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## *Articles*

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### Unmasking “John Doe” Defendants: The Case Against Excessive Hand- Wringing over Legal Standards

**W**ho is Atrios?

By the fall of 2003, there were people who wanted to know. Former Clinton adviser Sidney Blumenthal was asked whether he is Atrios.<sup>1</sup> Professor Glenn Reynolds of the University of Tennessee Law School speculated (through his Internet persona, “InstaPundit”) that Atrios was Democratic operative Robert Shrum, while jesting that Atrios may be Princeton Uni-

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<sup>1</sup> LiberalOasis, *LiberalOasis Interviews Sidney Blumenthal*, at <http://www.liberaloasis.com/blumenthal.htm> (last modified May 28, 2003) [hereinafter *Blumenthal Interview*].

versity economics professor and *New York Times* columnist Paul Krugman.<sup>2</sup> Internet users speculated and debated about who Atrios was, conducting polls on the subject,<sup>3</sup> and suggesting that he<sup>4</sup> might be Blumenthal, Shrum, or, more whimsically, Fidel Castro or Nick Nolte.<sup>5</sup> Atrios himself licenses the sale of products proclaiming, “I am Atrios!”<sup>6</sup>

Atrios is the pseudonym of an anonymous (until recently) individual who maintains “Eschaton,” a popular, liberal Internet website or weblog (commonly known as a “blog”).<sup>7</sup> Though his name and website are unfamiliar to many people, he is an influential figure in current political discourse. The website receives 100,000 visits per day,<sup>8</sup> a figure that is comparable to the daily circulation of newspapers among the top 100 dailies in the United States.<sup>9</sup> His influence exceeds his readership, however, because he is read, cited, and quoted, by other news makers, including Krugman,<sup>10</sup> Blumenthal,<sup>11</sup> the author of the *New Republic’s Notebook*,<sup>12</sup> columnist and fellow blogger Andrew Sullivan,<sup>13</sup> cartoonist Tom Tomorrow,<sup>14</sup> and the popular comedy

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<sup>2</sup> Posting of Glenn Reynolds, to instapundit.com (Dec. 17, 2002), at <http://instapundit.com/archives/006219.php>.

<sup>3</sup> Posting of Charles Kuffner, to [www.offthekuff.com](http://www.offthekuff.com) (Dec. 31, 2002), at <http://www.offthekuff.com/mt/archives/001425.html>.

<sup>4</sup> Atrios on several occasions indicated that he was male. See, e.g., Posting of Atrios, atrios@comcast.net, to Eschaton, at [http://atrios.blogspot.com/2002\\_06\\_16\\_atrios\\_archive.html#77834125](http://atrios.blogspot.com/2002_06_16_atrios_archive.html#77834125); Posting of Atrios, atrios@comcast.net, to Eschaton, at [http://atrios.blogspot.com/2002\\_07\\_14\\_atrios\\_archive.html#78939068](http://atrios.blogspot.com/2002_07_14_atrios_archive.html#78939068). Eventually, he permitted his identity to be disclosed as Duncan Black, a Ph. D. economist and former professor. Posting of Jeralyn Merritt, to [www.talkleft.com](http://www.talkleft.com) (July 26, 2004), at [http://talkleft.com/new\\_archives/007385.html](http://talkleft.com/new_archives/007385.html). Dr. Black is now responsible for editorial operations at Media Matters for America; see <http://mediamatters.org/etc/about.html>. In this Article, I refer to specific anonymous individuals using the gender pronoun implied by their online personas.

<sup>5</sup> Posting of Max B. Sawicky, Maxbsawicky, to [maxspeak.org](http://maxspeak.org) (Dec. 18, 2002), at <http://maxspeak.org/gm/archives/00000746.html>.

<sup>6</sup> Eschaton online store, CafePress.com, at <http://www.cafepress.com/atrios> (last visited Jan. 25, 2005).

<sup>7</sup> Eschaton, at <http://www.atrios.blogspot.com> (last visited Jan. 25, 2005).

<sup>8</sup> N.Z.Bear, Ecosystem Details: Eschaton (providing an independent tally of internet visitors), at <http://truthlaidbear.com/showdetails.php?host=http://atrios.blogspot.com> (last visited Jan. 25, 2005).

<sup>9</sup> Top 100 Daily Newspapers in the United States, at <http://www.infoplease.com/ipea/A0004420.html> (last modified Sept. 30, 2002).

<sup>10</sup> Paul Krugman, *Gotta Have Faith*, N.Y. TIMES, Dec. 17, 2002, at A35.

<sup>11</sup> Blumenthal Interview, *supra* note 1.

<sup>12</sup> *Notebook*, NEW REPUBLIC, March 17, 2003, at 8.

<sup>13</sup> E.g., Posting of Andrew Sullivan, to [andrewsullivan.com](http://andrewsullivan.com) (Feb. 4, 2004 5:01:15).

and news program, *The Daily Show*.<sup>15</sup> Atrios, along with Sullivan and a third blogger, Joshua Micah Marshall, have received credit for keeping media attention on the controversial remarks made by then-Senate Minority Leader Trent Lott, resulting in Mr. Lott’s resignation from that post in December 2002.<sup>16</sup>

Like many bloggers and others who use the Internet to spread information, Atrios chose to do so anonymously. While Atrios claimed to do so for reasons that “aren’t actually particularly interesting,”<sup>17</sup> others choose to act anonymously out of concern (well-founded or not) that their online statements will result in negative off-line consequences. Another prominent, anonymous blogger, known as Hesiod, implied that he chose to remain anonymous out of fear for his safety.<sup>18</sup> A more common concern is that online statements may affect employment. For example, a Microsoft employee who maintained a blog under his own name was fired for posting a photograph of Macintosh computers purchased by Microsoft,<sup>19</sup> while a Delta Air Lines flight attendant was suspended without pay for blogging that included posting a picture of herself in uniform and commenting negatively on her

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PM), at [http://www.andrewsullivan.com/index.php?dish\\_inc=archives/2004\\_02\\_01\\_dish\\_archive.html](http://www.andrewsullivan.com/index.php?dish_inc=archives/2004_02_01_dish_archive.html).

<sup>14</sup> Suzy Hansen, *Tomorrow’s News, Today!*, SALON.COM (Aug. 14, 2003), at [http://archive.salon.com/books/feature/archives/2003/08114/perkins/index\\_np.html](http://archive.salon.com/books/feature/archives/2003/08114/perkins/index_np.html).

<sup>15</sup> *The Daily Show with Jon Stewart*, “‘Fact’ Obsessed Bloggers” (Comedy Central television broadcast Feb. 16, 2005).

<sup>16</sup> Noah Shachtman, *With Incessant Postings, a Pundit Stirs the Pot*, N.Y. TIMES, Jan. 16, 2003, at G5; Oliver Burkeman & Kevin Canfield, *‘Bloggers’ Lead the Way in Lott Story*, THE HARTFORD COURANT, Dec. 17, 2002, at D1; *Bloggers Catch What Washington Post Missed*, THE GUARDIAN, Dec. 21, 2002, at 13; Al Fasoldt, *The Mighty Blog; Lott Saga a Milestone for Online Pundits*, TIMES-PICAYUNE, Jan. 8, 2003, at 3; see generally Helen Dewar & Mike Allen, *Lott Resigns as Leader of Senate Republicans; Frist Expected to Be Named His Successor*, WASH. POST, Dec. 22, 2002, at A1.

<sup>17</sup> Beth Gillin, *Booming Blogs*, PHILADELPHIA INQUIRER, Aug. 21, 2003, available at <http://www.philly.com/mld/philly/entertainment/6579970.htm>. Atrios writes, “Though it is amusing sometimes in the end I find any discussion of ‘Who is Atrios?’ rather silly—at least silly if people actually care . . . Who am I? Some guy in Philadelphia who runs a weblog.” Posting of Atrios, atrios@comcast.net, to Eschaton (Jan. 01, 2003, 3:29 P.M.), at [http://atrios.blogspot.com/2002\\_12\\_29\\_atrios\\_archive.html](http://atrios.blogspot.com/2002_12_29_atrios_archive.html) (footnote omitted).

<sup>18</sup> Hesiod, *Visitation Rights*, April 9, 2003, available at [http://web.archive.org/web/20030929082706/http://counterspin.blogspot.com/2003\\_04\\_06\\_counterspin.archive.html#200122746](http://web.archive.org/web/20030929082706/http://counterspin.blogspot.com/2003_04_06_counterspin.archive.html#200122746).

<sup>19</sup> Todd Bishop, *Microsoft Fires Worker Over Weblog*, SEATTLE POST-INTELLIGENCER, Oct. 30, 2003, available at [http://seattlepi.nwsourc.com/business/146115\\_blogger30.html](http://seattlepi.nwsourc.com/business/146115_blogger30.html); see also Posting of Michael Hanscom, to eclecticism (Oct. 27, 2003), at [http://www.michaelhanscom.com/eclecticism/2003/10/of\\_blogging\\_and.html](http://www.michaelhanscom.com/eclecticism/2003/10/of_blogging_and.html).

job.<sup>20</sup> Another blogger, “Marine’s Girl,” the girlfriend of a U.S. Marine stationed in Iraq, chose to discontinue her blog after receiving a message from a “career military man” that he believed she had divulged secret military information and that he was forwarding her blog to Marine Corps Central Command to be “tracked down.”<sup>21</sup>

Despite Atrios’ efforts to protect his anonymity, that anonymity was threatened in October 2003 as a result of one of the thousands of messages he had posted to his blog. On October 7, 2003, he posted a link to a blog maintained by Donald Luskin, a conservative author.<sup>22</sup> Atrios titled the link “Diary of a Stalker,” a pejorative reference to Mr. Luskin’s writing about personally attending an event involving the liberal Mr. Krugman.

On October 29, 2003, Atrios received a letter from Mr. Luskin’s lawyer alleging that the post was defamatory and demanding that the post, as well as comments posted by Eschaton readers, be removed from the Eschaton site.<sup>23</sup> The letter made a none-too-subtle threat that, if Atrios did not comply, Luskin’s lawyer would seek to unmask him: “Determining your identity for the purpose of making service of process can be easily accomplished through a subpoena to Blogspot.com.”<sup>24</sup>

The Atrios dispute was quickly settled. The claim of defamation was weak,<sup>25</sup> and the parties agreed simply to post a joint statement resolving the matter.<sup>26</sup> Yet, if Luskin had a case that

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<sup>20</sup> See Posting of Gary Leff, to webflyer (Oct. 2, 2004), at <http://www.webflyer.com/blog/posts.php?entry=1905>.

<sup>21</sup> Posting of Marine’s Girl, to A Marine’s Girl (Nov. 15, 2003, 7:55 P.M.), at [http://marinegirl.blogspot.com/2003\\_11\\_09\\_marinegirl\\_archive.html](http://marinegirl.blogspot.com/2003_11_09_marinegirl_archive.html). While the archived version of this information remains available through the above website, it is no longer accessible through A Marine’s Girl website, and it is not clear that the author intends it to remain so available. A highly truncated version of A Marine’s Girl, consisting of just a handful of non-controversial posts, is now available at <http://marinegirl.blogspot.com>.

<sup>22</sup> Posting of Atrios, atrios@comcast.net, to Eschaton (Oct. 7, 2003, 12:45 P.M.), at [http://atrios.blogspot.com/2003\\_10\\_05\\_atrios\\_archive.html](http://atrios.blogspot.com/2003_10_05_atrios_archive.html).

<sup>23</sup> Posting of Atrios, atrios@comcast.net, to Eschaton (Oct. 29, 2003, 5:03 P.M.), at [http://atrios.blogspot.com/2003\\_10\\_26\\_atrios\\_archive.html](http://atrios.blogspot.com/2003_10_26_atrios_archive.html).

<sup>24</sup> *Id.* Blogspot.com is the Internet service provider that provides computerized hosting facilities for Atrios and many other bloggers.

<sup>25</sup> Luskin’s lawyer is based in New York. Under New York law, as in most jurisdictions, the apparent reference to Luskin as a “stalker” would likely be non-defamatory as a statement of opinion. See, e.g., *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995).

<sup>26</sup> Posting of Atrios, atrios@comcast.net, to Eschaton (Nov. 4, 2003, 5:02 P.M.), at [http://atrios.blogspot.com/2003\\_11\\_02\\_atrios\\_archive.html#106798153621133681](http://atrios.blogspot.com/2003_11_02_atrios_archive.html#106798153621133681).

was even a bit stronger—not an improbability in an Internet culture that increasingly favors vituperative rhetoric that can, at times, cross the line into defamation—he would have had a good reason to identify Atrios so that he could serve him with process and, eventually, enforce a judgment.

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. As Paul Alan Levy of Public Citizen’s Litigation Group has perceptively observed, the 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.<sup>27</sup> On the other hand, refusing to permit the defendant’s identification may as a practical matter bar plaintiff’s claim, thus providing defendant the relief he or she seeks. In either case, the decision is usually made at the outset of litigation, before a full record may be developed. What is worse, the decision will often be subject to only limited appellate review, as it is merely an interlocutory discovery order and need not lead to a final judgment.

Because rules of civil procedure have been drafted, for the most part, with little or no consideration of the problem presented by cases involving unknown defendants,<sup>28</sup> courts and commentators have urged the development of new, judge-made standards to address claims of this nature, which are often re-

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<sup>27</sup> *E.g.*, Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy Information Center as Amici Curiae at 8-9, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002). The brief states:

In a lawsuit filed over anonymous speech, the identification of the speaker provides an important measure of relief to the plaintiff because it enables the plaintiff to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff’s self-help efforts to restrain or oppose his speech. In our system of laws, we ordinarily do not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.

*Id.*

<sup>28</sup> Indeed, it was only eight years ago that Professor Carol Rice argued that the Federal Rules of Civil Procedure permitted claims against fictitious name defendants. Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 918 (1996) [hereinafter Rice].

ferred to as “John Doe” cases. A working group of public-interest organizations, including the American Civil Liberties Union (“ACLU”), Public Citizen Litigation Group (“Public Citizen”), the Electronic Frontier Foundation, and the Electronic Privacy Information Center, has cooperated in an effort to develop legal standards limiting this type of discovery.<sup>29</sup> The New Jersey Appellate Division is the only appellate court to rule on the proper scope of discovery in this area.<sup>30</sup> In companion decisions, *Dendrite International, Inc. v. Doe*<sup>31</sup> and *Immunomedics, Inc. v. Doe*,<sup>32</sup> that court created new, heightened standards for plaintiffs seeking to identify John Doe defendants through discovery. Those decisions have been identified as “leading” cases in this area and they have been widely praised for creating these new standards.<sup>33</sup> This category of cases has also attracted considerable academic,<sup>34</sup> professional,<sup>35</sup> journalistic,<sup>36</sup> and, in some in-

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<sup>29</sup> See Audio Tape: 12th Conference on Computers, Freedom and Privacy (April 19, 2002) (on file with author). These organizations have been prominent as amici curiae or counsel for parties in significant cases. *E.g.*, *Dendrite Int'l Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (Public Citizen and ACLU); *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (ACLU); Mary P. Gallagher, *Defamation Plaintiffs Cannot Learn Anonymous Online Critics' Identities*, N.J.L.J., Jan. 7, 2002 (Public Citizen and ACLU amici in unpublished case). Public Citizen has made available an excellent collection of resources concerning this issue from a civil liberties perspective. See Public Citizen, *Internet Free Speech*, <http://www.citizen.org/litigation/briefs/IntFreeSpch/index.cfm> (last visited Jan. 30, 2005).

<sup>30</sup> In *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003), the Supreme Court of Pennsylvania declined to reach the merits of the issue, ruling instead that the intermediate appellate court had incorrectly concluded that the discovery order was not appealable. *Id.* at 50. While remanding to the intermediate court, the Supreme Court majority did make some substantive observations concerning the merits. See *id.* at 51 (Cappy, J., concurring). Those observations are addressed *infra* at text accompanying notes 76-82.

In *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), the Virginia Supreme Court did not reach the issue of what standards should apply because it refused to allow the requested discovery on the grounds that the party seeking the discovery had itself refused to disclose its identity.

<sup>31</sup> 775 A.2d at 756. The author acted as counsel to Dendrite in connection with this case.

<sup>32</sup> 775 A.2d 773 (N.J. App. Div. 2001).

<sup>33</sup> Counsel for the ACLU, which acted as amicus in *Dendrite*, has expressed the hope that *Dendrite* will be followed in other states, “call[ing] the *Dendrite* standard a ‘fair, workable test that stems the tide of using the subpoena power to punish people for criticizing others online.’” Stephen R. Buckingham & Alix R. Rubin, *Anonymous ‘Posters’ Complicate Discovery*, N.Y.L.J., Nov. 19, 2001, at 4.

<sup>34</sup> See, e.g., Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, COM. LAW., Fall 2000, at 3; David L. Sobel, *The Process that “John Doe” is Due: Addressing the Legal Challenge to Internet*

stances, legislative<sup>37</sup> interest.

Though well intentioned, the rush to apply new standards should be slowed. The threat to core First Amendment free speech rights from too readily identifying anonymous speakers is real, and should be taken seriously by the courts. At the same time, however, the new standards offer little real protection for anonymous speech beyond what courts can provide under existing rules. In exchange for this limited benefit, however, the grafting of new tests onto existing rules threatens to compromise

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*Anonymity*, 5 VA. J.L. & TECH. 3 (2000); Shaun B. Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493 (2001); Joshua R. Furman, Comment, *Cybersmear or Cyber-Slapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213 (2001); Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745 (2002); Margo E.K. Reder & Christine Neylon O'Brien, Comment, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 195 (2001-02); David C. Scileppi, Note, *Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?*, 54 FLA. L. REV. 333 (2002); Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533 (2002).

<sup>35</sup> See, e.g., Matthew E. Babcock et al., *Internet Jurisdiction and Choice of Law Issues* (July 2002), available at <http://www.medialaw.org/Template.cfm?Section=archive7&Template=/ContentManagement/ContentDisplay.cfm&ContentID=1065>; Wendy Beetlestone, *Litigation Unique Issues Posed by Defamation Suits Involving Statements Made via the Internet*, THE INTERNET NEWSLETTER, July 2002, at 1; Matthew S. Effland, *Digital Age Defamation: Free Speech v. Freedom from Responsibility on the Internet*, 75 FLA. B.J. 63 (Nov. 2001); Michael D. Goldhaber, *Fifth-Year Develops "Cybersmear" Practice*, N.Y.L.J., July 14, 2000; J. Burke McCormick & D. Alan Rudlin, *Not Mere Negligence*, 38 TRIAL 32 (Mar. 2002); Richard L. Ravin & Van V. Mejia, *Privacy in New Jersey Anonymous Online Speech: New Jersey's First Amendment Privacy Interest*, 213 N.J. LAW. 9 (Feb. 2002); Roger M. Rosen & Charles B. Rosenberg, *Suing Anonymous Defendants for Internet Defamation: Plaintiffs' Counsel Can Utilize Specific Procedures to Unmask an Online Wrongdoer*, 24 L.A. LAW. 19 (Oct. 2001); Robert L. Weigel & Lee G. Dunst, *Suing "John Doe": Guidelines for Piercing the Veil of Online Anonymity*, WALL STREET LAW. (Nov. 2001), at <http://www.cybersecuritieslaw.com/GDC/wslsuing.htm>.

<sup>36</sup> Jane Black, *A Victory, of Sorts, for Spouting Off*, BUSINESS WEEK ONLINE, July 20, 2001, at [http://www.businessweek.com/bwdaily/dnflash/jul2001/nf20010720\\_543.htm](http://www.businessweek.com/bwdaily/dnflash/jul2001/nf20010720_543.htm); Mary P. Gallagher, *N.J. Limits Right to ID on the Net*, NAT'L L.J., July 30, 2001, at A4; Judy Greenwald, *Court Sets Rules for Piercing; Web Anonymity*, BUS. INS., July 30, 2001, at 1; Dugie Standeford, *ISPs Should Tell Consumers When Subpoenas Seek Their Identity, Group Says*, WASH. INTERNET DAILY, Vol. 3, No. 134 (July 12, 2002).

<sup>37</sup> See VA. CODE ANN. § 8.01-407.1 (Michie Supp. 2002) (stating the procedures for compelling disclosure of identity of individuals alleged to have committed torts while acting anonymously on the Internet).

the values protected by other constitutional provisions, including due process, equal protection, and the right to trial by jury. In particular, application of an outcome-determinative heightened discovery standard singles out one class of plaintiffs who are systematically deprived of the litigation procedures, specifically discovery and trial, that are available to other plaintiffs, including plaintiffs with claims that are similar in all regards except that they allege harm by plaintiffs who did not act anonymously.

Part I of this Article summarizes the developing approach of courts to these John Doe cases, from an initial permissive approach allowing discovery freely to a more restrictive approach that substantially restricts discovery. Part II explains that while the Internet acts as a vehicle for empowering individual speakers, the anonymity of its speakers also has considerable potential to facilitate schemes which violate the law and infringe upon private rights, with the result that, as groups, both plaintiffs and defendants in these cases have significant interests at stake. In light of these competing interests, Part III analyzes First Amendment considerations and concludes that the First Amendment, while offering protection for anonymous speech, does not require creation of rules systematically favoring or disfavoring discovery in this context, at least absent a conclusion that existing procedural rules are insufficient. Part IV analyzes existing procedures and doctrine and concludes that they are sufficient, without creation of new standards, to balance the competing interests. Part V provides a critique of the trend toward creating new standards, arguing that they do little to advance defendants' legitimate interests while compromising plaintiffs' interests and risking unintended consequences.

## I

### OVERVIEW OF "JOHN DOE" DECISIONS

#### *A. Pre-Dendrite Decisions*

In the late 1990s, it became common for companies and others aggrieved by anonymous Internet speech to seek to learn the identity of the offending speakers. In many cases, Internet service providers ("ISPs") would simply provide identifying information upon request, without even requiring a subpoena. In other cases, ISPs would produce the requested information in response to attorney-issued subpoenas, without providing the

speaker an opportunity to object or seek judicial intervention. Significantly, such attorney-issued subpoenas were often invalid, as many jurisdictions allow only court-ordered discovery prior to service of process (which obviously cannot occur until the defendant has been identified).<sup>38</sup>

When subpoenas did receive judicial scrutiny, the discovery was almost uniformly granted. Most of the rulings were made either with no formal opinion or, at most, with a brief, unpublished opinion and contained little if any analysis of the competing interests.<sup>39</sup> In one case where the court did attempt to analyze the issues, it permitted discovery on the clearly erroneous theory that the First Amendment does not concern private action, without recognizing that subpoena power constitutes government action.<sup>40</sup>

One of the few early published decisions, *Columbia Insurance Co. v. Seescandy.com*,<sup>41</sup> attempted a serious analysis of the issue, but ultimately left significant questions unanswered. In *Sees-*

<sup>38</sup> See, e.g., ILL. S. CT. R. 201(d) ("Prior to the time all defendants have appeared or are required to appear, no discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown."); N.J. R. CT. 4:14-1 (requiring a court order prior to service of defendant for a deposition); N.J. R. CT. 4:14-7 (requiring that the subpoena for production of documents also compel simultaneous deposition); N.Y. C.P.L.R. § 3102(c) (McKinney 1995 & Supp. 2005) (permitting pre-commencement discovery before action commenced, "but only by court order"). *But see id.* § 3106(a) (allowing a party, after commencement, to take deposition of any party without court order except for the party whose time to file a pleading has not expired). In addition, in most cases the relevant ISP will be out-of-state, and thus will frequently require court involvement in the issuing of a subpoena for that reason alone. See, e.g., ILL. S. CT. R. 204(b); N.J. R. CT. 4:11-4; N.Y. C. P.L.R. § 3102(e).

In some cases, plaintiffs have sought to avoid this problem by joining and serving the ISP as a defendant. This tactic, though sometimes effective tactically as a way of avoiding judicial oversight, is generally not appropriate because most courts that have considered the issue have concluded that ISPs enjoy immunity from suit for information posted by others under Section 230(c) of the Federal Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2000). See *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003) (declining to resolve issue, but noting that all four circuits to consider the issue have found immunity).

<sup>39</sup> See, e.g., *Hvide v. John Does 1 Through 8*, No. 99-22831, Order at 1-2 (Fla. Cir. Ct. May 25, 2000) (on file with author); *Biomatrix, Inc. v. Doe I*, No. BER-L-670-00, Order at 1-2 (N.J. Super. Ct. Law Div. Jan. 28, 2000) (on file with author); *In re Imperial Sugar Co.*, No. 2000-33782 (Tex. Dist. Ct. July 21, 2000) (on file with author).

<sup>40</sup> See *Stone & Webster, Inc. v. John Does 1 Through 10*, No. 99MS-09-0173, slip op. at 6 (Ohio Ct. C.P. Feb. 7, 2000) (on file with author); cf. *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948) (holding that judicial enforcement of private covenants constitutes state action).

<sup>41</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

*candy.com*, the holder of various trademarks relating to See's Candy Shops, Inc., brought federal trademark infringement and other claims against defendants who had, among other things, registered the domain names "seescandy.com" and "seecandys.com."<sup>42</sup> The plaintiff sought a temporary restraining order and preliminary injunction enjoining the violations. The court, rather than the plaintiff, raised the issue of identifying the defendants by denying the injunction on the grounds that an injunction would be ineffective without the identity of the defendants and suggested that plaintiff could submit an application for discovery to obtain that information. The court observed that there was a need to balance "provid[ing] injured parties with a forum in which they may seek redress for grievances" with the "valuable right to participate in online forums anonymously or pseudonymously."<sup>43</sup>

While courts continue to struggle with this need for balance, *Seescandy.com* addressed it by requiring four "safeguards" prior to granting discovery of the identity of John Doe defendants. These were (1) "plaintiff should identify the missing party with sufficient specificity" to establish the court's jurisdiction; (2) plaintiff "should identify all previous steps taken to locate the elusive defendant"; (3) "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss"; and (4) plaintiff should make a formal request for the discovery stating the specific discovery required and the reasons why that discovery would likely identify the defendant.<sup>44</sup> Although each of these requirements makes it somewhat less likely that the discovery will occur, they advance different interests. The first is designed to protect the court itself from issuing subpoenas outside its jurisdiction, a concern that is particularly relevant to federal courts like the one in *Seescandy.com* (as diversity jurisdiction will systematically be unavailable when the defendant's identity is unknown<sup>45</sup>), although it may also concern state courts where, for instance, there is a lack of clear nexus to the forum state. The second requirement is atypical in the discovery context—parties do not generally have to establish that they have sought information from other sources in order to ob-

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<sup>42</sup> *Id.* at 575-76.

<sup>43</sup> *Id.* at 579.

<sup>44</sup> *Id.* at 578-80.

<sup>45</sup> See Rice, *supra* note 29, at 919-26.

tain formal discovery<sup>46</sup>—but evokes equitable doctrines applied in other contexts, such as preliminary injunction requests, where courts are reluctant to exercise their full powers when parties seeking relief have not first shown their own substantial efforts to protect their rights.<sup>47</sup> The third requirement, at a minimum, assures that the fact that discovery is sought prior to service of process does not expand the scope of discovery, although, as set forth below, it has been interpreted as a significant, substantive limitation on discovery. The fourth, while requiring more than an ordinary discovery demand, simply recognizes that the procedural posture of these discovery demands requires court intervention and, therefore, articulation of the basis for that intervention.

While each of *Seescandy.com*'s safeguards could prove controversial in a given case, the most significant impediment to discovery is the requirement that the plaintiff's complaint could survive a “motion to dismiss.” While the *Seescandy.com* opinion uses the phrase “motion to dismiss,” implying a minimal level of scrutiny, the court makes clear that it means to require more than that, although how much more is left unsaid. In particular, the court holds that “[a] conclusory pleading will never be sufficient” but, instead of analyzing the complaint under Federal Rule of Civil Procedure 8(a)(2)'s “short and plain statement of the claim” requirement, it suggests an inquiry analogous to the “probable cause” inquiry in criminal procedure.<sup>48</sup> In the civil context, “probable cause” has been defined to “require[ ] no more than a ‘reasonable belief that there is a chance that [a] claim may be held valid upon adjudication.’”<sup>49</sup> As “probable cause” is not ordinarily a standard applied to claims in civil procedure, the *Seescandy.com* formulation left many questions unanswered, including: Is the standard essentially a motion to

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<sup>46</sup> See, e.g., FED. R. CIV. P. 26(b)(2) (stating that limitation on discovery of relevant information available from non-discovery source where other source is “more convenient, less burdensome, or less expensive”).

<sup>47</sup> See, e.g., *Nutrition 21 v. United States*, 930 F.2d 867, 872 (Fed. Cir. 1991) (relying in part on plaintiff's delay in seeking injunction as basis for vacating district court's entry of injunction); *S.F. Real Estate Investors v. Real Estate Inv. Trust of America*, 692 F.2d 814, 818 (1st Cir. 1982) (vacating preliminary injunction where purported irreparable harm was “largely self-inflicted”).

<sup>48</sup> *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

<sup>49</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62-63 (1993) (quoting *Hubbard v. Beatty & Hyde, Inc.*, 178 N.E.2d 485, 488 (Mass. 1961)).

dismiss standard, augmented with a requirement of specificity in pleading (a requirement that exists in any event in most jurisdictions for defamation claims)? Is the plaintiff required to produce evidence? If so, is the plaintiff required to provide sufficient evidence to support all elements of the claimed cause of action (in effect requiring plaintiff to meet a summary judgment, rather than a motion to dismiss, standard), and can the defendant avoid discovery by producing evidence defeating plaintiff's claim? If not, how is the court to test the reasonableness of plaintiff's belief in the claim? Perhaps most difficult, how is the court to handle the case where discovery of evidence necessary to an element of plaintiff's case requires identifying the defendant?

### B. *Dendrite and Immunomedics*

To date, *Dendrite International, Inc. v. Doe*<sup>50</sup> remains the only appellate decision to address standards for discovery of the identity of John Doe defendants.<sup>51</sup> In *Dendrite*, the plaintiff, a publicly-traded provider of software and services to the pharmaceutical industry, sought to identify four fictitious name defendants based on their postings on the Yahoo! bulletin board devoted to the company.<sup>52</sup> The trial court allowed discovery to proceed for two of the defendants, both former employees whose postings either themselves violated the standard Dendrite employment contract or, in some instances, constituted admissions of off-line breaches.<sup>53</sup> The court denied discovery as to two other defendants, one of whom, "John Doe No. 3," was the subject of the appeal.<sup>54</sup> Dendrite's claim against John Doe No. 3 was based on several defamatory messages, including false allegations of accounting misconduct and of the CEO's trying unsuccessfully to shop the company.<sup>55</sup> John Doe No. 3 admitted financial motives for his postings, including trading in Dendrite's stock and a concern that Dendrite's stock performance would affect his or her own employer.<sup>56</sup> The *Dendrite* appeal was argued together with *Immunomedics, Inc. v. Doe*,<sup>57</sup> in which the defendant, a former

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<sup>50</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>51</sup> See *supra* note 30.

<sup>52</sup> 775 A.2d at 760.

<sup>53</sup> *Id.* at 763-64.

<sup>54</sup> *Id.* at 764.

<sup>55</sup> *Id.* at 769.

<sup>56</sup> See *id.* at 762-65.

<sup>57</sup> 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001).

employee whose postings were alleged to breach her employment agreement, appealed a decision allowing discovery of her identity.<sup>58</sup> Both the denial of discovery in *Dendrite* and the granting of discovery in *Immunomedics* were affirmed on appeal.<sup>59</sup>

The *Dendrite* court accepted the core challenge raised by John Doe No. 3 (and by virtually all John Doe defendants) to discovery of his or her identity—what the court described as the “well-established First Amendment right to speak anonymously.”<sup>60</sup> Based on this concern, the *Dendrite* court established “guidelines” for trial courts deciding John Doe applications.<sup>61</sup> These guidelines impose four requirements before a court should permit discovery of the identity of the John Doe defendant:

- First, the court should require notice to the defendant and an opportunity to be heard;
- Second, the court should require the plaintiff to set forth the exact statements that are the basis of its claim;
- Third, the court should receive evidence and determine not only whether the complaint would survive a motion to dismiss but whether plaintiff has submitted sufficient prima facie evidence to support its claim;
- Fourth, assuming plaintiff has presented a prima facie claim, “the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”<sup>62</sup>

While the first two requirements are hardly controversial (at least where notice to the defendant is feasible), the latter two present very troubling limitations on the rights of plaintiffs to pursue claims against defendants who have acted anonymously on the Internet. As a practical matter, these decisions accord the trial court broad discretion to allow or deny the requested discovery. The third factor, the ability to produce evidence in support of plaintiff’s claim, will often depend dispositively on the identity of the defendant. For example, when “actual malice” is an element of a defamation claim, the plaintiff will need to know the defendant’s identity, and in all likelihood take the defen-

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<sup>58</sup> *Id.* at 774-75.

<sup>59</sup> *Dendrite*, 775 A.2d at 772; *Immunomedics*, 775 A.2d at 778.

<sup>60</sup> 775 A.2d at 760; *see also* *Melvin v. Doe*, 836 A.2d 42, 46-50 (Pa. 2003). The nature and extent of this right is addressed in Part III, *infra*.

<sup>61</sup> 775 A.2d at 760.

<sup>62</sup> *Id.* at 760-61.

dant's deposition, to meet that burden.<sup>63</sup> Likewise, where the poster is a competitor, discovery may be focused on the competitor's efforts to lure customers or employees away from the plaintiff. Where stock manipulation is suspected, the defendant's trading records will be essential to proving damages. Moreover, as proving damages may involve complicated (and expensive) expert testimony concerning matters such as the effect of postings on stock prices, plaintiff has a strong interest in knowing whether the defendant has the financial means to satisfy a judgment before investing the resources in gathering such evidence.<sup>64</sup>

The fourth *Dendrite* factor is even more troubling. In effect, the court acknowledges that, even if plaintiff has alleged a viable legal claim against the defendant—and supported that claim with admissible evidence—the court may still exercise discretion to stop the case in its tracks, at least to the extent that the “strength of the prima facie case” is given less weight than “the defendant's First Amendment right of anonymous free speech.”<sup>65</sup> This is an exceedingly broad level of authority to grant to a single, trial-level judge, and is inconsistent with the spirit of such rights as due process and the right to trial by jury that generally animate judicial decision-making at the pre-trial stage.

The “*Dendrite* test” goes beyond what is necessary to satisfy the First Amendment. While the First Amendment right to speak anonymously is “well-established,” it does not necessarily require broad procedural protections in the John Doe context.<sup>66</sup> As set forth below, the right to speak anonymously has been recognized in the context of broad-based prior restraints on categories of anonymous speech (e.g., leaflets, petitions), and even then has been limited where necessary for important government interests (e.g., regulation of elections). The Supreme Court has

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<sup>63</sup> See, e.g., *Melvin*, 836 A.2d at 46.

<sup>64</sup> At least one court has recognized this practical need for discovering the defendant's identity:

[P]laintiff [judge] needs to know the identity of the Doe defendants prior to incurring the expenses and other burdens of a trial, because it is questionable whether plaintiff would wish to proceed with a trial if John Doe turned out to be, for example, an inmate incarcerated pursuant to a trial before plaintiff. In this instance, it is unlikely that any judgment that she obtained would be satisfied.

*Melvin v. Doe*, 49 Pa. D. & C.4th 449, 453 (2000), *appeal quashed on other grounds*, 789 A.2d 696 (Pa. Super. Ct. 2002), *rev'd*, 836 A.2d 42 (Pa. 2003).

<sup>65</sup> See 775 A.2d at 760-61.

<sup>66</sup> See *infra* Part III.

never interpreted the right as precluding discovery of the identity of a particular individual accused of illegal or actionable speech; indeed, the Court has recognized that common-law claims such as defamation are an essential balance to the right to speak anonymously.<sup>67</sup>

This broad assumption of judicial power over whether a claim will proceed is particularly troubling because it is substantially insulated from appellate review. *Dendrite* creates a standard that makes it unlikely that an appellate court will revisit a trial judge’s decision unless the court below abused its discretion—a high standard that virtually assures inconsistent results. Indeed, *Dendrite* and *Immunomedics* involved just such an inconsistency. The appellate court, while holding that *Dendrite* had properly plead a claim for defamation based on the challenged postings, affirmed the decision to deny discovery because it found *Dendrite* lacked sufficient proof of damages (normally not required pre-discovery and as to which discovery of John Doe’s identity might be relevant).<sup>68</sup> In contrast, the same court affirmed the decision to grant *Immunomedics* discovery, even though *Immunomedics* had offered no proof of damages.<sup>69</sup>

In tension with First Amendment concerns, the broad discretion accorded trial judges by *Dendrite* and *Immunomedics* creates a dangerous limitation on the due process rights of plaintiffs to seek redress for injuries. Such subjective standards risk transforming our elaborate judicial system—with the time-tested due process rights it affords—into an unregulated judicial “gut check” as to the merit or importance of a particular plaintiff’s claim. When a plaintiff is denied discovery of the identity of a John Doe defendant, that decision, as a practical matter, is likely

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<sup>67</sup> See *infra* Part III.A.1.

<sup>68</sup> See *Dendrite*, 775 A.2d at 769-70.

<sup>69</sup> The *Immunomedics* decision rejected Jean Doe’s argument that she should be allowed to disprove plaintiff’s claim before discovery of her identity. 775 A.2d at 778. The court’s reasoning in this regard is difficult to reconcile with its decision in *Dendrite* establishing a special four-part test for discovery of the identity of anonymous Internet posters. See *Dendrite*, 775 A.2d at 760-71. According to the *Immunomedics* court,

To allow a potential tortfeasor to disprove a plaintiff’s case before the plaintiff is even provided the opportunity to learn the defendant’s identity, let alone gather any discovery, has no foundation . . . . [Jean Doe] should not be afforded an advantageous position based on the media in which she chose to commit the breach of contract or because she committed that alleged breach anonymously.

775 A.2d at 778.

to have the same effect as a final judgment for the defendant. If the plaintiff cannot serve the defendant with process, it will be effectively precluded from all relief. 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. In some ways, the decision to deny discovery may be even more draconian than a dismissal. In particular, an ordinary motion to dismiss can dispose of all claims against a party and result in a final judgment appealable as of right under a standard of *de novo* review. In contrast, a discovery motion is decided under a similar (indeed, heightened) standard and has a similar result, yet in most jurisdictions it is not appealable as of right<sup>70</sup> and, at least under *Dendrite*, would face a higher, abuse of discretion, standard on appeal.

### C. *Developments After Dendrite*

*Dendrite* has been widely hailed as a sound decision that properly resolves the issues and balances the interests raised by suits against anonymous Internet posters. Public Citizen's Paul Levy described the decision as "a tremendous victory for free

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<sup>70</sup> See, e.g., N.J. R. 2:2-3(a), 2:2-4; ILL. S. Ct. R. 301, 304. Unlike most states, New York does permit routine appeal of interlocutory orders. N.Y. C.P.L.R. § 5701(a) (McKinney 1995 & Supp. 2005).

The Supreme Court of Pennsylvania has held John Doe discovery orders to be appealable as of right under Pennsylvania's collateral order rule, PA. R. APP. P. 313. *Melvin v. Doe*, 836 A.2d 42, 44 (Pa. 2003). However, the appealability of such an order could likely be resolved differently by different states, under different appellate rules. Even in Pennsylvania, the decision required a finding that the appeal presented an issue of public import, *id.* at 47, an issue as to which other states' courts might differ. Indeed, even future Pennsylvania courts might reach a different conclusion in future cases that, unlike *Melvin*, do not involve political speech directed at a public figure, or that involve nothing more than application of a discovery standard (once one is established) rather than determination of that standard.

Occasionally, a dispute over identifying a Doe may be appealable as of right when the proceeding arises under the Uniform Foreign Depositions Act ("UFDA"), on the theory that the court's jurisdiction is limited to the discovery issue and that its disposition of that issue is therefore final. See *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377, 381-82 (Va. 2001). However, since the scope of a court's review under the UFDA of the primary court's discovery request is generally quite narrow, this rule does not provide disappointed plaintiffs with systematic access to appellate review.

speech.”<sup>71</sup> ACLU counsel J.C. Saylor has called it a “fair, workable test that stems the tide of using the threat of the subpoena power to punish people for criticizing others online” but that “doesn’t close the courthouse door to those with meritorious claims.”<sup>72</sup> Commentators have argued that *Dendrite* achieves the proper “balance between employees’ speech and privacy rights, employers’ reputational interests, and the necessity of compelling identity disclosure,”<sup>73</sup> “that the guidelines adopted by . . . *Dendrite* . . . should be uniformly employed by courts dealing with the issue of compelled disclosure by ISPs,”<sup>74</sup> and that states should adopt “the *Dendrite* screening factors.”<sup>75</sup>

Since *Dendrite*, no published decision has articulated a new or different standard for resolving John Doe discovery applications. In a closely watched case, the Supreme Court of Pennsylvania in December 2003 declined to resolve the issue, ruling instead that the issue should be remanded to Pennsylvania’s intermediate appellate court, which had erroneously held that the issue was a non-appealable interlocutory order.<sup>76</sup> While that decision, *Melvin v. Doe*, did not resolve the issue, it did make a number of observations that may provide hints to how the court will resolve the issue if it reaches that court again.<sup>77</sup> In *Melvin*, the plaintiff is a former state court judge who is asserting defamation claims against an individual who anonymously posted allegations on the Internet that she was illegally lobbying then-Pennsylvania governor Tom Ridge.<sup>78</sup> The case thus arises in a context that is particularly favorable to the defendant, as the speech involved is core political speech, protected, for example, by the heightened “ac-

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<sup>71</sup> Mary P. Gallagher, *Court Erects Roadblocks to Flagging Cyberspammers on the Internet: Four-Step Process Must Be Followed Before Forcing ISP to Disclose*, N.J.L.J., July 16, 2001.

<sup>72</sup> Stephen R. Buckingham & Alix R. Rubin, *Anonymous “Posters” Complicate Discovery*, N.Y.L.J., Nov. 19, 2001, at s4.

<sup>73</sup> Margo E. K. Reder & Christine Neylon O’Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 196, 217 (2002).

<sup>74</sup> Jennifer O’Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2748 (2002).

<sup>75</sup> Lucy D. Lovrien, *Cybersmear Litigation Through a Massachusetts Prism*, 46 BOSTON B.J. 18, 20 (May/June 2002).

<sup>76</sup> *Melvin v. Doe*, 836 A.2d 42, 45 (Pa. 2003).

<sup>77</sup> See *id.* at 51-52 (Cappy, J., concurring) (criticizing majority for reaching merits issues).

<sup>78</sup> *Id.* at 43-44 & n.1.

tual malice” standard in defamation claims.<sup>79</sup> The *Melvin* majority addressed both the need for states to address the “evil” of libel, as well as “the importance of anonymous political speech,” and concluded that discovery of the defendant’s identity “presents a significant possibility of trespass upon their First Amendment rights.”<sup>80</sup> While those comments by themselves do little more than recognize the seriousness of the conflicting interests that the court must consider on remand, the *Melvin* majority gave a further hint of its views when it stated that resolution of the discovery issue did not require “consideration of the *merits* of the underlying defamation action.”<sup>81</sup> Rather, the court held that the relevant question was “strictly a legal one” of “what threshold requirements must be imposed as a prerequisite to discovery in an anonymous defamation case,” an “inquiry . . . plainly separable from the defamation action.”<sup>82</sup> The court needed to reach this conclusion to satisfy Pennsylvania-specific law concerning the availability of interlocutory appellate review, but it raises difficult questions as to what standard should be applied on remand. In particular, if the court literally means that the trial judge should not consider the merits, it leaves the judge little basis for weighing the competing interests that it acknowledges exist.

Subpoena applications certainly continue to be fought, though many are resolved at the trial level without published opinions.<sup>83</sup> On the whole, though statistics are difficult to come by, there appears to be a substantial reduction since *Dendrite* in lawsuits targeting anonymous Internet posters. At the same time, however, other related areas of litigation are becoming more common, such as the record industry’s post-Napster suits against computer users’ unauthorized downloading of copyrighted music and video.

The reasons for the decline in defamation litigation against anonymous Internet posters are subject to debate, but it is my impression that it is a combination of the enhanced judicial scrutiny of these cases that culminated in *Dendrite*, combined with

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<sup>79</sup> *Id.* at 49-50 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

<sup>80</sup> *Melvin*, 836 A.2d at 49-50.

<sup>81</sup> *Id.* at 46.

<sup>82</sup> *Id.*

<sup>83</sup> *See, e.g.*, Gallagher, *supra* note 30 (discussing a report of trial judge denying discovery under *Dendrite* test).

significant societal changes that are mostly unrelated to what occurs in the courtroom. These reasons include:

- Heightened judicial scrutiny. As ISPs began to require court orders, and courts began to scrutinize subpoena applications, the cost of obtaining discovery was substantially increased, even without the heightened *Dendrite* standard. I suspect that, particularly in the early days of “John Doe” practice, many requests were made by lawyers on the assumption that it would be cheap and easy to file a complaint, without really thinking through the possible costs or larger implications. As courts began to require motion practice, plaintiffs presumably became less interested in seeking this discovery. The significance of this factor was increased by the *Dendrite* ruling, which made clear that obtaining simply the basic discovery that would permit a plaintiff to commence its litigation would be burdensome, expensive, and uncertain.
- The Internet culture of derision. Efforts to commence suits against Internet posters were often met with derision on the very message boards that were the subject of the lawsuits. For example, after *Dendrite* commenced its suit, one of the defendants posted the message, “If *Dendrite* gets my info I’m coming onto this message board with all the dirt about what just went on behind the walls of *dendrite*. This could get real funny! So funny that my lawyer will sit on a beach for along [sic] time when I’m done with them. This is real funny since my IP is coming from a cyber café.”<sup>84</sup> Others also posted derisive messages,<sup>85</sup> though some were supportive of the company.<sup>86</sup>
- The September 11 attacks. September 11 may have reduced lawsuits aimed at Internet posters in two ways. First, the shared public sense that some things no longer seemed as important as they once seemed may have caused potential plaintiffs to conclude that such claims, even if actionable, were no longer worth pursuing.<sup>87</sup> Second, the

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<sup>84</sup> Posting of *ajcazz*, to Yahoo! Message Boards: DRTE (June 27, 2000) (on file with law review).

<sup>85</sup> *E.g.*, Posting of *Prgmr66*, *prgmr66@yahoo.com*, to Yahoo! Message Boards: DRTE (June 30, 2000) (“Egomaniac CEO’s can’t stand the fact that they can no longer control the flow of information through press releases and analyst meetings . . . . This lawsuit is a fishing expedition, nothing more.”) (on file with law review).

<sup>86</sup> *E.g.*, Posting of *Brian\_McGovern2*, to Yahoo! Message Boards: DRTE (June 30, 2000) (on file with law review).

<sup>87</sup> This hypothesis is necessarily speculative, although the author does have anecdotal experience suggesting that judges and litigants in some cases reevaluated the merit or desirability of litigation in light of the terrorist attacks. If this hypothesis has merit, then, in an odd sense, plaintiffs’ perceptions might have “caught up” with the *Dendrite* court. However, as the resilient American culture seems to be shifting back to pre-9/11 norms, this effect may be short-lived. More broadly, the problem with the *Dendrite* decision, as discussed below, is not whether the court is right in

challenges to civil liberties raised by the government's response to 9/11 may have affected broader views of privacy and governmental intrusions into anonymity, although how that would affect potential plaintiffs' decisions whether to sue is more difficult to say.

- The stock market crash. Beginning in March 2000, the stock market began a long downward slide. While some losses have been made up, there has been no return to the so-called "irrational exuberance" of the late 1990s. The resulting return to a greater emphasis on fundamentals, and the concomitantly smaller role of rumor, in determining stock prices may have decreased the incentive for corporations to bring such actions. At the same time, reduced stock market valuations and recession have on the whole made companies more reluctant to incur legal fees that may be perceived as non-essential.

While the kind of Internet bulletin board postings that inspired the first round of John Doe litigation may be abating, technological and market developments may lead to lawsuits in other areas that raise the same issues. One prominent example is the hundreds or thousands of lawsuits commenced by copyright holders in 2003 against individuals alleged to be illegally sharing digital music over the Internet. Reportedly, the Recording Industry Association of America, a music industry trade group, was obtaining 75 new subpoenas per day by mid-2003 to identify online music sharers—so many that one federal court reported that the requests were overwhelming court personnel.<sup>88</sup> These subpoenas were directed at various large ISPs and universities.<sup>89</sup> Mirroring to some extent the uncertainty over subpoenas relating to message board postings, some ISPs complied voluntarily with these subpoenas, while others objected.<sup>90</sup> In December 2003, the United States Court of Appeals for the District of Columbia ordered subpoenas quashed on statutory grounds under the Digital

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some instance as to whether a particular suit should be brought, but whether that decision is to be made by a court or a plaintiff.

<sup>88</sup> Ted Bridis, *Music Industry Wins Approval of Subpoenas*, ASSOCIATED PRESS, July 19, 2003, available at 2003 WL 59744114.

<sup>89</sup> *Id.*

<sup>90</sup> Recording Indus. Ass'n of America v. Verizon Internet Servs., 351 F.3d 1229, 1232 (D.C. Cir. 2003); see also Jay Lindsay, *Schools Call Music-Use Subpoenas Illegal*, ASSOCIATED PRESS, July 23, 2003 (noting that Massachusetts Institute of Technology and Boston College seek to quash subpoenas, while Northeastern University complies), available at 2003 WL59745296; *SBC Sues to Halt Music Industry Subpoenas*, YAHOO! NEWS, July 31, 2003 (reporting that RIAA official claims that "every" ISP other than SBC (and presumably Verizon) had complied with subpoenas) (on file with law review).

Millennium Copyright Act,<sup>91</sup> without reaching the resisting ISP’s constitutional (including First Amendment) arguments against the subpoenas.<sup>92</sup>

Another area of likely expansion for this kind of action is the rise of so-called weblogs (“blogs”). Discussed in Part II.A. below, blogs present many of the same opportunities for mischief as bulletin boards, but blogs can be much more influential and, therefore, much more dangerous if misused. Other possible uses of discovery to identify individuals acting anonymously on the Internet include suits to identify and recover from spammers, creators of viruses and worms, and others who use Internet technology destructively.<sup>93</sup> As technology develops, it is reasonable to expect that other opportunities for anonymous mischief will develop. In some regards, the fact that Internet message board cases are likely to become a smaller proportion of John Doe cases makes it more, not less, important that courts “get it right”—because, unmoored, the doctrine developed in this area can metastasize and cause greater harm.

## II

### A DELICATE BALANCE: THE POWERFUL PROMISE AND RISKS OF ANONYMOUS INTERNET SPEECH

#### A. *The Internet Is Beginning to Fulfill Its Promise of Empowering Individual Speakers*

In a period of less than a decade, the Internet has gone from a promising new technology to a mature technology that has a profound daily impact on the information available to citizens. Advocates of limiting discovery of the identity of John Doe defendants have argued, “[T]he Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers’ Corner in England’s Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen.”<sup>94</sup> Of course, the sheer volume of

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<sup>91</sup> 17 U.S.C. § 512(h) (2003).

<sup>92</sup> *Recording Indus.*, 351 F.3d at 1231.

<sup>93</sup> The problems of spam, worms, and viruses are unfortunately well known to most Internet users. The need for legal action to address these problems is suggested by the increasing aggressiveness of individuals using these techniques, including Internet denial-of-service attacks reportedly directed by spammers at websites designed to combat spam. See Elinor Mills Abreu, *Anti-Spam Web Pages Shut Down by Attacks*, YAHOO! NEWS, Sept. 25, 2003 (on file with law review).

<sup>94</sup> Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy

posts does not prove that these messages are being read. As Timothy Burke has argued, the principal barrier to being heard on the Internet is not the ability to speak, but the ability to say something that others want to hear—"most people don't have much to say, and what they do have to say, they say badly."<sup>95</sup>

While much Internet speech no doubt goes unread, some speech has had a major impact. Not only do essentially all major news outlets, political parties, and organizations have an Internet presence, but, to an extent that is unprecedented in the modern era, individuals who are neither professional journalists nor personally involved in events of public importance have been able to significantly affect the development of the public's understanding of significant issues.

An early example of the power of the Internet to spread information was the rapid rise to prominence of Matthew Drudge. Drudge, who maintains an Internet news and gossip site, *The Drudge Report*, achieved significant attention, and likely altered the course of major political events, when in January 1998 he posted information that *Newsweek* had developed, but chosen not to publish, concerning Bill Clinton and Monica Lewinsky, a story that was rapidly picked up by mainstream television and newspaper outlets.<sup>96</sup> The "most dramatic symbol of the emergence of cyberspace as a major media force," Drudge had "gone from anonymity to his own Fox News Channel show."<sup>97</sup> By the 2000 presidential election, Drudge was acting as a recognized (if not entirely praised) news source, posting exit poll information before traditional news organizations did so.<sup>98</sup>

As described above, bloggers Atrios, Joshua Micah Marshall, and Andrew Sullivan had a significant role in focusing public attention on controversial remarks by Trent Lott that led to his

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Information Center as Amici Curiae at 5, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002). The analogy, however, elides the fact that speakers in Hyde Park appear personally in public and, thus, do not generally rely on anonymity.

<sup>95</sup> Timothy Burke, *It's Content, Stupid: Why the "Digital Divide" Is a Red Herring*, at <http://www.swarthmore.edu/socsci/tburke1/digitaldivide.html>.

<sup>96</sup> See Dan Balz, *Washington's Extraordinary Week; How the Events Unfolded, From Jones to Lewinsky*, WASH. POST, Jan. 25, 1998, at A1.

<sup>97</sup> Mark Jurkowitz, *Caught in the Muddle: The Big Media Story of '98 Was How the Messengers Were the Message*, BOSTON GLOBE, Dec. 31, 1998, at C1.

<sup>98</sup> E.g., Drew Jubera, *Web Sites Defy Ban on Early Results Release*, ATLANTA J. & CONST., Nov. 8, 2000, at A9.

resignation as Senate Minority Leader in December 2002.<sup>99</sup> Also, in 2003 and 2004, substantial public concern arose concerning the issue of computerized voting and whether the systems involved were adequately protected from fraud. Bills were introduced into both Houses of Congress to address this problem by requiring computerized voting machines to provide a paper trail, assuring that election results can, if necessary, be audited.<sup>100</sup> Beverly Harris, a publicist with "no journalistic experience,"<sup>101</sup> discovered a great deal of information suggesting that there were substantial security concerns involving computerized voting and posted this information to her web site, titled *Black Box Voting: Ballot-Tampering in the 21st Century*.<sup>102</sup> As a result, Harris was "singularly responsible for almost every bit of attention recently paid to electronic voting machines."<sup>103</sup>

In addition, web sites such as [greedyassociates.com](http://greedyassociates.com), [vault.com](http://vault.com), and [ratemyprofessors.com](http://ratemyprofessors.com) provide "inside" information from anonymous individuals within law firms, businesses, and universities. While not affecting general public discourse in the manner of Drudge, Atrios, Marshall, Sullivan, or Harris, these sites can provide significant information for individuals interested in particular companies.

While many individuals do choose to use their name in publishing Internet speech, others choose not to, with little or no apparent negative effect on the persuasiveness of their opinions. Indeed, it is possible that by publishing anonymously, individuals can increase their persuasiveness.<sup>104</sup>

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<sup>99</sup> See *supra* note 17 and accompanying text.

<sup>100</sup> Secure and Verifiable Electronic Voting Act of 2004, S. 2045, 108th Cong. (2004); Voter Confidence and Increased Accessibility Act of 2003, H.R. 2239, 108th Cong. (2003).

<sup>101</sup> Farhad Manjoo, *Will the Election Be Hacked?*, SALON.COM, Feb. 9, 2004, at [http://salon.com/tech/feature/2004/02/09/voting\\_machines/index\\_np.html](http://salon.com/tech/feature/2004/02/09/voting_machines/index_np.html).

<sup>102</sup> <http://www.blackboxvoting.com>. Harris is no longer affiliated with this site, but runs <http://blackboxvoting.org>.

<sup>103</sup> *Manjoo, supra* note 101.

<sup>104</sup> That is not to say that anonymous speakers generally achieve the level of persuasiveness that a prominent public figure may have, but an ordinary citizen speaking anonymously may add credibility because it allows the reader to imagine expertise or access to information that may not exist or because it shields the reader from information that may cause the reader to discount the speech. Cf. Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1067 (2003) ("Speaker's identity is itself part of the meaning of a message."). While Atrios claimed he was really just "[s]ome guy in Philadelphia who runs a weblog," his influence and readership might have been increased by people believing he was "'somebody"—which I think means somebody

There are numerous ways for an individual to publish his or her views anonymously on the Internet. One of the oldest and most common is the Internet bulletin board or message board,<sup>105</sup> which allows users to post messages on a particular topic in a sort of running conversation that is, in most cases, publicly viewable. (There are also private message boards.) Such message boards are devoted to a broad range of topics, but for purposes of litigation the most important are usually those devoted to particular publicly-traded companies. For example, Yahoo! maintains a message board for every publicly-traded company in the United States. Yahoo!'s Microsoft board alone has over three-quarters of a million posts.<sup>106</sup> Another prominent provider of message board services, Raging Bull, has over 140,000 posts for Microsoft.<sup>107</sup>

More recently, as described above, blogs have become a common medium and, for some, an effective means of spreading information on the Internet.<sup>108</sup> Moreover, blogs and other web sites can be linked directly to users interested in the information they offer through use of the advertising features of search engines such as Google and Yahoo!.<sup>109</sup> A large number of influential blogs are anonymous.<sup>110</sup> As noted above, individuals may

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in politics or media outside of this weblog." Posting of Atrios, *supra* note 18. In fact, Atrios is "some guy in Philadelphia" with a Ph.D. in economics, see *supra* note 4, but he rarely posts concerning his area of academic expertise.

<sup>105</sup> See, e.g., *CompuServe Gateway Provides Subscribers with Link to Internet*, PC Wk., Sept. 25, 1989, at 10.

<sup>106</sup> Yahoo! Message Board: MSFT, at <http://messages.yahoo.com/?action=q&board=MSFT> (last visited Feb. 1, 2005).

<sup>107</sup> Raging Bull, at <http://ragingbull.lycos.com/mboard/boards.cgi?board=msft> (last visited Feb. 1, 2005).

<sup>108</sup> See *supra* notes 7-16 and accompanying text.

<sup>109</sup> For example, a non-profit group protesting environmental harm caused by cruise ships buys advertising from search engines to provide links to its site to users interested in cruises, though Google decided to reject the advertisements. See *Environmental Group's Ads Banned from Google Site*, S.F. CHRON., Feb. 13, 2004, at B3.

<sup>110</sup> See *supra* notes 1-16 and accompanying text. Other prominent anonymous bloggers have included Hesiod, who removed his site and archives in November 2004. See Posting of LarryE, to whoviating.blogspot.com (Nov. 4, 2004), at [http://whoviating.blogspot.com/2004\\_11\\_01\\_whoviating\\_archive.html#109961071446705](http://whoviating.blogspot.com/2004_11_01_whoviating_archive.html#109961071446705)

845. Also, there is Captain Ed, whose Captain's Quarters, [www.captainsquartersblog.com](http://www.captainsquartersblog.com), is among the top-rated blogs according to the independent rankings compiled by the anonymous N.Z. Bear at <http://www.truthlaidbear.com/ecosystem.php>. Underneath Their Robes, an anonymous legal blog published under the name "Article III Groupie," receives 1,500 hits a day and has been mentioned in *Newsweek*, *The Legal Intelligencer*, and the *ABA Journal*. See Howard J. Bashman, *Law-Related Blogs Can Provide Welcome and Even Worthwhile Diversion*, LEGAL INTELLI-

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seek to remain anonymous for personal or security reasons, but anonymity can also create a perception of reliability<sup>111</sup> or greater (insider) knowledge. While it appears that companies have not yet figured out how to use blogs productively in marketing, they are attracting attention. The failure to succeed in using blogs for commercial advertising may simply be the result of advertisers' allowing it to be known that advertising was their purpose, rather than using blogs surreptitiously.<sup>112</sup> The power of anonymous conduct on the Web has also been highlighted by the recent phenomenon of "flash mobs," where an individual (often anonymous) can influence dozens or hundreds of people to arrive at one place simultaneously for no particular reason, creating a "mob."<sup>113</sup>

### B. Defamation, Fraud, and Anonymous Mischief on the Internet

While large companies tend to attract a large number of posts to Internet message boards, the risk of manipulation is greatest among smaller and more thinly-traded companies.<sup>114</sup> A common and, perhaps surprisingly, often-effective stock manipulation scheme is the use of pseudonyms to post false information about a company to a bulletin board or to disseminate similar misleading information by anonymous spam e-mails. In one case, the president and CEO of Save the Air, a small, publicly-traded company, concerned that the company's stock price was being adversely affected by negative postings on the company's Raging Bull message board, arranged for a public relations consultant to post thirty-seven anonymous messages on the board in an effort

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GENCER, Dec. 13, 2004, at 7; Stephanie Francis Ward, *To Blog or Not to Blog?: Some Associates Who Asked That Question Say Web Logs Advance Careers, Exposure*, 90 A.B.A. J. 33 (Dec. 2004).

<sup>111</sup> Lance Concannon, *Like Falling Off a Blog*, INTERNET MAG., Aug. 1, 2003, at 13 ("Maybe it's because you can be a little more honest in a blog — it's easier to lay your soul bare to some anonymous reader than the people you deal with in daily life.").

<sup>112</sup> See, e.g., Thom Weidlich, *Internet—Weblogs: Windows of Marketing Opportunities*, PR WK. June 2, 2003, at 24 ("[B]loggers may be open to PR pitches, and their growing influence makes them the perfect viral marketing medium.").

<sup>113</sup> See Sam Skolnik, *They Came, and in a Flash, They Were Gone Seattle Adopts Latest Mob Mentality*, SEATTLE POST-INTELLIGENCER, Aug. 16, 2003, at B1.

<sup>114</sup> See, e.g., *United States v. Frank*, 520 F.2d 1287, 1288 (2d Cir. 1975) (noting relative ease of manipulating thinly-traded securities).

to boost the stock price.<sup>115</sup> In another case, a professional Internet spammer was found to have helped various stock issuers and promoters inflate their stock prices through millions of anonymous e-mails containing false information.<sup>116</sup> While promoting one's own stock seems to be more common than falsely attacking competitors, there are also instances of the latter. For example, the chief executive officer of La Jolla Club, a golf club company, posted more than one hundred anonymous negative messages about competitor Callaway Golf Company while actively trading in Callaway's shares.<sup>117</sup> The Callaway Golf case is one of hundreds of cases of abuse, many leading to "significant" consequences.<sup>118</sup>

In addition to insider schemes, Internet bulletin boards and e-mail can allow an individual to manipulate a stock's price for profit. The Securities and Exchange Commission described a typical scheme as follows:

Hogan used the same technique for each stock manipulation. First, Hogan accumulated a substantial position in the stock of a company quoted on the NASDAQ OTC Bulletin Board. Hogan then, after the close of the market and through the opening of the market the following trading day, used alias screen names to post hundreds of messages about the targeted Bulletin Board company on Internet message boards and sent numerous e-mails with the identical message. The spam postings and e-mails falsely claimed that a well-known "blue chip" company would soon acquire the outstanding stock of the targeted company at a substantial premium over its current market price. The spam postings and e-mails prompted a surge in the price and volume of the targeted company's stock. Hogan then liquidated his position, selling into the buying surge he created.<sup>119</sup>

In recent years, the SEC has identified numerous similar schemes.<sup>120</sup> Presumably, many others remain undetected.<sup>121</sup>

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<sup>115</sup> *In re* Wilson, Securities Act of 1933 Release No. 8042, 2001 SEC LEXIS 2627, at \*3-4 (Dec. 19, 2001).

<sup>116</sup> SEC v. Meltzer, Litigation Release No. 17,985, 2003 SEC LEXIS 392 (Feb. 19, 2003).

<sup>117</sup> A.J. Cataldo & Larry N. Killough, *Is Your Firm Safe from Cybersmear?*, 84 STRATEGIC FIN. 34, 36 (2003).

<sup>118</sup> *Id.* at 38 (describing twelve of "approximately 200 cases" collected at Silicon Investor's website, [www.siliconinvestor.com/stocktalk/msg.gsp?msgid=15828446](http://www.siliconinvestor.com/stocktalk/msg.gsp?msgid=15828446)).

<sup>119</sup> SEC v. Hogan, Litigation Release No. 17,769, 2002 SEC LEXIS 2532, at \*1-2 (Oct. 7, 2002).

<sup>120</sup> See, e.g., SEC v. Thomassen, Litigation Release No. 18,137, 2003 SEC LEXIS 1149, at \*1-2 (May 14, 2003) (using false statements in spam and message boards,

The shield of anonymity can also be a substantial aid to tortious conduct outside the context of the financial markets. In one case, a twenty-five year-old resident of Pakistan was accused of defrauding U.S. merchants of three million dollars in computer equipment purchased with credit card numbers obtained by establishing fraudulent "auctions at sites such as Yahoo! and eBay."<sup>122</sup> In one case, a fraudulent "National Do Not E-mail Registry" was created to appear like the Federal Trade Commission's National Do Not Call Registry, with the apparent purpose to fraudulently obtain e-mail and other personal information.<sup>123</sup> In another, anonymous individuals secretly videotaped varsity athletes in their locker rooms and sold the tapes over the Internet.<sup>124</sup> Ordinary fraud and computerized sabotage are two common forms of misconduct that occur with regularity, costing businesses billions of dollars annually.<sup>125</sup> Consumers reported Internet fraud losses to the Federal Trade Commission ("FTC") in 2003 of \$200 million (not to mention other fraud that undoubtedly was not reported).<sup>126</sup> Similarly, harassment among teenag-

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private investor earned 32%-132% profits on various "microcap" companies); *In re Snyder*, Securities Exchange Act of 1934 Release No. 46,108, File No. 3-10811, 2002 SEC LEXIS 1619, at \*2, \*4-5 (June 25, 2002) (instituting proceedings against a teenager who unsuccessfully sought to manipulate stock of biotech company through anonymous postings); Press Release from Thom Mrozek, Public Affairs Officer, U.S. Attorney's Office, No. 99-260 (Dec. 15, 1999) (on file with author) (announcing charges arising from false anonymous postings about reverse merger, which drove stock from 13 cents to \$15.50 a share, resulting in \$370,000 in illegal profits).

<sup>121</sup> Depending on the nature of the false information posted, victims may be more or less likely to realize that a fraud was committed and report it to authorities. Even if a scheme comes to the attention of authorities, limited resources may interfere with enforcement action.

<sup>122</sup> Daniele Micci-Barreca, *Unawed by Fraud: New Techniques and Technologies Have Been Enlisted in the Fight Against Online Fraud*, SECURITY MANAGEMENT, Sept. 1, 2003, at 75.

<sup>123</sup> Press Release, Federal Trade Commission, Sham Site Is a Scam: There Is No "National Do Not E-mail Registry" (Feb. 12, 2004), available at <http://www.ftc.gov/opa/2004/02/spamcam.htm>.

<sup>124</sup> *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003). The "Doe" in this case name refers to the victims, who sued anonymously to protect their privacy, rather than the unknown defendants. The court notes, however, that the anonymous wrongdoers could not be located, and the judgment against them was uncollectible. *Id.* at 656-57.

<sup>125</sup> See, e.g., VERISIGN, INTERNET SECURITY INTELLIGENCE BRIEFING 1, 4, 8, 13-15 (2004), available at <http://www.verisign.com/static/005573.pdf>; Micci-Barreca, *supra* note 122; Alison Langley, *Computer Viruses Are Frustrating Insurers, Too*, N.Y. TIMES, Oct. 12, 2003, sec. 3, at 4.

<sup>126</sup> FEDERAL TRADE COMMISSION, NATIONAL AND STATE TRENDS IN FRAUD &

ers appears to be relatively common.<sup>127</sup> Depending on the circumstances, such harassment can be actionable, a violation of school rules, or even criminal.

The First Amendment does not immunize anonymous speech over the Internet that constitutes libel, defamation, or other violations of the law from liability.<sup>128</sup> The general right to speak anonymously on the Internet is substantially different from the asserted right to remain anonymous when anonymity is being used as a shield protecting tortious or illegal conduct. The rapidity with which false information, trade secrets, and the like can be spread over the Internet creates a serious hazard, a hazard which must be weighed in determining the proper judicial approach to these situations.

### III

#### SPECIAL LIMITATIONS ON DISCOVERABILITY ARE NOT REQUIRED BY THE FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY

The core concern underlying both *Dendrite* and the organized opposition to discovery of the identities of John Doe defendants is rooted in the First Amendment right of free speech. The *Dendrite* court, for example, expressly relied upon “the well-established First Amendment right to speak anonymously.”<sup>129</sup> Likewise, Public Citizen’s central argument in *Dendrite* in support of a heightened standard was based on the assertion that “[i]t is well-established that the First Amendment protects the right to speak anonymously.”<sup>130</sup> *Melvin*, too, framed the issue as “what threshold requirements must be imposed as a prerequisite to discovery in an anonymous defamation case in order to implement essential First Amendment protections.”<sup>131</sup> *Melvin*, how-

IDENTITY THEFT, JANUARY - DECEMBER 2003, at 3 (Jan. 22, 2004), available at <http://www.consumer.gov/sentinel/pubs/topicfraud.2003.pdf>.

<sup>127</sup> See, e.g., Ethan Smith, *An Online Rumor Ruined My Life*, YM, April 2002, at 193, 194 (discussing posts on unofficial student message board that referred to high school student as “fat cow MOO BITCH” and stated that poster would kill student “if he knew that he wouldn’t get caught”).

<sup>128</sup> See, e.g., *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994).

<sup>129</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>130</sup> Brief of Amici Curiae Public Citizen and the American Civil Liberties Union of New Jersey at 22, *Dendrite Int’l Inc. v. John Does Nos. 1 through 4* (N.J. Super. Ct. App. Div. 2001) (No. A-2774-00), available at <http://www.citizen.org/litigation/briefs/1stAmendment/articles.cfm?ID=1862>.

<sup>131</sup> *Melvin v. Doe*, 836 A.2d 42, 46 (Pa. 2003).

ever, also recognized that “the cases dealing with the right to anonymous free speech have been decided by the United States Supreme Court in the context of regulatory bans on handbills and have not been applied in the area of libel suits against public officials.”<sup>132</sup> Thus, *Melvin* reasoned, the First Amendment is relevant, but what it commands remains to be decided.<sup>133</sup> While case-specific objections not based on the First Amendment to the use of discovery to identify defendants may exist in particular instances,<sup>134</sup> those objections hardly justify systematic, judicially-imposed restraints on discovery, as demonstrated by the fact that discovery of defendants’ identities has been routinely granted when speech was not involved.<sup>135</sup>

Recognizing the existence of a First Amendment right to speak anonymously, however, is the beginning, not the end, of analysis of what guidelines should govern the discovery of a John Doe defendant’s identity. As set forth in Part IV, existing procedural rules provide substantial protection to defendants who wish to avoid disclosure of their identities. For example, in the ordinary case, disclosure will be unavailable if the plaintiff has failed to plead an actionable claim against the defendant, or if the defendant can establish entitlement to summary judgment. Likewise, the court’s control of discovery will permit the court to issue protective orders protecting defendant from much extra-judicial retaliation and otherwise limiting use of the information discovered, without ordering that the discovery not be had in cases where it is essential to plaintiff’s case. The real question, then, is whether the First Amendment requires courts systematically to impose different, and greater, impediments against the discovery of the identity of John Doe defendants than are imposed for the discovery of other relevant materials.

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<sup>132</sup> *Id.* at 50.

<sup>133</sup> *See id.*

<sup>134</sup> For example, discovery of a defendant’s identity may be improper where a claim is patently without merit or is brought for an improper purpose. However, these concerns could exist regardless of whether the defendant’s conduct was alleged to involve speech.

<sup>135</sup> *See, e.g.,* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971) (reversing dismissal of complaint and reporting, without criticism, that defendant narcotics agents had not been named in complaint and district court had ordered service of that process through the agency upon those whom records indicated were involved in plaintiff’s arrest); *Dry Branch Kaolin Co. v. Doe*, 622 A.2d 1320 (N.J. Super. Ct. App. Div. 1993); *Brien v. Lomazow*, 547 A.2d 318 (N.J. Super. Ct. App. Div. 1988).

As a general matter, the First Amendment does not require such special procedures. In reaching this conclusion, this Article does not claim that individuals posting anonymously on the Internet lack any interest in maintaining their anonymity, nor does it claim that that interest should be ignored by the courts. Rather, it claims that the discovery of John Does' identities under existing rules is consistent with existing First Amendment jurisprudence, and that the First Amendment does not require special discovery rules to be established. In particular, while the Supreme Court has not considered directly the application of the First Amendment right to speak anonymously to restrictions on discovery in civil litigation,<sup>136</sup> two categories of cases decided by the Court do provide insight into the scope of the right to speak anonymously and its relevance in the present context. First, the Court has directly articulated the right to speak anonymously in the context of prior governmental restraints on speech.<sup>137</sup> Second, the Court has considered claims of anonymity as a basis for opposing after-the-fact discovery of a person's identity in the context of governmental criminal and legislative investigations.<sup>138</sup> Both of these lines of cases are helpful but imperfect analogies to the problem of John Doe discovery, and the Supreme Court has not affirmatively recognized a right to speak anonymously outside these contexts. Taken together, these cases suggest that the First Amendment is relevant to John Doe discovery requests, but that those anonymous free speech concerns may be satisfied by ordinary procedural rules.<sup>139</sup>

### A. *The Supreme Court and Anonymity*

#### 1. *The Prior Restraint Cases*

An often-repeated idea is that anonymous speech has throughout history "played an important role in the progress of mankind."<sup>140</sup> This sentiment, which often relies upon the

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<sup>136</sup> See *Melvin*, 836 A.2d at 50.

<sup>137</sup> See *infra* Part III.A.1.

<sup>138</sup> See *infra* Part III.A.2.

<sup>139</sup> See *infra* Parts III.B, IV.

<sup>140</sup> *Talley v. California*, 362 U.S. 60, 62 n.3, 64 (1960); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 n.4, 343 n.6 (1995); cf. *id.* at 358-71 (Thomas, J., concurring) (examining practice in 1791 to conclude that "original meaning" of Constitution was to protect anonymous speech). Justice Scalia has expressed skepticism of this positive view of anonymous speech. *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting) ("I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous

pseudonymous Federalist Papers for support,<sup>141</sup> seems accurate as far as it goes. The Supreme Court first expressly recognized a First Amendment right to speak anonymously in 1960, in *Talley v. California*, which invalidated a local ordinance requiring handbills to disclose the names of their creator and distributor.<sup>142</sup> Since that time, the Supreme Court has revisited the issue a number of times, though each time in the context of prior restraints on speech<sup>143</sup>—i.e., a governmental command that “forbid[s]” or, at a minimum, imposes a “legal impediment” to “future speech.”<sup>144</sup>

Because “the First Amendment historically provides greater protection from prior restraints than after-the-fact penalties,”<sup>145</sup> the Supreme Court’s anonymous speech cases cannot be directly translated into the John Doe context, and blanket invocation of the “First Amendment right to speak anonymously” may be mis-

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letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity.”)

<sup>141</sup> *E.g.*, *Talley*, 362 U.S. at 64-65; *Fed. Election Comm’n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 n.17 (D.C. Cir. 1981); *Bezanson*, *supra* note 104, at 1067 n.292.

<sup>142</sup> 362 U.S. 60 (1960). A few prior decisions had addressed related issues, but had not framed their analysis in terms of a distinct, First Amendment right to speak anonymously. For example, *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), had overturned laws requiring the disclosure of the names of members of the NAACP, but had done so on due process grounds, although the *Bates* concurrence (two weeks before *Talley*) had stated that the ordinance also violated the First Amendment’s guarantees of freedom of speech and assembly. 361 U.S. at 527-28 (Black and Douglas, JJ., concurring). Likewise, the Court had rejected laws prohibiting speech without prior governmental approval on general First Amendment grounds, without addressing the narrower consideration that an approval requirement could effectively prevent anonymous speech (at least as long as the approval process required disclosure of the speaker’s identity). *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

<sup>143</sup> *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150 (2002).

<sup>144</sup> *Alexander v. United States*, 509 U.S. 544, 549-51 (1993). There can be a blurring at the margins of the distinction between prior restraints and subsequent punishment. *Id.* at 567-68 (Kennedy, J., dissenting) (“A historical example is the sentence imposed on Hugh Singleton in 1579 after he had enraged Elizabeth I by printing a certain tract . . . Singleton was condemned to lose his right hand, thus visiting upon him both a punishment and a disability encumbering all further printing.”). However, as discussed *infra*, all the cases in which the Supreme Court has found the right to speak anonymously involved government regulation that either forbade future anonymous speech outright or forbade it unless certain pre-conditions were satisfied by the speaker.

<sup>145</sup> *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002).

leading.<sup>146</sup> Rather, the relevance of the First Amendment efforts to identify defendants requires analysis of the reasoning of the Supreme Court's anonymous speech jurisprudence. As described below, the Supreme Court has unambiguously recognized a right to speak anonymously in four cases. However, in each, the Court recognized limitations on that right. Moreover, in other circumstances it has required disclosure of the speaker's identity as a condition to expressive conduct.

In recognizing for the first time a specific right to speak anonymously, the *Talley* majority conceived of the right as derivative of the core First Amendment prohibition against restraints on speech.<sup>147</sup> This conceptual approach was not the only one open to the Court. Rather, it could have treated the right to speak anonymously as an independently protected right to choose the content of one's speech, analytically separate from the issue of whether the disclosure could deter speech;<sup>148</sup> or it could have treated the disclosure requirement as an impermissible effort to require speech against the speaker's wishes;<sup>149</sup> or it could have analyzed the question from a historical perspective, as Justice Thomas has more recently urged.<sup>150</sup> Instead, the Court took as its starting point prior decisions holding that it violated the First Amendment to prohibit the distribution of handbills, which were the particular form of speech at issue in *Talley*.<sup>151</sup> Relying on those precedents, the Court explained that an ordinance prohibiting anonymous handbills was clearly an unconstitutional prior restraint on speech, unless it was "saved" by its provision that

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<sup>146</sup> See, e.g., *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

<sup>147</sup> See *Talley*, 362 U.S. at 62.

<sup>148</sup> This perspective was suggested by the majority in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). In contrast, the *Talley* dissent explicitly considered and rejected a right to speak anonymously, stating that "[t]he Constitution says nothing about freedom of anonymous speech." 362 U.S. at 70 (Clark, J., dissenting). The dissent went on to cite instances in which the Court had approved restrictions on anonymous speech, including laws requiring newspapers using the mails to identify their editor, publisher, owner, and stockholders, and requiring lobbyists to provide their identity and other information. *Id.* (citing *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288 (1913) and *United States v. Harriss*, 347 U.S. 612 (1954)).

<sup>149</sup> See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573-75 (1995).

<sup>150</sup> See *McIntyre*, 514 U.S. at 358-71 (Thomas, J., concurring).

<sup>151</sup> 362 U.S. at 62-63.

handbills could be distributed if the author was identified.<sup>152</sup> The Court held that the ordinance was not saved, reasoning that required identification “would tend to restrict freedom to distribute information,” as evidenced by what it found to be the substantial and positive use of anonymity to promote various ideas throughout history.<sup>153</sup> In addition, and of particular relevance to John Doe discovery, the Court emphasized that the ordinance was not limited to “providing a way to identify those responsible for fraud, false advertising and libel,”<sup>154</sup> implying that an ordinance targeted at identifying such wrongdoers after the fact could survive First Amendment scrutiny.

After *Talley*, the Court did not revisit the issue of the right to speak anonymously until 1995, but since then it has done so three times. These cases, *McIntyre v. Ohio Elections Commission*,<sup>155</sup> *Buckley v. American Constitutional Law Foundation, Inc.*,<sup>156</sup> and *Watchtower Bible & Tract Society v. Village of Stratton*,<sup>157</sup> while stating that they apply “strict” or “exacting” scrutiny of restrictions on anonymous speech, have nonetheless recognized the propriety of limitations that are closely targeted toward wrongdoers. First, *McIntyre* invalidated an Ohio statute prohibiting the distribution of anonymous campaign literature. The Court reasoned that Ohio’s interest in regulating the voting process did not justify the statute<sup>158</sup> because “the ordinance plainly applies even when there is no hint of falsity or libel.”<sup>159</sup> The Court further explained that the blanket anonymity prohibition compared unfavorably with the state’s existing, and better-targeted, regulation of fraud and libel in elections, and, “[t]o the extent those provisions may be underinclusive, [state] courts [may] also enforce the common-law tort of defamation.”<sup>160</sup> *McIntyre* thus recognized that common-law defamation claims provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously. Unlike blanket prior restric-

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<sup>152</sup> *Id.* at 63-64.

<sup>153</sup> *Id.* at 64-65.

<sup>154</sup> *Id.* at 64. (“Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited.”).

<sup>155</sup> 514 U.S. 334 (1995).

<sup>156</sup> 525 U.S. 182 (1999).

<sup>157</sup> 536 U.S. 150 (2002).

<sup>158</sup> 514 U.S. at 344-45.

<sup>159</sup> *Id.* at 344.

<sup>160</sup> *Id.* at 351 n.13.

tions against anonymous speech, common-law claims are targeted at actionable speech, rather than speech generally.<sup>161</sup> While *McIntyre* does not address the issue of the discovery of the identity of defamation defendants, the very defamation actions the Court invoked cannot serve their function of deterring and punishing wrongdoing—and thus of allowing anonymous speech to be protected when it is not actionable—unless defendants can be identified.

Four years later, in *Buckley*, the Court again held that disclosure requirements are unconstitutional when they threaten broad restraints on speech unrelated to legitimate governmental interests, but that disclosures that impose only limited impediments to speech may be acceptable when they advance legitimate interests. In particular, *Buckley* held unconstitutional a Colorado statute that required election initiative petition circulators to wear identification badges, but approved a law requiring that the circulators file as a public record an identifying affidavit that revealed their name and other personal information.<sup>162</sup> As Justice Ginsberg explained, the affidavit requirement, by separating the identification in time from the speech, strikes an acceptable balance between the First Amendment right of the circulator to speak without “‘heat of the moment’ harassment” and the legitimate state interest in regulating elections.<sup>163</sup> While suggesting that the affidavits are *less likely* to lead to harassment than identity badges, *Buckley* thus accepts the possibility that forced disclosure of a person’s identity as a condition of political speech, when justified by legitimate governmental interests, may be acceptable even if there is a risk of private retaliation. For example, since *Buckley* approved the filing of affidavits as a public record, a private company could, without First Amendment restriction, obtain copies of the affidavits of all petition circulators opposing it on a political issue (say, location of an incinerator in a particular neighborhood) and then terminate any employees (or vendors) found among the circulators. The deterrent to speech of the possibility of discovery in a John Doe case is thus substantially less than what the First Amendment permits. For example, in *Melvin*,<sup>164</sup> the plaintiff judge seeking to discover the

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<sup>161</sup> *Id.* at 349-50 & n.13.

<sup>162</sup> 525 U.S. 182, 197-200 (1999).

<sup>163</sup> *Id.* at 199-200.

<sup>164</sup> 836 A.2d 42 (Pa. 2003).

identity of the person accusing her of misconduct could constitutionally have obtained the identity of the same person circulating a petition to remove her from office on the same grounds (if permitted by state statute).

Finally, in *Watchtower*, the Court considered for the first time the extent to which prior disclosure requirements are permissible in a context not involving election regulation. In *Watchtower*, Jehovah’s Witnesses challenged a local ordinance that required canvassers, solicitors, merchants, and others going onto private property to obtain a “Solicitation Permit,” which required the canvasser to provide information including name, address, certain prior addresses, and various categories of information about the purpose and scope of the proposed canvassing or solicitation.<sup>165</sup> While the ordinance allowed permits to be denied on certain grounds (e.g., fraud or incomplete forms), permits were issued routinely,<sup>166</sup> and the ordinance itself was “content neutral.”<sup>167</sup> The Court, while recognizing the “important interests”<sup>168</sup> advanced by the ordinance, held that it nonetheless violated the First Amendment in light of the “breadth of speech affected” and the “nature of the regulation.”<sup>169</sup> Again, the Court’s reasoning depended critically on the fact that disclosure was required prior to speech:

It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.<sup>170</sup>

Moreover, the Court was concerned that the ordinance would deter legitimate speech, and was not targeted at actionable speech. In particular, the Court recognized that “preclusion [of speech] may well be justified in some situations—for example, by the special state interest in protecting the integrity of a ballot-initiative process . . . or by the interest in preventing fraudulent commercial transactions.”<sup>171</sup> Indeed, “[h]ad this provision been construed to apply only to commercial activities and the sollicita-

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<sup>165</sup> 536 U.S. 150, 154-55 & n.2 (2002).

<sup>166</sup> *Id.* at 154-56 & n.4.

<sup>167</sup> *Id.* at 159.

<sup>168</sup> *Id.* at 165.

<sup>169</sup> *Id.* at 164.

<sup>170</sup> *Id.* at 165-66.

<sup>171</sup> *Id.* at 167.

tion of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud."<sup>172</sup> Taken as a whole, *Watchtower* is probably the broadest protection to date of the right to speak anonymously, but even under *Watchtower* restrictions focused specifically on deterring specific wrongs remain viable. Therefore, even *Watchtower* provides little support for the imposition of greater discovery hurdles in defamation cases beyond the general principle that the right to speak anonymously warrants First Amendment protection.

Moreover, while *Talley*, *McIntyre*, *Buckley*, and *Watchtower* address the right to speak anonymously most directly, the Court has also continued to uphold prior restrictions on anonymous speech. For example, in *Valeo*, the Court recognized that the Federal Election Campaign Act's forced disclosure of the identity of contributors to political campaigns might "seriously infringe on privacy of association and belief guaranteed by the First Amendment."<sup>173</sup> Nonetheless, the Court held that the broad disclosure requirements (requiring identification of contributors donating as little as ten dollars) were justified by the subordinating governmental interests in providing the public with information about the sources and uses of campaign funds, deterring corruption, and enforcing contribution limits.<sup>174</sup> In *Meese v. Keene*, the Court (writing through Justice Stevens, the author of *Watchtower*) upheld a federal statute requiring "agents of foreign principals" to disclose identifying information and to make detailed disclosures to the government when disseminating information classified by the State Department as "political propaganda."<sup>175</sup> The Court has also approved disclosure requirements in banking transactions<sup>176</sup> and has reiterated its pre-*Talley* approval of the Federal Regulation of Lobbying Act's prohibiting anonymous lobbying of Congress.<sup>177</sup>

Taken together, these cases establish that the right to speak

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<sup>172</sup> *Id.* at 165.

<sup>173</sup> 424 U.S. 1, 64 (1976).

<sup>174</sup> *Id.* at 63, 66-68; *see generally id.* at 60-84.

<sup>175</sup> 481 U.S. 465, 467-69 (1987). The Court in *Keene* did not address the right to speak anonymously specifically, focusing instead on whether the First Amendment prohibited the requirement that the disseminator of material classified as political propaganda was required to label it as such. *Id.* at 477-84.

<sup>176</sup> *See* *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

<sup>177</sup> *E.g.*, *Valeo*, 424 U.S. at 67 n.79.

anonymously does exist independent of the right to speak generally (despite Justice Scalia's continuing skepticism). In particular, they establish that, absent countervailing considerations, it is desirable to permit anonymous speech, and, therefore, the First Amendment restricts government interference with the right to speak anonymously. As with the right to speak generally, the First Amendment provides its greatest protections when the government seeks to impose a prior restraint on anonymous speech.

However, these cases also establish that, even in the context of prior restraints, the right to speak anonymously may yield to legitimate interests. In particular, the right to speak anonymously offers little or no protection to those whose speech is actionable, whether as fraud, defamation, or otherwise. The Court remains concerned that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct."<sup>178</sup> Even prior restraints, when targeted against such wrongdoers, are likely to be upheld. Likewise, although rare, the tort of trespass has been held to apply to protesters going onto private land to make a political statement.<sup>179</sup>

Common-law claims against those whose speech constitutes fraud, defamation, or another wrong are an important part of the governmental mechanism for deterring such wrongdoing. Indeed, the Court has recognized that common-law defamation claims provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously. Thus, the pursuit of common-law claims is wholly consistent with existing anonymous speech jurisprudence. If anything, permitting such actions supports, rather than detracts from, the right to speak anonymously, by permitting a form of regulation of speech that is targeted directly at wrongdoing.

## 2. *Journalistic Privilege Cases*

The Supreme Court has also considered the application of the First Amendment to efforts by government authorities to discover the identity of speakers after the fact. While these cases avoid the concerns about prior restraints that underlie the cases

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<sup>178</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

<sup>179</sup> *E.g. Huffman & Wright Logging Co. v. Wade*, 857 P.2d 101, 111 (Or. 1993) (en banc) (upholding compensatory damages award against protesters who interfered with logging operation, but scrutinizing punitive damages for speech basis).

discussed in the preceding subsection, they are also difficult to map directly into the John Doe context.

Arguably, the closest the Court has come to the situation presented by a John Doe discovery request is its treatment of journalistic privilege in *Branzburg v. Hayes*.<sup>180</sup> Indeed, one commentator has suggested that journalistic privilege is the proper analogy for analyzing John Doe discovery.<sup>181</sup> In *Branzburg*, journalists challenged grand jury subpoenas that sought to require them to identify anonymous sources under the First Amendment guarantees of freedom of speech and freedom of press.<sup>182</sup> The journalists argued that being forced to disclose their sources would deter anonymous sources from speaking to them and thereby burden the news-gathering process. The Supreme Court rejected this argument and held that no First Amendment privilege protects journalists from forced disclosure to a grand jury of their confidential sources. In explaining the decision, Justice White for the *Branzburg* majority expressly supported the decision on the grounds that, unlike prior restraints, subsequent discovery of an anonymous source's identity did not unconstitutionally interfere with the practice of using anonymous sources:

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request. The sole issue before us is the obligation of reporters to re-

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<sup>180</sup> 408 U.S. 665 (1972).

<sup>181</sup> Megan M. Sunkel, *And the I(SP)s Have it . . . but How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1213-18 (2003); Brief for Public Citizen, Electronic Frontier Foundation, and Electronic Privacy Information Center as Amici Curiae at 14-15, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003) (Nos. 50 WAP 2002 and 51 WAP 2002).

<sup>182</sup> 408 U.S. at 679-81.

spond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.<sup>183</sup>

On its face, *Branzburg* would seem to dispose of John Doe claims to First Amendment protection. While the governmental interest in disclosure of crimes to a grand jury is arguably greater than a plaintiff’s interest in the disclosure of relevant information in a civil proceeding, the Court’s reasoning, at least, is not so limited. For example, the Court cites with approval the Second Circuit’s 1958 decision in *Garland v. Torre* (authored by later Justice Stewart),<sup>184</sup> which rejected the assertion made by “a news gatherer . . . for the first time that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit.”<sup>185</sup> Likewise, *Branzburg* invokes the “longstanding principle that ‘the public . . . has a right to every man’s evidence,’” a principle which it explained is “vividly illustrated” by Jeremy Bentham’s suggestion that if they were witnesses, the Prince of Wales, Archbishop of Canterbury, and Lord High Chancellor could be compelled to testify in a civil dispute over “halfpennyworth of apples.”<sup>186</sup>

Moreover, the *Branzburg* majority makes a number of conclusions which are relevant, at least by analogy, to John Doe discovery requests. Most fundamentally, the Court observes that the privilege claimed is not the source’s, but the reporter’s.<sup>187</sup> While the source may have an “understandable” preference for anonymity, that desire for anonymity does not rise to the level of an evidentiary privilege, far less a constitutional preference.<sup>188</sup> By analogy, an ISP maintaining a message board (e.g., Yahoo!) might assert some kind of privilege, that the John Doe poster him or herself would not.<sup>189</sup> Moreover, the majority makes a clear

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<sup>183</sup> *Id.* at 681-82.

<sup>184</sup> 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>185</sup> 408 U.S. at 685-86.

<sup>186</sup> *Id.* at 688 & n.26.

<sup>187</sup> *Id.* at 695.

<sup>188</sup> *See id.* at 691, 695-96.

<sup>189</sup> Arguably, John Doe is not analogous to the anonymous source because, in most cases, the anonymous source would be called upon to testify to information of which he was aware prior to the communication with the reporter, while in the John Doe case it is the communication with the ISP itself (the posting along with identifying information supplied to the ISP) that is the subject of the discovery. However, this distinction will not always hold. For example, if an anonymous source had learned of relevant information through a communication protected by a recognized privilege (e.g., if the target of the grand jury had confessed to her spouse), it is

distinction between actual restraints on what may be published, as opposed to the merely secondary effect of reducing what is published by deterring sources from speaking to reporters.<sup>190</sup> While the Court does not deny that such deterrence might occur or hold that it is completely lacking in constitutional importance, the Court was highly skeptical of the unproven claim of deterrence, as well as viewing indirect deterrence as inherently less worrisome than direct restraints.<sup>191</sup>

Finally, and of particular relevance to John Doe discovery, the *Branzburg* majority centrally relies on the reasoning that requiring judges to make outcome-determinative privilege decisions places an untenable burden on the judicial role. In particular, the Court explains that forcing judges to make such a case-by-case determination would have the undesirable effect of making courts “inextricably involved in distinguishing between the value of enforcing different criminal laws”:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure . . . .

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a ‘compelling’ governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered

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possible that the grand jury would seek to inquire of the source about his communication with the reporter, as that communication may have waived (or be outside of) the prior privilege.

<sup>190</sup> See 408 U.S. at 691-93.

<sup>191</sup> See *id.* at 693-94.

legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.<sup>192</sup>

*Branzburg* is complicated, however, by the fact that it was decided by a 5-4 vote, with one of the majority, Justice Powell, filing a separate concurrence. In that concurrence, Justice Powell made clear that some form of First Amendment "privilege" does exist to protect journalists from having to disclose confidential sources.<sup>193</sup> Such a privilege would protect disclosure in cases of "harassment of newsmen," when "the grand jury investigation is not being conducted in good faith," the journalist "is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," or if there is no "legitimate need of law enforcement."<sup>194</sup> Since Powell was the decisive fifth vote, *Branzburg* has been interpreted as rejecting an absolute privilege for confidential journalistic sources but recognizing a qualified privilege.<sup>195</sup>

Whether because of Justice Powell's concurrence or a concern for the significant role of confidential sources in maintaining a vibrant press, courts following *Branzburg*'s strongly-worded rejection of journalistic privilege have not freely ordered discovery of journalists' confidential sources in civil discovery.<sup>196</sup> Part of the reason for this reluctance may be that many civil cases implicate state, rather than federal, law of journalistic privilege, meaning that a privilege may apply under state law even without consideration of a possible federal qualified privilege.<sup>197</sup> Further, even when federal law applies, courts have held that the important public concerns involved in a criminal investigation

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<sup>192</sup> *Id.* at 703-06 (citations and footnotes omitted).

<sup>193</sup> *Id.* at 710 (Powell, J., concurring).

<sup>194</sup> *Id.* at 709-10.

<sup>195</sup> *E.g.*, *Baker v. F & F Inv.*, 470 F.2d 778, 784-85 (2d Cir. 1972); *see also* *Carey v. Hume*, 492 F.2d 631, 635-36 (D.C. Cir. 1974); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Delaney v. Superior Court*, 789 P.2d 934, 938 n.3 (Cal. 1990); *In re Contempt of Wright*, 700 P.2d 40, 42 (Idaho 1985); *State v. Siel*, 444 A.2d 499, 502-03 (N.H. 1982). *But see In re Decker*, 471 S.E.2d 462, 465 (S.C. 1995) (holding that *Branzburg* rejected both absolute and qualified privileges, while acknowledging that it recognized protection from disclosure under "certain limited circumstances" involving bad faith and harassment).

<sup>196</sup> *E.g.*, *Baker*, 470 F.2d at 783; *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-99 (1st Cir. 1980).

<sup>197</sup> *E.g.*, *Delaney*, 789 P.2d at 939-45.

are not equally implicated by civil discovery.<sup>198</sup> As a result, courts considering discovery requests seeking journalists' confidential sources generally engage in a case-by-case inquiry, focusing on the centrality of the discovery of the source's identity to the claim. When the source's identity is central and cannot be discovered by other means, discovery has generally been granted; where the information is available from sources other than the journalist and its relevance is tangential, discovery has generally been denied.<sup>199</sup>

Finally, in interpreting these post-*Branzburg* cases, it is also necessary to recall that they are decided in the context of the great deference many courts give to the journalists. In particular, many courts apply a journalistic privilege in cases not involving any confidential information, although a weaker privilege applies than in instances involving confidential information.<sup>200</sup> This privilege derives from the concern that, if discovery of journalists were freely allowed, it would be regularly sought and would thereby burden the newsgathering and reporting process, thereby interfering with the public good of a vigorous free press.<sup>201</sup> Since there is no comparable reason to give similar deference to ISPs, the overall case for applying a privilege in that context will be weaker. Indeed, courts have declined to recognize any privilege when confidential information is gathered and maintained for non-journalistic purposes.<sup>202</sup>

### B. *Application of Right of Anonymous Speech to John Doe Cases*

While neither the prior restraint cases nor the anonymous

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<sup>198</sup> *E.g.*, *Baker*, 470 F.2d at 784-85; *see also Carey*, 492 F.2d at 635-36.

<sup>199</sup> *E.g.*, *Baker*, 470 F.2d at 783-84 (denying discovery where there were "other available sources of information . . . which appellants had not exhausted" and where appellants failed to demonstrate that the source's identity was "necessary, much less critical," to the claim); *Bruno & Stillman*, 633 F.2d at 595-99; *Carey*, 492 F.2d at 636; *cf. Britt v. Superior Court*, 574 P.2d 766, 775-76 (Cal. 1975) (refusing under First Amendment to require disclosure in litigation of plaintiffs' associational activities denied under First Amendment where those activities "appear quite unrelated to the matters placed at issue by plaintiffs' complaints"; stating that discovery may be permitted where information is "essential to the fair resolution of the lawsuit").

<sup>200</sup> *E.g.*, *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 34-35 (2d Cir. 1999); *see generally McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) (citing cases demonstrating division of authority over whether to extend journalistic privilege to nonconfidential sources).

<sup>201</sup> *See Gonzales*, 194 F.3d at 34-35; *McKevitt*, 339 F.3d at 532-33.

<sup>202</sup> *E.g.*, *von Bulow v. von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987).

source cases map directly to anonymous Internet speech, together they do suggest a common-sense approach that would balance the competing interests involved. In particular, neither set of cases establishes that the First Amendment requires a limitation on discovery in the John Doe context. However, they do reflect a sufficient concern for the First Amendment-type interests involved that it is reasonable for courts to consider those interests. Taken together, these conclusions suggest that courts should, within existing frameworks, seek to consider defendants' arguments that their anonymity should not lightly be disturbed. However, absent a First Amendment mandate to go beyond existing rules, courts should not do so without some clear evidence indicating that the existing rules are themselves somehow lacking. As set forth in Part IV, existing rules are sufficient to protect the legitimate interests that defendants may have.

First, while the *Talley* line of cases establishes that the First Amendment can in some circumstances protect a speaker's anonymity, those cases are limited by the fact that they arise in the special, and highly disfavored, context of prior restraints. To the extent they touch upon the issue at all, the cases suggest that subsequent disclosure is entitled to far less protection, and none if wrongdoing by the speaker is involved. They are relevant to John Doe discovery applications because it is at least plausible that the threat of discovery will deter some speech, either by the speaker or others. For example, after Dendrite posted notice of its lawsuit, the defendants greatly reduced their posting activity and in fact overall posting on the board declined.<sup>203</sup> The concern here, of course, is not that defamatory or fraudulent speech might be deterred, but that the risk of disclosure might also chill speech that is protected by the First Amendment. For example, an employee might be afraid to post a comment unfavorable to his employer for fear that the employer will allege it to be defamatory and seek to learn his identity to terminate him.

There is no way to judge precisely how large such a chilling effect might be from discovery in a particular John Doe action (or from John Doe actions in the aggregate), but the Supreme Court has made clear that some risk of deterrence is acceptable if

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<sup>203</sup> While an anonymous poster might change names, that would not necessarily solve the problem because his audience may be dependent on the pseudonymous identity. Atrios could create another blog under another name, but absent his established readership it would be unlikely, at least in the short run, to draw a similar audience.

closely tied to a legitimate governmental interest. So, for example, in *Buckley v. American Constitutional Law Foundation, Inc.*, the Supreme Court held that it was unconstitutional to require petition circulators to wear identity badges, and observed that the state's interest in apprehending wrongdoers was protected by the constitutional requirement that the filed petition contain the circulator's name and address.<sup>204</sup> This affidavit is "available to law enforcers" and, indeed, "a public record," but is not unconstitutional because it "does not expose the circulator to the risk of 'heat of the moment' harassment."<sup>205</sup> In the context of John Doe discovery, in contrast, the plaintiff is not seeking a blanket prohibition against anonymous speech, but rather seeks to serve the complaint upon individuals as to whom it has filed a non-dismissable claim.<sup>206</sup> The requirement of filing a non-dismissable complaint is a far greater impediment to "heat of the moment" (or any) harassment than simply having to check public records, as permitted by *Buckley*.<sup>207</sup> So, for example, if individuals were sponsoring a petition to which a corporation was opposed, it would not necessarily be unconstitutional to discover their identities through mandatory public filings—even though (unlike John Doe defendants) there may be no allegation that they had committed any tort, even though (unlike many John Doe defendants) core political speech was involved, and even though (unlike many John Doe defendants) the speakers might be employees subject to retribution.

Journalistic privilege cases offer little more to the John Doe defendant. These cases are arguably a closer match to the problems raised by John Doe discovery requests than the *Talley* line of prior restraint cases, because anonymous Internet posters have an interest in continuing anonymity, just as confidential sources have an interest in remaining confidential. However, whatever privilege does exist is the privilege of the journalist, not the source, and arises from the special role of a free press in our society. No similar rationale applies to protect ISPs from having to disclose the identity of anonymous posters, and the posters, unlike anonymous sources, cannot thereby benefit indirectly.<sup>208</sup>

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<sup>204</sup> 525 U.S. 182, 198-99 (1999).

<sup>205</sup> *Id.*

<sup>206</sup> See *infra* notes 248-52 and accompanying text.

<sup>207</sup> See 525 U.S. at 198-99.

<sup>208</sup> To be sure, it may affect ISPs' business to release customer information. Presumably, this is the reason that some ISPs have expended resources resisting sub-

To the extent generalization is possible, the case for disclosure is stronger in the context of Internet speakers, at least when they are defendants, because the action arises out of their alleged wrongdoing. In contrast, journalists' anonymous sources may just as likely be innocent whistleblowers as willing participants in wrongdoing. Moreover, *Branzburg*'s skepticism concerning forcing judges to make case-by-case weighings of the importance of a particular prosecution have particular resonance in this area, because the *Dendrite* test requires judges to undertake a similar unguided analysis as to the importance of particular claims.

Further, even if Internet posters could claim the benefit of a First Amendment privilege protecting journalists' confidential sources, the very existence of such a privilege remains in doubt. The *Branzburg* majority declined to find a privilege, and expressed an unmistakable preference for giving evidence over preserving anonymity. Even the *Branzburg* concurrence, while using the word "privilege," spoke of limiting disclosure in the extreme cases of harassment, irrelevant evidence, and the like.<sup>209</sup> Similarly, subsequent lower court decisions denying discovery, whether under the name of "qualified privilege" or otherwise, have done so in such cases or, at a minimum, where the requested discovery was not necessary to the case, because it was irrelevant, the case was untenable, the information could be obtained by other means, or otherwise.<sup>210</sup> It is beyond doubt that courts have the power to reject discovery demands in such circumstances, without need of a privilege. Thus, these cases do little more than recognize that courts maintain the power to control discovery, and that a speaker's anonymity, at least in the context of confidential sources, is an interest warranting protection where appropriate in the context of the individual litigation.

Beyond the individual doctrines, the context involved in John Doe discovery requests will often complicate the application of any First Amendment protection that a court should conclude

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poenas. See, e.g., *Recording Indus. Ass'n of Am v. Verizon Internet Servs. Inc.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003). However, unlike the burden on the free press of revealing confidential sources, that burden is not one that goes to the core of the expressive function of the business. Rather, the harm of risking loss of customers from revealing customer information could equally be imposed on other businesses entrusted with confidential information whose business does not depend on public discourse (e.g., banks, hospitals, accountants, or lawyers).

<sup>209</sup> *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring).

<sup>210</sup> See *supra* note 195.

applies, because (unless there is no First Amendment protection) the identity of the speaker often matters in determining the scope of protection afforded. Thus, the extent of First Amendment protection for the defendant's identity cannot be determined until the identity has already been disclosed. For example, a corporate speaker may have lesser protection of its anonymity than an individual.<sup>211</sup> In cases where "actual malice" is an element to be proved by the plaintiff, the defendant's identity may be highly relevant to motive and, thus, to whether malice is established. For example, the fact (as in the Callaway Golf situation described above) that defendant was the president of the victim's competitor would be highly probative of a guilty state of mind. In some cases, a common-law privilege against defamation liability (e.g., the common-interest privilege) may apply, but the availability of the privilege may depend on whether the defendant is a member of a group entitled to such a privilege. While this problem could theoretically be addressed by *in camera* review of the documents to be produced, determining whether an individual is acting within the scope of his employment and thus treated as a corporate speaker, may be impracticable without genuine discovery. For example, in the Callaway Golf situation, information showing that the anonymous poster was "Steven Cade" would not have revealed that he was acting as president of one of Callaway's competitors, a fact which would have required further investigation of the kind that courts are poorly equipped to undertake.<sup>212</sup>

In particular, the cases make clear that the First Amendment interest in anonymity is significant, and should be taken seriously, but that it will yield when a significant need relating to a properly justiciable controversy is presented. As applied, this suggests that courts should actively involve themselves in the resolution of John Doe discovery applications, but should be hesitant to imply new procedural rules without clear proof that existing rules are inadequate.<sup>213</sup>

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<sup>211</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-54 (1995).

<sup>212</sup> See *Cataldo & Killough*, *supra* note 117, at 34. When the universe of suspects is reasonably limited, a plaintiff could provide a judge with a list of suspects, such as employees. This solution, however, will not work in all situations.

<sup>213</sup> See *infra* Part IV (discussing the adequacy of existing rules).

#### IV

#### THE ADEQUACY OF EXISTING PROCEDURAL RULES

Though couched in the rhetoric of the Internet, First Amendment, and privacy, John Doe discovery requests actually call for the application of relatively mundane rules of civil procedure. While the applicable rules vary from state to state, most states routinely permit the filing of complaints against fictitious name defendants (i.e., John Does) and allow plaintiffs to engage in discovery to identify such defendants by name.<sup>214</sup> Likewise, while the federal rules do not expressly authorize the use of fictitious-named parties, in practice, “John Doe parties have become an essential part of federal civil practice.”<sup>215</sup>

Cases asserting claims against defendants whose identity is unknown need not arise in the context of the Internet or even in areas involving actionable speech or claims of First Amendment protection. For example, such suits are often used to identify a manufacturer of a defective product component,<sup>216</sup> or to identify government officials for civil rights violations.<sup>217</sup> In the latter context, the First Circuit described the right to identify defendants through discovery as a “principle of fairness [that] recognizes that a plaintiff in the heat of a confrontation with police may not know or have the opportunity to learn the identity of the

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<sup>214</sup> See, e.g., *Molina v. Panco Const., Inc.*, 49 P.3d 570, 573-74 (Mont. 2002); *Doe v. Miss. Blood Serv., Inc.*, 704 So.2d 1016, 1019 (Miss. 1997); *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 932-33 (1994); *Viviano v. CBS, Inc.*, 503 A.2d 296, 301-02 (N.J. 1986).

<sup>215</sup> *Rice*, *supra* note 28, at 884; see also *id.* at 886 (“Although the pseudonymous plaintiff is perhaps the more well known use of John Doe, it is John Doe as the unknown defendant who more frequently helps plaintiffs.”).

<sup>216</sup> See, e.g., *Bogseth v. Emanuel*, 633 N.E.2d 904 (Ill. App. Ct. 1994) (permitting discovery for plaintiff to identify unnamed defendant responsible for alleged medical malpractice); *Viviano*, 503 A.2d at 298-99, 301-02 (N.J. 1986) (approving procedure whereby plaintiff discovered identity of John Doe corporation as a result of extensive court-authorized depositions, document production, and interrogatories); *Farrell v. Votator Div. of Chemetron Corp.*, 299 A.2d 394, 395 (N.J. 1973) (approving procedure whereby identity of John Doe corporation discovered during depositions); *Banco Frances e Brasileiro S.A. v. Doe*, 331 N.E.2d 502, 507 (N.Y. 1975) (permitting discovery for plaintiff to identify alleged anonymous fraud-doers). *But see Conn. Res. Recovery Auth. v. Refuse Gardens, Inc.*, No. 364240, 1992 WL 67373, \*1-2 (Conn. Super. Ct. March 25, 1992) (holding that Connecticut does not permit joining of unnamed defendants).

<sup>217</sup> See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971); *Wilson v. Town of Mendon*, 294 F.3d 1, 7 n.16 (1st Cir. 2002).

alleged wrongdoer.”<sup>218</sup>

Once a complaint has been filed against a John Doe, the plaintiff is permitted to use the various—and ordinary—discovery devices available to pursue his case in order to identify and locate the John Doe defendant. Indeed, prior to the present wave of Internet cases, courts have ordered disclosure of information about the identities of fictitious name defendants, even when there were claims of alleged privilege.<sup>219</sup> Courts and commentators that have called for a higher level of protection for the identity of defendants accused of anonymous misconduct on the Internet therefore implicitly argue that existing rules are not sufficient to the task. This section examines those rules and concludes that, for the most part, the existing rules are adequate to protect John Doe defendants and to balance appropriately the relevant interests.

Claims against John Doe defendants are usually commenced in state court because lack of knowledge of John Doe’s identity will prevent plaintiff from alleging diversity jurisdiction,<sup>220</sup> although a claim could be brought in federal court if there is another basis for federal jurisdiction, such as a federal claim under 28 U.S.C. section 1983. Some states provide express procedures for obtaining discovery of unidentified defendants,<sup>221</sup> but in most states

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<sup>218</sup> *Wilson*, 294 F.3d at 7 n.16.

<sup>219</sup> See, e.g., *Banco Frances e Brasileiro S.A.*, 331 N.E.2d at 507 (affirming order requiring attorney to identify client defendant in fraud conspiracy case); *Dry Branch Kaolin Co. v. Doe*, 622 A.2d 1320, 1323-24 (N.J. Super. Ct. App. Div. 1993) (ordering John Doe’s attorney to disclose the name of John Doe defendant-client despite attorney-client privilege); *Brien v. Lomazow*, 547 A.2d 318, 327-28 (N.J. Super. Ct. App. Div. 1988) (permitting plaintiff-doctor to seek to identify unknown defendant who previously filed false claim of misconduct, despite informant privilege, by compelling disclosure from state agency that originally received the defendant’s claim).

<sup>220</sup> Federal courts have frequently taken an ad hoc approach to whether the presence of a John Doe defendant defeats diversity jurisdiction that is otherwise proper. See 14 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3642 (3d ed. 1998). However, except in the unusual case where a defendant’s anonymous conduct makes it possible to plead his domicile consistent with FEDERAL RULE OF CIVIL PROCEDURE 11, a federal court is unlikely to exercise jurisdiction when the only defendants are unidentified.

<sup>221</sup> E.g., CAL. CIV. PROC. CODE § 474 (West 2001) (“When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and when his true name is discovered, the pleading or proceeding must be amended accordingly.”); N.Y. C.P.L.R. § 3102(c) (permitting discovery by court order “to aid in bringing an action”). R.I. GEN. LAWS § 9-5-20 (2004) states that:

Whenever the name of any defendant or respondent is not known to the plaintiff, the summons and other process may issue against him or her by a fictitious name, or by such description as the plaintiff or complainant may

it is the responsibility of the plaintiff's lawyer to navigate through rules that were usually not designed with such cases in mind. As Carol Rice observed in discussing John Doe procedures under the federal rules, "each plaintiff must guess about the proper procedures for filing a Doe complaint."<sup>222</sup> While this uncertainty burdens plaintiffs, it also burdens defendants, because as a practical matter lawyers often avoid the arcane exercise of determining the proper procedure and, instead, choose "short cuts" that can deprive defendants of their opportunity to be heard.<sup>223</sup>

This section provides a brief roadmap of the procedural steps necessary to obtain discovery of the identity of an unnamed defendant. It is my hope that this outline will provide both a framework for answering the jurisprudential issues raised by this Article and a guide for practitioners and judges involved in these matters.<sup>224</sup> The analysis addresses procedures generally, rather than focusing on the procedure of a particular state, although it also highlights points where a particular state's practice may vary. On the whole, the relevant procedural rules are substantially similar from state to state, for the very reason that these motions can be resolved using basic procedural rules.

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select; and if duly served, it shall not be abated for that cause, but may be amended with or without terms as the court may order.

<sup>222</sup> Rice, *supra* note 29, at 918. Professor Rice's observation is confirmed by the author's personal experience, which includes multiple practitioners whom the author did not know calling for advice concerning the proper procedure in this sort of case. *See also supra* note 215.

<sup>223</sup> These short cuts include simply using an attorney-issued subpoena prior to service of process on any defendant, which is generally improper, or serving a defendant against whom the plaintiff has no bona fide claim, such as an Internet service provider, in order to allow issuance of a subpoena signed by an attorney. In either case, the defendant's only protection from disclosure is the subpoena recipient's decision whether to inform him or her of the subpoena and to withhold disclosure pending judicial decision.

<sup>224</sup> In my experience practicing in this area and speaking to practitioners involved in similar cases, these John Doe proceedings have created a good deal of confusion among judges and practitioners. For example, plaintiffs' attorneys are often confused about the fact that attorney-issued subpoenas, usually the preferred type of subpoena in most states, may not be appropriate for the identification of an unknown defendant, or they may believe it is necessary to join an ISP as a defendant, when joinder may not even be appropriate due to the ISP's immunity under the Digital Millennium Copyright Act. *See supra* notes 90-91 and accompanying text. Defendants' attorneys have expressed confusion about whether they are subject to the court's general jurisdiction as a result of being served with a discovery motion. In *Dendrite*, the court, before signing the initial order to show cause initiating the discovery motion, requested clarification as to its procedural authority for ordering such discovery.

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### A. *Drafting a Complaint*

First, plaintiff must commence an action, as discovery is generally unavailable except when an action is pending. Many states expressly permit actions against parties under fictitious names where the defendants' true names are unknown despite diligent efforts.<sup>225</sup> Such states generally require that, prior to judgment, the complaint be amended to state the defendants' true names,<sup>226</sup> thus at least implicitly recognizing the possibility of discovery being conducted concerning the identity of defendants.

Other states—notably those following the Federal Rules of Civil Procedure—do not expressly authorize the joining of defendants under fictitious names.<sup>227</sup> Since the federal rules (and state codes based upon them) do not prohibit John Doe claims,<sup>228</sup> courts in states without an express fictitious parties provision may properly accept pleadings alleging fictitious-named defendants, and many have done so.<sup>229</sup>

A few courts have denied plaintiffs the option of suing fictitious-named parties absent an express provision permitting such pleadings.<sup>230</sup> However, such rulings are rare and, to put it bluntly, “wrong.”<sup>231</sup> A blanket rule prohibiting a plaintiff from suing a fictitious-named defendant, even assuming the plaintiff has a valid claim against the defendant and has made diligent efforts to identify the defendant, would serve only to defeat valid claims with no countervailing benefit. The results of such a blanket rule would be particularly unjustifiable because they would equally exclude claims where it was defendant's own wrong that caused plaintiff not to know whom to sue. In the absence of an express prohibition on suing fictitious-named defendants, therefore, prohibiting such claims would violate the court's role (expressly incorporated in most procedural codes) in facilitating the just resolution of disputes.<sup>232</sup> In any case, in those jurisdictions that flatly prohibit fictitious name practice, the question posed by

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<sup>225</sup> *E.g.*, CAL. CIV. PROC. CODE § 474 (West 2004); N.J. R. CT. 4:26-4.

<sup>226</sup> *E.g.*, CAL. CIV. PROC. CODE § 474; N.J. R. CT. 4:26-4.

<sup>227</sup> See Rice, *supra* note 28, at 914.

<sup>228</sup> See *id.* at 914-17.

<sup>229</sup> *E.g.*, Hebert v. Honest Bingo, 18 P.3d 43, 45, 48-49 (Alaska 2001) (holding that amended complaint may relate back to time of original complaint against “John Doe”); Kramer v. Installations Unlimited, Inc., 770 N.E.2d 632, 636 (Ohio Ct. App. 2002) (recognizing permissibility of naming “John Does”).

<sup>230</sup> *E.g.*, Roe v. New York, 49 F.R.D. 279 (S.D.N.Y. 1970).

<sup>231</sup> Rice, *supra* note 28, at 914.

<sup>232</sup> *E.g.*, FED. R. CIV. P. 1; N.J. R. CT. 1:1-2; N.Y. C.P.L.R. 104.

this Article—whether to impose different standards for the discovery of the identity of defendants acting anonymously on the Internet than for the discovery of other matters—will not arise, as the case simply will not proceed.

While suing fictitious-named defendants is possible in most jurisdictions, the plaintiff's task is made easier if the complaint can name a non-fictitious defendant. The plaintiff can then either add the fictitious-named defendant as an additional defendant, or simply amend the complaint to add the John Doe's true name after discovery. In either case, the plaintiff avoids possible arguments that the action may not be filed. Moreover, as discussed below, it is much easier for the plaintiff to obtain discovery after at least one defendant has been properly served. However, it is not systematically possible to name "real" defendants. The obvious defendant that would be available in most cases, the Internet service provider on which the challenged message is posted, will generally be immune from suit under the Digital Millennium Copyright Act ("DMCA").<sup>233</sup> While plaintiffs may nonetheless be tempted to sue ISPs to gain these practical advantages, doing so in light of DCMA immunity would raise substantial issues under Rule 11 of the Federal Rules of Civil Procedure and its state analogues.<sup>234</sup>

From time to time, there may be another defendant who can be named, either because his actions were not anonymous or because the plaintiff has identified him from sources other than discovery. Plaintiff may only join such a defendant, however, if there is an adequate connection between the claims against the named and unnamed defendants. While the precise standard varies by jurisdiction, ordinarily the plaintiff will have to establish that its claims are "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."<sup>235</sup> This standard would clearly be satisfied in the rare case where a named and an unnamed defendant were known to have conspired in a single message or set of messages. In the more ordinary case, however, where defendants are simply two posters on the same message board, it will be a closer call as

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<sup>233</sup> See *supra* notes 91-92 and accompanying text.

<sup>234</sup> *E.g.*, N.J. R. Ct. 1:4-8.

<sup>235</sup> FED. R. CIV. P. 20(a); see also, *e.g.*, N.J. R. Ct. 4:29-1(a); N.Y. C.P.L.R. 1002(b).

to whether this standard is met. As a practical matter, however, in most cases plaintiff will be able to join defendants in good faith, and a motion for misjoinder is an unlikely vehicle for challenging the discovery request.

### *B. Submitting an Order to Show Cause*

While most procedural codes permit attorneys to issue subpoenas without prior court approval,<sup>236</sup> this practice is not usually available to identify fictitious-named defendants. Rather, the plaintiff must seek court approval to obtain the defendant's identity. The need for court approval derives from the prohibition in most states against the plaintiff seeking discovery without court approval prior to service of the answer (and, by extension, service of the complaint). For example, New Jersey expressly authorizes discovery to proceed at any time "after commencement of the action,"<sup>237</sup> but also requires "[l]eave of court, granted with or without notice, . . . if the plaintiff seeks to take a deposition prior to the expiration of thirty-five days after service of the summons and complaint."<sup>238</sup> Under the federal rules (and the rules of states adopting those rules),<sup>239</sup> the plaintiff must obtain court approval to take discovery prior to the initial party conference concerning discovery,<sup>240</sup> which obviously cannot occur if the defendant has not been identified.

In most states, the appropriate procedure for obtaining permission to serve pre-answer discovery demands (whether in a John Doe action or in any other type of case) is an order to show cause. The plaintiff cannot make an ordinary motion seeking the discovery because a motion must be served upon opposing parties, which is impossible because the plaintiff does not know the identity of those parties.<sup>241</sup> An order to show cause solves this problem because the order can contain directions as to how the order itself and supporting papers must be served. For example, when the claims arise out of defendant's posting on an Internet

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<sup>236</sup> *E.g.*, FED. R. CIV. P. 45(a)(3); N.J. R. CT. 1:9-1; N.Y. C.P.L.R. 2302(a).

<sup>237</sup> *Le.*, after filing of the complaint.

<sup>238</sup> N.J. R. CT. 4:2-2.

<sup>239</sup> N.J. R. CT. 4:14-1. These timing provisions apply equally to subpoenas requiring production of documents. *See* N.J. R. CT. 4:14-1, 4:14-7(a) (providing that attendance at deposition may be compelled by subpoena, which may also require production of documents).

<sup>240</sup> FED. R. CIV. P. 26(d).

<sup>241</sup> *E.g.*, N.J. R. CT. 1:5-1(a), 1:6-2(a); N.Y. C.P.L.R. §§ 2103(e), 2211.

bulletin board, the court may direct the order to be served by posting it on the same bulletin board.<sup>242</sup> More generally, courts in most states have broad authority to do justice that permits them to tailor an order to the needs of an individual situation.<sup>243</sup>

While local practice varies as to how closely orders to show cause are scrutinized by judges, the procedure permits the court to impose safeguards protecting the legitimate interests of both defendants and plaintiffs. First, the plaintiff must submit an affidavit that supports both the need for the discovery and the need for the extraordinary procedure of an order to show cause. While the precise contents of such an affidavit may vary, likely components are an affidavit summarizing the allegations (or even verifying the complaint), demonstrating the necessity of the discovery, and demonstrating the necessity of proceeding by order to show cause. The core aspects of such a showing will normally include establishing that the plaintiff has a genuine claim against the defendant and that the plaintiff cannot, despite due diligence, identify the defendant. Second, the judge performs an important screening function by reviewing the allegations for at least the minimal threshold to justify permitting the motion to proceed by order to show cause. Third, the judge has the discretion in the order to show cause to impose additional requirements that facilitate a fair resolution of the issue. Typically, the judge will establish a briefing and hearing schedule to permit the defendants to be heard. The judge’s order can also include other provisions protecting both plaintiffs and defendants and assuring an orderly resolution of the issue. For example, the order may require that plaintiffs notify defendants of the motion by the most effective method—such as by posting the order to show cause on the message board where the offending comments were posted.<sup>244</sup> (In

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<sup>242</sup> This procedure was followed in *Dendrite*, where the plaintiff’s order to show cause was posted. Posting of Michael S. Vogel, to Yahoo! Message Board: DRTE (June 23, 2000) (on file with author).

<sup>243</sup> For example, NEW JERSEY COURT RULE 1:1-2 provides in relevant part, “Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.” While few other states permit rules to be “dispensed with,” most do permit courts wide leeway in the interpretation of rules (subject, of course, to appellate review). *E.g.*, FED. R. CIV. P. 1; N.Y. C.P.L.R. § 104.

<sup>244</sup> The trial judge in *Dendrite* is the first judge known to have required such a posting. Whether such a notice is likely to come to the defendant’s attention may depend on the circumstances, such as the total volume of posts on the board, how frequently defendant posts, and whether those posts indicate that he or she reads other messages. In addition, the court could order the ISP to produce documenta-

some circumstances, disclosure to the defendant may also be mandatory under statutory law.)<sup>245</sup> The court may require that the notice be written in specific language and be effective in conveying to lay defendants a summary of key procedural rights—such as advising in simple language that the court will consider informal objections if the defendants choose not to retain counsel.<sup>246</sup> To protect plaintiffs, it may direct that defendants or third parties not destroy relevant evidence.

### C. *Hearing on the Order to Show Cause*

If the order is signed, a briefing schedule will be set and a hearing will likely be scheduled. The order can and should require that, where feasible, John Doe receive notice and have an opportunity to interpose objections to the discovery demand. It is also possible that the custodian of the records may interpose an objection. For example, an Internet service provider may choose to impose an objection to the belief that protecting a customer's privacy is good for public relations or simply because it believes there is a problem with the discovery demand. As described in Part I.C. above, there is evidence that some ISPs are doing precisely that.<sup>247</sup>

Without reliance on any new or special rules to govern this kind of discovery request, ordinary rules of procedure provide a number of possible avenues for a defendant to oppose the discovery demand.

First, the defendant may oppose the discovery on the grounds that the complaint should be dismissed. Courts have consistently permitted defendants to assert such opposition through counsel without revealing their identities.<sup>248</sup> Technically, this opposition need not be asserted in a formal motion to dismiss, because the complaint has not yet been served. However, establishing that a complaint will not survive a motion to dismiss should defeat dis-

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tion as to whether the defendant accessed the posting, although this would depend on the ISP's collecting such information and the defendant not taking action, such as using a different Internet protocol address, to avoid detection.

<sup>245</sup> *E.g.*, 47 U.S.C. § 551(c) (2000).

<sup>246</sup> *Cf.*, *e.g.*, *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352 (Alaska 1974) (holding a summons constitutionally defective when it failed to advise defendant adequately of procedural rights).

<sup>247</sup> *See supra* notes 89-91 and accompanying text.

<sup>248</sup> *E.g.*, *La Societe Metro Cash & Carry France v. Time Warner Cable*, 36 Conn. L. Rptr. 170 (Super. Ct. 2003); *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

covery because the defendant’s identity would then not be relevant to any issue presented in the case. While notice pleading does permit claims to be pled even when they are not ultimately viable, this kind of motion should be sufficient to prevent many improper claims. Many states require pleading of the particularized words complained of in defamation claims,<sup>249</sup> which are probably both the most common claims brought against John Does and the most likely to be brought in error or for improper reasons. Court review of those particularized pleadings should serve as an important check on improper claims.

Other types of claims—such as copyright violations or breaches of contract—may not formally require particularized pleading, but are still governed by rules requiring that a plaintiff have a reasonable (or good faith) basis for its pleadings.<sup>250</sup> Moreover, even when particularized pleading of a plaintiff’s claim is not mandated by blanket rule, particularized allegations can usually be required on a case-by-case basis where appropriate, either by a demand for a bill of particulars, where permitted,<sup>251</sup> or by a court-ordered particularized reply.<sup>252</sup>

Second, even when a plaintiff has superficially pled an actionable claim against the defendant, the defendant may oppose the discovery application by establishing that he or she is entitled to summary judgment. Again, the basis for denial of discovery would then be that the defendant’s identity is not relevant to any issue in the action. Significantly, such an opposition does not require the defendant to come forward with affirmative evidence establishing his right to summary judgment, although it is possible that the defendant will submit such evidence. Rather, summary judgment procedure permits the party that does not bear the burden of proof to shift the burden of production of evidence to the party bearing the burden of proof by demonstrating the absence of record evidence supporting the claim.<sup>253</sup> In some cases, of course, the information necessary to oppose the motion will require discovery of the defendant’s identity. For example,

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<sup>249</sup> *E.g.*, N.Y. C.P.L.R. § 3016(a), available at <http://assembly.state.ny.us/leg?cl=16&a=27>.

<sup>250</sup> *E.g.*, FED. R. CIV. P. 11(b); N.J. R. CT. 1:4-8(a).

<sup>251</sup> *E.g.*, N.Y. C.P.L.R. § 3041.

<sup>252</sup> In federal court, this may be accomplished by requiring a particularized reply to a defendant’s answer. *See, e.g.*, *Schultea v. Wood*, 47 F.3d 1427, 1430-34 (5th Cir. 1995).

<sup>253</sup> *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

in cases involving postings concerning public companies, evidence that the defendant is an owner or employee of a competitor may be relevant to issues such as malice or to damages. Likewise, in cases involving possible stock manipulation, evidence of defendant's trading records (which will only be discoverable after the defendant is identified) will be necessary to prove plaintiff's claim. In such cases, a motion for summary judgment would not succeed, and an effort to avoid discovery under such a standard would fail.

Testing an application for discovery under such a "defensive" summary judgment standard makes a great deal of sense. It would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of its claim, or at least all elements which should be in the plaintiff's, rather than the defendant's, possession. This standard would, therefore, provide an effective check that would tend to limit discovery to those cases where the plaintiff had a bona fide claim. Discovery would be precluded either when the plaintiff lacked evidence that it should have had to commence the action, or when the defendant can affirmatively establish that the plaintiff cannot establish its claim.

A difficult issue may arise in cases where the evidence in question is not simply factual evidence that should be in the plaintiff's custody, but is the subject of expert testimony. The practical problem presented by such a situation is that even if such expert testimony does not depend on information within the defendant's custody (e.g., trading patterns), the expert testimony may be very expensive to obtain. While that is evidence that a plaintiff would have to obtain if it proceeds to trial, a plaintiff is not ordinarily required to produce such evidence at the outset of a litigation. More important, a plaintiff has a strong interest in knowing whether the defendant has the financial means to satisfy a judgment before investing the resources in gathering such evidence. As one court has observed, "plaintiff needs to know the identity of the Doe defendants prior to incurring the expenses and other burdens of trial, because it is questionable whether plaintiff would wish to proceed with a trial if . . . it is unlikely that any judgment that she obtained would be satisfied."<sup>254</sup> In the context of a summary judgment motion made prior to the close

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<sup>254</sup> Melvin v. Doe, Pa. D. & C.4th 449, 453 (2000), *appeal quashed*, 789 A.2d 696 (Pa. Super. Ct. 2002), *vacated by* 836 A.2d 42 (Pa. 2003).

of discovery, a court has discretion to determine whether it is premature to require expert testimony at such a stage or to require the non-moving party to come forward with whatever expert testimony it may have.<sup>255</sup> While a court could theoretically require expert testimony at the outset, the more ordinary procedure is to require it only when the plaintiff has had a reasonable period of time to obtain an expert and has not done so.

Third, the defendant may seek to limit discovery under traditional, protective order grounds. Like Federal Rule 26(c), most state procedure codes provide courts broad discretion to limit or condition discovery to protect a party from annoyance, embarrassment, oppression, or undue burden.<sup>256</sup> While that discretion nominally extends to ordering that the discovery not be allowed, it is extremely rare for a court to prohibit entirely the discovery of relevant, non-privileged evidence. While Federal Rule of Civil Procedure 26(b)(2)(iii) does permit a court to conduct a cost-benefit analysis to decide whether to permit challenged discovery, courts have hesitated to use that power to prohibit discovery that was necessary to a party’s claim when no acceptable substitute was available.<sup>257</sup> However, the broad discretion already existing in the rules gives the court substantial ammunition to balance the respective interests of the plaintiff and the defendant.

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<sup>255</sup> See, e.g., *Wilbourn v. Shibben*, Nos. 2002-CA-00312-MR, 2002-CA-000942-MR, 2003 WL 21299627, at \*5 (Ky. Ct. App. June 6, 2003) (affirming summary judgment granted for lack of expert discovery prior to deadline for disclosing experts, but noting that “the court does retain discretion to find that sufficient time has not elapsed”); *Daniel v. Charleston Area Med. Ctr.*, 544 S.E.2d 905 (W. Va. 2001) (reversing summary judgment where court should have permitted plaintiff time to find an expert).

<sup>256</sup> E.g., N.J. R. Cr. 4:10-3; N.Y. C.P.L.R. § 3103(a).

<sup>257</sup> Rule 26(b)(1) was revised in 2000 to emphasize this power, in part because the rules committee was concerned that the court’s discretion to limit discovery was not being “implemented . . . with the vigor that was contemplated.” FED. R. CIV. P. 26 Advisory Committee Notes 2000. Even since those amendments, Rule 26(b)(2)(iii) has principally been invoked to curtail unnecessary discovery, not to permit a wide ranging analysis of the merits of plaintiff’s claim. E.g., *Duran-Perez v. Citibank, N.A.*, No. 02-Civ. 9793LBSDFE, 2003 WL 22118965, at \*2 (S.D.N.Y. Sept. 12, 2003) (finding that the information sought was duplicative and of limited relevance following multiple, more relevant, depositions); *Ricotta v. Allstate Ins. Co.*, 211 F.R.D. 622, 624 (S.D. Cal. 2002) (refusing to permit massive discovery of adversary’s expert to prove bias without any predicate showing of bias). Frequently, courts permit discovery that is burdensome relative to the issues at stake but shift costs to more appropriately balance the burdens of discovery. E.g., *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 477-78 (N.D. Cal. 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321-24 (S.D.N.Y. 2003).

There are several examples of orders a court might enter. As one, a common potential concern of John Doe defendants is that the plaintiff will impose some kind of non-judicial penalty upon them for negative, but not actionable, speech. For example, an employee who criticizes working conditions may be fired, or a vendor who criticizes a client's business practices may be replaced. A theoretically possible way to deal with this concern would be to limit discovery to outside attorneys and, possibly, a limited subset of plaintiff's insiders, such as an in-house attorney. While such an order is preferable to denying the discovery request outright, it does little to address plaintiff's concerns. Decision-makers within plaintiff's insider group will have a legitimate need to know the defendant's identity both because that will allow an informed decision of whether to pursue the claim—a libel action against an impecunious outsider may have little appeal compared to one against a competitor—and because the defendant's identity may be essential to investigation and understanding of the offense. For example, if certain employees had signed non-disparagement agreements while others had not, the identity may be relevant to determining whether there was a claim at all. A better, and more direct, approach would be to order the plaintiff not to take any extra-judicial action against the defendant pending either a judgment of liability or further order of the court. The plaintiff could not fire or terminate a defendant unless it proved its case. While this is obviously a less than perfect solution, since it could become uncomfortable for an exposed employee even if no formal action is taken against her, such a situation would not be lightly undertaken by most employers. Once the employee is identified, the employer will have a strong incentive to prosecute the case, if only to terminate the employee, rather than to keep the employee on. In effect, the employee could become close to untouchable. There might be situations in which a court would modify its order to permit extra-judicial action against the defendant prior to judgment. For example, if the poster is an attorney for the plaintiff who has disclosed privileged information, or even simply disparaged her client in violation of her professional obligations, the issue of whether the posting was technically defamatory would become almost academic, and it is unlikely that a court would insist on the plaintiff's continuing to retain, and disclose confidences to, the defendant.

Second, the court could require a bond to be posted. Such a requirement would respond to the problem that, for some plaintiffs, discovery of the identity rather than ultimate judgment may be the relief they are really seeking, and that the court should not lightly grant plaintiff the relief sought under the guise of a discovery motion. By requiring a bond, like in a preliminary injunction, there is an opportunity for relief for the defendant if it turns out that plaintiff was not entitled to the relief sought. The additional expense of the bond requirement may also serve to deter suits that are brought without intention of pursuing them through trial.

#### *D. Serving the Subpoenas*

Obtaining a court-ordered subpoena does not assure that the defendant will be identified. While most ISPs will cooperate with court-ordered process, cooperation may be more difficult to obtain when a foreign or smaller domestic ISP is involved. Moreover, as ISPs are coming to realize that there are good business reasons for protecting their customers' privacy, they are more likely to require technical compliance with procedural rules that may make discovery expensive. For example, if a plaintiff obtains a subpoena in state court in New Jersey, that subpoena will not automatically be enforceable against a California ISP with no (non-Internet) presence in New Jersey. The ISP will be in a position to insist that the plaintiff go through the further (and potentially expensive) procedure of obtaining a commission in New Jersey, commencing a special proceeding in California (requiring local counsel), and obtaining a subpoena in California court.

Particularly in light of the controversial nature of this kind of discovery demand, there will be some chance that, notwithstanding the host court's order granting discovery, the local court may require new proceedings again justifying the subpoena.<sup>258</sup>

If the subpoena is served and documents produced, there is still no certainty that the defendant will be identified. If the ISP subpoenaed is a paid Internet service provider, such as America Online or Earthlink, it is likely to have the defendant's identifying information. However, if, as is probably more likely, the recipient is a free Internet service, such as Yahoo! or Hotmail, it may not have information sufficient to identify the individual

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<sup>258</sup> This happened in *America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

poster. Rather, it will usually have computer-generated information concerning the IP address from which the defendant posted, which should identify the defendant's direct ISP. For example, if a defendant used an AOL account to post an anonymous message to a Yahoo! message board, Yahoo! would usually have information that identifies the poster as an AOL customer. A subpoena could then be issued to AOL to determine the poster's identity (or at least the identity of the person whose account was used for the posting). That subpoena, of course, may lead to additional proceedings in another state.

Finally, there is the risk that the trail may run cold. Even assuming all parties comply with discovery demands and have properly maintained records of the relevant computer access, the defendant may have posted from an "Internet café" or otherwise be practically unidentifiable.<sup>259</sup> Though there is no hard evidence available, one suspects that this is an increasingly likely outcome, as growing public awareness of the traceability of on-line conduct leads people to be more cautious about guarding their identities.

The process, then, is not simple or inexpensive for a plaintiff, even once discovery has been ordered by the court. The existence of these practical hurdles to discovery provides a substantial deterrent to plaintiffs seeking this kind of discovery, and would therefore tend to weed out plaintiffs who do not believe that their claims are valuable and important to their own interests or who assert claims to harass a defendant. The existence of these heavy burdens under existing law suggest that imposing additional hurdles is likely to over-deter this kind of action (if they are not over-deterred already).

#### *E. Post-Discovery Remedies*

In addition to the substantial existing hurdles to discovering the identity of anonymous defendants, which as noted above impose cost burdens that should deter many frivolous or improper claims, there are post-disclosure remedies that should further de-

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<sup>259</sup> In fact, one of the defendants in the *Dendrite* case claims to have been doing just that. Posting of ajcazz, *supra* note 84 ("This could get real funny! So funny that my lawyer will sit on a beach for along [sic] time when I'm done with them. This is real funny since my IP is coming from a cyber café. Track the time I'm in the café also."). His claim proved to be false.

ter improper claims and may also provide unfairly unmasked defendants with some remedy.

Numerous sanctions exist for abuse of the legal process. Fabrication of a false claim to obtain discovery would expose both the plaintiff and its lawyer to the risk of judicial sanctions under Rule 11 and its state analogues<sup>260</sup> and, in the case of the lawyer, professional discipline. Likewise, most states provide a civil remedy for abuse of process.<sup>261</sup>

While these sanctions will probably only come into play in the most egregious cases, that is a balance that is common in all kinds of modern litigation. Litigation is, by its nature, expensive and unpleasant for defendants, and it is an everyday occurrence that defendants must provide relevant discovery that they would prefer not to provide for reasons of cost, embarrassment, or otherwise. There is no compelling reason to provide a broader protection in this one category of cases.

## V

### A CRITIQUE OF CREATING NEW RULES FOR INTERNET POSTERS

The judicial creation of a different set of procedural rules for this single class of cases is troubling for a variety of reasons.

First, and perhaps most critically, new rules are not necessary. This is true as an initial matter because, as set forth in Part III above, the First Amendment does not require the adaptation of special procedural rules in this context. Rather, the Supreme Court has recognized that common law defamation claims provide an essential safeguard protecting the public against the risk of abuse inherent in the right to speak anonymously. Unlike blanket prior restrictions against anonymous speech, common law claims are less objectionable because they are targeted at actionable speech, rather than speech generally.<sup>262</sup> Obviously, such defamation actions cannot serve their function of deterring and punishing wrongdoing—and thus allowing anonymous speech to

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<sup>260</sup> FED. R. CIV. P. 11; N.J. R. CT. 1:4-8; *see also* CAL. CIV. PROC. CODE § 425.16 (West 2004) (imposing sanctions for certain lawsuits designated as "strategic lawsuits against public participation" ("SLAPP suits")).

<sup>261</sup> *E.g.*, *Franklin Collection Serv., Inc. v. Stewart*, 863 So. 2d 925, 931 (Miss. 2003); *Curiano v. Suozzi*, 469 N.E.2d 1324, 1326 (N.Y. 1984); *Drake v. McCulloh*, 43 P.3d 578, 586 (Wyo. 2002).

<sup>262</sup> *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349-50, 353 & n.13 (1995).

be protected when it is not actionable—unless defendants can be identified. Likewise, the Supreme Court has also held that even discovery of anonymous journalistic sources is unconstrained by the First Amendment except at the extremes involving harassment or seeking irrelevant information.<sup>263</sup>

The creation of new rules is unnecessary for a more fundamental reason, however—because the legitimate interests of John Doe defendants can be protected without them. As Judge Frank Coffin suggested a quarter century ago in the analogous context of journalistic privilege, the only “special procedure” that is necessary is Federal Rule of Civil Procedure 26, sensitively and intelligently applied:

[W]e find the “special procedures” suitable for this case to be the application of Fed. R. Civ. P. 26 (“General Provisions Governing Discovery”) with a heightened sensitivity to any First Amendment implication that might result from the compelled disclosure of sources. The conflicting considerations are contained in the language of the Rule. On the one hand, “(p)arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter . . . .” “On the other hand, the court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .”<sup>264</sup>

Judge Coffin discusses numerous considerations that may be relevant, including whether plaintiff’s claim could survive summary judgment as to the elements for which the contested discovery is not necessary, how strong the claim of confidentiality is under the circumstances, whether there are alternative means to obtain the same information, and whether any of various procedures might be devised by the judge to permit plaintiff to obtain the necessary discovery while at the same time protecting defendant’s interests as well.<sup>265</sup> Judge Coffin wisely recognized, however, that the key was sensitive and flexible application of existing rules:

We deliberately refrain from further categorizing with any precision what inquiries should be made by the court or in what sequence. The task is one that demands sensitivity, invites flexibility, and defies formula. While obviously the dis-

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<sup>263</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 707; see also *id.* at 709-10 (Powell, J., concurring).

<sup>264</sup> *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596-97 (1st Cir. 1980).

<sup>265</sup> *Id.* at 597-98.

cretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have. Given the sensitivity of inquiry in this delicate area, detailed findings of fact and explanation of the decision would be appropriate. . . . In short, our criticism is that the balancing process was not conducted with sufficient awareness of the contesting values, the factors to be considered, and the options available to the court. This is hardly a criticism of the district court, which had to act without the benefit of any guidance tailored to the case at hand. We therefore remand the case for reconsideration of the plaintiff’s motion to compel discovery in light of our discussion.<sup>266</sup>

Judge Coffin’s view of judging remains relevant in the Internet era. At best, new judicially-created tests are confusing and unnecessary, accomplishing the same results but at the cost of uncertainty and complication. At worst, by detaching the analysis from the moorings of ordinary procedure, the glitter of a new test may divert judges from a nuanced inquiry responding to the case’s particular circumstances in favor of application of the test for its own sake, without consideration of whether the test is well-tailored to the needs of that case.<sup>267</sup>

Second, while a sensitively-applied discretion to balance competing interests is essential, the adoption of the *Dendrite* test would give judges the wrong kind of discretion, namely the discretion to deny or grant discovery based on subjective evaluation of the worth of particular claims. Such unguided discretion may compromise other core values of the judicial system. Constitutional rights, including the rights of due process and trial by jury, as well as time-tested rules of civil procedure, are intended to assure each litigant his or her day in court. Appellate courts exist to remedy errors in the process and protect those core values. The creation of a system that allows a judge to (in effect, if not in name) dismiss meritorious claims with little appellate oversight is a substantial infringement on the truth- and justice-finding functions of the courts.<sup>268</sup>

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<sup>266</sup> *Id.* at 598-99.

<sup>267</sup> See generally ANTHONY T. KRONMAN, *THE LOST LAWYER* 346 (1993).

<sup>268</sup> See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463-64 (D.C. Cir. 1995) (“We are similarly distressed by the district judge’s decision to allow the Doe Companies to proceed anonymously . . . . Such proceedings would . . . seriously implicate due process.”). *But see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000) (implicitly approving a district court’s decision to permit students challenging school prayer to litigate anonymously to avoid possible harassment).

Third, the rush to create new procedural rules because of technological development carries inherent risk. One suspects that the broad information-gathering power of the Internet impelled the *Dendrite* court to offer defendants broader protection than called for under existing law. The ability to learn a speaker's identity online may seem more worrisome than the ability to learn it through a trip to a government office, as approved in *Buckley*, because it is so much easier to obtain the information online. While this is an understandable concern, the rapidity of technological and societal change related to the Internet makes the fashioning of an appropriate judicial response problematic. Even since *Dendrite* (and perhaps in part because of *Dendrite*), there has been increasing public awareness of the risk of disclosure of one's identity when acting anonymously online. For example, the lack of anonymity on the Internet has been the subject of a concerted advertising campaign by a major Internet service provider, Earthlink, and an episode of a popular television series, *Law & Order*. The numerous subpoenas served by the recording industry have fulfilled their intended purpose of making Internet users aware that their actions online are not anonymous or untraceable. As noted above, ISPs are resisting discovery demands for the very reason that the market demands it.

Thus, defendants now may have greater notice than in previous years of the limits of their anonymity when they choose to post on the Internet, and a greater opportunity to "hide their tracks" if they so desire (by, for example, posting from an Internet café).<sup>269</sup> Similarly, and perhaps more ominously, information gathering technology is developing rapidly, meaning that it may become increasingly easy to identify John Does without subpoenas; restrictive discovery rules may encourage the use of such technologies, which may be more dangerous than discovery guided by judicial oversight and regulated by appropriate protective orders.

The casual discovery of the identity of individuals acting anonymously on the Internet is a serious and legitimate First Amendment concern. However, existing procedural rules, designed to deal with a wide variety of cases involving the discovery of evidence defendants would prefer not to have revealed, are suffi-

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<sup>269</sup> Yahoo! and many other Internet service providers have long posted disclaimers advising users of limits on their online privacy.

cient to address that concern while also protecting the legitimate rights of claimants. At a minimum, the rush to create new standards, at odds with prior jurisprudence, carries a substantial and unjustifiable risk of skewing the balance against claimants and allowing anonymity to shield wrongdoing. The courts should proceed cautiously in creating new rules and should, instead, try to address these cases through existing frameworks.

#### CONCLUSION

The need to rule on discovery motions seeking to identify defendants speaking anonymously on the Internet poses substantial challenges for judges. In effect, judges are called upon to make outcome-dispositive determinations at the commencement of an action, before discovery or development of a full record. While the effects of courts' rulings are likely to be substantive, appellate review is systematically limited because the issue is usually raised in the context of an interlocutory discovery application. These cases present difficult issues for judges because often both the plaintiff and the defendant can articulate clear and important interests in the favorable resolution of the discovery dispute. As a result of these difficulties, both courts and commentators have advocated for the creation of new standards or "tests" to govern such motions. This rush to create new standards, however, is itself problematic. Courts already possess substantial tools and discretion to balance appropriately the competing interests. While appellate guidance is welcome, the creation of additional standards or tests is unnecessary and may offer little genuine benefit to trial judges, while at the same time introducing new sources of error by creating a false sense of certainty in an uncertain area and, in particular, inviting judges to engage in an inappropriate subjective evaluation of the "worth" of an individual plaintiff's claim.

