the anonymous defendant.

C. The “Dendrite” Standard Discussion

Some characterize the *Dendrite* standard as tipping the scale too much in favor of anonymous Internet speakers, while others view the standard as fair.¹⁶⁰ Requiring the plaintiff to notify the defendant that he is the subject of a subpoena via the same message board as the original allegedly defamatory posting allows the defendant to challenge the subpoena.¹⁶¹ More importantly, providing notice may prevent future legal action.¹⁶² In past Internet cases, plaintiffs have severed legal action in exchange for public apologies or an agreement to delete the statements at issue.¹⁶³

The second prong requirement, to set forth the exact statements purportedly made by the anonymous blogger, may or may not be material to the lawsuit. For example, the *Dendrite* court explained that the second prong adequately protects anonymous Internet speakers’ First Amendment rights.¹⁶⁴ In effect, failing to identify the specific defamatory statement deprives the defendant of the right to challenge the subpoena.¹⁶⁵ On the other hand, the Delaware Supreme

¹⁵⁸ O’Brien, *supra* note 1, at 2775.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2769.

¹⁶¹ *Id.* at 2770.

¹⁶² *Id.*

¹⁶³ O’Brien, *supra* note 1, at 2771.

¹⁶⁴ *Id.* (“In general, this requirement will not serve as an obstacle to pursuing an online defamation action.”).

¹⁶⁵ *Id.* See also *Hvide v. Does*, No. 99-22831 CA 01 (Fla. Cir. Ct. complaint filed Sept. 30, 1999), *cert. denied*, 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000); Matthew S. Efland, *Digital Age Defamation: Free Speech v. Freedom from Responsibility on the Internet*, 75 Fla. B.J. 63, 63 (2001).

Court reasoned that quoting the defamatory statements in the plaintiff's complaint is sufficient.¹⁶⁶ Therefore, the second prong is unnecessary and repetitive.

The Delaware Superior Court explained that the consequence of the *Dendrite* standard “is that the plaintiff must answer what is tantamount to a motion to dismiss before the plaintiff can learn the identity of the speaker he claims has defamed him.”¹⁶⁷ Critics of the standard explained how difficult it is to satisfy all of the elements without having the opportunity to learn the defendant's identity in order to describe the relationship between the plaintiff and speaker.¹⁶⁸

Even though some of the individual elements are sound, the four screening elements combined impose a difficult and arcane standard of review for the plaintiff. This difficult standard of review will likely lead to inconsistent judicial decisions.¹⁶⁹ As a result, this limits the plaintiff's due process rights because of an inconsistent “judicial ‘gut check’ as to the merit or importance of a particular plaintiff's claim.”¹⁷⁰

The Supreme Court has never interpreted the right to anonymous speech as preventing “discovery of the identity of a particular individual accused of illegal or actionable speech.”¹⁷¹ The *Dendrite* standard requires “broad procedural protections in the John Doe context,” which is unnecessary to protect the defendant's First Amendment right.¹⁷² The standard's broad discretion limits the plaintiff's due process rights when seeking redress for injuries.¹⁷³

¹⁶⁶ Cahill, 844 A.2d 451, 461.

¹⁶⁷ *Doe-Number One*, 879 A.2d at 952.

¹⁶⁸ *Id.*

¹⁶⁹ Vogel, *supra* note 3, at 809.

¹⁷⁰ *Id.* at 809.

¹⁷¹ *Id.* at 808.

¹⁷² *Id.* (“The right to speak anonymously has been recognized in the context of broad-based prior restraints on categories of anonymous speech (e.g., leaflets, petitions), and even then has been limited where necessary for important government interests (e.g., regulation of elections).”).

¹⁷³ *Id.* at 809 (“In tension with First Amendment concerns, the broad discretion accorded trial judges by

D. The “Summary Judgment” Standard Discussion

The criticism of the *Dendrite* standard is also applicable to the “summary judgment” stand. Additionally, the “summary judgment” standard may be adequate for private figures but inappropriate for defamation cases involving public figures. The Delaware Supreme Court was mindful that public figures in defamation cases must show actual malice.¹⁷⁴ However, without knowledge of the defendant’s identity, proving actual malice is “impossible.”¹⁷⁵ Therefore, the Court held that a plaintiff is not required to prove actual malice¹⁷⁶ and the plaintiff should only prove facts “that are within his control.”¹⁷⁷

Ignoring the actual malice requirement seems to presuppose that courts would permit public figures to escape the high burden of actual malice when the alleged defamation is anonymous, unless this requirement is reinserted for purposes of an actual summary judgment motion. The defendant’s identity is necessary to prove whether actual malice is established, but disregarding the actual malice requirement would tip the scales too far in favor of the plaintiff. Courts must create a standard that includes the protection of the First Amendment actual malice requirement.

VIII. THE EQUILIBRIUM STANDARD

Defamation cases, such as those described above, create First Amendment and due

Dendrite...creates a dangerous limitation on the due process rights of plaintiffs to seek redress for injuries.”).

¹⁷⁴ *Cahill*, 884 A.2d at 464.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (“We hold only that a public figure plaintiff must plead the first five elements and offer *prima facie* proof on each of the five elements to create a genuine issue of material fact requiring trial.”). The elements plaintiffs must prove in a defamation action under Delaware law are the following: “1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published...4) a third party would understand the character of the communication as defamatory...5) the statement is false and [for public figures] 6) that the defendant made the statement with actual malice.” *Id.* at 463. □

¹⁷⁷ *Id.* at 464. *See also New York Times*, 376 U.S. at 296-97 (discussing in the concurring opinion, Justices Black and Douglas explained that the Court should deny damages against critics of public officials because “at the very least [the first amendment] leaves the people and the press free to criticize officials and discuss public affairs with impunity”).

process concerns. Defamation law protects the dignity of bloggers and also allows meaningful public discourse.¹⁷⁸ The court’s jurisprudence must reflect the modernized culture of the Internet compared to newsprint.¹⁷⁹ Thus, this author would like to propose a new standard. The new standard sets forth a procedure that takes place before trial in order to determine whether the identity of the anonymous defendant must be disclosed so that discovery can proceed. A new standard is necessary to protect the rights of all parties involved.

In order to protect anonymous speech under the First Amendment without hindering due process, a balance between the plaintiff’s and defendant’s interests must be established. Lower courts should not wait for better guidance from upper-level courts to protect anonymous bloggers. The elements of this proposed “Equilibrium Standard” are as follows: (1) the court must reasonably determine if the statement on its face is fact or opinion;¹⁸⁰ (2) the plaintiff is required to notify the anonymous defendant that he or she is the subject of a subpoena;¹⁸¹ and (3) the plaintiff must satisfy a *prima facie* standard.¹⁸²

Each element of the “Equilibrium Standard” provides an appropriate balance between the dueling rights of the defamation plaintiff and the anonymous blogger. First, determining if the statements at issue are defamatory should be the beginning, not the end, of the analysis because opinions are not actionable.¹⁸³ The First Amendment protects opinions because non-factual

¹⁷⁸ See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 740-41 (1986).

¹⁷⁹ See *supra* Part II. A-C.

¹⁸⁰ *Milkovich*, 497 U.S. 1, 2695 (explaining the following factors determine if a statement is fact or opinion: “(1) the specific language used; (2) whether the statement is verifiable; (3) “the general context of the statement; and (4) the broader context in which the statement appeared”). See also *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (“A statement of fact is not shielded from an action for defamation by being prefaced with the words ‘in my opinion,’ but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”).

¹⁸¹ *Dendrite*, 775 A.2d at 767-68 (quoting *Cahill*, 884 A.2d at 460).

¹⁸² *Id.*

¹⁸³ *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (explaining

assertions are an important contribution to public conversation.¹⁸⁴ Therefore, if the court determines at the beginning that the statements are opinions, then the plaintiff's contention is without merit and the court can quickly dispose of the case, saving time and resources.¹⁸⁵ On the other hand, if the court finds that the statement is an assertion of fact, then it can proceed to the second element.¹⁸⁶

Similar to the "opinion-centered" standard, the judge will look to the words and context of the allegedly defamatory statements.¹⁸⁷ It is impossible for a court to correctly decide the effect of a defendant's statement without looking to an immediate, narrow textual context and a broader social context.¹⁸⁸ An innocent statement may sound harmful out of context, or vice versa.¹⁸⁹ For example, the statement from Shakespeare's Julius Caesar, "Brutus is an honourable man," alone appears complimentary, but after reading the play in context, the statement means

opinions are privileged because "[u]nder the First Amendment there is no such thing as a false idea"). *See also* Kotlikoff v. The Community News, 89 N.J. 62, 65 (1982) (discussing statements published in a newspaper claiming that the mayor might be part of a "huge coverup" were protected expressions of opinion); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 288 (Ct. App. 1981) (discussing a political ad that stated the gubernatorial candidate would be the type of governor who would put his friends in office was a constitutionally protected opinion).

¹⁸⁴ Lidsky, *supra* note 2, at 942.

¹⁸⁵ *See* RESTATEMENT (SECOND) OF TORTS § 556 at cmt. a (1977).

If the expression of opinion was on a matter of public concern, it was a form of privileged criticism, customarily known by the name of fair comment. The privilege extended to an expression of opinion on a matter of public concern so long as it was the actual opinion of the critic and was not made solely for the purpose of causing harm to the person about whom the comment was made, regardless of whether the opinion was reasonable or not. According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.

¹⁸⁶ *See* Riley v. Moyed, 529 A.2d 248, 251 (Del. 1987) ("If a court determines that the statements are protected expressions of opinion or that they are not capable of a defamatory meaning, it will not reach the actual malice issue or need to inquire into the defendant's state of mind."). *See also* Lidsky, *supra* note 2, at 932 ("After Milkovich, the opinion privilege applies only to statements that do not imply an assertion of objective facts.").

¹⁸⁷ *Cahill*, 884 A.2d at 464 ("The plaintiff should also have easy access to proof that the statement was published. He can produce a computer print-out of the statements made over the internet or simply direct the court to the specific website where the statements were made should they still be available."). *See also* *Rocker Mgmt.*, *supra* note 125, at *3 (explaining the reasonable reader would not interpret the defendant's comments as factual, therefore the court did not disclose the defendant's identity because the plaintiff would not have a successful defamation claim).

¹⁸⁸ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

¹⁸⁹ Lidsky, *supra* note 2, at 940.

the opposite.¹⁹⁰ Therefore, reading and evaluating the statement in a narrow and broad context helps protect opinions pursuant to the First Amendment.

The second element “adds a layer of protection” to speak anonymously on the Internet by giving the defendant an opportunity to respond.¹⁹¹ Requiring the plaintiff to notify the anonymous defendant of the discovery request via the same message board as the original allegedly defamatory posting provides the defendant a reasonable opportunity to challenge the subpoena.¹⁹² Furthermore, the “notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond.”¹⁹³ If the defendant chooses to ignore the subpoena and the court decides to unmask the defendant, the Internet Service Provider (ISP) will likely have the anonymous defendant’s identifying information.¹⁹⁴ Online technologies attach unique identifiers to individuals who send and receive information on the Internet.¹⁹⁵ Therefore, the courts can learn the defendant’s identity if necessary.¹⁹⁶

The third element sifts out petty claims and reflects the Supreme Court rulings supporting protection of anonymous speech.¹⁹⁷ The Supreme Court has recognized that defamation actions “provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously.”¹⁹⁸ Before discovering the anonymous defendant’s identity through a compulsory discovery process, the third element requires that the plaintiff, “as the party

¹⁹⁰ *Id.* (quoting William Shakespeare, Julius Caesar act 3, sc. 2 (Mark Antony's funeral oration)).□

¹⁹¹ *Cahill*, 884 A.2d at 461.

¹⁹² *Id.* at 460.

¹⁹³ *Id.* at 461.

¹⁹⁴ *See Vogel*, *supra* note 3, at 802.

¹⁹⁵ Michael Traynor, *Anonymity and the Internet*, 22 COMPUTER & INTERNET L. 1, 3 (2005) (explaining how Internet technologies operate to identify anonymous speakers).

¹⁹⁶ *Id.*

¹⁹⁷ *See Talley*, 362 U.S. at 65 (1960); *McIntyre*, 514 U.S. at 341-43 (1995).

¹⁹⁸ *Vogel*, *supra* note 3, at 855.

bearing the burden of proof at trial, must introduce evidence . . . for all elements of a defamation claim *within the plaintiff's control*.”¹⁹⁹ A *prima facie* standard “appropriately balances a defamation plaintiff's right to protect his reputation and a defendant's right to speak anonymously”²⁰⁰ by forcing the plaintiff to show some evidence supporting each element of a defamation claim.²⁰¹

A public figure defamation plaintiff is not required to prove actual malice until the trial because it is nearly impossible for plaintiffs to meet this burden before trial. In cases where the plaintiff is required to prove actual malice, the defendant's identity is relevant to motive, and therefore material to whether malice is established.²⁰² Similar to the standard used by the Delaware Supreme Court, the “Equilibrium Standard” requires that a “public figure plaintiff must plead the first five elements and offer *prima facie* proof on each of the five elements.”²⁰³ Without knowing the defendant's identity, the actual malice standard is too burdensome to prove under the circumstances of an anonymous blogger.

IX. CONCLUSION

The “Equilibrium Standard” is better than the four inconsistent standards for various reasons. The new standard sets the bar higher than the “good-faith” standard by requiring the

¹⁹⁹ *Cahill*, 884 A.2d at 461. *See also Dendrite*, 775 A.2d at 769 (holding the plaintiff, Dendrite, failed show that the statements harmed his reputation, and therefore failed to make a *prima facie* case).

²⁰⁰ *Cahill*, 884 A.2d at 462 (“A summary judgment standard does not correspondingly set the bar too high for a defamation plaintiff seeking redress for reputational harm to obtain relief.”).

²⁰¹ Under Delaware law, the plaintiff must prove the following:

1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; and 4) a third party would understand the character of the communication as defamatory. In addition, the public figure defamation plaintiff must plead and prove that 5) the statement is false and 6) that the defendant made the statement with actual malice. Finally, “[p]roof of damages proximately caused by a publication deemed libelous need not be shown in order for a defamed plaintiff to recover nominal or compensatory damages.” *Id.* at 463.

²⁰² *Vogel*, *supra* note 3, at 840. *See also Vogel*, *supra* note 3, at 807-08 (“When ‘actual malice’ is an element of a defamation claim, the plaintiff will need to know the defendant's identity, and in all likelihood take the defendant's deposition, to meet that burden.”).

²⁰³ *Cahill*, 884 A.2d at 464.

plaintiff to show more than a subjective and speculative good-faith belief. The new standard does not include loose elements that would skew the balance between protection of speech and protection of plaintiffs' due process rights. The new standard does not afford the courts broad discretion, but rather requires the courts to take an active role and apply a heightened standard to prevent frivolous claims from piercing the anonymity of anonymous bloggers.

The “Equilibrium Standard” overcomes the difficulties of distinguishing fact from opinion with a four-prong test.²⁰⁴ Many courts struggle when distinguishing a fact from an opinion.²⁰⁵ The resolution of this threshold question determines whether an allegedly defamatory statement is actionable or not.²⁰⁶ The four factors are considered to ascertain whether, under the “totality of circumstances,” a statement is fact or opinion within the unique context of cyberspace.²⁰⁷ Courts should apply the following factors: “(1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.”²⁰⁸

Lower courts do not have a uniform test when deciding opinion claims, but the multifactor approach proposes a uniform opinion test that provides guidance and consistency.²⁰⁹ If state courts decide to adopt the “Equilibrium Standard,” then courts should not depend on federal constitutional law to adopt and apply the opinion test to the Internet, “but instead can adapt state constitutional or common law to the task. Ideally, of course, the Supreme Court should resolve the uncertainty its decisions have engendered, but lower courts cannot wait for

²⁰⁴ *Milkovich*, 497 U.S. 1, 2700 (explaining the following factors determine if a statement is fact or opinion).

²⁰⁵ Abner J. Mikva, *In My Opinion, Those Are Not Facts*, Address at the Georgia Bar Media & Judiciary Conference, 11 GA. ST. U. L. REV. 291 (1995).

²⁰⁶ See *Ollman*, 750 F.2d at 974.

²⁰⁷ *Milkovich*, 497 U.S. 1, 2700. See also *Ollman*, 750 F.2d at 975 (discussing separating fact from opinion is “by no means as easy a question as might appear at first blush”).

²⁰⁸ *Milkovich*, 497 U.S. 1, 2700.

²⁰⁹ See *Hustler*, 485 U.S. at 50. The purpose of the multifactor test acknowledges the need to address the fact/opinion determination. See also O’Brien, *supra* note 1, at 2752.

Supreme Court guidance to begin protecting John Doe.”²¹⁰

The new standard requires the plaintiff to notify the defendant via the same message board as the original allegedly defamatory posting in order to avoid issuing a subpoena to the ISP. Furthermore, cases have shown that it is easy to get a subpoena forcing an ISP to reveal the anonymous defendant’s identity.²¹¹ “As more and more suits are filed, many Internet users will come to recognize the ease with which their online anonymity can be stripped simply by the filing of a [defamation] action, and they will censor themselves accordingly.”²¹² Even though current law has various “doctrines available to combat the chill of defamation law, these doctrines are ill suited to the unique context of cyberspace.”²¹³ Therefore, the new standard suits the unique context of cyberspace by forcing the legal issue to remain between the plaintiff and defendant.

The new balanced approach fosters public discourse and new public policy. Blogs help shape public opinion.²¹⁴ Blogs create an opportunity for people to share their opinions about economics, politics, and news stories. A heightened, unbalanced standard often deters meaningful public discourse, and thus hinders the development of public policy.²¹⁵ “The chilling effect occurs when defamation law encourages prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.”²¹⁶ Utilizing the “opinion-centered” standard, as it currently stands, or the “good faith” standard, the plaintiff’s burden is too easy, thus deterring anonymous Internet speech. The new standard balances the plaintiff and

²¹⁰ Lidsky, *supra* note 2, at 944.

²¹¹ *Id.* at 888.

²¹² *Id.*

²¹³ *Id.* (explaining a chilling effect “is an act of deterrence”).

²¹⁴ See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 91 (1948).

²¹⁵ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685 (1978).

²¹⁶ Lidsky, *supra* note 2, at 888.

defendant's burden, guaranteeing that valuable, but not defamatory, public discourse is encouraged.

XI. CONCLUSION

Courts should implement the "Equilibrium Standard", that combines elements of the "opinion-centered" and the "Dendrite" standard, before unmasking the anonymous defendant through a compulsory discovery process. The discovery of an anonymous blogger's identity poses substantial challenges for judges. The new standard sets forth a procedure that takes place before trial in order to determine whether the identity of the anonymous defendant must be disclosed so that discovery can proceed. Compared to the four current standards, the new standard appropriately balances the defendant's First Amendment right to speak anonymously against the plaintiff's right to protect his reputation from potentially defamatory communications. The "Equilibrium Standard" addresses the important issues facing victims of defamation and anonymous bloggers without granting either party undue deference. This new standard remedies the problems that courts face with anonymous defamatory bloggers.