

Independent Newspapers, Inc. v. Brodie:
The Constitution, Defamation Plaintiffs, and Pseudonymous Internet Defendants

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Introduction

A donut shop in Queen Anne's County, Maryland, found itself defamed on the Internet by allegations of unsanitary conditions. The speakers were identified only by their web names. The shop owner's defamation suit named as defendants the sponsor of the website on which the defamation occurred, and, as Does, the individuals who did the actual posting as Does under web names. It then sought to determine the posters' actual identities.² The website defended its position successfully, asserting the federal statute immunizing Internet service providers,³ and

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2 The focus of this article is *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009).

3 47 U.S.C. § 230.

resisted discovery of the identity of the posting individuals.⁴ The website was presumably the sole source of that information.

When a defamation plaintiff seeks to ferret out the true identity of those maligning him, constitutional doctrine comes into play. The United States Supreme Court has, in a series of decisions, found a First Amendment right to speak anonymously.⁵ That right includes anonymous Internet speech.⁶

The defense of this right in the *Independent Newspapers, Inc.* (“INI”) case ultimately resulted in a decision of the Maryland Court of Appeals, the highest state court, which sought to establish definitively the procedural requirements and standards for breaching Internet anonymity.

Resolution of the issue involves the collision of two conflicting interests: the right of the defamation plaintiff to redress, and constitutional protection of the right to anonymous speech.

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

4 *Id.*

5 See Part II, *infra*.

6 *Id.*

I. The Ruling

On March 21, 2006, postings defamatory of the Dunkin Donuts store in Centreville, Maryland were made on “Newszap.com,” a website operated by Independent Newspapers, Inc. (herein “INI”).⁷ The posters were identified as “RockyRaccoonMD” and “Suze.” The allegations were that the establishment failed to meet appropriate sanitary standards.⁸ Various negative remarks about the shop’s owner surrounded the offending statements.⁹

Zebulon J. Brodie, the owner of the shop, filed suit on May 26, 2006 in Maryland state court against INI and individuals identified by their web names. INI’s motion to dismiss was granted, as were the suits against the three named defendants other than the two identified above.¹⁰

INI was, however, required by the court to comply with plaintiff’s subpoena directing it to identify the posters, RockyRaccoonMD and Suze.¹¹ The court made the following order:

ORDERED, that the requested protective order is denied as to statements regarding Plaintiff’s businesses to the extent providing [sic] available discovery regarding the identity of those individuals who made statements that the Plaintiff’s food service was

7 *Independent Newspapers*, 966 A.2d at 442-443.

8 *Id.* at 446.

9 *Id.*

10 *Id.* at 449.

11 *Id.*

maintained in a “dirty and unsanitary-looking” manner, and was permitting trash from its business to pollute the nearby waterway.¹²

Plaintiff’s counsel provided the requested Internet thread, and served a second subpoena on INI, ordering discovery of “anyand all documents and tangible things identifying and/or relating to . . . ‘RockyRaccoonMD’ and ‘Suze.’”¹³

INI filed a motion to quash and/or for a protective order, arguing that anonymity should be protected; it asserted that plaintiff had not stated an actionable claim for defamation.¹⁴ The motion was denied, INI filed a notice of appeal, and the Maryland Court of Appeals, the state’s highest court, granted certiorari before the case could be heard in the intermediate state appellate court.¹⁵

The Court of Appeals ruled that INI was correct in its assertion that plaintiff had not stated a valid defamation claim.¹⁶ It ruled in the case despite the fact that the statute of limitations had in fact run on the claim against the two posting individuals.¹⁷ In doing so, the court explained that it “granted certiorari in this case not merely to sort out the record, but to

12 *Id.* at 446.

13 *Id.* at 447.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Independent Newspapers*, 966 A.2d at 449.

provide guidance to the trial courts in defamation actions, when the disclosure of an anonymous Internet communication is sought.”¹⁸

The court then surveyed out-of-state decisions on the issue.¹⁹ It concluded by holding that the trial court had abused its discretion in denying INI’s motion for a protective order, on the ground that when the court ordered the identification of the Does, plaintiff had not yet “pleaded a valid defamation claim against any of them.”²⁰

Most significantly, the court then adopted a five-step test to be employed by the trial courts of Maryland in deciding motions in similar cases.²¹

II. Anonymity, the First Amendment, and the Internet

The First Amendment right to speak anonymously is well established in Supreme Court doctrine.²²

In *Talley v. California*,²³ a Los Angeles ordinance required that any handbill distributed in the city contain the name and address of the person preparing, distributing or sponsoring it.

The Supreme Court held the ordinance “void on its face,” finding it an inhibition to freedom of expression.²⁴ The argument that the requirement could be justified as a prevention of

18 *Id.*

19 *See generally Id.* at 449-53.

20 *Id.* at 447.

21 *Id.* at 457. Discussed *infra* Part IV.

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

23 362 U.S. 60 (1960).

“false advertising and libel” was rejected out of hand, the opinion noting that the ordinance was “in no manner so limited.”²⁵

McIntyre v. Ohio Elections Commission,²⁶ reached the same result, to invalidate a law (then common in many states) that prohibited anonymous leaflets in an election campaign. Writing for the Court, Justice John Paul Stevens found that the “an author’s decision to remain anonymous” is “an aspect of the freedom of speech protected by the First Amendment.”²⁷ The Federalist Papers were cited as an example of anonymity (more precisely pseudonymity) in a writing of historic importance.²⁸ The Court imposed strict scrutiny, even though the ban was narrower than the ban in *Talley*.²⁹ Waxing eloquent, Stevens said that anonymous writing was “not a pernicious fraudulent practice, but an honorable tradition of advocacy of dissent.”³⁰

The Supreme Court had expressly held in 1997 that First Amendment protection applied on the Internet.³¹ A District Court opinion in 2001 specifically held that the right of anonymous

24 *Id.* at 65.

25 *Id.* at 63.

26 514 U.S. 334 (1995).

27 *Id.* at 341.

28 *Id.* at 342.

29 *Id.* at 347.

30 *Id.* Two other Supreme Court cases, not cited by the Maryland court, support constitutional protection of anonymous speech. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 205 (1999) invalidated a Colorado requirement that all persons circulating petitions wear a badge bearing their name. In *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), invalidating a municipal ordinance regulating door-to-door solicitation on multiple grounds, the Court noted that the permit requirement inhibited anonymous speech.

31 *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). “Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that “[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.”^[footnote omitted] This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time

speech on the Internet “must be carefully safeguarded.”³² These cases remain established constitutional doctrine.

The arguments offered in defense of anonymity include the assumption that this protection encourages speech, that speakers may believe that acceptance of their message will be colored by knowledge of the speaker’s identity, and that the speaker may want to disclose confidential information without revealing the speaker’s identity.³³

The cases cited above have helped to preserve Internet anonymity. *Reno* is one of a series of cases finding unconstitutional federal legislation aimed at protecting children from offensive material on the Internet, the Supreme Court emphasized that there was no reason to apply a reduced level of First Amendment protection to Internet communications.³⁴

III. Anonymity and the Defamation Plaintiff

The First Amendment has something to say about all speech; it leaves only five categories without constitutional protection.³⁵ Early case law included defamation as an

dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.” *Id.* at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.* at 870.

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

33 INI, 966 A.2d at 431.

34 *Reno*, 521 U.S. at 870. Decisions extending this protection are cited in Lyrissa Barnett Lidsky, *Silencing John doe: Defamation and Disclosure in Cyberspace*, 49 DUKE L. J. 855(2008).

35 The most recent recitation of excluded categories is *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008), *cert. granted* 129 S. Ct. 1984, which lists as unprotected categories of speech child pornography when actual children are involved in its production; fighting words; incitement; obscenity and threats. The case points out that the Supreme Court has not found a category of speech to be unprotected since 1982. *Id.* at 223.

unprotected category, but *New York Times v. Sullivan* and its progeny have imposed a set of constitutional limitations on defamation plaintiffs.³⁶

The plaintiff attempting a defamation suit against a pseudonymous defendant thus faces two constitutional doctrines, the right of anonymity and the protections afforded under *New York Times*. The latter are only peripherally involved in this discussion, although the courts do refer to them when discussing pleading requirements.³⁷

Nor can the right of anonymity be absolute. Virtually any analysis of the balance of societal interests would conclude that the law cannot allow the Internet to become a sanctuary for defamation.

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

Speaking generally, the constitution does not do much for tort plaintiffs. The Supreme Court's defamation jurisprudence protects defendants in the interest of protecting free expression from undue burdens.³⁸ Moreover, the Court has held that plaintiffs have no constitutional

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

37 See *Doe v Cahill*, 884 A.2d 451 (Del. 2005), discussed in part ____, *infra*.

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

interest in reputation.³⁹ Justices Douglas and Black dissented in defamation cases, asserting that the First Amendment absolutely protected expression with respect to government officials.⁴⁰ That view has never prevailed, and it can be questioned whether state law completely eliminating causes of action for defamation for a category of individuals would be constitutional.⁴¹

Resolution of the conflict thus boils down to defining the process and standard required to reach trial in a tort claim in state court when the constitutional protection of anonymous speech is asserted as a barrier.

IV. Factual Background

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

RockyRaccoonMD: I wouldn't go to that Dunkin' Donuts...anyway...have you taken a close look at it lately? One...most dirty and unsanitary-looking food-service places I...seen.

Suze: I haven't seen the inside of a DD in a while, but have you seen the outside? I drove th...through not long ago and was completely and utterly SHOCKED at the amount of trash that is...and sides of that building. It's apparent no one is cleaning the outside of he

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

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

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

[sic] building and the...wafting into the river that runs right alongside. [smiley face symbol]

RockyRaccoonMD: I wouldn't go to that Dunkin' Donuts of Brodie's anyway...take a close look at it lately? One of the most dirty and...looking food-service places I have seen...I bought coffee...couple of times but quickly lost my appetite...⁴²

Brodie sought discovery that would disclose the identities of the two speakers. INI moved to quash and for a protective order, arguing to maintain anonymity, and contending that plaintiff failed to state an actionable claim for defamation.⁴³ The trial court denied the motion and INI appealed. The Court of Appeal granted certiorari, precluding intermediate review by the Court of Special Appeals.⁴⁴ The court expressly stated that it was issuing its opinion to guide trial courts in future cases.^{45 46}

V. Prior Approaches

42 *Independent Newspapers*, 966 A.2d at 446-47. The ellipses resulted from words being cut off on the right hand side of the page. (*Court's footnote.*)

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

44 *Id.* at 447

45 *Id.* at 435.

46 The cases analyzed by the *INI* court were not all the cases previously decided on the issue, but they included all the issues and considerations required for the court's analysis. One other case is *Krinsky v. Doe*, 72 Cal. Rptr. 3d (Cal. App. 2008).

After finding the law to be as set forth in part III above, the *INI* court reviewed the approaches that sister courts had taken.⁴⁷

The court correctly stated the issue: posters have a First Amendment right to remain anonymous, but viable causes of action for defamation should not be defeated by their anonymous posting on the Internet.⁴⁸ It then reviewed several out of state cases which had attempted to resolve the conflict.

A. Early Cases Set Forth a “Good Faith” Test.

Two cases claimed to be the first to address the issue of piercing Internet anonymity in a litigation context.⁴⁹ Each minimized the burdens for plaintiff to discover defendants’ true identity.

In the earlier of the two cases, in 1999 the District Court for the Northern District of California was faced with demands by Sees Candy for disclosure of the identity of a party advertising its products on the Internet under an allegedly infringing name.⁵⁰ The district court decided the case by creating its own four-part test: (1) The defendant must be identified sufficiently to assure federal jurisdiction of the case; (2) plaintiff must disclose all steps taken to

⁴⁷ *Id.* In acknowledging that anonymity may be limited by “defamation considerations” the court cites two entirely inapposite cases, *Beauharnais v. Illinois*, 343 U.S. 250 (1952) which makes the outdated and overruled blanket statement that libel is completely unprotected, and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) which makes the same generalization. Both cases antedate *New York Times Co. v. Sullivan* and its progeny, which have established current constitutional doctrine limiting defamation recovery.

⁴⁸ *Independent Newspapers*, 966 A.2d at 449.

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

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

identify the posting party; (3) plaintiff must satisfy the court that it could survive a motion to dismiss; and (4) plaintiff must file its discovery request with the court, with reasons, and identification of persons who might provide the required information.⁵¹

Under barebones federal pleading rules, surviving a motion to dismiss requires only a statement of the claim.⁵² The requirements turn the plaintiff's attempt to learn the identity of his defamer into a Rule 12(b)(6) motion.⁵³ The court satisfied itself that plaintiff had made a factual submission sufficient to meet the burden, pleading actual infringement of its trademarks, and submitting thirty-one instances of actual confusion.⁵⁴

An intermediate appellate court in Virginia reached a similar result in *In re Subpoena Duces Tecum to America Online, Inc.*⁵⁵ Anonymous individuals had posted defamatory information about plaintiff in violation of fiduciary duties and contractual obligations in chat rooms on AOL.⁵⁶ AOL moved to quash the subpoena; its motion was denied.

The court first asked a constitutional question: "Whether the subpoena would unreasonably burden the anonymous rights of the John Does."⁵⁷ After citing *Talley* and

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

52 FED. R. CIV. P.12.

53 FED. R. CIV. P. 12(b)(6).

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

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

56 *Id.* at 27.

57 *In re Subpoena Duces Tecum*, 52 Va. Cir. at 28.

McIntyre the court found that the right of anonymity must be balanced against the need to assure that abusers may be called to account.⁵⁸ But the court answered the question by misstating the law and misciting authority.

Citing *Beauharnais*, the court said that defamatory statements are outside constitutional protection, as would be the release of confidential information about a publicly traded company.⁵⁹ It avoids this question by finding a compelling interest in the state of Indiana in protecting “companies operating within its borders.”⁶⁰

The court then framed a “two [sic] prong test” for piercing anonymity:⁶¹ (1) The Court must be satisfied by the pleadings or evidence; (2) the party requesting the subpoena has a “legitimate, good faith basis to contend that it [has been] the victim of conduct actionable in the jurisdiction” in which the suit was filed; and (3) that the subpoenaed identity information is “centrally needed to advance that claim.”⁶²

The court found the interest in protecting companies’ reputations outweighed the “limited intrusion” into the anonymous speaker’s rights.⁶³

58 *Id.*

59 The court cites *Beauharnais* for the proposition of no protection, although that precedent has long since been rendered obsolete by the *New York Times v. Sullivan* line of cases. It misstates the date of *Beauharnais* in citing it, attributing it to 1992 rather than 1948.

60 *In re Subpoena Duces Tecum*, 52 Va. Cir. at 35.

61 Although it broke it into three parts.

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

63 *Id.*

This “good faith” test requires very little beyond a well-pleaded complaint, but this plaintiff flunked even this test.⁶⁴

What is missing is a definition of what the plaintiff must show to proceed with his case. The court did not require a showing of efforts to identify the speaker as a condition of disclosure.

B. New Jersey raises the bar - somewhat

A New Jersey appellate court denied plaintiff’s motion to discover identities, using a different standard.⁶⁵ Pseudonymous statements on a website accused Dendrite International, Inc., a developer of marketing systems largely for the pharmaceutical industry, of inflating its earnings report, and “shopping” the company.⁶⁶ The company brought suit against Doe defendants. The trial court granted Dendrite’s motion to ascertain the identities of two defendants (Doe 1 and Doe 2) but denied it as to Doe 3.⁶⁷

On Dendrite’s appeal of the Doe 3 dismissal, the appellate panel found that the plaintiff was first required, under these circumstances, to establish facts “sufficient to maintain a prima facie case.”⁶⁸ It reasoned that revelation of defendant’s identity depended on whether or not the statements were defamatory.⁶⁹ The court said that if the statements were lawful, they merited

64 *Id.*

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

66 *Id.* at 763.

67 *Id.* at 760.

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

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

constitutional protection.⁷⁰ But it found that standard provided inadequate protection for defendants.⁷¹

Like the Maryland court in *INI*, the court stated that it was establishing guidelines for the lower courts to follow.⁷² The court acknowledged that the prima facie standard was more onerous than the motion to dismiss standard.⁷³ Adopting the Virginia analysis, the court found that the third prong of that test required a “flexible, non-technical application of the motion to dismiss standard.”⁷⁴ As the court explained, a fact-sensitive inquiry was required:

Here, although Dendrite’s defamation claims would survive a traditional motion to dismiss for failure to state a cause of action, we conclude the motion judge appropriately reviewed Dendrite’s claim with a level of scrutiny consistent with the procedures and standards we adopt here today...⁷⁵

The trial judge had relied on the *Seescandy* holding to require a prima facie case of defamation against Doe. No. 3, and denied Dendrite the limited discovery it sought, on the ground that it had not shown that the statements caused it any harm.⁷⁶ “Although Dendrite

70 That clearly misstates the standard for protected speech. The court is making the same error as in *In re Subpoena Duces Tecum*, *supra* Part IV § 1.

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

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

73 *Id.* at 771.

74 *Id.* at 770.

75 *Id.* at 771.

76 *Id.* at 768.

alleges that it has been harmed and that it will continue to be harmed by the defendants' statements, saying so does not make the alleged harm a *verifiable reality*.”⁷⁷ (Italics in original.)

The court emphasized that it was striking a balance between the competing interests, including “the right of the plaintiff to protect its proprietary interests and reputation.”⁷⁸ There is no mention of the constitution on plaintiff’s side of the equation.

C. Delaware adopts a new, higher standard

The Delaware Supreme Court was the first state supreme court to address the attempt to pierce the veil and identify an offending poster, and its holding raised the bar that the earlier cases had set. In *Doe v. Cahill*,⁷⁹ a town councilman and his wife sued Comcast, the ISP, to require it to identify an alleged defamer.⁸⁰ The trial court found “good faith” on the part of the plaintiff and held that the plaintiffs met the requirements of (1) a legitimate good faith basis for their claim, (2) the information being required to prosecute the suit and (3) there being no other source.⁸¹

On appeal by the pseudonymous defendant, asserting that his First Amendment rights had been violated, the Delaware Supreme Court found that the trial court’s standard provided inadequate constitutional protection.⁸² The court then held that a defamation plaintiff seeking to

77 *Id.* at 769.

78 *Id.* At 760.

79 884 A.2d 451 (Del. 2005).

80 *Id.* at 454.

81 *Id.* at 455.

82 *Id.* at 457.

determine the speaker's identity must be required to support his claim with "facts sufficient to defeat a summary judgment motion."⁸³

That ruling constituted a rejection of the *Dendrite* standard, which required balancing. "The fourth *Dendrite* requirement, that the trial court balance the defendant's First Amendment rights against the strength of the plaintiff's *prima facie* case is also unnecessary. The summary judgment test is itself the balance."⁸⁴

The court found that to meet that standard, the plaintiff must submit evidence "creating a genuine issue of material fact for all the elements of a defamation claim *within the plaintiff's control*."⁸⁵ Because the defendant in the case was a city councilman, and thus a public official, the plaintiff would be required, under *New York Times v. Sullivan* to show falsity and malice.⁸⁶ Because these facts were not necessarily within plaintiff's knowledge, the court did not require the element of showing malice to be met at this stage.⁸⁷

The higher burden was required, the court said, because "substantial harm may come from allowing a plaintiff to compel the disclosure of an anonymous defendant's identity by simply showing that his complaint can survive a motion to dismiss or that it was filed in good

83 *Id.* The appellate court included a requirement that the plaintiff must give the posting defendant sufficient notice to allow him to fight the discovery request.

84 *Id.* at 461

85 *Id.* at 463.

86 *New York Times Co. v. Sullivan* requires, as a constitutional matter, that a defamation plaintiff suing a public official demonstrate that the defendant acted with "actual malice" if the defamed party is a public official. A Yale Law Journal article provides a detailed proposal for utilizing the public figure doctrine in anonymity cases. It proposes that speech aimed at a public figure should receive a higher degree of protection than speech directed at a private figure. Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 336, (2008). Current constitutional doctrine would have the same effect on trial of the case.

87 *Cahill*, 884 A.2d at 464.

faith.”⁸⁸ The higher summary judgment standard more appropriately protects against “the chilling effect on anonymous First Amendment Internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or unmask their critics.”⁸⁹

The Delaware ruling substantially elevates plaintiff’s burden. The court justifies the burden by derogatory comments on the nature of Internet dialog.⁹⁰ Lack of editorial control, lack of reliability, and the ease of plaintiff’s reply through the same medium are among the considerations cited by the court in requiring scrutiny of the claim.⁹¹

Ultimately the court reviewed the complaint, and found that it could not meet the state law requirement of elements for a defamation cause of action.⁹² The offending statements would be interpreted as opinion and therefore, not actionable.⁹³

Under this Delaware rule, which the court makes plain is to be binding on the trial courts,⁹⁴ plaintiff at his peril must not just plead, but must go forward with sufficient evidence to show no triable issue of fact with respect to five prima facie elements.⁹⁵

88 *Id.* at 459.

89 *Id.*

90 *Id.* at 465-66.

91 *Id.*

92 *Id.* at 467.

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

94 *Id.* at 457.

95 DEL. SUPER. CT. R. CIV. P. 569(c); *Id.* at 457.

It is questionable whether any other cause of action outside the class action area must meet this standard at the starting gate.⁹⁶

VI. Maryland elects the middle ground, with balancing

The Maryland Court of Appeals reviewed each of these holdings in detail, to assist it in formulating a policy for the trial courts. In *INI*, it identified three distinct tests from the foregoing cases: A “good faith” test; a “prima facie” test and a “summary judgment” test.⁹⁷

The court found the *AOL* “good faith” or “motion to dismiss” tests too weak, and insufficiently protective of speech.⁹⁸ These tests, it decided, would inhibit use of the Internet by unduly exposing posting parties to defamation suits.⁹⁹

On the other hand, it found the summary judgment test of *Doe v. Cahill* too stringent, and an imposition on plaintiff’s right to pursue justice. It would “undermine personal accountability

96 The Supreme Court recent decisions in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 128 S.Ct. 1937 (2009) suggest that gatekeeper issues may take on increasing significance. Application of the *Twombly* doctrine in this area is briefly discussed in Nathaniel Gleicher, *supra* note 88 at 351.

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

98 *Independent Newspapers*, 966 A.2d at 456.

99 *Id.* The Maryland court assumes the applicability of the *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) line of cases to cases of Internet defamation; It cites *McIntyre* briefly, and in no detail. But commentators observe that *McIntyre* involved political speech, which should receive the highest degree of First Amendment protection. The defamation cases often involve a class of speech which receive questionable protection, if any. *McIntyre* involved a municipal ordinance limiting anonymity. Internet defamation cases involved individual statements, and subsequent litigation. The differences in the nature of the speech between the two are discussed in detail in Caroline E. Strickland, *Applying McIntyre v. Ohio Elections Commission to Anonymous Speech on the Internet and the Discovery of John Doe’s Identity*, 59 WASH. & LEE L. REV. 1507 (2001).

and the search for truth, by requiring plaintiffs to essentially prove their case before even knowing who the commentator was.”¹⁰⁰

The Court’s instruction to the trial courts:¹⁰¹ In a defamation action where plaintiff seeks to unmask pseudonymous defendants, the lower court must:

- (1) Require plaintiff to make an attempt to notify the anonymous posters of the motion for discovery; a message must be posted on the message board involved in the contested posting;
- (2) allow the posters time to respond;
- (3) require plaintiff to identify with precision the offending statements;
- (4) Determine whether the complaint contains a *prima facie* defamation case against the anonymous posters; and
- (5) If the first four are satisfied, “balance the anonymous poster’s First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity.”¹⁰²

The fifth element is the key. The trial court is required to balance something against something, and make a decision whether the case can go forward.

100 *Independent Newspapers*, 966 A.2d at 456-457.

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

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

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

Three of the seven court members disagreed with this analysis, although not with the court’s result. Their concurring opinion is discussed in part VII.

VII. Balancing: Pro and Con

Balancing as a method of constitutional analysis is of fairly recent vintage.¹⁰³ Decisions based on balancing are based on “the identification, valuation and comparison of competing interests.”¹⁰⁴

Balancing can exist on an *ad hoc* basis, in each case in which the competing elements are present, or it can rest on a macro basis, when the court determines that between two competing interests, one is always, absent unusual circumstances, to be given priority.¹⁰⁵ By not making that determination, the Maryland court is leaving it to the trial courts to decide individual cases by balancing the interests in each case.

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

104 *Id.* at 945.

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

What factors should the trial courts consider in determining whether a plaintiff is entitled to the information needed for his/her/its case to go forward to satisfy the fifth element? In balancing the interests in the *INI* case, the court would consider the interest of the plaintiff, a business, in protecting its reputation. A restaurant accused of violating sanitary regulations would have a strong argument in its favor.

The defendants are simply two citizens exercising their first amendment rights. Those rights, of course, do not include the right to injure another by false statements. Without extended analysis, plaintiff's interest in being allowed to proceed with the case clearly should prevail.

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

There are other questions that could be asked when a trial court is asked to balance interests before ordering disclosure of the defendant's identity:

(1) Is the offending speech of the kind that receives a high degree of constitutional protection? Here the distinction could be made on the basis of high level political or intellectual discussion, measured against adolescent twaddle or rumor mongering.¹⁰⁶

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

(2) How serious is the damage to plaintiff likely to be, based on the nature of plaintiff's interest and the likely effect of the speech on that interest?

(3) What is the likelihood that the defamation will reach a large audience with a common interest (or familiarity with the plaintiff), enhanced by the protection of anonymity and the lack of any editorial control? These are cited as the characteristics of Internet speech which enable abuse to be exploited.¹⁰⁷

(4) What is the risk of bullying by plaintiff, or what's popularly known as a SLAPP suit?¹⁰⁸ The unlikelihood of a plaintiff being able to anticipate substantial damages would affect this side of the equation.¹⁰⁹ On the other hand, defamation actions are often attacked as SLAPP suits, intended not to collect damages or achieve public vindication, but to silence criticism.¹¹⁰ This point is also made in commentary on the issue. Strickland discusses one aspect of "cybersmear" as the frequent practice of dissident shareholders vilifying the corporation and its directors.¹¹¹ Anonymity in these cases can be used to protect irresponsible speech.¹¹²

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

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

110 Lidsky, note 31 *supra* at 860 n. 1; Strickland, *supra* note 101, at 6.

111 *Dendrite* is such a case.

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

Each of these questions, however, relate to the substance of the cause of action itself, and are ill-suited to decision at this early stage of litigation.

Among those rejecting balancing are three justices of the Maryland Court of Appeals in *INI*, who concur in the result of the case, but disagree with the court's ultimate inclusion of balancing. The concurring opinions of the three justices have suggested another method of resolution of the issue.¹¹³

They have no quarrel with points (1), (2) and (3). No serious quarrel with (4) though more specificity would be appreciated.¹¹⁴ However, the last point, the balancing test, brings forth a strong statement of disagreement. The three, speaking through Justice Adkins, first opine that the wide-open Internet encourages an "anything goes" mindset, highlighting the danger of individuals with no responsibility being free to make "false or exaggerated statements."¹¹⁵

Justice Adkins explained:

I would venture to guess that on the Internet, defamation occurs more frequently and is broadcast to more people than via any other medium, past or present. With this in mind, I am reluctant to set additional barriers to a person seeking to assert a legitimate cause of action to remedy the damage inflicted by a defamatory Internet communication."¹¹⁶

113 *Independent Newspapers*, 966 A.2d at 457.

114 *Id.*

115 *Id.* at 458.

116 *Id.* No reference to Tom Paine or the Federalist Papers here. And no footnote in support of what these justices apparently consider to be within judicial notice. ("I would venture to guess...").

The concurring opinion found that no balancing test is needed because the law of defamation itself balances the interests involved.¹¹⁷ Privileges, both absolute and qualified, protect defendants in some contexts. The barriers imposed by *New York Times v. Sullivan*, requiring malice on defendant's part as a constitutional matter in cases involving public officials or public figures, and limiting damages in state libel cases are another.¹¹⁸

The substantive rules applicable to defamation actions represent a judicial balancing of the competing interests.¹¹⁹ What is missing from the concurring analysis is the recognition that the Internet speech which it denigrates is constitutionally protected. There is always a constitutional right on the defense side of the equation, no matter how trivial the speech in question.

Ultimately, balancing analysis gives the trial court the discretion to nonsuit a plaintiff although all the pleading requirements imposed by law have been met. Accepting the concurring viewpoint involves allowing the plaintiff to identify the defendant, and, assuming procedural compliance, allowing the lawsuit to proceed.

VII. Protected Speech Should Not Be Stratified

The question remains: where is the Constitution in this law? The courts' references to defendants' constitutional right to anonymous speech, as one side of the balancing equation¹²⁰

117 *Independent Newspapers*, 966 A.2d at 460.

118 *Id.* at 458-59.

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

120 In *Dedrite* and *INI*.

are off the mark. The court is in fact determining whether anonymity is to be preserved, an entirely different question. The right to speech is not impacted. A defamation suit is not, in itself an invasion of free speech. Each of the cases discussed acknowledges constitutional doctrine protecting anonymity. But except for *AOL*, in each case the court simply recites the operative doctrine, and does not incorporate it in the *ratio decidendi*.

This follows logically from the fact that only a negative doctrine is in play. Finding constitutional protection for anonymity is simply a finding that the speech at issue does not lose its constitutional protection because it is anonymous. Anonymity becomes simply an additional adjective describing protected speech.

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

All speech that falls outside five unprotected categories is protected, although specific rules govern certain categories of speech.¹²¹ The protection given even particularly unattractive speech when subjected to content discriminatory legislation is illustrated by *United States v. Stevens*,¹²² in which the Third Circuit gave full strict scrutiny protection to videos graphically showing pit bulls fighting to the death. Cases like *Stevens* show that while the courts may talk of

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

122 533 F.3d 218 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 1984 (2009).

political speech as receiving the highest level of protection, it is only in extremely limited areas like erogenous zoning that the evaluation has constitutional teeth.¹²³

McIntyre was decided in 1995, and the Supreme Court has not decided a case involving the constitutional protection of anonymity since then. At that time the Internet was active, but its growth since that date has been exponential. There appears to be a cosmic distance between the political speech protected by *McIntyre* and the dialog between RockyRaccoonMD and Suze, some of which derives from Justice Stevens’s expansive language. But characterizing the Maryland Internet speech in *INI* as requiring lesser protection involves a judgment with respect to its innate worth.

RockyRaccoonMD and Suze may lack the sophistication of Hamilton and Madison, but their dialog in part expressed their distress that a structure that should have been historically preserved had been demolished.¹²⁴ In any event they were individuals exercising their First Amendment rights of free speech.

Stevens should emphasize for us that the fewer distinctions required in First Amendment analysis, the better.¹²⁵ In *McIntyre*, Justice Stevens expressly noted that “[w]hen a law burdens core political speech we apply ‘exacting scrutiny’” and its regulation must be “narrowly tailored

123 Certiorari has been granted to the Stevens case, which is now scheduled to be heard during fall 2009.

124 *Independent Newspapers*, 966 A.2d at 444.

125 The Supreme Court upheld the classification of protected films in *Young v. American Mini-Theaters* 427 U.S. 50 (1976) and *Renton v. Playtime Theaters, Inc.* 475 U.S. 41 (1986). In both cases cities were permitted to zone movie theaters on the basis of their content, non-obscene “adult” films. The judgment of municipalities between classes of protected speech was upheld, in what is essentially a zoning case.

to serve an overriding state interest.”¹²⁶ Nothing in that statement assists us in classifying speech as either political/nonpolitical, or high/low level.

By the same token, Internet speech can range from the highest to the lowest level of social value. But unless it falls into a category the Supreme Court has consigned to a lower standard, content-based regulation will be based on strict scrutiny.¹²⁷

Denigration of Internet speech occurs in virtually all the cases cited by the Maryland court.¹²⁸ The volume, universal quality and ease of access to the Internet are commented on by the courts in formulating doctrine for piercing the veil.¹²⁹

However, the Internet is a ubiquitous modern phenomenon, and constitutional protection should not be based on the apple pie image Justice Stevens projects in *McIntyre*, a community where public issues are intelligently debated by anonymous pamphleteers learned in the history of the Greek democracies. That language is unfortunate in suggesting that the fact that the speech in question was of a high level helped the Court to its decision.

Talley and *McIntyre* were both undoubtedly correctly decided. And they are correct to note the high level of speech ostensibly being protected. But that language should not be used to limit the protection of speech by those with less sophistication. The unchallenged acceptance of these dicta by the lower courts has led to a lack of analysis of its proper limitations.

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

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

129 See e.g. *INI*, 966 A.2d at

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129 *Id.* at

A rule that invites state courts to consider the value of protected speech, and to discriminate among expression, unduly limits speech.

IX. Conclusion

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

The Supreme Court cases cited above, and many lower court decisions, invoke the historic pseudonymous writers, Tom Paine, the Federalist authors (Madison, Hamilton, Jay) and John Marshall, all of whom wrote at a time when debate on public issues took place through such publications. Often the author was known to the public, or at least to the *cognoscenti*.

Not all pamphleteers were at the level of those writers. The anonymous leafletters of that era, who shielded their identities, can be compared with the men who signed the Declaration of Independence with their real names, and pledged their "lives, their fortunes and their sacred honor" to the cause of American Independence.¹³⁰ Whatever the influences on the founders by anonymous writings, their acts, to which they were willing to sign their names, are far more important to our history.

¹³⁰ Historic lore notes the boldness of John Hancock's signature, and Charles Carroll's appending his address ("of Carrollton") to his signature so that King George would have no doubt of his identity.

When a court is asked to decide a case by balancing the competing interests, it essentially takes two rules of law or status, and applies each to the facts of the case. The judge must make a fact-specific value judgment. The factors that lead to that judgment define the law.

The First Amendment right to speak anonymously is an important one. The right of a defamed plaintiff to redress if that speech is defamatory is analytically the other side of the same coin, and in that sense equally important.

Ultimately the question posed by cases like *INI* will turn on the burden borne by the plaintiff. The law of defamation imposes its own burdens on plaintiff's recovery.

Take the Internet out of the equation and where does the case come down? Does a defendant have the right to defame at will, taking no responsibility for her statements? Is there a reason for a medium capable of anonymous speech to insulate an anonymous speaker from liability? And do not fundamental canons of personal responsibility mandate that speakers be willing to stand behind that they say?

Are the Supreme Court's leaflet precedents particularly relevant to cases involving anonymous defamation? Should they be? The courts have assumed that they do, but the high court's jurisprudence evolved not from defamation cases, but from attempts by the government to limit private speech and censor Internet content.

If we simply acknowledge that speech does not gain protection from the speaker's anonymity, we come closer to a sound constitutional policy. Anonymous speech should receive the same protection it would receive if it were identified with the speaker, no more and no less.

The rights of plaintiffs, as noted above, do not derive from the Constitution. Plaintiffs in Internet cases are subject to the same limits as plaintiffs in *New York Times* or other defamation cases. But they should not be denied access to the courts when they fail an ill-defined and probably unworkable balancing test.

A proposition that everyone should be responsible for his or her actions has a lot to recommend it. There is nothing commendable about anonymous libel or slander, and scant reason to protect it. As long as pleading rules embody the concept of the courts being open to the assertion of rights, they should not be further fortified to hinder plaintiffs because modern modes of communication have facilitated anonymity.