NOTES

UNMASKING JOHN DOE: SETTING A STANDARD FOR DISCOVERY IN ANONYMOUS INTERNET DEFAMATION CASES

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INTRODUCTION

COURTS have addressed the general application of fundamental First Amendment protections on the Internet with surprising clarity. For the most part, they have looked to early free speech cases and mapped standards developed therein onto Internet speech. The general conclusion courts have reached is that speech is protected just as strictly on the Internet as anywhere else, with the same exceptions for unprotected defamatory speech. In determining who is liable for defamatory Internet speech, courts, as well as Congress, have analogized Internet service providers ("ISPs") to libraries, bookstores, and newspapers,[1] ultimately shielding them from liability for defamatory statements made by their subscribers under Section 230 of the Communications Decency Act ("CDA").[2]

Beyond these preliminary determinations, the complexities of Internet speech have demanded a more nuanced approach to defamation than was previously necessary in the context of traditional media, such as newspapers. Specifically, "John Doe" defamation cases have required courts to determine whether the identity of anonymous Internet speakers can be compelled through

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[1] See, e.g., Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[2] See Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997); see also 47 U.S.C. § 230(c) (2000) (protecting users of interactive computer services from liability).

"expedited" (pre-trial) discovery and, if so, under what standard the appropriateness of such a request should be judged. In just over a decade, several standards have been articulated and modified, almost all of which allow wide judicial discretion.

Judicial discretion, which permits courts to deny expedited discovery even after the plaintiff has met the requisite standard (and, in some cases, to grant it even when they have not), may leave potential victims without a legal roadmap or any realistic recourse. Proponents of these standards, however, have argued that the availability of self-help measures,[3] the dubious reasons for litigating defamation suits against largely judgment-proof defendants,[4] and the questionable credibility of anonymous Internet speakers[5] weigh in favor of a high plaintiffs' standard. These rationales are largely unpersuasive and may underappreciate the significance and impact of defamatory Internet speech.

This Note demonstrates that the standards employed by courts are insufficient to protect plaintiffs in John Doe lawsuits, and discusses alternatives to develop a more efficient way to balance the rights of parties in such lawsuits. It looks closely at the development of Internet defamation law with respect to anonymous speakers to determine where the law stands and in what direction it is and should be headed. Part I will provide a hypothetical John Doe Internet defamation case, based on a real life lawsuit, which

[3] See generally Anne Wells Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces, 104 Yale L.J. 1639, 1665–67 (1995) (discussing self-governance and cyberjurisdiction); Edward A. Cavazos, Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology, 12 Rev. Litig. 231, 243–47 (1992) (discussing the right of reply).

[4] See generally Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 855, 858–59 (2000) ("One of the most striking features of these new cases is that, unlike most libel suits, they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment.").

[5] See generally John Doe No. 1 v. Cahill, 884 A.2d 451, 465 (Del. 2005) (discussing the spectrum of sources available on the internet); I. Trotter Hardy, The Proper Legal Regime for "Cyberspace," 55 U. Pitt. L. Rev. 993, 1049 (1994) (arguing that the costless nature of anonymous speech lessens its impact and the value it is accorded by those who hear it); Eugene Volokh, Cheap Speech and What It Will Do, 104 Yale L.J. 1805, 1838 (1995) (noting that the lack of fact-checking norms online may lead to more untrustworthy speech but may also help to supplement valuable speech that would not exist in other fora).

will be instructive throughout the rest of the Note. Part II will explain the development of the fundamental aspects of First Amendment protections on the Internet, affirming the importance of anonymous speech and acknowledging the need for accountability for Internet defamation. Part III will present the "*Baxter* standard," arguing that it provides the best method for resolving discovery questions in John Doe defamation cases while also laying the groundwork for a comparison with other standards promulgated by the courts. Part IV will scrutinize these other standards for determining whether a subpoena compelling the identity of an anonymous speaker is appropriate. It then compares several proposed methods of analysis and looks at the problems inherent in both the standards and the remedies proffered by courts and scholars. Part V will dissect alternatives to these standards and judge their viability in the circumstances surrounding many John Doe cases. Part VI will conclude that the *Baxter* standard is the best available approach, ensuring that Internet speakers know the limits of protection guaranteed to them, and that meritorious claims of defamation will not be prematurely dismissed before they can be developed effectively.

I. A HYPOTHETICAL

A member of Phi Beta Kappa whose work had been published in a top law journal, "Sarah" had more than a dozen first-round interviews for a summer associate position, a lucrative internship for law students that usually results in an offer for permanent employment. Those initial interviews, however, resulted in only four invitations for a follow-up interview. At the end of the process, she did not receive a single employment offer. A good student at one of the top law schools in the country, Sarah did not understand why she was receiving rejection after rejection. It was only after a friend mentioned that some offensive Internet postings had been circulating that Sarah did a simple online search of her name. What she found was shocking: dozens of links to a blog attacking her character and morals. The blog provided a forum for anyone to post messages anonymously, and they had specifically targeted Sarah. Over the course of months, the messages purported to detail her sexual exploits, an alleged affair with a law school administrator, and false claims about her academic record (among many other allegations

and threats). Sarah had no idea who the posters were, but she knew the devastating allegations to be false.[6]

Unsure what to do, Sarah sent the owner of the blog an email, imploring that he or she remove the defamatory statements. In response, the owner of the blog posted Sarah's email and the anonymous posters merely made more threatening allegations and character attacks.

When the owner of the blog and various Internet service providers refused to reveal the posters' identities, Sarah filed what is known as a John Doe lawsuit, naming all of the posters as John Does—from the most active posters to those who made only a few comments. Unlike traditional defamation lawsuits, Sarah's situation presented the question of what a court should do when a defendant is an anonymous Internet speaker. Although Sarah could present strong evidence that the allegations the posters made were untrue and therefore defamatory, she was largely unable to take any legal action without knowing the identity of her defamers. Without their identities, she could not serve process, and she could not prove defendant-specific allegations to be false. For example, some allegations stated that she performed certain illicit sex acts with the poster. It would be virtually impossible for her to prove the negative (that she had never done those acts) or, alternatively, that the posters' allegations specifically were false without knowing the posters' identities.

To determine each Doe's identity, Sarah moved for pre-service, or expedited discovery. This process allows discovery to occur at a very early stage—before service of process has even occurred—and

[6] This hypothetical is based on a lawsuit filed in the U.S. District Court for the District of Connecticut, Doe I v. Ciolli, No. 3:07-cv-00909-CFD (D. Conn. filed June 8, 2007). The suit was originally filed on June 8, 2007, by two plaintiffs alleging, inter alia, defamation by various defendants identified only by their Internet pseudonyms. On January 24, 2008, plaintiffs filed a motion for expedited discovery, and on January 29 the motion was granted without opinion. On February 22, 2008, one of the defendants filed a motion to quash the subpoena with respect to him, which was denied. On August 13, 2008, one formerly anonymous defendant, whose identity was revealed by way of the expedited discovery order, filed a motion to dismiss; this motion remains pending before the court at the time of this writing. For more information on the real case, see, e.g., Ellen Nakashima, Harsh Words Die Hard on the Web: Law Students Feel Lasting Effects of Anonymous Attacks, Wash. Post, Mar. 7, 2007, at A1; Posting of Amir Efrati to Wall St. J. Blog, http://blogs.wsj.com/law/2007/06/12/students-file-suit-against-autoadmit-director-others/?mod=WSJBlog (June 12, 2007).

provides plaintiffs in John Doe lawsuits the chance to discover the information necessary to fully present their case. The court, in determining whether expedited discovery to uncover a John Doe's identity is appropriate, must balance a person's right to protect her reputation and the John Doe's right to speak anonymously. On the one hand, it seems clear that someone in Sarah's position should have the opportunity to hold her defamers accountable for making statements that are damaging and absolutely false. On the other hand, making it easy to compel the identity of Internet speakers by simply saying they are lying may scare potential speakers away from exposing the truth, or from simply exercising their First Amendment right to free speech. For example, in the business world people may be discouraged from criticizing a company's bad business practices truthfully for fear that the company will discover their identity and attack or intimidate them in an attempt to silence or discredit them. In Sarah's case, those posters who had bad experiences with her may be fearful of posting their opinions—fully within their First Amendment rights—because of the possibility that their identity could be discovered and they may face ridicule or threats. Sarah's hypothetical situation is not uncommon,[7] and it is illustrative of the competing needs for speech protection discussed in this Note.

II. THE FIRST AMENDMENT IN CYBERSPACE

The Supreme Court has said that "it is a prized American privilege to speak one's mind, although not always with perfect good taste,"[8] and that the First Amendment's protection of free speech "was fashioned to assure unfettered interchange of ideas."[9] The Court has reminded us, however, that society also has "a pervasive and strong interest in preventing and redressing attacks upon reputation."[10] The advent of the Internet, where the ability to access and disseminate information is virtually unlimited, presented an

[7] See, e.g., Anna Badkhen, Web Can Ruin Reputation with Stroke of a Key, S.F. Chron., May 6, 2007, at A1; Anne Barnard, Facing Criticism: Cosmetic Surgeon Sues over Postings by a Former Patient, Boston Globe, Sept. 24, 2002, at B1; Nakashima, supra note 6.

[8] Bridges v. California, 314 U.S. 252, 270 (1941).

[9] Roth v. United States, 354 U.S. 476, 484 (1957).

[10] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

exciting and powerful new forum for the exercise of the freedoms provided by the First Amendment.[11] At the same time, it raised basic questions as to how courts should treat Internet speech that is anonymous and defamatory, how to differentiate between public and private figures (and issues), and who ultimately can be held liable for defamatory speech. This section examines the answers to these questions in order to better understand the legal foundation upon which John Doe Internet defamation jurisprudence must be built.

A. Anonymous Speech

Anonymous speech and its status under the First Amendment have received particular attention from the courts. In 1960, the Supreme Court struck down a municipal ordinance making it a crime to distribute handbills anonymously.[12] Justice Black, writing for the majority, emphasized the significance of anonymous speech throughout American history, citing its frequent use for "constructive purposes."[13] More recently, the Court in *McIntyre v. Ohio Elections Commission* reaffirmed the importance of anonymous speech, striking down an Ohio statute banning distribution of anonymous political campaign literature.[14] Justice Stevens stated that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[15] Therefore, the Court concluded that "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."[16]

Only recently have the courts begun to look at anonymous speech over the Internet. In 2000, the Circuit Court of Fairfax

[11] See, e.g., Mike Godwin, The First Amendment in Cyberspace, 4 Temp. Pol. & Civ. Rts. L. Rev. 1, 3 (1994) (describing the Internet as a means to "reclaim the perception of First Amendment freedom of the press as an individual right").

[12] Talley v. California, 362 U.S. 60, 60, 65–66 (1960).

[13] Id. at 65; see also id. at 64–65 ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.").

[14] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336, 357 (1995).

[15] Id. at 342.

[16] Id.; see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002).

County, Virginia, was the first to publish an opinion squarely addressing this issue.[17] The court acknowledged that the right to communicate anonymously was to be protected in "diverse contexts," and held that "[t]o fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require this Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century."[18] Such treatment has been accepted by other courts, and the right to speak anonymously on the Internet has not been significantly challenged.[19]

While permitting anonymous speech may protect an open marketplace of ideas, it also creates the danger of abuse inherent when individuals think that they will not be held responsible for their actions.[20] These holdings, however, have not created a safe haven for otherwise unprotected speech—at least to the extent its unprotected nature is readily apparent. Therefore, when speech takes on the characteristics of obscenity,[21] contempt, and incitement or advocacy of unlawful activity,[22] the right to remain anonymous no

[17] In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 385 (Va. 2001).

[18] Id. at 33–34.

[19] See, e.g., John Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); John Doe No. 1 v. Cahill, 884 A.2d 451, 456 (Del. 2005); see also Henry Hoang Pham, Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers, 26 Loy. L.A. Ent. L. Rev. 207, 213–14 (2005–2006). A Kentucky legislator recently filed a bill to make anonymous posting on the Internet illegal. Were it to pass, however, such a bill would likely be held unconstitutional. See H.R. 775, Gen. Assem., Reg. Sess. (Ky. 2008); Stephenie Steitzer, Lawmaker Files Bill Seeking Ban on Anonymous Posts to Internet, The Courier-Journal (Louisville, Ky.), Mar. 6, 2008, at B5.

[20] See, e.g., Branscomb, supra note 3, at 1642–43 ("Disguising the sources of messages or postings relieves their authors from responsibility for any harm that may ensue. This often encourages outrageous behavior without any opportunity for recourse to the law for redress of grievances."); Hardy, supra note 5, at 1048–49 ("Private commentary that is identifiable (not anonymous) exhibits a balanced set of incentives. . . . When unidentified, anonymous messages defame private individuals, however, the balance disappears. . . . [T]he 'cost' of a privately defamatory communication to its author is reduced to near zero by anonymity, leading one to predict that the incidence of such communications will rise, perhaps dramatically.").

[21] See Roth v. United States, 354 U.S. 476, 485 (1957).

[22] See De Jonge v. Oregon, 299 U.S. 353, 364–65 (1937).

longer applies. For example, the Court in *McIntyre* held that while an anonymous speaker's identity may be protected as a general matter, the right to speak anonymously would *not* protect a speaker from being held responsible for noncompliance with the Election Code and therefore losing their anonymity.[23] In other words, courts have determined that the anonymity of speech will only be protected to the extent its substance complies with the law.[24] A more difficult situation arises, however, when a statement's legal status is intimately tied to the speaker's identity. In these circumstances, a court must determine when the need to protect anonymity yields to an inquiry into the substance of the statement. A closer look at defamation law and its rubric for evaluating speech about different "types" of people (specifically, public or private figures) will help to shed light on the framework in which courts must answer this question.

B. Defamatory Speech and the Public/Private Dichotomy

The law of defamation, rooted in the common law and codified in state law, was formulated to limit the right of free expression in order to protect reputation. To demonstrate liability for defamation, four elements are required: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault in publication amounting at least to negligence; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[25] A defamatory statement has been defined as one that "tends so to harm

[23] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 352 (1995).

[24] See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002); John Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 35 (Va. Cir. Ct. 2000), rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) ("Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.").

[25] Restatement (Second) of Torts § 558 (1976); see also id. § 569 (stating that liability exists for written or printed defamation (libel) although no special harm results from publication); id. § 570 (stating that liability exists for spoken defamation (slander) although no special harm results from publication if the publication imputes to the other a criminal offense, loathsome disease, matter incompatible with his business, trade, profession, or office, or serious sexual misconduct).

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."[26]

The Supreme Court has held that an individual has a right to the protection of his own good name that "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[27] As such, defamatory statements are not protected under the First Amendment.[28]

In 1964, the Court, noting the importance of speech critical of public figures in a representative democracy, constitutionalized aspects of defamation law so as to protect controversial speech in certain circumstances. As a result, defamation claims are evaluated using different standards depending on the plaintiff's public or private status. In *New York Times Co. v. Sullivan*, the Supreme Court first held that public officials would have to demonstrate "actual malice" in order to recover damages in a defamation action.[29] Shortly thereafter, the Court extended the constitutional privilege of defamatory criticism to "public figure[s],"[30] and then to any mat-

[26] Id. § 559 ("To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect.").

[27] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

[28] See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."); *New York Times Co.*, 376 U.S. at 269 ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

[29] 376 U.S. at 279–80. The Court based its holding on a determination that "[s]uch a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen." Id. at 282. Public officials have that privilege because without it, the threat of damage suits would hinder their ability to do their job. The Court stated that "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." Id. at 282–83. See also *Rosenblatt*, 383 U.S. at 87 n.13 ("The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.").

[30] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

ter of general or public interest.[31] This last expansion exposed almost every claim of defamation to a defense of public interest criticism. To check this trend, the Court limited the defense in *Gertz v. Robert Welch, Inc.*, holding that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."[32] Additionally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, the Court held that speech regarding information that was clearly more private than public and was made with respect to a private individual would receive even less protection than that found in *Gertz*.[33]

There has been tremendous debate over the formulation of the public/private dichotomy in the context of the Internet, with the courts generally using case specific, ad hoc applications of the *Sullivan-Gertz-Dun* tests that provide little consistency or a framework for the future.[34] The path that the courts choose to follow to determine whether a person or controversy on the Internet is public or private will weigh heavily on the practical effects of a given standard for expedited discovery in anonymous defamation cases. More specifically, if the plaintiff is found to be a "public figure"

[31] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31–32 (1971).

[32] *Gertz*, 418 U.S. at 352.

[33] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985).

[34] For a better understanding of this debate, see Godwin, supra note 11, at 7–8 ("The reason we allow private individuals to sue more easily for defamation is that public individuals can hold press conferences and people show up. . . . When you put the power of a mass medium in everyone's hands, libel law becomes superfluous."); Jeremy Stone Weber, Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech, 46 Case W. Res. L. Rev. 235, 261, 264 (1995) ("A libel plaintiff who can post counterspeech on the bulletin board where the defamatory statement appeared is thereby analogous to a public official or figure. . . . It is true that the response may never 'catch up' with the defamation, because the defamatory posting can be re-posted on other bulletin boards, printed to paper, or transferred through word of mouth. This risk, however, is not sufficient to justify a libel standard lower than actual malice."); see also Thomas D. Brooks, Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards, 21 Rutgers Computer & Tech. L.J. 461 (1995). But see Michael Hadley, The *Gertz* Doctrine and Internet Defamation, 84 Va. L. Rev. 477, 492, 494 (1998) ("The ability to reply in cyberspace, just like in the real world, depends not just on one's access to the Internet, but also on the ability and willingness of others to access one's reply. . . . There is no reason to think that anyone reading the charges on Drudge's page would have the desire to run a search using a Web search engine just in case a reply page exists.").

due solely to his actions or position on the Internet, the "actual malice" standard necessary to bring a public figure defamation case will be applicable to a far greater proportion of potential Internet plaintiffs versus that of non-Internet cases. Since actual malice on the part of an anonymous speaker may be difficult, if not impossible, to prove without knowing his identity and state of mind, how a standard for compelling an anonymous speaker's identity takes into account the differences between public and private defamation lawsuits will have an enormous impact on the outcome of these cases.

C. Who Will Be Liable?

Traditional defamation liability is determined by distinguishing between information distributors, common carriers, and publishers. Specifically, the Supreme Court has held that the "constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors also called secondary publishers for the substance of the materials they provide.[35] Common carriers,[36] such as the telephone company, are also not generally liable for transmitting statements made by their subscribers absent actual knowledge of the statements' defamatory nature.[37] Publishers, on the other hand, are at the heart of defamation law and are generally held liable for defamatory content that they publish or re-publish.[38] The bulletin board systems and blogs[39] of the Internet age do not fit neatly into any of these categories.

[35] Smith v. California, 361 U.S. 147, 152–53 (1959); see also Restatement (Second) of Torts § 612 cmt. g (1976).

[36] A common carrier is defined in Title II of the Federal Communications Act of 1934 as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(10) (2000); see also Phil Nichols, Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition, 1987 Duke L.J. 501 (1987) (discussing the common carrier doctrine).

[37] Restatement (Second) of Torts § 612 cmt. g (1976).

[38] Id. §§ 577 cmt. a, 578 (1976).

[39] For an understanding of bulletin board systems, see Hardy, supra note 5, at 1000–05; Paul R. Niehaus, Cyberlibel: Workable Liability Standards?, 1996 U. Chi. Legal F. 617, 617 (1996). For an understanding of blogs, see David Narkiewicz, Bloggers and Blawgs, 25 Penn Law. 49, 49–50 (2003); Larry E. Ribstein, From Bricks to Pajamas:

In 1991 the Southern District of New York made the first attempt to classify online fora for purposes of defamation liability. In *Cubby, Inc. v. CompuServe Inc.*, the court used a "knew or had reason to know" standard and held that the database at issue was similar to a news vendor or other distributor and would not be liable for statements of third parties published on the provider's forum when such provider did not exercise control over content.[40] Four years later, another New York court in *Stratton-Oakmont Inc. v. Prodigy Services Co.*, held that the ISP there was a "publisher" because it used screening technology to monitor postings and was therefore liable for the defamatory statements posted by its users.[41] These opinions sparked much scholarly comment on the appropriate classification of various Internet services.[42]

The CDA, signed into law on February 8, 1996, put much of this debate to rest. The CDA makes it clear that "[n]o provider or user of an interactive computer service" will be held liable for information provided by someone else or for taking steps to remove objectionable content.[43] The Fourth Circuit, in *Zeran v. America Online, Inc.*, held that the CDA bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" and enforced the statute's grant of federal immunity for such claims.[44] As a result, those who provide only a forum for Internet discourse may do so without fear of liability for defamatory statements made by third parties over their systems. The absence of such liability helps to maximize the number of out-

The Law and Economics of Amateur Journalism, 48 Wm. & Mary L. Rev. 185, 190–93 (2006).

[40] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

[41] Stratton Oakmont Inc. v. Prodigy Serv. Co., 23 Media L. Rep. 1794, 1797 (N.Y. Sup. Ct. 1995).

[42] See Hardy, supra note 5, at 1002–06; Niehaus, supra note 39, at 625–30; Matthew C. Siderits, Defamation in Cyberspace: Reconciling *Cubby, Inc. v. Compuserve, Inc.* and *Stratton Oakmont v. Prodigy Services Co.*, 79 Marq. L. Rev. 1065, 1070–73 (1996); Jeffrey M. Taylor, Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace, 47 Fla. L. Rev. 247, 262–65 (1995); see also Cavazos, supra note 3, at 237 (arguing that the interactive quality of computers may indicate that this line of cases is not well-suited to computers).

[43] 47 U.S.C. § 230(c)(1) (2000).

[44] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

lets for Internet speech and minimize over-censoring of speech by providers fearful of litigation.

III. COMPELLING IDENTIFICATION OF ANONYMOUS INTERNET SPEAKERS: THE *BAXTER* STANDARD

Foreclosed by the CDA from lawsuits against the deep pockets of ISPs and other interactive computer services, the victims of Internet defamation are left to pursue litigation against the specific individuals or entities who have defamed them. For these potential plaintiffs, however, the most difficult step in defending their reputation is often the very first: identifying their defamers.[45] Anonymity, characteristic of many bulletin board system posters and bloggers, can present a formidable obstacle to the victims of defamation. As a result, many such plaintiffs merely contact website "hosts" or bloggers, requesting that they take down the defamatory information. Sometimes this is enough and the matter is closed. Often, however, bloggers refuse to take action—or worse, such contact serves only to "fan the flame," as with our hypothetical John Doe. At this stage, some ISPs have been willing to turn over identifying information to defamed parties. The threat of Internet users switching to providers that will better protect their identity, as well as increased intervention by civil liberties organizations and free speech advocates, however, has prompted many ISPs to deny access to such information without a court order.[46]

[45] See Hardy, supra note 5, at 1043 ("Users paying this little cannot necessarily be equated with 'solvent defendants' who would be able to respond in damages to defamed or infringed plaintiffs. The availability of identifiable solvent defendants is even less certain with many small, desktop BBSs.").

[46] See, e.g., In re Subpoenas Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 32 (Va. Cir. Ct. 2000), rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) ("If AOL did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances, one could reasonably predict that AOL subscribers would look to AOL's competitors for anonymity. As such, the subpoena duces tecum at issue potentially could have an oppressive effect on AOL."). Organizations such as the ACLU, Public Citizen, and Electronic Frontier Foundation have also become involved on behalf of anonymous Internet posters, filing amicus briefs on their behalf in an attempt to prevent unmasking. See, e.g., Press Release, Am. Civil Liberties Union, In Legal First, ACLU Asks Pennsylvania Supreme Court to Protect Anonymous Online Speakers from Legal Intimidation (Oct. 1, 2002), http://www.aclu.org/privacy/internet/15108prs20021001.html.

Accordingly, state courts are starting to see more and more John Doe lawsuits where plaintiffs seek to compel the identity of their alleged defamers from the ISPs.[47] Existing procedural laws, drafted outside the context of the online environment, are ill-equipped for the nuances of anonymous Internet defamation cases.[48] The result is a mish-mash of standards for granting discovery requests applied by state courts lacking federal guidance and looking to each other for direction. As such, John Does have little idea of what level of protection to expect and plaintiffs can rarely determine what a given court may demand of them.

The unique nature of John Doe lawsuits makes ambiguity potentially disastrous for plaintiffs because in the majority of these cases denial of expedited discovery essentially ends the case. Without knowing the identity of the John Doe defendant, a plaintiff is often unable to move forward with the case and must forfeit the opportunity for a full trial on the merits of his or her claim. In the Sarah and John Doe hypothetical, for example, without the defendants' identities Sarah would be unable to serve process and effectively initiate her suit. Even if she could somehow initiate her suit, her substantive claims would suffer, since it would likely be impossible for Sarah to prove that many of the specific statements the defendants made were false, because she would be faced with the task of proving a negative. Additionally, denial of expedited discovery is often only reviewable under the very high abuse of discretion standard, as opposed to a review on the merits.[49] As a result, "the decision to deny discovery may be even more draconian than a dismissal."[50]

[47] These cases generally fall under state law, since diversity jurisdiction is not available until the John Doe party's location can be determined.

[48] See discussion of existing procedural laws infra Section V.A.

[49] See Michael S. Vogel, Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards, 83 Or. L. Rev. 795, 810 (2004) ("Though the application for discovery is not a motion to dismiss, it has a similar effect because the court rules on the merits of the case—despite the fact that the plaintiff faces a higher burden and is deprived of the ordinary protections of the discovery process—and because the plaintiff cannot proceed with its claim if the discovery is denied. . . . A discovery motion . . . in most jurisdictions . . . is not appealable as of right and, at least under *Dendrite*, would face a higher, abuse of discretion, standard on appeal."); see also Dendrite Int'l, Inc., v. John Doe, 775 A.2d 756, 769–70 (N.J. Super. Ct. App. Div. 2001).

[50] Vogel, supra note 49, at 810.

Over the past two decades the courts have developed a number of standards to determine when expedited discovery is appropriate in John Doe defamation cases. For a variety of reasons discussed later in this Note, these standards have largely failed to provide a clear and effective method for courts to balance the First Amendment rights of John Doe defendants with the rights of plaintiffs to their good name and reputation. A largely overlooked ruling from the Western District of Louisiana, however, provides a standard capable of achieving this balance, while at the same time giving plaintiffs, John Does, and courts a legal roadmap to its application in every case. This Part lays out the *Baxter* standard as expressed and applied by the court, discusses the appropriateness of its application to anonymous Internet defamation cases, and provides a foundation for later comparison with other standards.

A. In Re Richard L. Baxter *and the* Baxter *Standard*

In 2001, Richard L. Baxter sought an order in the Western District of Louisiana to compel a website host to disclose the identities of the anonymous authors of allegedly false and defamatory materials posted on their website.[51] The court considered Baxter's application for an order to conduct discovery, as well as a motion by "John Doe" (one of the targeted authors) to intervene anonymously, and provided a single standard for determining when anonymity should be protected in the context of anonymous Internet defamation cases.

In its memorandum ruling, the court first provided a detailed history of the importance of anonymous speech and the Supreme Court precedent balancing free speech rights and the societal interest in redressing defamation.[52] The court then looked closely at the attempts of other courts to provide a standard for determining whether to unmask Internet speakers before discarding them in favor of its own approach.[53]

The standard proposed by the *Baxter* court functions as a dual analysis. First, it must be determined whether the plaintiff is a pub-

[51] In re Richard L. Baxter, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001 (W.D. La. Dec. 19, 2001).
[52] Id. at *20–34.
[53] Id. at *34–38.

lic figure or a private figure and whether the speech at issue is of public concern.[54] If the matter is one of an entirely private nature, the court held that the proper standard was a showing of a reasonable *probability* of recovery on the defamation claim. If, however, the plaintiff and/or subject matter are determined to be public, the appropriate standard is a showing of a reasonable *possibility* that proof of malice will be shown. The court explained that, while a uniform reasonable probability standard would be preferable, the dual standard is necessary so as to ensure that public figures, likely to be unable to prove actual malice "until the defendant's identity is disclosed and his testimony taken," would not be effectively cut off from the opportunity to obtain expedited discovery so as to adequately pursue strong claims.[55]

The court's use of a "reasonable probability" standard is not the first application of such an approach; the *Baxter* court explicitly pointed to the Supreme Court's decision in *Buckley v. Valeo* for a discussion of reasonable probability.[56] In *Buckley*, the Court allowed minor political parties to demonstrate a reasonable probability of harassment and a chill on constitutional rights in order to gain exemption from contributor disclosure requirements contained in the Internal Revenue Code.[57] The Court noted that "unduly strict requirements of proof could impose a heavy burden" and therefore "[m]inor [political] parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim."[58] The Court then stated that proof of a reasonable probability of future harassment may include not only specific evidence, but also a pattern of threats or evidence of such actions directed against similarly situated individuals.[59]

Just as the Supreme Court provided the reasonable probability standard to balance the societal interest in tracking political contributions with the right of members of minor political parties not to be harassed, it is appropriate to use the reasonable probability

[54] See discussion on the public/private dichotomy in traditional defamation law, supra Section II.B.
[55] *Baxter*, 2001 U.S. Dist. LEXIS 26001, at *38–39.
[56] Id. at *25.
[57] Buckley v. Valeo, 424 U.S. 1, 74 (1976).
[58] Id.
[59] Id.

standard to balance the First Amendment rights of anonymous speakers with the right not to be defamed. Although Internet John Does may attempt to use the reasonable probability standard to prevent disclosure of their identities by arguing a reasonable probability exists that disclosure will subject them to harassment, this interpretation fails for two reasons. First, the Court in *Buckley* used the reasonable probability standard to ensure that a heavy burden of proof would not foreclose consideration of a claim; they did not provide the standard as a defense to a charge of foul play. Second, the use of the reasonable probability standard as a defense in anonymous defamation cases would effectively allow almost all John Doe defendants to prevent disclosure of their identities because they can show a probability that they will face recrimination for the precise crime with which they are charged. This result would undermine the very foundation of defamation law. As such, the use of the reasonable probability standard in *Baxter* is not at odds with its use in *Buckley*; such use, in fact, serves as a constructive example of the feasibility of asking courts to apply a reasonable probability standard.

The reasonable probability standard has also been used in a context more in line with the case law to which *Baxter* seeks to apply it. Specifically, California's defamation law takes into account the need to prevent a chill on participation in matters of public significance arising from abuse of the judicial process. As such, the law provides defendants a special motion to strike when the cause of action arises from actions "in furtherance of the person's right of petition or free speech . . . in connection with a public issue."[60] But if the plaintiff in one of these cases demonstrates a probability that he will prevail, such a motion will not be granted.[61] The statute provides that in order to make such a determination, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[62] This application further illustrates the familiarity of the reasonable probability standard and its appropriateness in the context of defamation.

[60] Cal. Civ. Proc. Code § 425.16 (West 2008).

[61] Id. § 425.16(b)(1). For discussion, see Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264–65 (C.D. Cal. 2001).

[62] Cal. Civ. Proc. Code § 425.16(b)(2).

The argument could be made that just as the California statute specifically applies the reasonable probability standard to matters of public significance, so too should courts apply this higher standard (as opposed to the lower reasonable possibility standard) to public matters in John Doe defamation cases. This claim is weak, however, because, unlike in John Doe lawsuits, the California statute deals with circumstances in which the speaker is known. Because the speaker is identifiable, it is feasible to demonstrate the actual malice element to the level of a reasonable probability. The reasonable possibility standard that the *Baxter* court uses for anonymous public defamation cases provides an analysis better suited for determining actual malice when the speaker is unknown. Such a standard brings anonymous defamation enforcement more into line with traditional defamation law by lowering the standard for a higher proof element. At the same time, the reasonable probability standard is appropriately retained for those elements of John Doe lawsuits that do not inherently demand a higher level of proof, thus protecting anonymous speakers from having their identity revealed too easily.

Having outlined the feasibility and appropriateness of the standard proposed in *Baxter*, this Part now turns to the practical application of the *Baxter* standard to John Doe defamation cases. Although *Baxter* was decided in the context of a public official (Baxter was the appointed vice president of a university), the allegedly defamatory statements were on matters of both private and public concern, providing the court the opportunity to conduct both analyses.

B. Showing a "Reasonable Probability" of Success

In order to determine whether the plaintiff had demonstrated a reasonable probability of success, the court in *Baxter* applied the reasonable probability standard to each element needed to prove a defamation claim, as articulated by the state. The court's analysis accounted for the context of the statements in determining the plaintiff's probability of success. For example, the court found that evidence showing that the plaintiff was "likely to be able to prove

the falsity" of statements was sufficient as to the "false statement" requirement.[63]

Turning to the Sarah and John Doe hypothetical, Sarah may demonstrate a reasonable probability of success by providing evidence that the statements made about her were false. As for the defendant-specific allegations, she would need to provide evidence that she could not have committed the acts alleged, but would not have to provide so much evidence as to prove her innocence with certainty. For example, if a John Doe had indicated in his posting a time or place the alleged incidents occurred or some other detail that Sarah could demonstrate to be false, she could show a reasonable probability of success by submitting affidavits contradicting the facts of the allegations (such as an "alibi" for the date on which the acts allegedly occurred). The context of the statements and the posters' reaction to her email requesting the offending statements be removed would all be weighed toward Sarah's probability of success. This requires some work on the part of the plaintiff (beyond just saying "it's not true"), but will not foreclose a plaintiff with enough evidence to indicate a meritorious claim. There exists the argument that if the John Does provide no details at all, Sarah would be less likely to be able to prove a probability of success even though she remains defamed. This is a valid concern; the alternative, however, would be to make the standard of proof required so low that Sarah would essentially only have to say "it wasn't me" to be granted discovery, which flies in the face of protecting anonymous speech and the rights of John Doe. This tension will be developed throughout the following Sections as the *Baxter* standard is compared to others developed by the courts and measured against the competing concerns that pervade the field of Internet defamation law.

C. Showing a "Reasonable Possibility" of Proof of Malice

With respect to matters of public significance, the *Baxter* court held that a plaintiff must demonstrate a reasonable possibility of proof of malice. This standard of proof ensures that public figures are not precluded from bringing defamation lawsuits when it may be impossible to prove malice—a state of mind—to the level of a

[63] *Baxter*, 2001 U.S. Dist. LEXIS 26001, at *49–51.

reasonable probability without knowing the speaker's identity. The reasonable possibility standard, however, does not make it easier for public plaintiffs to succeed on anonymous defamation claims than for private plaintiffs. Rather, because there is no element of defamation with respect to private plaintiffs that requires higher levels of proof, the higher reasonable probability standard does not put private plaintiffs at a disadvantage as compared to public figure plaintiffs, who still have to prove malice.

In applying the reasonable possibility standard, the *Baxter* court emphasized that the context of the statements in a given case may provide an indication of the possibility of malicious intent that can only be further developed through discovery and trial testimony. For example, in *Baxter* the court found that "some of the hyperbole" surrounding the allegedly defamatory statements "demonstrates an underlying animus that can only result in a finding of malice as to all of the statements."[64] In the hypothetical Sarah and John Doe case (assuming for a moment a different set of facts in which Sarah was a public figure), she could use the reactions of each poster to her email, as well as portions of the postings found, to hold only opinion (and therefore not actionable under defamation law) to demonstrate a reasonable possibility of proof of malice.

IV. COMPELLING IDENTIFICATION OF ANONYMOUS INTERNET SPEAKERS: OTHER STANDARDS

To fully appreciate the strength of the *Baxter* standard, it is important to understand the judicial landscape in which it evolved. This Part examines various cases and courts that have struggled to provide a framework for granting or denying motions for expedited discovery in these circumstances. It critiques the general standards proposed by the courts,[65] comparing them to the *Baxter* standard and concludes that, as articulated, such standards are ineffective at balancing the rights of anonymous speakers and the right not to be defamed.

[64] Id. at *52.

[65] This Part covers the first and most often cited cases on the subject, but it is not exhaustive.

A. Proposed Standards for Expedited Discovery of Identity

1. A Good Faith Basis Standard: In re Subpoenas Duces Tecum to America Online

In 2000, an anonymous company sought the identities of five individuals sued for allegedly publishing defamatory material on Internet chat boards.[66] The suit was filed in Indiana, but the discovery occurred in Virginia. As a result, America Online's motion to quash was decided by the Circuit Court of Fairfax County, Virginia, in the first published opinion[67] on the issue of whether a subpoena duces tecum and the subsequent loss of anonymity of the defendants "would constitute an unreasonable intrusion on their First Amendment rights."[68]

The court reasoned that there was a clear state interest in protecting the reputation and integrity of its citizens from wrongful conduct.[69] It therefore found that any standard would have to balance the right to speak anonymously with the need to ensure that those who abuse that right will be held accountable.[70] In order to strike such a balance, the court held that a plaintiff must demonstrate that their cause of action is valid rather than merely "perceived."[71] In the Sarah and John Doe hypothetical, it would seem that the fact that Sarah has been denied employment after the posters' statements were discovered (assuming she can provide evidence of such a connection) indicates that Sarah's claim is in fact a valid, rather than merely a perceived, wrong. Additionally, the nature of the statements (the degree of their vulgarity and se-

[66] In re Subpoenas Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), rev'd on other grounds sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 379 (Va. 2001). The Supreme Court of Virginia reversed the circuit court because it failed to review adequately the determination that the plaintiff company could proceed anonymously; the reversal, however, did not extend to the test applied with respect to the John Doe defendants.

[67] Am. Online, 52 Va. Cir. at 33 n.5 ("Although the framework for an analysis of this specific issue appeared to be present in *Columbia Ins. Co. v. Seescandy.com*, . . . the court, in rendering its ruling, focused solely on the procedural propriety of allowing discovery before service of process was effected.").

[68] Id. at 33.

[69] Id. at 35.

[70] Id. at 34–35.

[71] Id. at 36.

verity of accusations and tone) may weigh towards fulfilling this element.

The court, however, also found that a prima facie standard would not be equitable, because of the variation in the elements of such a standard from state to state.[72] The court instead articulated a standard requiring a claim to have a "legitimate, good faith basis" and also requiring that discovery of identity information be "centrally needed to advance that claim."[73] In doing so, the court chose not to follow its traditional standards for ruling on a motion to quash a subpoena, supporting the argument that the unique circumstances of anonymous Internet defamation permit deviations from traditional legal standards.

Using this standard in our hypothetical, the court would have to first determine whether Sarah's claims were in good faith. Since she has been denied employment and seeks to compel the John Does' identities to clear her name and reputation, it seems clear that she meets this bar. In all likelihood, the court would also find under this test that the John Does' identities are central to advancing a defamation claim against them: because without their identities Sarah could not serve process, nor could she likely prove whether the defendant-specific allegations were true. Thus, it seems that the good faith standard would result in a grant of expedited discovery in favor of Sarah. The court in *Baxter*, however, noted the weakness of this standard as compared with the *Baxter* standard, stating that "a plaintiff may well be in actual subjective good faith in filing the suit believing he has a strong case when, in fact, he may have no case at all."[74] The good faith standard would be such an easy standard to surmount that it offers little, if any, protection to John Does and others merely accused of defamation on the basis that the plaintiff "promises" the statements are false. The *Baxter* standard, in contrast, would require the plaintiff to show a heightened level of proof, thereby protecting Doe's inter-

[72] Id. ("What is sufficient to plead a prima facie case varies from state to state and, sometimes, from court to court. This Court is unwilling to establish any precedent that would support an argument that judges of one state could be required to determine the sufficiency of pleadings from another state when ruling on matters such as the instant motion.").

[73] Id. at 37.

[74] *Baxter*, 2001 U.S. Dist. LEXIS 26001, at *37.

ests, while at the same time providing a uniform standard that would not vary across jurisdictions. This would address the fears about state variations as articulated by the court in *America Online*.

2. A Motion to Dismiss Standard / Prima Facie Basis Hybrid: SeesCandy *and* Dendrite

a. Columbia Insurance v. SeesCandy.Com

In 1999, the U.S. District Court for the Northern District of California proposed a standard for disclosing the identity of anonymous defendants in cyberspace in *Columbia Insurance v. SeesCandy.Com*.[75] Although the suit concerned procedural matters with respect to a temporary restraining order and did not implicate the free speech rights of the defendant, the analysis of the district court provided a framework that subsequent courts have looked to in formulating standards for expedited discovery in Internet defamation cases.[76]

In *SeesCandy*, the court noted the unique characteristics of the Internet environment and provided guidelines for plaintiffs to follow in the unusual circumstance where the defendant's identity is unknown and, as a result, discovery is required before service can take place.[77] Specifically, the court compared expedited discovery to the process of obtaining warrants in criminal investigations. The court sought to provide safeguards akin to the requirement that the government show probable cause,[78] so that such discovery would only be permitted where a good faith effort had been made to identify a civil defendant.[79]

The result in *SeesCandy* was a four-pronged approach, placing various requirements upon plaintiffs. First, the plaintiff must demonstrate that the defendant is a real person or entity who could properly be prosecuted in the specified court. Second, he or she must identify steps taken in a good faith effort to locate and serve

[75] *Columbia Ins. Co. v. SeesCandy.Com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999).
[76] See, e.g., Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 2001).
[77] *SeesCandy*, 185 F.R.D. at 577.
[78] Id. at 579–80.
[79] Id. at 578.

process on such a defendant. Third, the plaintiff must demonstrate that the allegations would satisfy a motion to dismiss. Finally, the plaintiff must file a statement of reasons justifying the request for pre-service discovery. As part of this prong, the plaintiff must identify a limited number of persons or entities on whom such discovery might be served and for which there is a reasonable likelihood that such discovery will provide the necessary information.[80]

In the Sarah and John Doe hypothetical, it seems Sarah would be able to show that the John Does are real people (they posted on the blog, reacted to Sarah's email, and maintained a subscription to an ISP), and that she has taken appropriate steps indicating a good faith effort by contacting the defamers via the blog and their ISPs.

The court in *SeesCandy* was not presented with the opportunity to apply the remaining prongs, and so their precise meanings were not defined. As such, later courts have little guidance as to how to apply this framework to the facts of a given case. A faithful application of the last two prongs, however, likely provides little protection for John Does. Traditionally, a motion to dismiss standard requires only that the plaintiff assert some set of facts entitling her to relief. In the case of a defendant who claimed to have performed illicit sex acts with Sarah, a fact pattern wherein those claims are shown to be false would entitle her to relief. Thus, any "he said–she said" fact pattern would survive the motion to dismiss standard and serve to unmask John Does who may not have been lying. The fourth prong attempts to mitigate this outcome by requiring a detailed reasoning for such discovery to be granted, but this is a vague requirement that lends itself to judicial discretion in the form of a case-by-case analysis and provides little clear guidance to plaintiffs or John Does.

b. Dendrite International v. Doe

Two years later, in *Dendrite International v. Doe*, the Superior Court of New Jersey addressed a case in which the plaintiff corporation alleged defamation by multiple John Does on a Yahoo! bulletin board.[81] Here the court had the opportunity to apply the *SeesCandy* standard and take it one step further. The court held

[80] Id. at 579–80.
[81] *Dendrite*, 775 A.2d at 760.

that although the defamation claims would survive the Federal Rules of Civil Procedure's traditional 12(b)(6) motion to dismiss,[82] a higher standard was necessary to protect the rights of the John Doe defendants.[83] The court's opinion relies primarily on the rationale of *SeesCandy* and *America Online*, but constructs a four-prong standard that is much harder for plaintiffs to satisfy or even understand.

Similar to the *SeesCandy* approach, the *Dendrite* standard's first prong requires plaintiffs to make an effort to notify the anonymous posters, giving them a "reasonable opportunity" to oppose the motion.[84] The second prong calls for plaintiffs to set forth the exact statements constituting the alleged defamation.[85] In the Sarah and John Doe hypothetical, this is easily met. Sarah notified the defendants electronically and can clearly show the specific statements that were allegedly defamatory. To meet the reasonable opportunity standard, Sarah will have to notify (or attempt to notify) the defendants of her legal action so that they have the opportunity to oppose her motion for expedited discovery.

The third prong of the *Dendrite* standard requires that the plaintiff establish that its claim can withstand a motion to dismiss for failure to state an actionable claim and "produce sufficient evidence supporting each element of its cause of action, on a prima facie basis."[86] This standard is difficult to follow. On the one hand, a motion to dismiss standard requires only that the plaintiff assert some set of facts entitling her to relief—a task often easily met. A prima facie showing, on the other hand, may be much harder to demonstrate in a pre-discovery context when the defendant's identity remains unknown.[87]

In the final prong, the court provides staggering discretion to the judge to "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

[82] Fed. R. Civ. P. 12(b)(6) ("[A] party may assert [a motion to dismiss]… for failure to state a claim for which relief may be granted.").
[83] *Dendrite*, 775 A.2d at 771.
[84] Id. at 760.
[85] Id.
[86] Id.
[87] See *Baxter*, 2001 U.S. Dist. LEXIS 26001, at *38.

defendant's identity to allow the plaintiff to properly proceed."[88] The court, dealing a final blow to any clarity the test could have provided, emphasizes that the standard must be applied on a case-by-case basis, with a flexible construction of its concepts, so as to achieve a "proper balancing of the equities and rights at issue."[89] Even if Sarah were able to decipher and surmount the third prong, it is very possible that the court would use its discretion under this standard to protect the John Does' right to speak out anonymously, thus prematurely ending Sarah's defamation case. Because such action is up to the discretion of the courts, plaintiffs have very little guidance as to how to satisfy the *Dendrite* test. The *Baxter* standard, however, provides a uniform method for analyzing a plaintiff's claims. Although the court must exercise its discretion in determining whether a showing of a reasonable probability or possibility has been shown, the standard itself is supported by clear guidance and precedent for the court to use when making these determinations. The *Dendrite* standard does not boast such support. As a result, the *Baxter* standard is better able to balance the "equities and rights" without sacrificing clarity in how it should be applied.

3. A Summary Judgment Standard: John Doe v. Cahill

The Supreme Court of Delaware provides a further iteration in this string of standards for expedited discovery. In *John Doe v. Cahill*, a case involving anonymous statements posted to a blog about Cahill's performance as City Councilman, the court reversed the judgment of the lower court, which had applied the *America Online* "good faith" standard.[90] The Supreme Court of Delaware also explicitly rejected the *Dendrite* standard as excessively limiting access to the civil justice system in anonymous defamation cases.[91] In doing so, the court found that plaintiffs can often meet the good faith test with a fairly weak defamation case, and so held that a summary judgment standard is necessary to protect against trivial

[88] *Dendrite*, 775 A.2d at 760–61.
[89] Id. at 761.
[90] Doe I v. Cahill, 884 A.2d 451, 466 (Del. 2005).
[91] Cahill v. Doe I, 879 A.2d 943, 952 (Del. Super. Ct. 2005), rev'd Doe I v. Cahill 884 A.2d 451 (Del. 2005).

defamation lawsuits.[92] To meet such a standard, the court required only sufficient evidence to demonstrate a genuine issue of material fact as to every element of a defamation claim "*within the plaintiff's control*."[93]

It is important to note that this case involved defamation of a public figure (Cahill was an elected City Councilman). The court's opinion, however, provides a standard to be applied in all cases involving anonymous Internet defamation. The court specifically states that in order to lift the veil of anonymity, it does *not* require a plaintiff to produce evidence with respect to actual malice in cases of defamation of a public figure or in relation to a public issue.[94] The result is that public figures that have been legitimately defamed will have the opportunity to discover their attacker's identity and litigate their claims. This solution, however, may defeat the goals of having an "actual malice" standard in the first place. Under *Cahill*, public figures would be permitted to unmask critical speakers by meeting a fairly low standard, despite the Delaware Supreme Court's clear intention to hold such figures to a higher standard. The dual analysis of the *Baxter* standard responds to the *Cahill* court's failure to account for such public policy concerns.[95] The *Cahill* court declined to differentiate the test for public and private figures based on the idea that proof of actual malice is not an element within the plaintiff's control.[96] The *Baxter* standard, however, requires a more rigorous showing as to the possibility of malicious intent based on context—an element within his control—but not to the extent that such proof may be beyond his control so

[92] *Cahill*, 884 A.2d at 457–59.

[93] Id. at 463.

[94] Id. at 464.

[95] Such public policy concerns are vast. See New York Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964) ("[A] privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. . . . It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."). To prove defamation of a public figure, it is necessary to prove intent in the form of malice. Malice can only be determined by knowing who made the statement. Id. at 286. Thus, it seems that compelling identity (necessary to prove malice) may lead to a *lower* standard for public figures, which clearly goes against the public policy goals of encouraging open debate of matters of public interest.

[96] *Cahill*, 884 A.2d at 464.

early in a proceeding. As such, the *Baxter* standard accounts for the actual malice element without making it impossible for public figures to bring suit.

B. Rationales for a High Standard

The *SeesCandy*, *America Online*, *Dendrite*, and *Cahill* decisions have moved Internet defamation law in a direction that is more protective of anonymous speech by virtue of the court's wide discretion, but at the same time less protective of anonymous speech critical of public figures. They have also made the outcome of lawsuits for online defamation difficult to predict. The proposed standards are largely based on undefined terms—which also vary by state—and grant wide judicial discretion to look to the specific circumstances of a case even after the plaintiff has met the required level of proof. The result has been widely varying analyses leading to inconsistent results.[97]

In the face of criticism that such discretion in granting expedited discovery prevents the litigation of many valid claims, proponents of these standards have sought to justify them in four main ways. First, they claim that a standard permitting wide judicial discretion serves to protect the marketplace of ideas by preventing a chill on anonymous Internet speech. Second, they argue that the availability of self-help militates against the need for litigation. Third, they have claimed that such a standard reduces the number of cases commenced for dubious reasons—such as to discourage public discourse and to intimidate lawful speakers. Finally, it has been argued that discretion takes into account that litigation may be unnecessary in many circumstances where the allegedly defamatory speech has little actual impact because of the already suspect nature of anonymous Internet speech. These arguments, analyzed in the remainder of this Section, are unconvincing and largely miss the mark in their conception of Internet speech.

[97] See, e.g., Mobilisa, Inc. v. Doe 1, 70 P.3d 712 (Ariz. Ct. App. 2007); Krinsky v. Doe, 72 Cal. Rptr. 3d. 231 (Cal. Ct. App. 2008); Immunomedics, Inc. v Doe, 342 N.J. Super. 160 (App. Div. 2001); Reunion Indus., Inc. v. Doe, No. GD06-007965, 2007 Pa. D. & C LEXIS 145 (C.P. Allegheny County Ct. Sept. 21, 2007).

1. Preventing a Chill on Speech

Developing a standard that avoids chilling legitimate speech is clearly desirable. The very rationale for protecting anonymous speech under the First Amendment is that it provides the means to express ideas that are important to free and open discourse. A lack of protection could subject a speaker to persecution or otherwise discourage their comment. The Supreme Court has pointed to the Federalist papers, which were published anonymously and were only later revealed to have been written by James Madison, Alexander Hamilton, and John Jay, as well as the work of Benjamin Franklin, who used numerous pseudonyms, as examples of the significance anonymous work has played throughout history.[98]

Forward-thinking and enlightening work, however, is not the only type of anonymous speech that is protected. Our hypothetical John Doe case brings to light another significant example. A subset of the John Does in this case only contributed to the postings to the extent of name-calling, offensive statements about Sarah's sexual behavior, and opinions about her appearance. These postings are not of particular societal value, but to the extent that they are true or are merely opinions, they fall within a person's First Amendment rights. In other words, while the First Amendment does not protect defamatory speech, it does protect name-callers. Faced with the threat of their identity being revealed, John Does who expressed their frustration or dislike for someone from the safe position of anonymity may be unmasked to their bosses, coworkers, and others, potentially losing jobs and professional standing for having spoken their mind. Thus, those who advocate a high standard for plaintiffs to meet in order to compel disclosure of an anonymous speaker's identity claim that such a standard is necessary to avoid over-deterrence of legitimate and nondefamatory—although not necessarily tasteful—speech.[99]

[98] For a more complete discussion, see *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 341 n.4 (1995); *Talley v. California*, 362 U.S. 60, 65 (1960).

[99] See, e.g., *Cahill*, 884 A.2d at 457 ("[S]etting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously."); Lidsky, supra note 4, at 861 ("[T]hese Internet defamation actions threaten not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora."); Weber, supra note 34, at 266 ("Because libel litigation is exceedingly expensive com-

While this rationale is persuasive, wide judicial discretion is not the only way to encourage open discourse. On the one hand, a standard that is clearly articulated and ensures that plaintiffs with legitimate defamation claims are able to obtain expedited discovery and have their day in court will enhance Internet speech and deter speech that is defamatory without reaching speech that is protected by the First Amendment. As one scholar has noted, "The quality of speech is improved when speakers realize that their speech has consequences."[100] On the other hand, a standard that makes it nearly impossible for the defamed to determine who has made such statements encourages speakers to flaunt defamation law with little fear of repercussions.[101] As such, a standard for expedited discovery, such as the *Baxter* standard, that limits judicial discretion by way of a clear method to analyze individual circumstances encourages open and constructive speech by eliminating that which detracts from legitimate discourse—but no more. In other words, by accounting for individual circumstances under a standardized rubric, the *Baxter* standard makes clear distinctions between permissible and impermissible speech that speakers can rely on. The result is two-fold: first, legitimate anonymous speech is actually encouraged because speakers can determine how far their speech may go without fear of prosecution; second, because illegitimate speech can be consistently dealt with, the quality of anonymous speech available is improved.

2. Availability of Self-Help

It has been argued that wide judicial discretion limiting the success of a plaintiff's motions for expedited discovery is acceptable because of the opportunity for self-help measures. Proponents of this argument claim that it is not only extremely easy in the online arena for someone who has been defamed to reply, but it is also "a

pared to other types of civil suits, courts . . . must assess the likelihood that truthful, protected speech will be chilled when determining whether an actual malice standard is constitutionally compelled for bulletin board communication." (footnote omitted)).

[100] Lidsky, supra note 4, at 887.

[101] See id. at 882 ("[R]emoving the cloak of anonymity from John Doe defendants is likely also to remove their sense that anything goes, and the mere threat of being revealed may be enough to force a defendant to temper his remarks in the future.").

natural and encouraged part of the ongoing discussion."[102] Just because it is easy for a person who has been defamed to refute the defamatory statements on the Internet, however, does not mean that the presence of this option removes the need for a legal remedy.

The Supreme Court has held that the inadequacy of a reply to get rid of an original false statement does not make the reply irrelevant;[103] numerous scholars have indicated that this holds true on the Internet.[104] But these scholars misunderstand the nature of the Internet. In traditional media, the reply to a defamatory statement occurs in the same general forum. For example, a defamatory statement in the *New York Times* is cured (at least to some extent) by a retraction. While those who read the original may not believe the retraction (or see it), the defamatory story is largely out of circulation and the defamation itself has ended.

Defamatory statements on the Internet are perpetual—a simple Google search will turn up defamatory statements in their original form years later. As one scholar has noted, the adequacy of a reply on the Internet depends not just on the ability to reply, but also the "ability and willingness of others" to seek out that reply.[105] As such, "[t]here is no reason to think that anyone reading the charges on [one website] would have the desire to run a search using a Web search engine just in case a reply page exists."[106] In addition, a person who has been defamed on the Internet may not learn of the defamation for weeks, or even months. As such, their response may

[102] Cavazos, supra note 3, at 246; see also Branscomb, supra note 3, at 1671–72; Godwin, supra note 11, at 7–8.

[103] See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974).

[104] See, e.g., David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1381–82 (1996) ("[B]ecause the Net has distinct characteristics, including an enhanced ability of the allegedly defamed person to reply, the rules of defamation developed for the Net could take into account these technological capabilities—perhaps by requiring that the opportunity for reply be taken advantage of in lieu of monetary compensation."); Weber, supra note 34, at 277 ("If we truly are a nation that believes that 'truth will out,' then the courts must require a strongly speech-protective rule . . . for libel plaintiffs who have access to the computer bulletin board on which the defamatory material appeared. If ever a true marketplace of ideas existed, it exists where the cyberlibel plaintiff can make a nearly instantaneous and universal response on the bulletin board." (footnote omitted)).

[105] Hadley, supra note 34, at 492.

[106] Id. at 494.

be so removed in time from the original statement as to render it incapable of attracting the attention of those who read the original defamatory remarks and remedying the harm already done. Finally, the nature of blogs allows the blog owner (that is, the defamer) to remove or even edit a reply posted by the plaintiff, further diminishing the value of available self-help remedies.

Our hypothetical case is again illustrative. Sarah's attempt to reply was largely ignored by the anonymous posters, except to the extent that it fanned the defamatory flames. If she attempted to post a response on the blog, it could simply be removed by the site owner. While a reply may be one remedy available to a victim of defamation, it is no more sufficient to protect one's reputation online than offline, where litigation is the traditional means of dealing with defamation. As such, victims of Internet defamation should be provided the same recourse and should not be forced to rely alone on attempts at self-help to restore their reputation.

3. Limiting Allegations of Dubious Nature

Proponents of a high standard for expedited discovery also argue that many Internet defamation cases involving anonymous speakers are initiated for questionable reasons, and that such a standard helps to keep at least some of these cases from ever making it to court. They claim that plaintiffs are often only after revenge or retribution for defamatory statements, attainment of which is not the purpose of the law.[107] This argument misstates the purpose of defamation law as well as the appropriate remedy.

It is true that many Internet defamation lawsuits are symbolic—the plaintiff may just want the fraudulent nature of the statements to be acknowledged and to silence the defendant and others like him.[108] In part, this is a result of the fact that most John Doe defendants lack the resources to defend such lawsuits, much less satisfy a judgment against them, and so symbolism is often all plaintiffs *can* hope for. Plaintiffs may simply desire to signal to the world that the allegations made by the defamer are untrue. This is not, however, contrary to the purpose of defamation law. The "right" that defa-

[107] See, e.g., Doe I v. Cahill, 884 A.2d 451, 457 (Del. 2005).
[108] See, e.g., Lidsky, supra note 4, at 860, 876.

mation law seeks to protect is the right to guard one's good name.[109] Thus, even if a plaintiff chooses not to follow through with a lawsuit after their defamer has been revealed[110] (either because the defendant has ceased to make defamatory statements or because the revelation satisfies the plaintiff that the statements have been sufficiently refuted), this does not mean that expedited discovery was wrongly granted. In fact, "from the standpoint of traditional First Amendment law, there is no harm in silencing knowingly or recklessly false statements of fact, for these statements have no value to public discourse."[111] Further, this is not particularly different from traditional defamation suits.[112] For example, celebrities often sue tabloids for running stories that they claim are defamatory; the goal of such suits is largely to say to the world that the statements and character implications they contain are false. In fact, failure to bring a suit can signal to others an acknowledgement of the truth of the allegations. While large damages can be rewarded in these cases, they are not the driving force behind the litigation.[113]

While discouraging suits commenced for legitimate symbolic reasons is not an acceptable goal, preventing lawsuits with the principal aim of harassing legitimate (albeit offensive or negative) speakers is not only desirable but constitutionally necessary. Again, defamation law does not punish name-callers. In a scenario where there is a disparity in power (for example, a wealthy corporation and an individual consumer), a company, or similarly powerful plaintiff, that is guilty of the acts (or omissions) anonymously alleged may nonetheless seek to compel the identity of the speaker. The company may do so with no intention of going forward with the litigation. Rather, once they have identified the speaker, they may apply pressure or take other steps to silence the person that

[109] See, e.g., Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

[110] See, e.g., Vogel, supra note 49, at 799 ("[T]he identification of a defendant for purposes of service of process may in itself constitute relief for the plaintiff—and may even be the sole relief the plaintiff really desires.").

[111] Lidsky, supra note 4, at 860.

[112] But see id. at 859 ("[U]nlike most libel suits, [Internet libel suits] are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment.").

[113] Another example is companies that sue in an attempt to get people to stop saying negative and untrue things about the company when the amount of money they could hope to get from an individual defendant is hardly enough to be significant for a large corporation.

would be contrary to the open discourse at the heart of the First Amendment. Perhaps an even more demonstrative example is presented by the scenario of a boss who is called names and whose misdeeds are recounted online. Such a person may seek only to identify those who have spoken out against him in order to intimidate the speakers into silence, or simply to fire them.

A high standard for obtaining expedited discovery in every case, however, is not the appropriate course of action, since such a standard forecloses many valid suits. Rather, legislation preventing Internet-related strategic lawsuits against public participation ("SLAPPs"), which has already been introduced in at least twenty states, achieves this goal far more effectively than judicial standards can.[114] SLAPP legislation provides safeguards against cases instigated for illegitimate purposes and penalties for those who fail to comply.[115] As such, standards for discovery of defamers' identities can be more favorable to plaintiffs without risking illicit motions dampening Internet discourse.[116]

4. Allowing the Nature of the Internet to Militate Against the Necessity of Litigation

Finally, the fact that valid defamation claims will be foreclosed by a high standard for expedited discovery has been rationalized by an assumption that the very nature of the Internet mitigates any harm that could be caused by defamation. This argument assumes that "[t]he very power of anonymity . . . is the plaintiff's own protection, for anonymous remarks will be greatly devalued precisely because they are anonymous and easy to make."[117] This line of rea-

[114] See, e.g., Cal. Civ. Proc. Code § 425.16 (2004); Ga. Code Ann., § 9-11-11.1 (2006); 735 Ill. Comp. Stat. 110/5 (Supp. 1 2008); Ind. Code § 34-7-7-5 (1998); Mass. Gen Laws Ann. Ch. 231, § 59(h) (2000).

[115] For a more in-depth discussion of SLAPPs, see Victoria Smith Ekstrand, Unmasking Jane and John Doe: Online Anonymity and the First Amendment, 8 Comm. L. & Pol'y. 405, 415–16 (2003).

[116] See Jennifer E. Sills, SLAPPs (Strategic Lawsuits Against Public Participation): How can the Legal System Eliminate Their Appeal?, 25 Conn. L. Rev. 547, 582–83 (1993).

[117] Hardy, supra note 5, at 1049. On the one hand, Hardy acknowledges that the cost of private defamation is zero to the author, and so there may be much more of it. On the other hand, he argues that a strong self-help remedy and the idea that people do not trust what they read online anyway is an effective mediator for this problem. See also Doe No. 1 v. Cahill, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chat rooms tend

soning is not only legally questionable, but also drastically underestimates the power and longevity of Internet speech.

The rapidly changing nature of Internet speech may be one reason for such a misconception of its power. The cases formulating expedited discovery standards were largely decided in the context of postings on financial bulletin boards. As one scholar has noted, an

> [I]dealized vision of Internet discourse [as the living embodiment of the marketplace of ideas] contrasts rather sharply with the reality of the financial message boards. Discourse on the boards bears more resemblance to informal gossip than to rational deliberation, and the culture of the boards fosters . . . "disinformation, rumors, and garbage."[118]

In that light, it is easy to see how one might assume a reasonable person would not believe statements made in such an environment, lessening the need for a standard more accommodating to plaintiffs. However, since these cases were decided, blogs have emerged as "the newest and most efficient means of disseminating decentralized information."[119] Blogs are generally written by a single individual or small group, and usually present information through journal-style entries.[120] This structure eliminates much of the chaos that characterizes bulletin boards and makes blogs "much more influential and, therefore, much more dangerous if misused."[121]

The reach and impact of Internet speech as a whole has taken on great importance over the past two decades. Traditional news me-

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to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."); Volokh, supra note 5, at 1838 ("[W]hen speakers can communicate to the public directly, it's possible their speech will be less trustworthy: They might not be willing to hire fact checkers, or might not be influenced enough by professional journalistic norms, or might not care enough about their long-term reputation for accuracy. Talk radio, for instance, has been criticized for being unreliable in large part because of how democratic and spontaneous it is.").

[118] Lidsky, supra note 4, at 893 (quoting Reliable Sources: Are 24-Hour TV and the Internet Helping People Understand Wall Street, or Is There Too Much Bull in the Bull Market? (CNN television broadcast, July 31, 1999)).

[119] Charles B. Vincent, Note, Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006, 31 Del. J. Corp. L. 987, 991 (2006).

[120] See Ribstein, supra note 39, at 187, 189.

[121] Vogel, supra note 49, at 815.

dia have added interactive online editions[122] and the number of widely read blogs covering everything from the news to politics to sports has grown exponentially. According to a 2007 survey, more than half of those individuals using the Internet to get their political news (53%) look to Web sources (including blogs) not fed by traditional news media.[123] This does not even begin to account for the multitude of people that run countless Google searches every day on any number of topics—both newsworthy or merely of peculiar interest—or the number of employers and educational institutions that routinely run Internet searches on potential candidates, as in the case of our hypothetical Sarah. Finally, the influence of many blogs extends far beyond their initial readership; their stories are emailed across the Internet and subsequently "read, cited, and quoted, [sic] by other news makers."[124] Many of the most popular of these blogs are posted anonymously.[125]

Anonymous blogs—not held to the same professional standards of fact checking as traditional media and often inclined to sensational news stories—have on many occasions run a defamatory story, which is then picked up by other blogs (and sometimes traditional news sources) and quickly becomes "news." For example, in 2000 a rumor was spread via the Internet that Tommy Hilfiger, a popular clothing designer, had made racist comments on the Oprah Winfrey show. Although the reports were entirely false, many people still believe that Hilfiger made those statements.[126] In another, more recent example, an anonymous Internet report that then presidential-hopeful Barack Obama attended a radical Madrassa primary school spread rapidly across the Internet.[127] The report was

[122] See, e.g., The New York Times, www.nytimes.com (last visited Nov. 8, 2008); The Washington Post, www.washingtonpost.com (last visited Nov. 8, 2008).

[123] Lee Rainie & John Horrigan, Election 2006 Online, (Jan. 17, 2007), http://www.pewinternet.org/pdfs/PIP_Politics_2006.pdf.

[124] Vogel, supra note 49, at 796.

[125] See, e.g., id. at 795–96.

[126] See Lidsky, supra note 4, at 864 n.33; see also Tony Cox, Hilfiger Rumor, House Hate Crime Legislation*, on* News & Notes (National Public Radio broadcast May 4, 2007), available at http://www.npr.org/templates/story/story.php?storyId=10011201}; Hilfiger Defends Himself Against Racist Rumor, WENN Entertainment News Wire Service, (LexisNexis May 3, 2007).

[127] See, e.g., Hillary's Team Has Questions About Obama's Muslim Background, Insight, Jan. 17, 2007, http://www.insightmag.com/Media/MediaManager/Obama_2.htm.

picked up by Fox News[128] and widely disseminated before being shown to be entirely false.[129] In this case, traditional media sources publicly retracted the statements, but they remain on various Internet sites with no such retraction long afterwards—in some cases out of malice and in others simply out of neglect or ignorance.

Once an individual's or company's name has been mentioned on the Internet, many popular search engines will turn up the article when such a person's or entity's name is entered. As in the story of our hypothetical Sarah, potential employers or investors may turn up false information through simple searches on anonymous blogs they may not otherwise visit and they may believe what they read, without giving the defamed a chance to respond. In fact, as one scholar has argued, "anonymity can also create a perception of reliability or greater (insider) knowledge."[130] The Internet makes it hard to determine what is and is not a legitimate news source, and lies and gossip become easier to spread. While our John Doe example is merely hypothetical, Sarah's situation is not unique; more and more employers are looking to the Internet for insight into candidates' background. Sorting the truth from the lies is often much harder in this context than deciding to give more weight to something in the *New York Times* than *The Enquirer*.

The impact that anonymous Internet speech has may be exacerbated by a phenomenon called the "sleeper effect." This theory indicates that, while a person may not believe an article when they first read it, they will later forget the source but remember the (false) statement. In later conversations or decisions, the statement remains in the back of their mind, having the opposite impact it

[128] See, e.g., Bill Carter, Rivals CNN and Fox News Spar Over Obama Report, N.Y. Times, Jan. 24, 2007 at A19; The Big Story With John Gibson: Interviews with Terry Holt and Thomas Nazario (Fox News Network television broadcast Jan. 19, 2007).

[129] See, e.g., Howard Kurtz, Headmaster Disputes Claim that Obama Attended Islamic School, Wash. Post, Jan. 23, 2007 at C7; Sean Aqui, Another Made-Up Scandal to Befoul Political Waters, Blogcritics Magazine, Jan. 25, 2007, http://blogcritics.org/archives/2007/01/25/190401.php; Countdown (MSNBC television broadcast Jan. 22, 2007).

[130] Vogel, supra note 49, at 819.

would have had they remembered the context in which they had read it.[131]

The development of the Internet as a forum for diverse speech makes it clear that the pervasiveness and ultimate impact of Internet speech should not be underestimated. As such, a standard ensuring that legitimate claims are not foreclosed is particularly necessary, so as to protect the right to one's good name in an environment where tarnishing another's reputation has become much easier.

V. ALTERNATIVES TO NEW DISCOVERY STANDARDS FOR ANONYMOUS INTERNET DEFAMATION

A. Existing Procedural Rules

It has been suggested that requests for expedited discovery in the context of anonymous Internet defamation are not so unique as to require the formulation of new standards, and that the "grafting of new tests onto existing rules" may even threaten constitutionally protected values.[132] One proposed alternative is to simply fit John Doe cases into existing procedural law. On the surface, this approach seems to offer some level of continuity, since the relevant state procedures are often fairly uniform and well defined.[133] However, this alternative fails to recognize that the very reason courts began to formulate new standards was that there was no existing, relevant procedural law to provide a basis for decisions. Procedural law was not written to account for the nuances of anonymous Internet defamation, and thus any attempt to use them in such cases requires wide discretion on the part of courts to determine what procedural law each case implicates. Specifically, the wording of many traditional procedural rules, which balance the due process rights of speakers, does not lend itself to application in circumstances requiring First Amendment balancing where defendants are unnamed and generally not present to defend themselves. Therefore, simply grafting existing rules onto these new circum-

[131] See Farhad Manjoo, Rumor's Reasons, N.Y. Times Magazine, Mar. 16, 2008, § 6, at 22.

[132] These values include due process, equal protection, and the right to trial by jury. Vogel, supra note 49, at 801–02.

[133] Id. at 843.

stances is much like trying to force a key into the wrong lock. As a result, this approach may present the same constitutional troubles proponents seek to avoid, requiring courts to exercise the same level of discretion so problematic in the current manifestations of expedited discovery standards.

Federal Rule of Civil Procedure 56 presents a useful example. While the rule sets forth a standard for summary judgment, courts (for example the court in *Cahill*) have used this standard to determine whether to allow expedited discovery. The rule states that summary judgment should be granted once it has been shown that "there is no genuine issue as to any material fact."[134] At the early stages of anonymous Internet defamation cases, the plaintiff will often not have had the opportunity to acquire the necessary evidence for every material fact in order to meet this standard. In such a situation, the rule states that if the party (here, the plaintiff) has valid reasons for not having the requisite information (the lack of an identified adverse party seems to be a valid reason) the court should allow the plaintiff to obtain such information before granting or denying summary judgment. As such, the plaintiff is put in a situation where he cannot satisfy a summary judgment standard without the identity of the defendant and cannot obtain such identity without having met the summary judgment standard.

In 2006, a Pennsylvania trial court attempted to justify granting discovery requests for an anonymous poster's identity under Pennsylvania's discovery rules.[135] The rules require discovery to be granted only when it will not "cause *unreasonable* annoyance, embarrassment, oppression, burden or expense" to the defendants;[136] however, the rule provides no guidance as to what would rise to the level of unreasonableness in this context. In this case, the court determined that an analysis of the defendants' First Amendment rights was necessary to gauge reasonableness. They held that the speech in question was defamatory per se and therefore not protected by the First Amendment, and discovery was not unreasonable.[137] This holding left entirely unclear whether anonymous

[134] Fed. R. Civ. P. 56(c).

[135] Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., 2006 Phila. Ct. Com. Pl. LEXIS 1, *27–31 (2006), rev'd, 898 A.2d 1141 (Pa. Super. Ct. 2006).

[136] Id. at *31 (emphasis added).

[137] Id. at *32–34.

Internet speech must be defamatory per se before the speaker's identity may be compelled, or whether it must be left to the discretion of the court to make a fact based determination. As such, the holding either created a new standard (the requirement of per se defamation), which it had sought to avoid doing, or it vested the courts with enormous discretion. Although the Superior Court of Pennsylvania reversed this decision, it did so without opinion, and so the question of what standard should be applied in these cases remains unclear.[138]

B. Internet Posters as Journalists

Laws protecting journalists' sources have been proffered as providing a promising answer to the question of when to grant expedited discovery in John Doe defamation cases. In 1972, the opinion in *Branzburg v. Hayes* summarized the argument for shielding journalists from being forced to reveal their sources, asserting that "if the reporter is . . . forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."[139] This description mirrors the argument for limiting expedited discovery of John Doe identities—that John Doe bloggers and Internet users seek to foster open discourse and should be afforded additional protections for speaking anonymously. This suggests that similar protections from disclosing identities may be appropriate.[140] It is important, however, to avoid confusing similar constitutional goals and the appropriate means to achieving such goals.

Lower courts have interpreted the plurality's opinion in *Branzburg* as providing guidance on the limited protections from discovery motions to be afforded to journalists.[141] Justice Stewart, dissenting, suggested that these protections include a requirement that the government demonstrate probable cause to believe that the re-

[138] Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., 898 A.2d 1141 (Pa. Super. Ct. 2006).
[139] Branzburg v. Hayes, 408 U.S. 665, 679–80 (1972).
[140] See Ekstrand, supra note 115, at 425.
[141] See, e.g., In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983).

porter's information (an anonymous identity) is clearly relevant to a specific probable violation of law, that the information cannot be obtained through less destructive methods, and that there is a "compelling and overriding interest" in the information.[142]

This test is not appropriate for John Doe defamation cases. In considering a motion for expedited discovery, there is almost no question that the compelled identity is relevant to a defamation charge against the anonymous speaker. Thus, the first prong—a probable cause test—will necessarily be met without any meaningful inquiry into the charge itself. Second, the Internet not only allows people to speak anonymously but also provides the means to remain anonymous very effectively. As such, the second prong of Stewart's test would likely always be met in these cases. Finally, the "compelling and overriding interest" prong seems useful in balancing the rights of both parties. It suffers, however, from the same problem of judicial discretion that current expedited discovery standards have produced. There is always a compelling and overriding interest to protect a speaker's First Amendment rights and, at the same time, a compelling and overriding interest in protecting a person's reputation from defamation. In the context of private individuals particularly, such a "compelling and overriding interest" is hard to gauge. Ironically, the very standard that serves to protect the anonymous sources of journalists may actually serve to underprotect the rights of anonymous Internet speakers and is therefore not appropriate in John Doe defamation cases.[143]

C. A New Body of Law

At the opposite end of the spectrum, some have argued that the Internet is so unique that an entirely new conceptualization of First Amendment and procedural law is necessary for lawsuits involving Internet speech. One scholar has gone so far as to compare the In-

[142] *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

[143] But cf. Vogel, supra note 49, at 836, 839 (arguing that because journalists are given a shield so as not to burden the delivery of the news, and because journalists' sources are not necessarily charged with any wrongdoing—whereas anonymous defamers are—there is no comparable reason to guard ISPs).

ternet to the Wild West frontier.[144] Under this conception, it is claimed that the Internet provides a true marketplace of ideas as a result of its lawless nature, free from the strictures of offline civilization. Some scholars have used this comparison as a foundation for arguments that the international scope of the Internet requires a hybrid legal system, guided either by some new governing force[145] or by "Internet norms" that develop over time.[146]

In some ways, the Wild West analogy is useful. The Internet is full of possibilities still largely unexplored and cyber-pioneers are constantly reconceptualizing online capabilities as well as the Internet itself.[147] However, just as the Wild West was tamed, so too must the Internet be civilized. Law and order will breed discourse and the exchange of ideas, whereas a void lends itself to chaos and incoherence.[148]

It is important to acknowledge the borderless nature of the Internet in any attempt to formulate a legal framework. However, to say that because international norms vary, a forum that welcomes speakers from anywhere in the world is beyond the reach of the laws of any one nation is narrow minded. The debate as to how exactly the Internet should be governed as a whole is fierce, and likely to remain unresolved for many years to come.[149] In the meantime, it is necessary for U.S. defamation law to apply to its citizens, even as they function in an international marketplace. A useful comparison is to copyright and trademark law, which has developed in the face of similar conditions of international access. While

[144] David Allweiss, Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?, 15 Touro L. Rev. 1005, 1005 (1999). But see Jonathan D. Bick, Why Should the Internet Be Any Different?, 19 Pace L. Rev. 41, 43 (1998).

[145] See Johnson & Post, supra note 104, at 1367.

[146] See Hardy, supra note 5, at 995–96.

[147] See Doug Chandler, Web 2.0: Buzzword or Bonanza?, Electrical Wholesaling, May 2007, at 25–26.

[148] See, e.g., Lidsky, supra note 4, at 886 ("This civilizing influence could benefit Internet discourse in at least two ways. First, to the extent that the prospect of being verbally 'attacked' deters some citizens from participating in Internet discourse, application of defamation law can help to ensure that Internet discourse remain open to all. Second, defamation law might help to cure the largest single threat to meaningful discourse in cyberspace: incoherence.").

[149] See Dan L. Burk, Law as a Network Standard, 8 Yale J.L. & Tech. 63, 64 (2005-2006); Jack L. Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199, 1199–1200 (1998).

evolving international agreements[150] have provided some consistency, in the end each nation is responsible for policing its own intellectual property laws. Similarly, Internet defamation law must be articulated in a national context first. Internet norms, as they relate to the context in which Internet defamation occurs, are useful in conceptualizing the appropriate standards, but they do not have the force of law and are not sufficient to protect the rights of Internet victims.

VI. THE *BAXTER* STANDARD AS A SOLUTION

The lack of a clear standard more than two decades after courts first began to construct a First Amendment framework for understanding Internet defamation shows just how elusive an effective and efficient standard is. The process of articulating such a standard requires balancing First Amendment rights against the right to protect one's good name and reputation, as well as balancing the impulse of some plaintiffs to use defamation law to silence critics against the legitimate claims of those who have been defamed, all in the unique context of the Internet.[151]

This Note has shown that a good faith standard[152] is insufficient, since many plaintiffs can bring a suit honestly believing they have a valid claim when none exists. Similarly, it has shown that a motion

[150] See, e.g., World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 38542; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197; Berne Convention for the Protection of Literary and Artistic Works, amended Sept. 29, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 18388.

[151] See, e.g., Lidsky, supra note 4, at 945 ("The chief threat posed by the new cases is that powerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse. If this were the only threat the new John Doe cases posed, they would be relatively easy to resolve, perhaps with anti-SLAPP legislation of the sort recently enacted in California. The problem, however, is that many plaintiffs will have legitimate claims against aggressively uncivil and vicious speakers whose only intent is to destroy the reputation of their targets. Thus, courts must formulate a response that is nuanced enough to respond to the facts of each individual case and that resolves cases quickly enough to prevent ordinary John Does from being chilled by the mere threat of being sued.").

[152] See, e.g., In re Subpoenas Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), rev'd on other grounds sub nom., Am. Online, Inc. v. Anonymous Pub. Traded Co., 542 S.E.2d 377 (Va. 2001).

to dismiss[153] or summary judgment standard[154] provide far too little protection for the First Amendment rights of anonymous Internet speakers—which explains the provision by courts for broad judicial discretion under such standards. A prima facie standard,[155] however, is overly aggressive, since it requires plaintiffs to make a more complete showing than should be required at such an early stage in the proceedings. The appropriate standard lies somewhere in between.

The *Baxter* standard has received essentially no attention thus far from the legal community, and yet its nuanced approach has the potential to balance the rights of all parties to a given case efficiently while at the same time to acknowledge the constitutional framework in which public figures have been treated. *Baxter*'s dual reasonable probability/possibility standard responds to First Amendment concerns by providing a fairly high standard under which plaintiffs must demonstrate the strength of their case before they are allowed to proceed, without demanding such a high level of proof so as to preclude cases that turn on the identity of the defendant. Although in cases such as our hypothetical, plaintiffs like Sarah may be denied discovery if the "Doe" defendant has not provided enough details on which to build a reasonable probability claim, this result is not necessarily bad as a general matter. The strength of the *Baxter* standard lies in the even-handed balance of rights it strikes while at the same time providing plaintiffs a clear legal framework in which they know their claim will be analyzed. As a result, Internet speakers can be assured that their identities are secure from the whims of unguided judicial discretion and will be revealed only once their First Amendment rights have been balanced effectively against the merits of a defamation claim. At the same time, the standard provides plaintiffs with a strong case, based on more than just good faith, to clear their good names from defamation. Finally, the standard takes into account the need to protect public figures from malicious defamation while at the same

[153] See, e.g., Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

[154] See, e.g., John Doe No. 1 v. Cahill, 884 A.2d 451, 467 (Del. 2005).

[155] Dendrite Int'l, Inc. v. John Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

time ensuring that they will not have an easier time unmasking their critics than contemplated by the Constitution.

CONCLUSION

The Internet may just be the newest frontier in First Amendment law. It provides an environment where free speech can flourish, but it also provides the opportunity for abuse. A carefully crafted standard is therefore necessary to protect those rights that we value and to encourage the open discourse envisioned by the Framers. In the coming years, more and more courts will face the challenge of balancing First Amendment values and those embodied in defamation law. By adopting the standard sketched by the District Court for the Western District of Louisiana in *Baxter* and more fully articulated herein, courts may begin to balance the rights of all parties more effectively—assuring that Internet speakers know the limits of protection guaranteed to them and that meritorious claims of defamation will proceed. Plaintiffs and anonymous defendants need consistency in John Doe cases immediately, so that they will know the metes and bounds of their Constitutional protection and can make decisions with full knowledge of where the law will stand. As such, it is necessary that courts not only address the issue clearly, but that they address it uniformly across the country. The reasonable probability/reasonable possibility standard provides the guidance needed by both plaintiffs and defendants and at the same time has the characteristics necessary for uniform enforcement irrespective of the nuances of the defamation laws of the individual states. Such a standard will serve to protect age-old Constitutional rights on the new and exciting Internet frontier.