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Note

Who is John Doe and Why Do We Care?: Why a Uniform Approach to Dealing with John Doe Defamation Cases is Needed

*Craig Buske**

John Doe may be the most wanted person in cyberspace. Corporations everywhere . . . are tracking him down in lawsuits that allege sins ranging from interference with business relationships to defamation to breach of fiduciary duty.¹

This kind of case—in which a plaintiff seeks to identify a defendant for purposes of serving process—poses a substantial challenge for courts because they are called upon at the very outset of the case to make the critical, and often outcome-determinative, decision whether to permit discovery of the defendant's identity.²

I. INTRODUCTION

Courts have utilized a variety of standards in determining whether to allow a plaintiff to discover the identity of an anonymous defendant. Many of the standards currently utilized are contradictory, and oftentimes poorly explained. This Note seeks to guide the reader through the quagmire of existing standards, and to recommend a uniform approach to this issue that finds common ground in satisfying the various concerns of the courts.

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1. Steve Woodward, *Three Corporations Go to Court to Fight Internet Falsehoods*, SEATTLE TIMES, Nov. 1, 1998, at B5.

2. Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 Or. L. Rev. 795, 799 (2004).

II. THE PROBLEM OF JOHN DOE DEFENDANTS AND HOW COURTS HAVE TRIED TO FASHION REMEDIES

A. THE RIGHT TO ANONYMOUS SPEECH

Most Americans are familiar with the right to free speech derived from the First Amendment. If the average American were asked what the right to free speech meant to him, he would likely answer something about the freedom of the press or the right to criticize our government. However, the average layperson may not be familiar with the concept of the right to anonymous speech.

The right to anonymous speech is largely a development of modern jurisprudence, and its beginnings are found in *Talley v. California*.³ The case concerned a Los Angeles city ordinance that made it illegal to distribute any handbill that did not include information identifying the name and address of the person who created the publication.⁴ The petitioner in *Talley* was convicted of violating the ordinance when he distributed handbills urging people to boycott certain named businesses that engaged in racial discrimination in hiring. Petitioner argued that the ordinance “invaded his freedom of speech and press in violation of the Fourteenth and First Amendments”⁵ The Court agreed, discussing the important role anonymous literature has played in the “progress of mankind” and invalidating the ordinance on the grounds that “[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”⁶ Although the Court’s opinion in *Talley* falls short of proclaiming that “there is a right to anonymous speech under the First Amendment,” the opinion has been used as a basis for that conclusion.⁷

3. 362 U.S. 60 (1960)

4. *Id.* at 60.

5. *Id.* at 62.

6. *Id.* at 64. One of the most noteworthy examples of anonymous literature that “played an important role in the progress of mankind” is the Federalist Papers. *See id.* at 64–65.

7. For examples of cases that cite *Talley* in finding a right to anonymous speech, see *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 334 (1995).

Following *Talley*, jurisprudence regarding the right to anonymous speech lay dormant, at least as far as the Supreme Court was concerned, until it granted certiorari in *McIntyre v. Ohio Elections Commission* thirty-five years later.⁸ The subject matter of *McIntyre* was nearly identical to that of *Talley* in that a law prohibiting the distribution of anonymous literature was challenged as unconstitutional under the First Amendment.⁹ The Court in *McIntyre* defended the decision in *Talley*, holding that “an author’s decision to remain anonymous . . . is an aspect of freedom of speech protected by the First Amendment.”¹⁰ As in *Talley*, one of the Court’s rationales was the important role anonymous publications have played in the advancement of American society, referring again to the Federalist Papers, but also citing examples such as novels by Mark Twain (Samuel Clemens) and O. Henry (William Sydney Porter).¹¹

The Supreme Court relied on the right to anonymous speech two more times in the subsequent decade to strike down laws that required the identification of anonymous speakers. In *Buckley v. American Constitutional Law Foundation*, the Court invalidated a Colorado law that required anyone circulating a petition in favor of putting a particular initiative or issue on an election ballot to wear a badge that included their name, holding that “Colorado’s current badge requirement discourages participation in the petition circulation process by forcing name identification without sufficient cause.”¹² Similarly, in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, the Court struck down a village ordinance requiring anyone who wanted to go door-to-door to promote any cause to obtain a permit first.¹³ Part of the Court’s opposition to the permit requirement was that it required all

8. 514 U.S. 334 (1995).

9. *Id.* at 336. The statute in *McIntyre* was different from the ordinance in *Talley* only in that the *McIntyre* statute only prohibited distribution of anonymous campaign literature, and not all anonymous literature. While the Court in *McIntyre* acknowledged this fact and conceded that because of that difference *Talley* does not automatically control, the distinction was not enough to justify a different result. *See McIntyre*, 514 U.S. at 344, 357.

10. *Id.* at 342.

11. *Id.* at 341–43.

12. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999).

13. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 168–69 (2002).

canvassers, solicitors, and peddlers to carry the permit with them when they went door-to-door and display it if requested by a police officer or resident.¹⁴ The Court concluded that these requirements resulted in “a surrender of [the canvasser’s] anonymity,” and as such, “the ordinance may preclude such persons from canvassing for unpopular causes.”¹⁵

The four cases discussed above—*Talley*, *McIntyre*, *Buckley* and *Watchtower*—form the foundation for the “well-established First Amendment right to speak anonymously.”¹⁶ Although these cases all dealt primarily with printed materials, the principles elucidated in those opinions have, without reserve, been interpreted to apply not only to the physical distribution of literature, but to the Internet as well.¹⁷

B. HOW COURTS HAVE DEALT WITH JOHN DOE DEFENDANTS IN THE PAST

Several competing standards have emerged to deal with the problem of anonymous, or John Doe, defendants in defamation cases. As the court noted in *Doe v. Cahill*, there is

an entire spectrum of ‘standards’ that could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment, and beyond that, hurdles even more stringent.¹⁸

In order to understand the current confusion regarding the correct standard in a John Doe defamation case, a review of the chronological progression of these standards is necessary.

Columbia Ins. Co. v. Seescandy.com was one of the first cases to analyze the competing interests of plaintiffs seeking discovery of anonymous defendants and the “legitimate and valuable right to participate in online forums anonymously.”¹⁹

14. *Id.* at 155, 166.

15. *Id.* at 166–67.

16. *Dendrite Int’l, Inc. v. Doe*, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

17. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]”); *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (“[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”).

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

19. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal.

Columbia Insurance Company filed suit in the Northern District of California on behalf of See's Candy Shops seeking injunctive relief because a different entity had registered the domain names *www.seescandy.com* and *www.seecandys.com*.²⁰ An impasse arose when the court determined it could not grant injunctive relief until the defendants had been served with the complaint.²¹ However, the defendant could not be served with the complaint because his identity was unclear as the domain names had been registered online under potentially fictitious names.²² The specific issue before the court was whether to allow discovery before the defendant had been made a party to the suit.²³ The court adopted the following safeguards to limit the situations in which discovery could take place before the defendant was a party to the suit:

- “First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court.”²⁴
- “Second, the party should identify all previous steps taken to locate the elusive defendant.”²⁵
- “Third, plaintiff should establish to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.”²⁶
- Fourth, the “plaintiff should file a request for discovery with the Court” including justification for the specific discovery requested and “identification of a limited number of persons” on whom discovery could be served that will produce a “reasonable likelihood” of identifying the defendant.²⁷

One year later a Virginia court used a simpler standard in

1999).

20. *Id.* at 575.

21. *Id.* at 577.

22. *Id.*

23. *Id.* at 578.

24. *Id.*

25. *Id.* at 579.

26. *Id.*

27. *Id.* at 580.

*In re Subpoena Duces Tecum to America Online, Inc.*²⁸ In that case, the plaintiff sought to compel America Online (AOL) to provide the identities of four subscribers allegedly engaged in defamation.²⁹ A subpoena was issued to AOL, who subsequently filed a Motion to Quash.³⁰ In denying the Motion to Quash, the court held that a non-party Internet service provider (ISP) should only be ordered to identify a subscriber or user if “the party requesting the subpoena has a legitimate, good faith basis” for bringing suit and “the subpoenaed identity information is centrally needed to advance that claim.”³¹ The requirement of a “good faith basis” adopted in this case is considered one of the lowest standards required before unmasking an anonymous defendant.³²

Dendrite International, Inc. v. Doe represents the next important development in John Doe defamation cases.³³ The facts were similar to those in *America Online*. Dendrite International, Inc. (Dendrite) brought a defamation claim against various John Doe defendants and sought expedited discovery to identify the defendants.³⁴ In *Dendrite*, the John Doe defendants had posted messages on a Yahoo! bulletin board dedicated to matters related to Dendrite.³⁵ Specifically, the anonymous posters accused Dendrite of restructuring its accounting practices in a way that would cause the company’s annual earnings to appear to increase, but without any accompanying increase in the number of sales.³⁶ The New Jersey court, in denying Dendrite’s interlocutory appeal, offered a four-step set of guidelines for trial courts to use when “striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and

28. *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

29. *Id.* at *1.

30. *Id.*

31. *Id.* at *8.

32. *See Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

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

34. *Id.* at 760.

35. *Id.* at 762.

36. *Id.*

reputation”³⁷ First, the plaintiff must try to notify the anonymous posters by placing a notice regarding the identity discovery request on the same message board where the allegedly defamatory material appeared.³⁸ Second, the plaintiff must identify the exact statements made that allegedly constitute actionable speech.³⁹ Third, the plaintiff must establish that its action can withstand a motion to dismiss and must produce sufficient prima facie evidence to support each element of its cause of action.⁴⁰ Finally, the “court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented”⁴¹ The notification required by the court in *Dendrite* is an important aspect of these guidelines. The most important provision, however, is the third step—the ability to withstand a motion to dismiss coupled with sufficient evidence supporting each element of the claim. As the law develops, this third step will be the subject of much debate.⁴²

The next important case that addresses the issue of identifying defendants in John Doe cases is *Doe v. Cahill*.⁴³ As the only state supreme court case to deal specifically with the issue of John Doe defendants in defamation suits arising in the context of the Internet, *Cahill* is the highest appellate court opinion addressing the subject.⁴⁴ *Cahill* involved a situation that should be familiar by now: comments are posted on an online forum; the subject of those comments doesn’t like them; the subject subsequently sues for defamation.⁴⁵ The plaintiffs

37. *Id.* at 760.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. The main point of disagreement regarding standards in John Doe defamation cases centers on the quantum of proof required before a plaintiff is allowed to discover an anonymous defendant’s identity. Different standards are adopted by the courts in nearly every John Doe defamation case discussed in this Note.

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

44. Although the Wisconsin State Supreme Court dealt with a similar subject in *Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006), that suit did not arise in the context of the Internet, but as a discovery dispute over whether the identities of unknown members of a political organization had to be disclosed.

45. *Cahill*, 884 A.2d at 454.

in the case were Patrick and Julia Cahill.⁴⁶ Mr. and Mrs. Cahill were residents of Smyrna, Delaware, and brought suit in response to anonymous messages posted on a website hosted by the Delaware State News.⁴⁷ An anonymous online poster using the alias “Proud Citizen” criticized Patrick Cahill’s performance as a City Councilman and made other disparaging statements about Mr. Cahill as well, alleging that he was paranoid and that he was suffering from “an obvious mental deterioration.”⁴⁸ Mr. Cahill understandably took issue with those statements, and he and his wife filed suit on November 2, 2004.⁴⁹ On June 14, 2005, the Delaware Superior Court applied a “good faith” standard in deciding to compel disclosure of the John Doe defendant’s identity and ordered the anonymous defendant’s Internet Service Provider to disclose his identity.⁵⁰ John Doe filed an interlocutory appeal, which was accepted by the Supreme Court of Delaware.⁵¹

The issue on appeal before the Supreme Court of Delaware was whether the “good faith” standard applied by the trial judge was the correct legal standard.⁵² In deciding that issue, *Cahill* explicitly referenced the guidelines set forth in *Dendrite*, but offered some criticisms of that standard and modified it in a few ways. First, the court adopted the notification provision of the *Dendrite* guidelines.⁵³ However, that was the only step of the test the court specifically adopted. *Cahill* instead recharacterized the third step of *Dendrite*, that the plaintiff must establish that its action can withstand a motion to dismiss and must produce sufficient prima facie evidence to support each element of its cause of action, as a “summary judgment standard.”⁵⁴ Although the *Dendrite* opinion never used the words “summary judgment,” *Cahill* simply substituted the summary judgment standard for the *Dendrite* language and purported to follow the third prong of *Dendrite*.⁵⁵ If this

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 455.

51. *Id.*

52. *Id.*

53. *Id.* at 460.

54. *Id.*

55. *Id.*

approach seems confusing, it should, because it has caused confusion among courts and scholars ever since the opinion was published. With regard to the rest of the test from *Dendrite*, the court in *Cahill* dismissed the second and fourth steps as unnecessary.⁵⁶ The court found the second step subsumed by the summary judgment standard.⁵⁷ Similarly, the *Cahill* court stated that balancing “the defendant’s First Amendment rights against the strength of the plaintiff’s *prima facie* case is also unnecessary,” because the “summary judgment test is itself the balance.”⁵⁸

Two years after *Cahill*, the issue of what standard to apply when deciding to unmask a John Doe defendant was again before an appellate court, although not in a defamation suit. In *Mobilisa, Inc. v. Doe*, an Arizona court was faced with a plaintiff who wanted to discover the identity of an anonymous entity that allegedly accessed certain information on Mobilisa’s protected computer systems illegally and then sent the information to various Mobilisa employees via e-mail.⁵⁹ Although the court in *Mobilisa* said it agreed with the two steps adopted in *Cahill*, notification and surviving a summary judgment motion, it disagreed “with [the *Cahill*] court’s conclusion that a balancing step is unnecessary.”⁶⁰ The *Mobilisa* opinion recognizes that there will likely be a “vast array” of cases that involve anonymous speech, and that these cases will be factually distinct.⁶¹ Including a balancing test will allow the court to consider factors that might weigh against disclosure of an anonymous defendant’s identity that are not taken into account by a summary judgment standard, such as whether the anonymous speaker is a non-party witness, what type of speech was involved, and what kind of expectation of privacy the speaker had.⁶² Subsequently, the *Mobilisa* decision

56. *Id.* at 461.

57. *Id.*

58. *Id.*

59. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 715–16 (Ariz. Ct. App. 2007).

60. *Id.* at 720.

61. *Id.*

62. *Id.* With regard to what type of speech is at issue, the court points out that political expression is afforded the most protection by the First Amendment, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995), while commercial speech is less protected than other forms of speech, *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

revitalized the balancing test deleted from the *Dendrite* test by *Cahill*.

The Texas Court of Appeals reiterated the absence of a consensus regarding whether courts must balance a plaintiff's right to pursue her case against an anonymous defendant's rights under the First Amendment in *In re Does 1-10*.⁶³ Less than a month after the court in *Mobilisa* decided that a balancing test was necessary to adequately protect anonymous plaintiffs, the Texas Court of Appeals adopted only the second prong of the test from *Cahill*, while disregarding the notification provision and declining to add a balancing test.⁶⁴

Following the decision in *In re Does 1-10*, there continues to be disagreement regarding the inclusion of a notification step and the necessity of a balancing test. A consensus had emerged, however, around the summary judgment standard from *Cahill*. A California decision in *Krinsky v. Doe* upset that emerging consensus.⁶⁵ *Krinsky* first pointed out the shortcomings of the notification requirement from *Dendrite* and *Cahill*, specifically the requirement that plaintiff post a notice of the discovery request in the same place the allegedly defamatory comments were originally made: “[A]n Internet Web site, chat room, or message board may no longer exist or be active by the time the plaintiff brings suit; consequently, it would be unrealistic and unprofitable” to insist a plaintiff follow the notice requirement from *Dendrite* and *Cahill*.⁶⁶ Criticisms aside, the court in *Krinsky* conceded the notification requirement was not unduly burdensome.⁶⁷ These two positions leave the reader, and other courts, unclear about where the court in *Krinsky* stands on the notification provision. With regard to the summary judgment standard, the court “[f]ound] it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker”⁶⁸ Instead, the court decided a plaintiff must make a prima facie showing of the elements of their case.⁶⁹ Finally, concerning the

63. *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007).

64. *Id.* at 821-22.

65. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

66. *Krinsky*, 72 Cal. Rptr. 3d at 244.

67. *Id.*

68. *Id.* at 244.

69. *Id.* at 245. The context of the *Krinsky* opinion is slightly limited

use of a balancing test, the *Krinsky* opinion concluded it was unnecessary to balance the interests of the competing parties, at least in a defamation case, because “[w]hen there is a factual and legal basis for believing libel may have occurred, the writer’s message will not be protected by the First Amendment.”⁷⁰

In summary, when deciding whether to allow a plaintiff to discover the identity of an anonymous defendant, some courts have required the defendant be given notice and others have not.⁷¹ Some courts have required the defendant’s First Amendment rights be balanced against the strength of the plaintiff’s case, and some have held that step to be unnecessary.⁷² The quantum of proof the courts deem necessary in pleading a case ranges “from placing an extremely light burden (indeed, virtually no burden at all) on the plaintiff, to requiring the plaintiff to tender proof of its allegations that would survive a summary judgment, or even more stringent requirements.”⁷³ It is out of this confusing state of contradictory and competing standards that this Note attempts to reconcile the competing interests and recommend a single standard that may bring uniformity to the issue.

III. A UNIFORM APPROACH IS NEEDED

It is well known that different states have different common law. This fact is the inevitable result of a judicial system in which thousands of judges across the country try to find equitable dispositions to the problems created by difficult cases. In many instances, these differences in law may not present insurmountable problems, and the courts are able to administer effective justice. Some areas of the law, however, suffer from a lack of uniformity. John Doe defamation cases are

because it is addressing the specific question of what standard should be applied when the plaintiff’s cause of action is for libel and when the defendant has already filed a Motion to Quash a subpoena seeking to obtain the identity of the defendant. However, I believe the principles the case was decided upon may be extrapolated to a slightly broader context without distorting the court’s reasoning.

70. *Id.*

71. Compare *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005), and *Dendrite Int’l, Inc. v. Doe*, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001), with *Krinsky*, 72 Cal. Rptr. 3d at 244.

72. Compare *Dendrite*, 775 A.2d at 760–61, with *Cahill*, 884 A.2d at 461.

73. *In re Does 1–10*, 242 S.W.3d 805, 821 (Tex. Ct. App. 2007).

one such area. A new approach to John Doe defamation cases is needed because “existing law lacks nimble ways to resolve disputes about speech and privacy on the Internet.”⁷⁴

The fact that Constitutional rights are at stake in these cases is one of the reasons they should be closely scrutinized. The confusing array of competing standards currently being adopted across the country creates problems unique to John Doe defamation cases. Most of the defamation suits that raise problems regarding the anonymity of the defendant arise in the context of the Internet which raises the potential for jurisdictional problems. Unlike libelous statements published in a newspaper that only circulates in a particular geographic area, anything posted on the Internet is easily accessible to anyone in the United States with an internet connection, and as such, the defendant may be subject to personal jurisdiction in any state in America.⁷⁵ As such, if standards for unmasking a defendant are easier to meet in some jurisdictions than others, a plaintiff in a John Doe defamation case will have significant incentive to forum shop. This encouragement of forum shopping is particularly troubling in light of the fact that many plaintiffs in John Doe defamation cases are not actually seeking a monetary reward, but rather more of a symbolic victory.⁷⁶ In many instances, simply unmasking a John Doe defendant for the purposes of shaming them may be enough to satisfy the plaintiff.⁷⁷ If this scenario unfolds as speculated above, the plaintiff may be able to obtain the relief they want in violation of the defendant’s First Amendment rights, and the defendant will be left without recourse.

The considerable confusion among different jurisdictions is

74. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1199 (2006).

75. Personal jurisdiction for activity that takes place over the Internet is a somewhat uncertain field. However, *Calder v. Jones*, 465 U.S. 783, 791 (1984), suggests that in situations where defendants purposefully engaged in the tort of defamation (libel, more specifically, in *Calder*) and their actions were calculated to cause harm to a victim they knew to be residing in particular state, that personal jurisdiction in the victim’s home state is appropriate. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 553 (1991) for a discussion of how libel law in general is a field in which a defendant may be subject to the laws of more than one state.

76. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 860, 872 (2000).

77. *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005) (unmasking an anonymous defendant affords a plaintiff an important form of relief).

another reason to adopt uniform standards. Courts in different jurisdictions disagree on issues frequently. However, there is a difference between disagreement and confusion. Lower courts that have to deal with the questions presented in John Doe defamation cases are not merely following the decisions made by the appellate courts in their jurisdiction, resulting in the application of two or three competing standards. Instead, lower courts are left without clear guidelines. Rather than having two competing standards between federal circuits, each jurisdiction in the country is utilizing different standards. The confusion that results from having a myriad of different standards is considerably greater than that created by having two competing standards.

Another argument in favor of establishing a uniform standard is that it will be more cost effective and efficient. Many commentators are concerned that free speech on the Internet will be chilled by fear of litigation and identification.⁷⁸ The more complex the problem presented in litigation, the more time and expense it will take to find a solution. As such, if there were a uniform standard for dealing with John Doe defamation cases, litigation expenses for such cases would likely decrease and the chilling effect that defamation suits have on free speech may be somewhat ameliorated.

The above paragraphs all point to the need for a uniform approach to John Doe defamation cases. As David Anderson remarked, “[l]ibel is a field that cries out for some uniformity.”⁷⁹ That sentiment translates wholly to defamation in general, particularly in the context of the Internet. Based on the First Amendment rights at issue in John Doe defamation cases; the potential for jurisdictional problems and forum shopping; the existing confusion regarding this area of the law; and the potential for saving litigants, as well as the court system, time and money, a uniform system for dealing with John Doe defendants should be adopted by the United States Supreme Court.

IV. THE APPROACH THAT COURTS SHOULD TAKE FOR JOHN DOE DEFENDANTS

As demonstrated above by section II-B, courts across the

78. *Id.* at 457; Lidsky, *supra* note 76, at 861.

79. Anderson, *supra* note 75, at 553.

country have chosen to deal with the problem of John Doe defendants in many different ways. This section analyzes and critiques the various approaches taken, and suggests a course of action for each potential element of the test to decide whether a court should unmask an anonymous defendant.

A. WHY A NOTIFICATION PROVISION IS NEEDED

In many instances when someone is trying to identify an anonymous defendant, the defendant will learn about it, either from their Internet Service Provider (ISP), or through a third party. However, many ISPs may not notify a subscriber if they are served with a court order to divulge that subscriber's identity.⁸⁰ Steps have been taken to prevent this from happening, but there is no guarantee that an Internet subscriber will be notified before their identity is divulged.⁸¹ However, when a "provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond,"⁸² and the defendant's "First Amendment interests are at stake,"⁸³ a balancing of the competing parties' interests favors including a notification provision. As a general principle, "[a] court should not consider impacting a speaker's First Amendment rights without affording the speaker an opportunity to respond to the discovery request."⁸⁴

Although notification of a defendant is important, any notification provision adopted should not be absolute. In the past, some courts have required the plaintiff to notify the defendant by placing a notification in the same place where the allegedly defamatory material was posted.⁸⁵ The problem with this requirement is that, due to the fluid and impermanent nature of the Internet, the website where the allegedly

80. Vogel, *supra* note 2, at 802–03 (stating that in the 1990s, many ISPs would produce the information requested in subpoenas without allowing their subscriber to object or seek judicial intervention).

81. For example, 47 U.S.C. § 551(c)(1) prohibits a cable internet service provider from disclosing "personally identifiable information," even pursuant to a court order, unless the subscriber is first given notice.

82. Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005).

83. *Id.*

84. Mobilisa, Inc. v. Doe, 170 P.3d 712, 719 (Ariz. Ct. App. 2007).

85. See, e.g., Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. Super Ct. App. Div. 2001).

defamatory material was posted may no longer exist by the time a suit is brought.⁸⁶ Given this challenge, there should not be an absolute requirement that an anonymous defendant be notified before their identity is disclosed. However, the plaintiff should be required to make a good faith effort to notify the defendant, whether by posting on the same board where the material originally appeared or through some other means, before discovery of the defendant's identity is allowed.⁸⁷

B. A REQUIREMENT THAT THE EXACT STATEMENTS IN QUESTION BE STATED SHOULD BE INCLUDED

The requirement found in *Dendrite* that the court “require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech,” is an important requirement.⁸⁸ Although the court in *Cahill* may be correct in saying that requiring the exact statements to be set forth is unnecessary if a summary judgment standard is being utilized,⁸⁹ there are potential problems presented by this step's absence. First, because this Note is not advocating a summary judgment standard, it makes sense to retain the requirement that the exact statements in question be set forth. Second, procedural motions may create unique difficulties as explained by the court in *Krinsky*: “[I]f a complaint is filed in a notice-pleading state in which defamation claims are not excepted by statute or case law, the second *Dendrite* requirement (setting forth the statement with particularity) will be essential, while in Wisconsin it will be superfluous”⁹⁰ The requirement that the statements in question be stated with particularity would be superfluous because Wisconsin “require[s] particularity in the pleading of defamation claims.”⁹¹ Although in some states requiring the plaintiff to set forth the exact statements that allegedly constitute defamation may be redundant or unnecessary, the benefits to be gained from the additional clarity provided, as well as the benefits to be realized

86. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008).

87. This requirement is, of course, moot if it has been established that the defendant already has notice that someone is seeking to learn his identity.

88. *Dendrite*, 775 A.2d at 760.

89. *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

90. *Krinsky*, 72 Cal. Rptr. 3d at 244.

91. *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006).

from having a uniform law, outweigh any concerns about superfluous language.⁹²

C. THE APPROPRIATE QUANTUM OF PROOF

“The proper focus . . . [of John Doe defamation suits] should be on providing an injured party a means of redress without compromising the legitimate right of the Internet user to communicate freely with others.”⁹³ Achieving this balance, however, is easier said than done. It is the position of this Note that the optimum quantum of proof is to require a plaintiff to make a prima facie case for all elements of defamation that are within the plaintiff’s control. Although requiring a plaintiff to make a prima facie case of all elements of a claim may seem like a high standard to impose at the discovery stage, it is necessary. The considerations that led to this conclusion are discussed below.

1. A High Standard is Needed to Adequately Protect First Amendment Rights

As discussed above in section II-A, there is a well established right to engage in anonymous speech, and that right has been applied to the Internet without reserve.⁹⁴ Unfortunately, how to protect that right in John Doe defamation cases has not enjoyed a similar consensus, as evinced by the wide variety of standards adopted by different courts.⁹⁵

There are many reasons to insist on a high standard in John Doe defamation cases, one of them being the Constitutional importance that is placed on anonymous speech.⁹⁶ The advantages to society in allowing anonymous speech outweigh the interests of plaintiffs in easily identifying

92. In this author’s opinion, the law could benefit from a little redundancy if it made the law easier to understand.

93. *Krinsky*, 72 Cal. Rptr. 3d at 241.

94. *See supra* text accompanying notes 3–17.

95. For a discussion of the wide range of standards adopted by different courts, see *Doe v. Cahill*, 884 A.2d 451, 457 (2005).

96. Cases that emphasize the importance of the right to engage in anonymous speech include: *Watchtower Bible & Tract Soc’y of N.Y., Inc., v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); and *Talley v. California*, 362 U.S. 60 (1960).

anonymous defendants.⁹⁷ It is true that much of the “speech” on the Internet is not scholarly discourse.⁹⁸ Anyone who has used the Internet recognizes that celebrity gossip and personal websites that bear more similarities to online diaries make up a large percentage of all websites.⁹⁹ However, it is also true that, partially due to its anonymous nature, the Internet is a great equalizer, and as such it fulfills a very democratic function—it allows anyone with an Internet connection to voice their opinion on any matter, “however silly, profane, or brilliant [the idea] may be”¹⁰⁰ Some commentators have even gone so far as to say that the Internet has had the greatest effect on a person’s ability to make their opinion heard since the invention of the printing press.¹⁰¹ The reason the Internet is such a great innovation in speech is because it “allows ordinary John Does to participate as never before in public [sic] discourse, and hence, to shape public policy.”¹⁰²

However, the ability of the Internet to realize its potential for facilitating a marketplace of ideas will never occur if people do not use it for that purpose, and “[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.”¹⁰³ The democratic nature of the Internet is what gives it value deserving of being protected by the First Amendment, and it is why a high level of protection should be afforded to speakers on the Internet. If the standard of proof is set too low, it may “chill potential posters

97. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”)

98. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1196–97 (2006).

99. *Id.* According to one estimate, personal websites written by children and teenagers under the age of 19 account for over fifty percent of all blogs. G. Jeffrey Macdonald, *Teens: It’s a Diary. Adults: It’s Unsafe*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 11.

100. Vogel, *supra* note 2, at 815 (quoting Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy Information Center as Amici Curiae at 5, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002)).

101. Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 88 (2000).

102. Lidsky, *supra* note 76, at 861.

103. *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

from exercising their First Amendment right to speak anonymously.”¹⁰⁴

Another reason to insist that plaintiffs meet a high evidentiary burden before being allowed to unmask an anonymous defendant is that there is evidence to suggest many defamation suits would not succeed if carried through to trial.¹⁰⁵ In fact, only 13% of plaintiffs in a libel suit will ultimately prevail in libel litigation,¹⁰⁶ and of those who do, they “owe more to good fortune than ‘to their virtue, their skill, or the justice of their cause.’”¹⁰⁷ Because defendants are much more likely to succeed in defamation litigation than plaintiffs, courts should be particularly cautious in letting a suit proceed that will irreversibly destroy the defendant’s anonymity. Furthermore, by imposing a high standard on plaintiffs, courts are making it easier for legitimate plaintiffs to succeed at trial, because once “vigorous criticism descends into defamation . . . constitutional protection is no longer available,”¹⁰⁸ and anonymous defendants will no longer be able to hide behind the First Amendment.

2. Why Standards Adopted in the Past Are Inadequate

The lowest level of protection offered to anonymous defendants in defamation cases is the good faith standard imposed in *In re Subpoena Duces Tecum to America Online, Inc.*¹⁰⁹ It seems clear that this standard is insufficient because, as the court remarked in *Krinsky v. Doe*, “[I]t offers no practical, reliable way to determine the plaintiff’s good faith and leaves the speaker with little protection.”¹¹⁰ The condemnation of the “good faith” test was best articulated, however, in *Doe v. Cahill*, which not only pointed out the test’s shortcomings but also raised the specter of some troubling

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

105. Lidsky, *supra* note 76, at 875 (citing RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 3, 239–40 (1987)).

106. *Id.*

107. *Id.* (quoting ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* at xxix (2d ed. 1994)).

108. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 238 (Cal. Ct. App. 2008).

109. *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

110. *Krinsky*, 72 Cal. Rptr. 3d at 241.

consequences of applying such a lax standard, making it clear that a good faith standard offers too little protection for John Doe defendants:

Plaintiffs can often initially plead sufficient facts to meet the good faith test . . . even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.¹¹¹

The next lowest quantum of proof that courts have required of plaintiffs to successfully unmask an anonymous defendant is requiring a plaintiff to bring a claim that could survive a motion to dismiss.¹¹² In order to survive a motion to dismiss, all a plaintiff is required to do is include sufficient information to give “general notice of the claim asserted.”¹¹³ This standard is also insufficient to protect an anonymous defendant’s First Amendment rights. Even if a claim is not meritorious or is unlikely to win, it may still survive a motion to dismiss. When weighing a right that is protected by the Constitution, simply requiring a plaintiff to assert a coherent legal claim is not a high enough threshold because “even silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be.”¹¹⁴ The opinion in *Cahill* went on to point out that if the motion to dismiss standard does not afford

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

112. Although the words “motion to dismiss” were used in the standard promulgated by the court in *Dendrite Int’l, Inc. v. Doe, No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001), that was not exactly the standard adopted because in addition to being able to survive a motion to dismiss, the court also required a plaintiff to support each element of his cause of action with prima facie evidence. A motion to dismiss standard was also adopted by the Wisconsin Supreme Court in *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006), but again it was not a true motion to dismiss standard because in Wisconsin plaintiffs are required to plead defamation suits “with particularity.” *Id.*

113. *Cahill*, 884 A.2d at 458 (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998); see also FED. R. CIV. P. 12(b)(6)).

114. *Cahill*, 884 A.2d at 459.

enough protection for anonymous defendants, then the good faith standard is also clearly insufficient.¹¹⁵

The next standard utilized by courts in an attempt to protect First Amendment rights of anonymous defendants is the summary judgment standard.¹¹⁶ The summary judgment standard suffers from a different problem than the standards that have already been discussed. Rather than failing to provide enough protection to anonymous defendants, the summary judgment standard lacks the clarity that is needed for a well formulated quantum of proof. In applying the summary judgment standard to John Doe defamation cases, the court acts as if the anonymous party has made a motion for summary judgment, and decides whether the plaintiff would survive that motion.¹¹⁷ If the plaintiff can survive a motion for summary judgment they are allowed to discover the defendant's identity. To succeed in learning the identity of an anonymous defendant under a summary judgment standard, a plaintiff would have to show that, based on the pleadings, the discovery material currently before the court, and any affidavits, there is a genuine issue as to a material fact of the plaintiff's defamation claim.¹¹⁸ This does not mean merely the existence of some alleged factual dispute between the parties.¹¹⁹ To survive the summary judgment step, a plaintiff would have to show that there is a genuine dispute over some fact or facts that could affect the outcome of the case.¹²⁰

This practice of attaching a procedural label, while perhaps constituting a high enough hurdle that it adequately protects the defendant's anonymity, is "unnecessary and potentially confusing."¹²¹ The principal complaint about utilizing this kind

115. *Id.*

116. The standard required plaintiffs to include as much information in their motion to compel discovery of an anonymous defendant's identity as would be necessary to survive a motion for summary judgment. The *Cahill* court used it, 884 A.2d at 460–61, and claimed it originated in *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), even though the *Dendrite* court never explicitly used those terms.

117. *See, e.g. Cahill*, 884 A.2d at 460.

118. FED. R. CIV. P. 56(c)(2).

119. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

120. *Id.*

121. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008). This shortcoming of the summary judgment standard also applies to the motion to dismiss standard.

of procedural language is that it results in a standard that does not clearly state the requisite quantum of proof, and while most lawyers dealing with this issue will be familiar with the summary judgment standard, an assumption of knowledge is a poor substitute for genuine clarity. Another problem with utilizing a procedural label in this context is that Internet defamation suits “may relate to actions filed in other jurisdictions, which may have different standards governing pleadings and motions; consequently, it could generate more confusion to define an obligation by referring to a particular motion procedure.”¹²²

3. A Standard Requiring Plaintiffs to Make a Prima Facie Case of All Elements of a Defamation Claim Within Their Control Should Be Implemented.

Requiring plaintiffs to make a prima facie case for each element of a defamation claim within their control is the quantum of proof that should be applied in John Doe defamation cases. This standard requires plaintiffs to meet a higher burden than either the “good faith” standard or the “motion to dismiss” standard, both of which offer inadequate First Amendment protections. The “prima facie” standard is also devoid of the confusing procedural terms that plague the “summary judgment” standard. By implementing a “prima facie” standard, the principal shortcomings of all of the existing standards would be alleviated.

D. A BALANCING TEST IS NECESSARY

The last provision of the standards used in John Doe defamation cases about which there is debate is whether to include a balancing test at the end of the test, whereby a court would “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented”¹²³ In *Doe v. Cahill*, the court dismissed the balancing test as unnecessary because a balancing test would add “no protection above and beyond that of the summary judgment test and needlessly complicates the analysis.”¹²⁴

122. *Id.*

123. *Dendrite Int’l, Inc. v. Doe*, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

124. *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

These objections do not outweigh the benefits of including a balancing test. Allowing a court to conduct a balancing of interests adds only minimal complexity to the overall test. As for the summary judgment test itself providing the balance, that conclusion fails to consider “whether balancing a broader range of competing interests is warranted.”¹²⁵ Such broader interests that may need to be taken into account, but which would be neglected without a balancing test, include what type of speech is involved; the speaker’s expectation of privacy; the consequences unmasking the speaker will have, both on himself and on others; and the availability of other discovery methods.¹²⁶

V. A UNIFORM APPROACH IS NOT AS FAR AWAY AS IT MAY SEEM

Many of the current interjurisdictional disagreements regarding John Doe defamation cases are differences that may be settled easily. While there is admittedly much disagreement about what quantum of proof to require,¹²⁷ the other elements of the standard to apply when deciding to unmask an anonymous defendant are much less controversial. For example, several cases have required a notification provision.¹²⁸ However, most of the cases that failed to include a notification provision did not do it because they thought it was a bad idea—they did it because they felt it was unnecessary.¹²⁹ For example, in *In re Does 1-10*, the court declined to impose a notification provision, but the opinion never explicitly stated that a notification was a bad idea.¹³⁰ In fact, the court in *In re Does 1-10* adopts the standard used by the court in *Doe v. Cahill*,¹³¹ which contained a notification provision.¹³²

125. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007).

126. *Id.*

127. *See supra* section II-B.

128. *See supra* section II-B.

129. *E.g., In re Does 1–10*, 242 S.W.3d 805 (Tex. Ct. App. 2007). The court in *Krinsky v. Doe* did state that a requirement that a plaintiff post a notice in the same place where the allegedly defamatory material was posted that they are seeking to learn the anonymous defendant’s identity may be “unrealistic and unprofitable” in some circumstances, but the court did not object to the idea of general notification. *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 244 (Cal. Ct. App. 2008).

130. *In re Does 1–10*, 242 S.W.3d 805 (Tex. Ct. App. 2007)

131. *Id.* at 822–23.

The requirement that the exact statements be set forth is another element that is not very controversial. The courts that have rejected it have done so mainly on the grounds that it is unnecessary.¹³³ But, as with the notification provision, just because a step of analysis is not always necessary does not mean courts will find the requirement that the exact statements be included to be a bad idea.

Even the most controversial aspect of developing a test for when to unmask anonymous defendants in John Doe defamation cases, i.e. which quantum of proof to use, is not as contentious as it might seem. The two highest courts to decide the issue, the Supreme Court of Delaware¹³⁴ and the Supreme Court of Wisconsin¹³⁵ essentially agree on the standard. Although the court in *Cahill* called for a “summary judgment test”¹³⁶ and the court in *Lassa* adopted a “motion to dismiss” standard,¹³⁷ these are functionally equivalent because Wisconsin requires “particularity in the pleading of defamation claims.”¹³⁸

VI. A SUGGESTED UNIFORM APPROACH

If implemented, the uniform approach advocated in this Note might look something like this:

- First, the plaintiff must make a good faith effort to notify the defendant that plaintiff is seeking to learn his identity.
- Second, in any motion to discover the identity of an anonymous defendant, plaintiff must state the exact statements that allegedly constitute actionable speech.
- Third, plaintiff must establish a prima facie case of each element of defamation that is in his control.
- Finally, the court must balance the plaintiff’s right to

132. *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005).

133. *Id.* at 461 (explaining that if the court adopts a high enough evidentiary standard in John Doe defamation cases, in this instance a summary judgment standard, that evidentiary standard would subsume a requirement that the exact statements be set forth).

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

135. *Lassa v. Rongstad*, 719 N.W. 2d 673 (Wis. 2006).

136. *Cahill*, 884 A.2d at 461.

137. *Lassa*, 719 N.W.2d at 687.

138. *Id.*

relief against the defendant's right to engage in anonymous speech.

VII. CONCLUSION

The situation presented any time there is a John Doe defendant creates problems above and beyond the normal difficulties of bringing a suit. The entity bringing the suit obviously believes it was wronged or it would not be in court. However, the rights of the plaintiff must be balanced against the First Amendment rights of the John Doe defendant. When two opposing entities both have strong competing interests, it is difficult to strike a balance between them, and this difficulty is illustrated by the confused and contradictory development of case law on the subject. However, this Note suggests that an appropriate balance between the two rights can be achieved if the plaintiff is required to make a good faith effort to notify the defendant of the suit, to set forth the exact statements that allegedly constitute actionable speech, to make a prima facie case for all elements of the wrongful act allegedly committed that are within the plaintiff's control, and the court concludes by balancing the rights of the plaintiff against the rights of the defendant. This test is free of confusing procedural terms and can be applied universally to jurisdictions that require only notice pleading in defamation cases (e.g. Delaware) as well as jurisdictions that require more "particularity in the pleading of defamation claims" (e.g. Wisconsin).¹³⁹ Advocating the above-described standard is the principal purpose of this Note. However, the only way uniformity, coherence, and finality will be brought to this area of the law is if the United States Supreme Court grants certiorari to a John Doe defamation case.

139. *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006).