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TO REVEAL OR CONCEAL?—AN ISP'S DILEMMA, Presenting a New "Anonymous Public Concern Test" for Evaluating ISP Subpoenas in Online Defamation Suits

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Presenting a New "Anonymous Public Concern Test" for Evaluating ISP Subpoenas in Online Defamation Suits

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This article proposes a new test called the "Anonymous Public Concern Test" which incorporates public concern analysis in enforcing Internet Service Provider [ISP] subpoenas in online defamation suits. Anonymous speech is an important aspect of First Amendment rights that warrants protection. Current tests used by courts to analyze whether to enforce ISP subpoenas are either too pro-plaintiff or too pro-defendant. The article's proposed "Anonymous Public Concern Test" is the best approach in dealing with ISP subpoenas because it protects both anonymous speech and preserves online defamation plaintiffs' rights.

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Patrick Cahill was a local City Councilman in the town of Smyrna, Delaware.[1] Beginning in 2004 Cahill began to openly break with the Smyrna Mayor Mark Schaeffer on a number of local issues.[2] These differences between Councilman Cahill and Mayor Schaeffer did not go unnoticed within the Smyrna community. Beginning in September of 2004 several people began posting comments online on the "Smyrna/Clayton issues blog" about the tension between Councilman Cahill and the Mayor.[3] These posts were all anonymous and were posted under the usernames "Proud Citizen;" "Saw it All;" "Me too;" and "Screwed U All."[4] Their comments ranged from criticism of Cahill's ability to serve as a local councilman to commentary on Cahill's marriage and personal life.[5] One anonymous posting commented on Cahill's aptitude and ability as a City Councilman.[6] The anonymous blogger wrote:

> "If only Councilman Cahill was able to display the same leadership skills, energy and enthusiasm toward the revitalization and growth of the fine town of Smyrna as Mayor Schaeffer has demonstrated!...Cahill has devoted all of his energy to being a divisive impediment to any kind of cooperative movement. Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration. Cahill is a prime example of failed leadership—his eventual ousting is exactly what Smyrna needs…."[7]

Other postings were less political, and took the forms of personal attacks on Cahill and his wife Julia.[8] An anonymous blogger wrote:

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[1] Cahill v. Jon Doe No. One, 879 A.2d 943, 946 (Del. Super. 2005) *rev'd*, John Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005).
[2] Cahill, 879 A.2d at 946.
[3] Id.
[4] Id.
[5] Id. at 946-48.
[6] Id. at 946.
[7] Id. at 946.
[8] Id. at 946-947

> "I have to say that I would be embarrassed to be associated with the scum of the earth Pat and Julia [Cahill]. Everybody in town talks about how freaky they are. Not to mention the fact that Julia has screwed…or at least tried to screw half the people in town! That just goes to show that she's nothing but a "bottom of the barrel scum sucking whore"!! [sic] While I am thinking about it why don't Pat and Julia take their boat and shove it up their asses…I hear Pat likes that kind of stuff."[9]

Other bloggers went further accusing Councilman Cahill's wife of being a prostitute, stating that she had left him, and that she regularly committed adultery.[10] One blogger went so far as to write that Cahill and his wife "couldn't have sex because he [Councilman Cahill] has Hepititis [sic] C. Now she's [Julia Cahill] living in Dover with her BIG blond girlfriend and they both go out to the bars most nights trying to pick up guys."[11]

The Cahills eventually brought suit against the online bloggers for defamation.[12] The Cahills did not know the true identity of these bloggers so they had to request their identities from Independent Newspapers, Inc., who maintained the blog, and later Comcast, who was the Internet Service Provider (ISP).[13] At this point victims of online defamation must petition courts to force ISPs to tell plaintiffs who these anonymous posters are.[14] This places courts in the difficult position of having to decide between telling defamation plaintiffs the true identity of a defendant verses protecting an anonymous online speaker's right to remain unidentified.[15]

This example of these online comments concerning the Cahills illustrates the competing interests courts' face in enforcing ISP subpoenas in online defamation suits. While some

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[9] Id. at 946-947.
[10] Id. at 947.
[11] Id.
[12] Id. at 945.
[13] Id. at 948.
[14] In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372, *1 (Va.Cir. Ct. 2000).
[15] Ashely Kissenger, Katherine Larson, *Untangling the Legal Labyrinth; Protections for Anonymous Online Speech*, 13 No. 9 J. Internet L. 1, 16 (2010).

postings online are legitimate commentary that rises to the level of highly protected political speech; other postings are simply defamation. The varying types of online postings coupled with the importance courts give to anonymous speech present an interesting and difficult decision for courts. While anonymous speech has been considered to be an extremely important aspect of free speech, anonymous defamation presents a major problem with online forums such as blogs.

Even though there is no universally accepted approach to analyze ISP subpoenas, several courts have created their own tests.[16] Creating a fair test is difficult because courts must simultaneously uphold the integrity of anonymous speech while affording defamation plaintiffs the right to know the identity of defendants. Because of the tension of these incompatible interests the current tests either lean heavily in favor of plaintiffs or defendants. Three cases represent the approaches and difficulties courts have had in developing a standard method to evaluate ISP subpoenas.[17] This tension is illustrated in the pro-plaintiff test outlined in the Virginia Circuit Court case of In re Subpoena Duces Tecum to America Online, Inc. (AOL)[18] and the pro-defendant tests from New Jersey and Delaware in the cases of Dendrite Intern. Inc. v. John Doe No. 3 (Dendrite) and John Doe No. 1 v. Cahill, (Cahill).[19] None of these tests achieve the goal of providing an effective method for plaintiffs to discover the true identity of online defamers without violating online bloggers' right to remain anonymous.

This article presents a new test that protects anonymous speech while striking a fair balance between plaintiffs' and defendants' rights. The "Anonymous Public Concern Test" incorporates the history of protection of anonymous speech and addresses the critiques of various

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[16] Id. at 17.
[17] Clay Calvert, Kayla Gutierrex, Karla D. Kennedy, Kara Carnley Murrhee, *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 For Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. Marshall L. Rev. 1, 15, 15-16 (2009).
[18] In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372 (Va.Cir.Ct. 2000) *rev'd on other grounds*, America Online Inc. v. Anonymous Publicly Traded Co., 261 Va. 350, 542 S.E.2d 377 (2001).
[19] Dendrite Intern., Inc. v. John Doe, No. 3, 342 N.J. Super. 134 (2001); John Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005).

pro-plaintiff, pro-defendant, and hybrid tests employed by courts today. This article presents a new test that utilizes an initial "matter of public concern" test that is later coupled with a pro-plaintiff analysis to evaluate when ISP subpoenas should be enforced.[20]

This article explores anonymous speech, ISP subpoenas, and proposes a new approach to evaluate ISP subpoenas in three sections. Section I explores the history and jurisprudence surrounding anonymous speech and association within the First Amendment. Section II examines and critiques the various pro-plaintiff, pro-defendant, and hybrid tests used by courts to determine when to enforce ISP subpoenas. Last, in Section III the article proposes a new "Anonymous Public Concern Test" as the best method for courts to use in order to determine when to enforce an ISP subpoena. From these sections this article shows the importance of anonymous speech and illustrates the failure of current tests in evaluating ISP subpoenas. This article presents the new "Anonymous Public Concern Test" which is a new test that seeks to remedy the pro-plaintiff and pro-defendant biases of current tests while preserving the right to speak anonymously. This is accomplished by incorporating the U.S. Supreme Court's standards used in workplace speech cases along with current tests used in online defamation.[21] Incorporating workplace speech analysis into this new test makes logical sense because both issues involve a type of proportional balancing between conflicting interests of speakers' rights against other interests, e.g. workplace harmony and plaintiffs' rights. This novel approach of this new test provides the best analysis for protecting online speakers' rights preserving defamation plaintiffs' right to know the identity of defendants. Using this new approach not only borrows from established case law, but it provides an operationalized framework for balancing these competing rights of plaintiffs and defendants.

[20] Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734 (1968).
[21] Id.; Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983).

I. Anonymity and the First Amendment

Anonymous speech has been consistently viewed as part of the First Amendment by the U.S. Supreme Court. However, the issue of anonymous speech in online defamation suits has never been directly addressed by the Court. Anonymity has been analyzed by the Court in both written speech[22] and association.[23] While these two areas of anonymity are different, both illustrate that anonymity within American speech and politics has a rich history and a high value to the Supreme Court.[24]

A. Anonymous Writings

The U.S. Supreme Court has evaluated regulations on anonymous speech using exacting scrutiny.[25] Exacting scrutiny analysis requires the statute restricting anonymous speech to be "narrowly tailored to serve an overriding state interest."[26] This high level of scrutiny can be justified by the importance anonymous speech plays within American society and social movements. Commenting on the importance of anonymous speech within history Justice Hugo Black wrote:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[27]

This view of the important role anonymous speech has in political discourse was a major underpinning in Justice Black's majority opinion in Talley v. California (Talley), which struck

[22] Talley v. Cal., 362 U.S. 60, 80 S.Ct. 536 (1960); McIntyre v. Ohio Elections Commn., 514 U.S. 334, 115 S.Ct 1511 (1995).
[23] NAACP v. Ala., 367 U.S. 449, 78 S.Ct. 1163 (1958).
[24] Talley, 362 U.S. 60; McIntyre, 514 U.S. 334; NAACP, 357 U.S. 449.
[25] McIntyre, 514 U.S. at 345-347.
[26] Id. at 347.
[27] Talley, 362 U.S. at 64.

down a local ordinance requiring handbills to contain the author's name and address.[28] In Talley the City of Los Angeles prosecuted a man who produced and distributed anonymous handbills that advocated the boycott of businesses that sold certain products by companies who practiced discriminatory employment practices.[29] Los Angeles argued that their ordinance "is aimed at the prevention of 'fraud, deceit, false advertising, negligent use of works, obscenity, and libel,' in that it will aid in the detection of those responsible for spreading material of that character."[30] However, the majority of the Court rejected this justification citing that they recently held anonymity was an important factor in political association.[31] Justice Black pointed to the "fear of reprisal" as a major justification for allowing both anonymous association and speech.[32] Justice Black wrote, "It is plain that anonymity has sometimes been assumed for the most constructive purposes."[33]

Anonymous speech was again addressed by the Supreme Court in 1995 in McIntyre v. Ohio Elections Commission (McIntyre).[34] Like the majority in Talley, the majority in McIntyre struck down an Ohio statute that banned anonymous pamphlets concerning political messages.[35] In McIntyre a woman distributed an anonymous pamphlet that criticized the local school board

[28] Id. at 60-66.
[29] Id. at 61. The handbill asked readers to sign and become a member of the National Consumers Mobilization. Talley v. Cal., 362 U.S. 60, 61 (1960). One the handbill contained the statement "I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth." Id. at 61.
[30] Id. at 66.
[31] Id. at 65 (citing Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412 (1960)); NAACP v. Ala., 357 U.S. 449 (1958).
[32] Id. at 65. Justice Black cited several examples from Puritan pamphleteers in seventeenth century England to the Federalist Papers in the newly formed United States as illustrations of the great political importance of anonymous speech. Talley v. Cal., 362 U.S. 60, 65 (1960).
[33] Id. The dissent of Justices Clark, Frankfurter and Whittaker cited that the First Amendment did not give a freedom for anonymous speech. Talley v. Cal., 362 U.S. 60, 70 (1960). The dissenting Justices also pointed out that the reasons given by Los Angeles for justifying this ordinance were "compelling." Id. at 67. The dissenters also noted that there are other state statutes that banned anonymous publishing concerning political candidates and that bans on anonymous publication "expressed the overwhelming public policy of the Nation." Id. at 70.
[34] McIntyre, 514 U.S. 334.
[35] Id.; Talley, 362 U.S. 60.

concerning school taxes.[36] Instead of signing her name as required by the statute she instead signed the pamphlet "Concerned Parents and Tax Payers."[37] Citing Justice Black's opinion in Talley, Justice Stevens' majority opinion highlighted the importance of anonymous speech in politics.[38] Justice Stevens wrote that anonymous writings have a special place in history and literature.[39] The majority held that even though there may be some public interest in the identity of an anonymous speaker it is ultimately the anonymous speaker's decision to reveal themselves.[40]

Justice Stevens held the speech banned under the Ohio statute in McIntyre was more narrowed than the speech banned in Talley.[41] However, the speech in McIntyre was political speech restricted by a content based statute which is given exacting scrutiny analysis under the First Amendment.[42]

Part of the majority's rationale for striking down the Ohio law banning anonymous political pamphleteering is that anonymity itself is an important means of communication.[43] Justice Stevens recognized the importance of anonymous speech writing, "On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity."[44] This idea is predicated on the belief that anonymity divorces the message from the author so readers "will not prejudge her [the author's] message

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[36] McIntyre, 514 U.S. at 336.
[37] Id. at 337.
[38] Id. at 341-345.
[39] Id. at 341-342. Justice Stevens listed a wide variety of authors and political figures whose work was published anonymously. McIntyre v. Ohio Elections Commn., 362 U.S. 334, 342 footnote 4 (1995). These authors and political figures included Charles Dickens, Benjamin Franklin, Voltaire, George Sand, Mark Twain, Charles Lamb, and Shakespeare. Id.
[40] Id. at 341.
[41] Id. at 344.
[42] Id. at 345-347. Ohio argued that its state interest was two-fold. McIntyre v. Ohio Elections Commn., 362 U.S. 334, 348 (1995). The Ohio statute served to stop "fraudulent and libelous statements" and ensured voters would receive "relevant information." Id. at 348. The Court rejected these two justifications and found the statute unconstitutional. Id. at 348-351; 357.
[43] Id. at 342.
[44] Id. at 342.

simply because they do like its proponent."[45] Justice Stevens also placed great importance of the role of anonymity in politics.[46] Citing the example of the secret ballot he wrote that anonymity is an important political mechanism that allows a person to voice his or her views without fear.[47]

Justice Thomas' concurrence in McIntyre reiterated this point stating that the right to speak anonymously was inextricably intertwined with the Framers' idea of the First Amendment.[48] Examining eighteenth century America, Justice Thomas held that the type of pamphleteering found in McIntyre was exactly what the Framers were trying to protect under the freedom of the press.[49] Commenting on the Framers' use of anonymous speech during the American Revolution, Justice Thomas wrote, "the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'"[50]

Like Justice Black's majority opinion in Talley, Justice Thomas' concurrence in McIntyre gives a wide variety of examples of anonymous speech in early America.[51] Beginning with the famous 1735 Zenger trial, Justice Thomas explained how much of the anti-British political movement in America stemmed from anonymous speech.[52] Justice Thomas particularly pointed to the debates surrounding the ratification of the Constitution and the use of anonymous speech by Federalists and Anti-Federalists alike.[53] The major concept of Justice Thomas' analysis of anonymous speech is that he believes the exacting scrutiny analysis is

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[45] Id.
[46] Id. at 343.
[47] Id. at 343.
[48] Id. at 359.
[49] Id. at 360.
[50] Id. at 361.
[51] McIntyre, 362 U.S. at 361-370; Talley, 362 U.S. at 64-66.
[52] McIntyre, 362 U.S. at 361-367. Peter Zenger was an early American printer prosecuted for sedition for not releasing the names of anonymous authors who were writing criticism of the colonial British government of New York. McIntyre v. Ohio Elections Commn., 514 U.S. 334, 361 (1995). At a jury trial Zenger was acquitted. Id.
[53] Id. at 368.

ultimately unnecessary because the foundational construction of the First Amendment protects anonymous speech.[54]

B. Anonymous Association

In addition to anonymous speech the U.S. Supreme Court has also recognized anonymous association rights.[55] As with anonymous speech, the Court has recognized the importance of anonymous association in context with political activity. The right of association is related to the rights of anonymous speech; in both Talley and McIntyre there are references to Supreme Court cases on the right to nondisclosure of the names of members in political organizations.[56] Similar issues arise in association disclosure cases as do in anonymous speech cases. In NAACP v. Alabama the U.S. Supreme Court's per curium opinion pointed out the various issues of mandatory disclosure of memberships in a political organization.[57] The Court held that an Alabama Circuit Court could not force the NAACP to submit a list of all of their statewide members even though Alabama business incorporation law required such a disclosure.[58]

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[54] Id. at 370. Justice Scalia's dissent joined by Chief Justice Rehnquist discredits Justice Thomas' historical justification for protection of anonymous speech under the freedom of the press. McIntyre v. Ohio Election Commn., 514 U.S. 334, 371-373 (1995). The dissent also focuses on the historical underpinning of laws designed to reduce anonymous speech. Id. at 375-376. Justice Scalia's writes that the ban on anonymous speech is justifiable because of the importance of protecting the elections and candidates from false statements. Id. at 378-380.

[55] NAACP, 357 U.S. 449.

[56] Talley, 362 U.S. at 66 (citing NAACP v. Ala., 357 U.S. 449 (1958) as holding that states may not always force organizations to reveal the identities of their members); 362 U.S. at 66 (Justice Harlan's concurrence references NAACP v. Ala., 357 U.S. 449 (1958) in the discussion of applying strict scrutiny to freedom of speech and association); McIntyre, 514 U.S. at 347 (citing Buckley v. Valeo, 424 U.S. 1, 347 (1976)(per curiam) as holding that the constitution has an important role in political campaigns); McIntyre, 514 U.S. at 353 footnote 14 (discussing a state's interest in identifying those engaging in political speech through donations); McIntyre, 514 U.S. at 355-356 (discussing the difference between mandatory disclosure of identities of campaign contributions to the overly broad Ohio statute in McIntyre requiring all political communication to contain the author's identity).

[57] NAACP, 357 U.S. at 462-463.

[58] Id. at 459-466. Alabama state law required all foreign businesses to submit a charter to the state. NAACP v. Ala., 357 U.S. 449, 451-452 (1958). The NAACP did not submit a charter for its newly formed field office and the State of Alabama petitioned for a court order to restrict the NAACP from operating their Alabama field office. Id. at 452. During this lawsuit the Alabama court requested information from the NAACP which included membership rosters with members' identities. Id. at 453-454.

Applying a strict scrutiny analysis the Court held that Alabama's requirements of disclosure were a violation of the Fourteenth Amendment.[59]

The Court also discussed the importance of anonymity in regard to association. Justice Harlan held that speech and association were related and that associations result in "effective advocacy of both public and private points of view, particularly controversial ones."[60] Speech and association are viewed as part of the same "liberty" interests "assured by the Due Process Clause of the Fourteenth Amendment."[61]

The Supreme Court held that the NAACP did not seek to be exempt from Alabama laws.[62] Rather, the Court held mandatory disclosure of NAACP membership lists were an infringement of the NAACP's members' freedom of association.[63] Alabama's argument for obtaining these membership lists were not related to the political message of the NAACP.[64] Alabama sought the membership lists in order to determine whether the NAACP is a foreign corporation that had to register with the state.[65] The Court found this reasoning unconvincing especially since the NAACP had complied with all of the document requests of the Circuit Court except the membership lists.[66]

Justice Harlan commented on the negative impact such compelled disclosure would have writing, "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[67] The Court also cited the reasoning behind the NAACP's reluctance to

[59] Id. at 460-461, 466.
[60] Id. at 460.
[61] Id. at 460.
[62] Id. at 463.
[63] Id. at 462.
[64] Id. at 464.
[65] Id. at 464.
[66] Id. at 464.
[67] Id. at 462.

release their Alabama membership lists.[68] Justice Harlan wrote, "Petitioner [NAACP] has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[69] The Court was also concerned about the potential chilling effect this forced revelation could have on political association.[70] There was a fear that compelled disclosure of membership in the Alabama NAACP would not only drive current members out of the organization, but potential members would be afraid to join because of the negative collateral consequences of disclosed membership.[71]

The association right of individuals was revisited by the U.S. Supreme Court in Buckley v. Valeo (Buckley).[72] Buckley concerned many laws the Federal Elections Commission (FEC) had promulgated concerning campaign finance.[73] The Supreme Court once again held that government laws concerning association rights of were reviewed using strict scrutiny.[74] However, the Court made a point to note that this scrutiny level did not mean that all government regulations of association are automatically struck down.[75] The majority held that association was a fundamental right, but that there was no "absolute" right to associate in "political activities."[76]

The majority also recognized the importance of anonymity within political association.[77] The majority in Buckley recognized that the government must meet "exacting scrutiny" in order

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[68] Id. at 462.
[69] Id. at 462.
[70] Id. at 462-463.
[71] Id. at 463.
[72] Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976).
[73] Id.
[74] Id. at 75.
[75] Id. at 25 (quoting CSC v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 2891 (1973)).
[76] Id.
[77] Id. at 64-74.

to compel political groups to disclose the identities of their members.[78] "Exacting scrutiny" is interpreted as requiring the government to have "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[79] The Supreme Court emphasized that a "mere showing of some legitimate governmental interest" was not enough to overcome this exacting scrutiny standard.[80] The Court justified this high level of scrutiny stating that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[81]

Justice Thomas recently discussed his ideas concerning the importance of anonymous association in his concurring opinion in Citizens United v. FEC (Citizens United).[82] Citizens United, like Buckley, concerned campaign finance laws.[83] Justice Thomas' concurrence in Citizens United discussed the importance of anonymous speech and reiterated his idea first articulated in McIntyre that anonymous speech was intrinsic to the First Amendment.[84] Citing examples of the negative treatment political donors have received because of their political contributions; Justice Thomas emphasized the importance of anonymity within the political world.[85]

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[78] Id. at 64, 64-65.
[79] Id. at 64 (citing Pollard v. Roberts, 283 F.Supp. 248, 257 (E.D. Ark.) aff'd, 393 U.S. 14, 89 S.Ct. 47 (1968)). In Buckley the government gave three reasons for the compelling state interests requiring the disclosure of campaign contributors' identities. Buckley v. Valeo, 424 U.S. 1, 66-68 (1976). The interests were (1) voters needed to know where campaign contributions came from in order to evaluate the candidates; (2) mandatory disclosure reduces misconduct on the part of the candidates; and (3) disclosure permits for a more detailed account of contributions so misconduct can be found. Id. Ultimately the Supreme Court found all three of these reasons to qualify as "substantial government interests." Id. at 68.
[80] Id. at 64. The Supreme Court noted that laws that require the disclosure of associations' members can arise both as "direct government action" and as "unintended but inevitable result of the government's conduct." Buckley v. Valeo, 424 U.S. 1, 65 (1976).
[81] Id. at 66.
[82] Citizens United v. FEC, __ U.S. __, 130 S.Ct. 876, 980 (2010).
[83] Id.; Buckley, 424 U.S. 1.
[84] Citizens United, 130 S.Ct. at 980; McIntyre, 362 U.S. at 370.
[85] Citizens United, 130 S.Ct. at 980.

One example of political retribution concerned the controversy over California's Proposition 8 which banned gay marriage.[86] The mandatory disclosure requirements of all contributors to either side of the issue resulted in particularly dangerous harassment of those who were in favor of banning gay marriage.[87] Justice Thomas pointed to this harassment as an illustration of why anonymity is important.[88] He wrote, "The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights [original emphasis]."[89] In examining the intimidation in the Proposition 8 debate and the 2008 presidential election Justice Thomas held that compelled identification of political donors should not be required.[90] Justice Thomas wrote that mandatory disclosure of political contributions ultimately reduces the amount of people contributing to political campaigns and thus reduces individuals' free speech rights.[91]

II. Online Defamation, Anonymous Speech, and ISP Subpoenas

The invention and growth of the Internet has created many issues within the First Amendment. The United States Supreme Court recognized the "phenomenal" growth of the Internet.[92] The Court held in Reno v. ACLU that government regulation of speech on the Internet "is more likely to interfere with the free exchange of ideas than to encourage it."[93] Internet anonymity has been viewed as highly important; one California Court of Appeals held "the use of a pseudonymous screen name offers a safe outlet for the user to experiment with

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[86] Id.
[87] Id. In one instance gay marriage advocates posted the names and addresses of supporters of Proposition 8 on a website. Citizens United v. FEC, 130 S.Ct. 876, 980 (2010). Other instances of harassment included damaging property and personal threats directed toward Proposition 8 supporters. Id. at 980.
[88] Id. at 981.
[89] Id. at 981.
[90] Id.
[91] Id. Justice Thomas cites an example in which a man did not want to contribute to a political campaign because he feared if his candidate lost the winner would seek retribution against him. Citizens United v. FEC, 130 S.Ct 876, 981 (2010).
[92] Reno v. ACLU, 521 U.S. 844, 885, 117 S.Ct. 2329 (1997).
[93] Id. at 885.

novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal."[94] However, with the advent of the Internet and blogs came the problem online anonymous libel. As one court noted, "When vigorous criticism descends into defamation …constitutional protection is no longer available."[95] The issue of online defamation is a byproduct of the type of Internet communication which oftentimes is "a vehicle for emotional catharsis."[96] Since these bloggers and authors of web postings are anonymous, defamation plaintiffs must first file a John Doe lawsuit and try to make the ISP divulge the identity of the anonymous author before they can proceed further with the lawsuit.[97]

This demand places ISPs in a precarious situation because they must comply with court orders but wish to make money and gain popularity with users.[98] Telling defamation plaintiffs the identity of their customers make ISPs do something that is antithetical to their business interests.[99] The Virginia Circuit Court in AOL recognized that if courts made ISPs release the names of their users "one could reasonably predict that AOL subscribers would look to AOL's competitors for anonymity."[100]

Likewise Courts have grappled with striking a balance between free speech rights of anonymous online authors and defamation plaintiffs' rights to sue.[101] With that pervasive problem courts across the United States have devised tests that can be characterized as either pro-plaintiff or pro-defendant.[102] The Maryland Court of Appeals summarized this tension holding "we are cognizant that setting too low a threshold would limit free speech on the

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[94] Krinsky v. Doe 6, 159 Cal.App. 4th 1154, 1162 (2008), 72 Cal. Rptr. 3d 231 (Cal. App. 2008).
[95] Id. at 1164.
[96] Id. at 1163.
[97] AOL, 2000 WL 1210372, *1.
[98] Id. at *5.
[99] Id.
[100] Id. at *5.
[101] America Online, 2000 WL 1210372; Dendrite, No. 3, 342 N.J. Super 134 (2001), 775 A.2d 756 (2001); Cahill, 884 A.2d 451 (Del. 2005).
[102] Id.

Internet, while setting too high a threshold could unjustifiably inhibit a plaintiff with a meritorious defamation claim from pursuit of that cause of action."[103] However, one scholar noted that "when expressive speech is at issue, as in defamation cases, courts tend to apply a high burden test."[104]

A. Pro-Plaintiff Tests

The genesis of tests for ISP subpoenas began with the U.S. District Court for the Northern District of California in 1999 in Columbia Ins. v. Seescandy.com [Seescandy].[105] In Seescandy the District Court required a plaintiffs' to satisfy a four part test in order to obtain the identity of an anonymous online user.[106] Seescandy was decided in the early days of the Internet and concerned a trademark infringement action.[107] An attempt to create a test to evaluate subpoenas in online defamation cases came in 2000 by the Circuit Court of Virginia in the case of In re Subpoena Duces Tecum to America Online (AOL).[108] In that case five anonymous bloggers wrote several detrimental comments in an online chat room about a publically traded company.[109] The company argued that the statements were untrue and brought a defamation suit against the anonymous bloggers.[110] The company requested the ISP AOL to voluntarily release

[103] Independent Newspapers v. Brodie, 407 Md. 415 (2009).
[104] Kissinger and Larsen, 13 No. 9 J. Internet L. at 18.
[105] Columbia Ins. v. Seescandy.com, 185 F.R.D. 573 (W.D. Cal. 1999).
[106] Id. at 578-580. Seescandy did not concern an issue of defamation but of trademark infringement. Columbia Ins. v. Seescandy.com, 185 F.R.D. 573, 575-576 (W.D. Cal. 1999). However, the District Court surmised that defamation issues would present themselves on the Internet. Id. at 578. The four-part test required a plaintiff to: (1) Attempt to "identify the missing party with sufficient specificity;" (2) "identify all previous steps taken to locate the elusive defendant;" (3) "establish to the Court's satisfaction that plaintiffs' suit…could withstand a motion to dismiss;" (4) "file a request for discovery…along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served." Id. at 578-580.
[107] Id. at 575-581.
[108] AOL, 2000 WL 1210372 *8.
[109] Id. at *1. The company in this case went by the pseudonym APTC, but remained anonymous. In re Subpoena Duces Tecum to America Online Inc., 2000 WL 1210372, *1 (Va. Cir.Ct. 2000). The company brought suit against the bloggers anonymously and the Virginia Court opinion does not include the company's name only its pseudonym. Id.
[110] Id.

the anonymous bloggers identities, but AOL refused.[111] The company then sought a court order to compel AOL to release the names of the anonymous bloggers.[112]

AOL argued that requiring the release of the bloggers' names "unreasonably impairs the First Amendment rights of the John Does to speak anonymously on the Internet."[113] The Virginia Circuit Court recognized that forcing an ISP to reveal the names of its customers presented a problem for ISPs as well.[114] The Court said, "There can be no reasonable doubt that a disclosure of the names of those who support the activities of the appellants could have no result other than to injuriously affect the effort of appellants [AOL] to obtain financial support in promoting their aims and purposes."[115] Recognizing the potential business implications of forcing AOL to reveal the identity of its users the court said, "The subpoena duces tecum at issue potentially could have an oppressive effect on AOL."[116]

The court in AOL also recognized the important rights associated with anonymous speech.[117] Discussing the history of anonymous speech in America the court held, "This right [of anonymous speech] arises from a long tradition of American advocates speaking anonymously though pseudonyms, such as James Madison, Alexander Hamilton, and John Jay."[118] This right to anonymity was further linked to the Internet in that user anonymity is a large part of the Internet itself.[119] The court held, "To fail to recognize that the First Amendment right to speak anonymously should be extended to communications of the Internet would require this Court to

[111] Id.
[112] Id.
[113] Id. at *2.
[114] Id. at *5.
[115] Id. at *5.
[116] Id. at* 5.
[117] Id. at *6.
[118] Id. at *6.
[119] Id.

ignore either United States Supreme Court precedent of the realities of speech in the twenty-first century."[120]

Despite this recognition of the role of anonymous speech and the Internet, the Virginia Circuit Court found "the right to speak anonymously is not absolute."[121] The court further held that there should be some balancing between "the right to communicate anonymously" and "the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions."[122] In order to balance these interests the Virginia Circuit Court devised a three-part analysis in deciding when to enforce an ISP subpoena.[123] The court held that an ISP must:

> "provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleading or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim."[124]

Ultimately the Virginia Court held that the allegedly defamed company met this test and that AOL had to comply with the subpoena to release the names of the anonymous bloggers.[125]

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[120] Id. at *6.
[121] Id. at *6.
[122] Id. at *6.
[123] Id. at *8. The test suggested by AOL was "(1) the party seeking the information must have pled with specificity a prima facie claim that it is the victim of particular tortious conduct and (2) the subpoenaed identity information must be centrally needed to advance that claim." In re Subpoena Decus Tecum to America Online Inc., 2000 WL 1210372, *7 (Va.Cir. Ct. 2000). This test was rejected by the Virginia Circuit Court at "unduly cumbersome." Id. at *7.
[124] Id. at *8.
[125] Id.

Courts have referred to this AOL test as a "'good faith' standard."[126] Another court referred to the test in AOL as "functionally similar to that put forth in Seescandy.Com."[127]

This AOL approach was later adapted by a Delaware trial court in Cahill v. John Doe Number One.[128] Although the Delaware Supreme Court later reversed the Delaware Superior Court in Cahill, the Superior Court decision provides valuable insights and explanations of the AOL standard.[129] The anonymous speech in the Cahill involved anonymous bloggers posting negative comments about a local city councilman.[130] Like the Virginia Court in AOL, the Delaware Superior Court in Cahill recognized the anonymous speech rights for Internet users.[131] The court said, "This extension [of rights of anonymous speakers on the Internet] is appropriate given that the internet readily 'facilitates the rich diverse, and far ranging exchange of ideas.'"[132] However, the trial court also pointed out that serious problems arise with anonymous Internet speech because Internet anonymity suffers from a large lack of "accountability" on the part of the speakers.[133] The court pointed to a lack of an "editorial filter" and that compared to other mediums anonymous Internet speech was less controlled.[134] The Delaware trial court feared that plaintiffs unable to identify their defamers would be "in the untenable situation of sitting idly by, without any recourse, as his [the plaintiff's] reputation quite literally is destroyed."[135]

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[126] Krinsky v. Doe 6, 159 Cal.App. 4th 1154, 1167 (2008); 72 Cal.Rptr. 3d 231, 241 (Cal. App. 2008).
[127] Dendrite, 342 N.J. Super. at 157.
[128] Cahill, 879 A.2d at 953-954.
[129] Id.; Cahill, 884 A.2d 451 (Del. 2005).
[130] Cahill, 879 A.2d at 946-948. The particular facts surrounding this case are contained in the introduction of this article. The bloggers' attacks on Cahill commented on his ability to work with the Mayor of Smyrna as well as Cahill's mental condition, alleged venereal diseases, alleged homosexuality, and Cahill's relationship with his wife. Cahill v. John Doe No. 1, 879 A.2d 943, 946-948.
[131] Id. at 950.
[132] Id. at 950.
[133] Id. at 950.
[134] Id. at 950.
[135] Id. at 951.

Given these problems of anonymous Internet speech in relation to defamation the Delaware Superior Court in Cahill praised the standard articulated in AOL.[136] The court held "the 'good faith' showing required by America Online [AOL] is not insubstantial and more than adequately protects against the abuse of the subpoena power by an overzealous defamation plaintiff."[137] The trial court did have issues with the lack of definition to the "good faith basis" requirement of part two of the AOL test.[138] The lack of definition of "good faith basis" led the trial court to use other methods to determine the phrase's meaning.[139] The trial court determined whether a case was "brought in good faith" by looking at the plaintiff's pleadings and motions.[140] This "good faith" was met when plaintiffs demonstrate "a legitimate basis for claiming defamation in the context of their particular circumstances."[141] The court emphasized that plaintiffs "need not establish per se defamation."[142]

The Delaware Superior Court further defined the requirements of the second and third step of the AOL standard.[143] AOL's second step is redefined by the Delaware trial court as "the identifying information sought by the subpoena must relate directly and materially to an essential aspect of the claim."[144] This requirement of AOL did not permit a plaintiff to obtain the identity of an anonymous Internet speaker on a "secondary claim."[145]

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[136] Id. at 953-954.
[137] Id. at 953.
[138] Id. at 953 footnote 48. The second part of the AOL test is "(2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed in." In re Subpoena Duces Tecum to America Online Inc., 2000 WL 1210372 *8 (Va. Cir. Ct. 2000).
[139] Cahill, 879 A.2d. at 953. The Cahill court states applying the AOL "good faith" test used definitions of Delaware Superior Court Civil Rule 11 which uses a "subjective good faith test" as opposed to "require[ing] the plaintiff to plead facts sufficient to establish a prima facie basis for relief." Cahill v. John Doe No. 1, 879 A.2d 943, 953 (Super. Crt. Del. 2005).
[140] Id. at 954.
[141] Id. at 954.
[142] Id. at 954.
[143] Id. at 955-956.
[144] Id. at 955.
[145] Id. at 955 (citing John Doe v. 2TheMart.com, 140 F.Supp 2d 1088, 1096 (W.D. Wash. 2001)).

The third step in AOL, as defined by the Delaware trial court, requires plaintiffs to show that "they cannot discover the identity of John Doe No. 1 by other means."[146] The Delaware Superior Court interpreted this requirement to mean that "the plaintiff must first attempt to locate the identifying information from other sources or demonstrate that it would be futile to undertake this effort."[147] The court stressed that just because the simplest way to obtain an anonymous online speaker's identity is through an ISP does not mean that the plaintiff needs to petition an ISP first without pursuing other avenues of investigation.[148] Ultimately the Delaware Superior Court in Cahill held that the plaintiffs met the AOL requirements and enforced a subpoena against the ISP for the identities of the anonymous bloggers in their defamation case.[149]

The approach in AOL was sharply criticized by the New Jersey Superior Court in Dendrite v. John Doe No. 3 which addressed a similar factual situation to that in AOL.[150] The Court in Dendrite held the AOL standard "depart[s] from traditionally-applied legal standards in analyzing the appropriateness of such disclosure in light of the First Amendment implications."[151] The D.C. Court of Appeals also criticized AOL stating the standard put forth by the Virginia Circuit Court "insufficiently protects a defendant's anonymity."[152] The D.C. Court feared AOL's test "strip[ed] defendants of anonymity in situations where there is no substantial evidence of wrongdoing."[153] Likewise, the Maryland Court of Appeals rejected AOL's test stating that it lacked standards in its requirement for plaintiffs to put forth a good faith test because this standard "varies from state to state and, sometimes, court to court."[154] A

[146] Id. at 955.
[147] Id. at 955.
[148] Id.
[149] Id. at 956.
[150] Dendrite, 342 N.J. Super 134.
[151] Id. at 157.
[152] Solers v. John Doe, 977 A.2d 941, 952 (D.C. App. 2009).
[153] Id. at 952.
[154] Independent Newspapers, 407 Md. 415, 448 (2009).

California Appeals Court described the AOL test as "a low threshold for disclosure….It offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection."[155]

B. Pro-Defendant Tests

As online defamation cases appeared in other states, courts began to develop new tests for enforcing ISP subpoenas. Two states, New Jersey and Delaware, expressly rejected the pro-plaintiff approach and created pro-defendant tests known as the Dendrite test and the Cahill test.[156] In essence these pro-defendant tests utilize, either expressly or implicitly, a balancing of defamation plaintiffs' and defendants' rights.[157] This balancing is not operationalized and courts are somewhat left to their own discretion of deciding when a plaintiff's interest in knowing the identity of an online defendant outweighs the defendant's anonymous speech rights.[158] In Dendrite International, Inc. v. John Doe No. 3[159] the New Jersey trial court refused to enforce a subpoena against Yahoo! to disclose the identity of an anonymous online blogger who posted derogatory messages concerning Dendrite Incorporation.[160] The New Jersey Superior Court ultimately denied Dendrite Incorporation's appeal for enforcing the subpoena against Yahoo! on the grounds that the company failed to meet a defamation claim's harm element.[161]

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[155] Krinsky, 159 Cal.App. 4th at 1167. This court also noted that anonymity presents other problems no matter the test used. Krinsky v. Doe 6, 159 Cal.App. 4th 1154, 1167 footnote 8 (2008). Focusing on the inherent problem of anonymous defendants the court noted "without knowing the defendant's identity, a plaintiff may have difficulty determining whether it is financially worthwhile to pursue litigation." Id. at 1167 footnote 8.
[156] Dendrite, 342 N.J. Super. at 140-158.; Cahill, 884 A.2d 451.
[157] Dendrite, 342 N.J. Super. 134; Cahill, 884 A.2d 451.
[158] Id. Cahill does use a summary judgment standard in their analysis of online defendants. John Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005). However, this standard while providing some context for balancing does not precisely state what elements or factors of anonymous speech rights should be taken into consideration by courts. Id.
[159] Dendrite, 342 N.J. Super at 140-158.
[160] Id. at 140-141.
[161] Id. at 141.

The New Jersey court created a test that defamation plaintiffs must meet in order to enforce a subpoena against an ISP.[162] This particular test involves a four-part analysis.[163] The test is:

1) Plaintiffs must "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application."[164]
2) Plaintiffs must "set forth the exact statements" at issue that "constitutes actionable speech."[165]
3) Plaintiffs must "set forth a pima facie cause of action against the fictitiously-named anonymous defendants."[166] This requirement is interpreted as requiring the plaintiff to "produce sufficient evidence supporting each element of its cause of action…prior to a court ordering the disclosure of the identity of the unnamed defendant."[167]
4) After these first three elements are met the Court will then "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."[168]

The court stated that this test was applied "case-by case" and that the "guiding principle" of the court's test was a "proper balancing of the equities and rights at issue."[169]

The Court in Dendrite created this four-part test because they recognized the importance of anonymous speech on the Internet.[170] Citing Seescandy the Dendrite Court analyzed the

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[162] Id. at 141-142.
[163] Id.
[164] Id. at 141.
[165] Id. at 141.
[166] Id. at 141. This particular requirement is further explained to require a plaintiff to "establish that is action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted." Dendrite Intern., Inc. v. John Doe, No. 3, 342 N.J. Super. 134, 141 (2001).
[167] Id. at 141.
[168] Id. at 142.
[169] Id. at 142.

unique situation the Internet creates in regard to anonymous speakers.[171] The federal court in Seescandy foresaw that the Internet created a situation where an individual could "commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely online."[172] Despite this concern in Seescandy, the Dendrite decision recognized that courts must look to speakers' First Amendment rights as well as defamation plaintiffs' right to sue.[173]

In 2005 the Supreme Court of Delaware analyzed and incorporated parts of the Dendrite test in their new Cahill test.[174] The Delaware Supreme Court reversed the lower court's adoption of the AOL standard holding that it was "concerned that setting the standard [for revealing anonymous online speakers] too low will chill potential posters from exercising their First Amendment right to speak anonymously."[175] A plaintiff's ability to force an ISP to reveal the identity of an anonymous speaker is "a very important form of relief."[176] The Court feared that revealing an anonymous speaker could potentially subject the speaker to a whole host of negative collateral consequences or what the court called "extra-judicial self-help remedies."[177] In fact, there was some concern by the Court that some plaintiffs' brought defamation suits solely for the purpose of "unmask[ing] the identities of anonymous critics."[178]

The Delaware Supreme Court in Cahill also pointed out that the facts in their case were different than those in cases like AOL.[179] They noted that in Cahill the anonymous speech concerned a politician and his role as a city councilman, rather than a business and its practices

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[170] Id. at 148-149.
[171] Id. at 150-152 (citing Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999)).
[172] Columbia Ins. Co. v. Seescandy, 185 F.R.D 573, 578 (N.D. Cal. 1999).
[173] Dendrite, 342 N.J. Super. at 150.
[174] Cahill, 884 A.2d 451 (Del. 2005).
[175] Id., at 457.
[176] Id. at 457.
[177] Id. at 457.
[178] Id. at 457.
[179] Id.

like that found in AOL.[180] Given the Cahill court's uneasiness with forcing ISPs to reveal the identities of their users the court adopted a variation of the Dendrite test.[181] However, the Court explicitly noted that they were not following the entire Dendrite standard.[182] Rather, the Cahill test is described as a "summary judgment standard."[183] This standard was used to "strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously."[184]

The Supreme Court of Delaware pointed out specific parts of the Dendrite test that it was expressly abandoning.[185] The Court held "we do not think that the second and fourth prongs of the Dendrite test are necessary."[186] The second prong of Dendrite "require[s] the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that…constitutes anonymous speech."[187] The Supreme Court of Delaware viewed this prong as unnecessary in light of using a "summary judgment inquiry" which would essentially require this identification of statements by the plaintiff.[188] The fourth prong of Dendrite holds "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented."[189] This requirement was also viewed as unnecessary by the Delaware Supreme Court because "the summary judgment test is itself the balance."[190] In sum the Cahill test for determining when an ISP must release the identity of an anonymous user to a defamation plaintiff is defined as being "a modified Dendrite standard consisting only of

[180] Id.
[181] Id. at 460-462.
[182] Id. at 460.
[183] Id. at 460.
[184] Id. at 460.
[185] Id. at 461.
[186] Id. at 461.
[187] Dendrite, 342 N.J. Super. at 141.
[188] Cahill, 884 A.2d at 461.
[189] Dendrite, 342 N.J. Super. at 142.
[190] Cahill, 884 A.2d at 461.

Dendrite requirements one and three: the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard."[191] Using this new standard the Delaware Supreme Court held that the statements made about Robert Cahill and his wife were opinion and "therefore, incapable of a defamatory meaning" thus failing to "satisfy the summary judgment standard."[192]

One criticism of these pro-defendant tests is that they have, according to one scholar, "made the outcome of lawsuits for online defamation difficult to predict."[193] The original trial court in Cahill sharply criticized the Dendrite test.[194] The Cahill trial court agreed with the plaintiff's characterization of the Dendrite test as being a standard that "requires too much."[195] The Dendrite test was seen as requiring a plaintiff to "answer what is tantamount to a motion to dismiss before the plaintiff can learn the identity of the speaker he claims has defamed him."[196] The court further criticized Dendrite holding "under Dendrite, the plaintiff is put to the nearly impossible task of demonstrating as a matter of law that a publication is defamatory before he serves his compliant or even knows the identity of the defendant(s)."[197]

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[191] Id. at 461. The Supreme Court of Delaware pointed out that this standard would be applied in any anonymous libel case regardless of the medium at issue. John Doe No. 1 v. Cahill, 884 A.2d 451, 465 (Del. 2005). The Court noted however that even though this standard was applied universally "certain factual and contextual issues relevant to chat rooms and blogs are particularly important in analyzing the defamation claim itself." Id. at 465. Recognizing the hierarchy in online speech the Court further held that certain Internet forums, such as "Blogs and chat rooms," have speech that is clearly "not a source of facts of data" but are simply "vehicles for the expression of opinions." Id. at 465.

[192] Id. at 467. The Supreme Court of Delaware made a point to note that "no reasonable person could have interpreted these statements as being anything other than opinion." John Doe No. 1 v. Cahill, 884 A.2d. 451, 467 (Del. 2005). The Court pointed out that other posters on the blog criticized the John Doe's postings and that the blog itself was "dedicated to *opinions* about issues in Smyrna" [original emphasis]. Id. at 467.

[193] Jessica Chilson, Student Author, *Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 Va. L. Rev. 389, 416 (2009).

[194] Cahill, 879 A.2d at 948-949; 951-953.

[195] Id. at 949.

[196] Id. at 952.

[197] Id. at 952-953.

Other criticisms of the Dendrite test center on the balancing requirement.[198] The Illinois Appellate Court held that there was a logical flaw in balancing the anonymous speech interests of online speakers verses the plaintiff's prima facie case.[199] The Court held that since by this stage of the Dendrite test the plaintiff had already made out a prima facie case for defamation it was illogical to balance the interests of the two parties since there is "no first-amendment right to defame."[200]

Cahill's pro-defendant summary judgment standard has also been criticized. The Maryland Court of Appeals held that Cahill test is "setting the bar too high…to require plaintiffs to meet a summary judgment standard…would undermine personal accountability and the search for truth, by requiring claimants to essentially prove their case before even knowing who the commentator was."[201] In Krinsky a California appellate court also noted that the summary judgment standard was bad in general application because there is no uniform standard for summary judgment.[202]

The Cahill test also has been attacked because of the amount of specificity a plaintiff must have in their pleadings to overcome a summary judgment standard.[203] The District Court of Massachusetts held that "bare assertions in an affidavit are not adequate to defeat summary judgment, as the plaintiff must adduce specific facts."[204] The U.S. District Court of Connecticut sharply criticized the Cahill standard as being "potentially confusing and also difficult for a plaintiff to satisfy when she has been unable to conduct any discovery at this juncture."[205] The Connecticut District Court even went as far to say that overcoming the Cahill standard may be

[198] Maxon v. Ottowa Publishing Co., 929 N.E. 2d 666, 676. (Ill.App. 2010); 341 Ill. Dec. 12, 22 (2010).
[199] Id.
[200] Id. at 676.
[201] Independent Newspapers, 407 Md. at 455-457.
[202] Krinsky, 159 Cal.App. 4th at 1170.
[203] McMann v. Doe, 460 F.Supp.2d 259, 267 (D. Mass. 2006).
[204] Id. at 267.
[205] Doe I and Doe II v. Individuals, 561 F.Supp. 2d 249, 255-256 (D. Conn. 2008).

"impossible to meet…for any cause of action which required evidence within the control of the defendant."[206] At least one Court held that the summary judgment standard in Cahill did not even adequately address the Court's concern of chilled speech effects.[207] The Wisconsin Supreme Court held that a motion to dismiss standard was better than the Cahill summary judgment standard because it better protects the anonymity of the defendants.[208]

Despite the criticism of the pro-defendant stances of Dendrite and Cahill, many courts have adopted these standards for reviewing ISP subpoenas. As recent as July 2010 the U.S. District Court for the Western District of Washington adopted a variation of the Dendrite standard holding that a plaintiff must meet the requirements of notice; presentation of a prima facie case; and proving the importance of the defendant's identity to "the plaintiff's case."[209] Once these standards were met the plaintiff's case would undergo Dendrite balancing.[210] Citing the importance of anonymous speech verses plaintiff's rights, the U.S. District Court of Connecticut held that the prima facie standard announced in Dendrite "strikes the most appropriate balance between the First Amendment rights of the defendant and the interest in the plaintiff of pursuing their claims."[211]

Cahill's summary judgment standard has also received praise from various courts. The Court of Appeals of Texas adopted the Cahill test holding that the summary judgment standard was best because it protected anonymous speech.[212] The U.S. Court of Appeals for the Ninth

[206] Id. at 256.
[207] Lassa v. Rongstad, 294 Wis.2d 187, 214-215 (2006), 718 N.W.2d 673 (Wis. 2006).
[208] Id. at 215.
[209] Salehoo Group, Ltd. v. ABC Co., 2010 WL 2773801, *4-*5 (W.D. Wash 2010).
[210] Id. at *5.
[211] Doe I and Doe II, 561 F.Supp. 2d at 256.
[212] In re Does, 242 S.W.3d 805, 822-823 (Tex. App. 2007).

Circuit also held in 2010 that Cahill was "the most exacting standard" and that a District Court did not err in applying it.[213]

C. Hybrid Tests

Despite the pervasiveness of the AOL, Dendrite, and Cahill tests, some courts have created their own tests to analyze anonymous speaker subpoenas.[214] Like other pro-defendant tests these approaches provide a balancing, or at least some analysis, of plaintiffs' and defendants' interests.[215] One U.S. District Court extrapolated anonymous speaker subpoena standards in defamation cases to issues concerning illegal Internet file sharing.[216] In Sony Music Entertainment v. Does the U.S. District Court for the Southern District of New York created a four-part test to determine when a court should enforce a subpoena on an ISP to reveal an anonymous user.[217] The four-part test requires plaintiffs to prove:

1) "prima facie case of copyright infringement;"[218]
2) "specificity of the discovery request;"[219]
3) "absence of alternative means to obtain subpoenaed information;"[220]
4) " central need for subpoenaed information;"[221]
5) Analysis of the "defendant's expectation of privacy."[222]

[213] In re Anonymous Online Speakers v. U.S. Dist. Court, 611 F.3d 654, 661 (9th Cir. 2010).
[214] Sony Music Entertainment Inc. v. Does, 326 F.Supp. 2d 556 (S.D.N.Y. 2004); Solers Inc. v. John Doe, 977 A.2d 941(D.D.C. 2009); Mobilisa Inc. v. John Doe 1, 217 Ariz. 103 (2007), 170 P.3d 712 (Ariz. 2007); In re Richard Baxter, 2001 WL 34806203 (W.D. La. 2001).
[215] Id.
[216] Sony Music, 326 F.Supp. 2d 556.
[217] Id. at 564-565.
[218] Id. at 565.
[219] Id. at 566.
[220] Id. at 566.
[221] Id. at 566.
[222] Id. at 566.

This approach has gained some popularity with a New York state trial court which adopted this standard in 2005; the U.S. District Court for the District of Massachusetts in 2008; and in the U.S. District Court for the Eastern District of North Carolina in 2009.[223]

Other courts have used a variation of the Dendrite test.[224] In the U.S. District Court for the Northern District of California used a two-part Dendrite variation in which a plaintiff had to prove (1) "support a pima facie case on all elements" and a (2) balancing of the plaintiff's rights verses the defendant's anonymous speech rights.[225] The U.S. District Court for the District of Connecticut adopted a hybrid of Dendrite standards in 2008.[226] The Court incorporated Dendrite's prima facie case standard and balancing test in order to determine if an ISP had to release the names of anonymous users who allegedly committed defamation.[227]

Some courts have also used a variation of the Cahill summary judgment standard.[228] The District of Columbia Court of Appeals created a five-step test using the Cahill summary judgment standard.[229] This five-part test included elements of notice and giving the defendant enough time to respond to the subpoena.[230] The Court of Appeals of Arizona also used a Cahill test coupled with Dendrite balancing.[231] The Court held that while Cahill's summary judgment

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[223] The Public Relations Society of America, Inc. v. Road Runner High Speed Online, 8 Misc. 3d 820, 827 (N.Y. Sup. 2005), 799 N.Y.S. 2d 847, 853 (2005); London –Sire Records Inc. v. Doe 1, 542 F.Supp. 2d 153, 164 (D. Mass. 2008); Sony BMG Music Entertainment v. John Doe, 2009 WL 5252606 *7 (E.D.N.C. 2009).
[224] USA Technologies v. John Doe, 2010 WL 1980242 (N.D. Cal. 2010).
[225] Id. at *4.
[226] Doe I and Doe II, 561 F.Supp. 2d at 254-255.
[227] Id. The U.S. District Court cited Sony Music extensively in its analysis of how courts determine when to force an ISP to reveal the identity of an anonymous user. Doe I and Doe II v. Individuals, 561 F.Supp. 2d 249, 254-256 (D. Conn. 2008).
[228] Solers Inc., 977 A.2d at 954.
[229] Id.
[230] Id. The five part test enumerated was "(1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each elements of the claim that is *within its control* [original emphasis], and determine that the information sought is important to enable the plaintiff to proceed with his lawsuit." Solers Inc. v. John Doe, 977 A.2d 941, 954 (D.D.C. 2009).
[231] Mobilisa Inc., 217 Ariz. at 111.

standard is appropriate it does not allow courts to analyze the importance of anonymous speech.[232] Given this criticism of Cahill the Arizona court added the Dendrite balancing test to Cahill's summary judgment analysis.[233] The Court held that this balancing was important for courts because there were "a vast array of factually distinct cases likely to involve anonymous speech."[234]

Still other courts have created their own standards for evaluating ISP subpoenas.[235] The U.S. District Court for the Western District of Louisiana found that none of the common approaches to enforcing an ISP subpoena "satisfactory."[236] The Court criticized other efforts to protect the identity of anonymous speakers since plaintiffs could conceivably learn the identity of John Doe defendants by means other than a subpoena.[237] The District Court created a test that required plaintiffs to have "a showing of at least a reasonable probability or a reasonable possibility of recovery on the defamation claim."[238] This test has actually received one scholar's support.[239] Jessica Chilton wrote that the test devised by the Louisiana District Court "provides the best method for resolving discovery question in John Doe defamation cases while also laying the groundwork for a comparison with other standards promulgated by the courts."[240]

The issue with all of these hybrid tests is that they, like all pro-defendant tests, provide no real context in which to strike the appropriate balance between plaintiffs' and defendants' rights. Additionally, these tests leave too much subjectivity to the court in applying these tests. Using

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[232] Id.
[233] Id.
[234] Id. at 111.
[235] Baxter, 2001 WL 34806203.
[236] Id. at * 12.
[237] Id.
[238] Id. at *12. The District Court noted that in cases involving public figure defamation the level of "reasonable probability" would be difficult for plaintiffs since they would have to prove actual malice standard. In re Richard Baxter, 2001 WL 34806203, *12 (W.D. La. 2001).
[239] Chilson, 95 Va. L. Rev. at 391.
[240] Id. at 391.

these approaches presents is a real situation where the outcome of a suit would depend largely upon the judge's independent viewpoints in making the decision. Even the test articulated by the U.S. District Court for the Western District of Louisiana provides no real protection for anonymous speech.[241] That court's analysis of the success of a plaintiff's claim allows for the same undefined subjective reasoning of other hybrid tests.[242]

III. A New Approach to ISP Subpoenas: Introducing the "Anonymous Public Concern Test"

Given the shortcomings of pro-plaintiff, pro-defendant, and hybrid tests a new test is needed to evaluate when an ISP should release the name of a speaker in an online defamation suit. The major shortcoming in all of the current tests is striking the right balance between plaintiffs and defendants. Current tests are either too pro-plaintiff or too pro-defendant, which gives both sides an unfair advantage depending on what court they are in. All of the tests fail to give the proper protection to anonymous speech and instead focus too much on the defamation claim. A new test needs to be devised that gives the right amount of protection for anonymous speech. However, the difficulty is that this test does not need to be so encompassing that defamation becomes protected as well. One scholar noted that while there is little uniformity within current ISP subpoena tests one thing is consistent—"courts have developed standards for unmasking anonymous internet speakers without regard for the content of the speech at issue."[243]

This new test would have its foundation in the Supreme Court's holdings that anonymous speech is protected under the First Amendment.[244] Likewise the U.S. Supreme Court's discussion of the importance of anonymous speech has made in shaping the United States'

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[241] Id.
[242] Id.
[243] Ryan Martin, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. Cin. L. Rev. 1217, 1237 (2007).
[244] Talley, 362 U.S. 60; McIntyre, 514 U.S. 334; NAACP, 357 U.S. 449; Buckley, 424 U.S. 1.

history, particularly the history surrounding the ratification of the Constitution, underscores the importance anonymous speech in American discourse.[245] Only the Dendrite balancing test provides an actual step that takes into account the importance of anonymous speech.[246] However, any balancing needs guidelines for courts.

Workplace speech regulation within the government provides a good framework for evaluating speech rights against other concerns such as defamation plaintiffs' rights. Unlike the balancing in different ISP subpoena tests, the balancing used in workplace speech cases is operationalized.[247] Because of this operationalization public concern analysis should be incorporated into lower courts' tests for enforcement of ISP subpoenas. The U.S. Supreme Court held that public concern speech is so important that government employees who engage in disruptive workplace speech cannot be fired in some instances where the speech itself touches on "matters of public concern."[248] Pickering's analysis of "matters of public concern" speech and its relationship to government employees provides an interesting model that can be used to create a new test for determining when an ISP must disclose the identity of its users to defamation plaintiffs.[249]

In Pickering v. Board of Education the U.S. Supreme Court devised a two-part test used to determine when a government employee could be fired from their job because of disruptive speech.[250] The first part of this test determines whether the speech focuses on "matters of public

[245] Talley, 362 U.S. at 64-65; McIntyre, 514 U.S. at 358-371.
[246] Dendrite, 342 N.J. Super. at 142.
[247] Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731 (1968); Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983).
[248] Pickering 391 U.S. at 570; Connick, 461 U.S. at 143, 145.
[249] Pickering, 391 U.S. at 568.
[250] Pickering, 391 U.S. 563, 568-573. The Pickering case arose when a local teacher in Illinois was fired from her teaching position because she sent a letter to a newspaper criticizing the school superintendent and his handling of raising school funds. Pickering v. Board of Educ., 391 U.S. 563, 564 (1968). The Supreme Court held that the teacher was wrongfully fired from her job because her speech was "on issues of public importance." Id. at 574.

concern."[251] If the speech is touches on "matters of public concern," the second part of the test is a balancing of the value of the speech against the government's interest in preserving "efficiency" within the office.[252] The Court addressed the balancing of untrue speech in this equation.[253] In discussing false statements made by government employees, the U.S. Supreme Court focused on the effects of the speech on the workplace more than the falsity itself.[254] Writing for the majority Justice Marshall held that "matters of public concern" was so important under the First Amendment that even government employees' criticism of their employers can sometimes be protected.[255]

The protection of "matters of public concern" was revisited by the U.S. Supreme Court in Connick v. Myers.[256] Justice White, writing for the majority, reiterated the principles of the Pickering balancing test and the role of "matters of public concern."[257] When speech is not considered a "matter of public concern" by the courts there is no need for any balancing and an employee's termination is not afforded Pickering analysis.[258] However, in order to determine if an employee's speech is a "matter of public concern" the Court uses "the content, form, and context of a given statement, as revealed by the whole record."[259] While neither Pickering nor Connick provide a concrete explanation of what "matters of public concern" are, it is evident by

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[251] Id. at 568.
[252] Id. at 568.
[253] Id. at 570.
[254] Id.
[255] Id. at 574.
[256] Connick, 461 U.S. at 145-147. The lawsuit in Connick concerned an Assistant District Attorney in New Orleans who circulated a questionnaire within the District Attorney's Office that focused on problems within the office and issues that directly related to grievances by this particular Assistant District Attorney. Connick v. Myers, 461 U.S. 138, 140-141 (1983).
[257] Id. at 145-147.
[258] Id. at 146
[259] Id. at 147-148. In Connick the Court held that many questions in the Assistant District Attorney's questionnaire did not constitute speech that was a "matter of public concern." Connick v. Myers, 461 U.S. 138, 148-149 (1983). The Court focused on the fact that many of the questions within the questionnaire were focused on the disgruntled Assistant District Attorney's own personal issues with her office and "gather ammunition for another round of controversy with her superiors." Id. at 148.

these cases that it is essentially self-defining.[260] As the case in Connick illustrates speech taken as a whole can contain both a "matter of public concern" and other types of speech that are not afforded First Amendment protection.[261] However, Connick holds that finding that speech is a "matter of public concern" is only the first part of the analysis.[262] After determining speech is about "matters of public concern" that speech is weighed against the employer's interests in office efficiency; and, as in Connick, employees speaking on "matters of public concern" can still be Constitutionally fired from their government jobs.[263]

This article's proposed "Anonymous Public Concern Test" incorporates the U.S. Supreme Court's view of protection for anonymous speech and public concern in its three-part analyses for evaluating ISP subpoenas. Borrowing from the standards of Pickering and Connick, courts should (1) evaluate whether the anonymous online speech at issues touches on "matters of public concern."[264] If the online speech meets this first test then the court then (2) determines whether the plaintiff's need to know the defendant's identity substantially outweighs the defendant's right to anonymity. If the court determines the plaintiff's interest substantially outweighs the speaker's anonymity rights the court (3) evaluates the plaintiff's claim using the "good faith" test outlined by the Virginia Circuit Court in AOL.[265] It is important to note that if the Court

[260] Pickering, 391 U.S. at 568; Connick, 461 U.S. at 145-147. Pickering held that a school teacher's letter regarding the school board decisions regarding taxes were "matters of public concern." Pickering v. Board of Educ., 391 U.S. 563, 569-570 (1968). The Supreme Court in Connick held that the employee's office survey did not contain "matters of public concern" where the employee's questionnaire concerned issues that were relevant only to the employee or to the office personnel themselves. Connick v. Myers, 461 U.S. 138, 148-149 (1983). However, one question did rise to the level of public concern which as an inquiry on whether employees in the District Attorney's Office felt compelled to "'work in political campaigns on behalf of office supported candidates'." Id. at 149.
[261] Connick, 461 U.S. at 148-149.
[262] Id. at 149-150.
[263] Id. at 154.
[264] Pickering, 391 U.S. at 568; Connick, 461 U.S. 145-147.
[265] AOL, 2000 WL 1210372 at *8.

determines that the anonymous speech does not qualify as "matters of public concern" the court skips the second step and goes straight to the AOL test.[266]

A. An Analysis of the "Anonymous Public Concern Test"

This next section takes this proposed test and analyzes each part in order to demonstrate how courts would apply it in real-world situations. After each of these elements are discussed, the "Anonymous Public Concern Test" will be applied to the online statements made by anonymous bloggers in Cahill.[267] Through this analysis this new test will be shown to protect anonymous speakers' rights as well as placing reasonable requirements on defamation plaintiffs.

Step 1. "Matters of Public Concern"[268]

This part of the test serves to protect important online commentary that may take the form of high value political speech. Conversely, this analysis helps to weed-out unprotected defamatory speech. If the court were to determine the speech was not "matters of public concern" then the speech would skip the balancing test and go straight to the Step 3 AOL test.[269]

It is important for courts to have standards in determining what are "matters of public concern."[270] As the U.S. Supreme Court held in Connick, "matters of public concern" are determining by the "content, form and context of a given statement, as revealed by the whole record."[271] The U.S. Supreme Court gave further guidance on what constitutes public concern holding that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[272] For the purposes of determining if a comment addresses "matters of public concern" this

[266] Id.; Pickering, 391 U.S. at 568.
[267] Cahill, 879 A.2d at 946-948.
[268] Pickering, 391 U.S. at 568.
[269] Id. at 568; AOL, 2000 WL 1210372 at *8.
[270] Pickering, 391 U.S. at 568.
[271] Connick, 461 U.S. at 147-148.
[272] City of San Diego v. Roe, 543 U.S. 77, 83-84; 125 S.Ct. 521, 525-526 (2004).

proposed test would not allow a plaintiff to separate out individual phrases from a speaker's overall message.[273] In utilizing this method, courts should look to the overall message of the commentary. If the overall message is one that is constitutes "matters of public concern" then the court should go through the Step 2 balancing and Step 3 AOL analysis.[274] While this proposed method not separating defamatory statements from the whole message may seem unduly harsh to plaintiffs it serves the practical function of judicial economy. The nature of online statements is different than those of the written word. Since online writers oftentimes write without much editing or pre-writing it is appropriate to analyze commentary as a whole, rather than individual statements. Since mixed messages still would go through balancing and the AOL test, this method would not necessarily allow defamatory speech to go unpunished.[275]

Step 2. Balancing Speakers' and Plaintiffs' Rights

If the online speech in question is determined to be "matters of public concern," the court then balances the anonymous speaker's interest in remaining unidentified against the plaintiff's interest in discovering the speaker's true identity.[276] This balancing is a crucial part of this new test. This element is modeled on the balancing found in the Dendrite test.[277] However, unlike Dendrite, this balancing is operationalized and does not occur after a court makes the determination of whether a plaintiff has a legitimate defamation claim.[278] This operationalization is important because it remedies the unpredictability of other tests as well as provides courts with some rubric in analyzing anonymous speakers' and defamation plaintiffs' rights. It is essential to establish a standard for courts to follow in balancing. Balancing in

[273] Pickering, 391 U.S. at 568.
[274] Id. at 568; AOL, 2000 WL 1210372 at *8.
[275] AOL, 2000 WL 1210372 at *8.
[276] Pickering, 391 U.S. at 568.
[277] Dendrite, 342 N.J. Super. at 142.
[278] Id.

general is crucial to ISP subpoenas because it provides a protection for anonymous speech. The balancing permits the courts the ability to quickly identify truly frivolous defamation claims as well as baseless assertions for the preservation of anonymity for online speakers. Providing a framework in which courts conduct this balancing also allows for consistency in the courts.

Designing a test in which a court balances the anonymous speaker's and plaintiff's interest early on also provides for judicial economy. Unlike other tests which rely on implicit balancing such as Cahill or balancing after the fact such as Dendrite, this initial balancing allows courts to directly grapple with the issues of a speaker's right to remain anonymous in light of the plaintiff's defamation allegations.[279] It is important for judges to address these issues of anonymous speech rights directly given the history of anonymous speech and the importance the U.S. Supreme Court has given it in Talley and McIntyre.[280]

The standard for balancing these interests will be the "exacting scrutiny" standard.[281] The U.S. Supreme Court in McIntyre held that "exacting scrutiny" meant that government action must be "narrowly tailored to serve an overriding state interest."[282] In Citizens United the U.S. Supreme Court held "'exacting scrutiny' requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[283] This standard was created to present a high hurdle for government action against anonymous speech. While not impossible to overcome, a government entity, such as a trial court enforcing an ISP subpoena, must analyze the important interests of anonymous speakers.

The interests of a defamation plaintiff are evident. Plaintiffs' interests are seeking a remedy for online libel and clearing their besmirched names. However, the interests of anonymous

[279] Dendrite, 342 N.J. Super. at 142; Cahill, 884 A.2d at 461.
[280] Talley, 362 U.S. at 64-65; McIntyre, 514 U.S. at 358-371.
[281] McIntyre, 514 U.S. at 347.
[282] Id. at 347.
[283] Citizens United, 130 S.Ct. at 914.

speakers vary. First, there is the interest in engaging in dialog about important political issues that could otherwise be silenced. Second, there is the interest of speaking freely in an open dialog about issues that are true concerns of society. Third, and perhaps most important, is the interest in speaking on a subject without the fear of reprisal. It was this interest the U.S. Supreme Court first addressed this concern in NAACP, and it is this issue that leads to the concerns of chilling effects on anonymous speech.[284] These interests of anonymous speakers must be taken into account by the courts engaging in this balancing. These issues are important to preserving the integrity of anonymous speech and therefore should be the main factors courts analyze in this new balancing test.

Courts can include other factors within their analysis. For instance, the amount of attention an online posting has received, where the posting was located on the Internet, and the public figure/private citizen status of the plaintiff all come into courts' balancing. While some of these factors may be part of the plaintiff's own determination to bring a defamation suit, they are important for courts to consider when evaluating whether to reveal a defendant's identity.

This balancing test does present an advantage for anonymous speakers. However, plaintiffs can succeed in this test if they can show that the speakers' rights are not at danger. Plaintiffs can point to the low-value of the speech at issue; the lack of potential retribution toward other anonymous speakers in similar situations; and the great interest the plaintiff has in clearing his or her own name. The balancing somewhat determines just how important "matters of public concern" are, and affords plaintiffs the right to sue for defamation on low level speech that is of little value to the community.[285]

[284] NAACP, 357 U.S. at 462.
[285] Pickering, 391 U.S. at 568.

Step 3. AOL Test[286]

If a plaintiff's rights outweigh an anonymous speaker's right to preserve their anonymity the court then must analyze the plaintiff's case under the AOL standard.[287] This standard set forth by the Virginia Circuit Court states a defamation plaintiff can enforce a subpoena for an anonymous speaker's identity:

> "(1) when the court is satisfied by the pleading or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim."[288]

This standard is important for this new "Anonymous Public Concern Test" because it provides courts the opportunity to remove truly frivolous lawsuits while simultaneously placing a low burden on defamation plaintiffs.

This test has been criticized by the court in Cahill because it seemingly places too low a burden on defamation plaintiffs.[289] However, in the context of this new rule this test strikes the appropriate balance. Step 1 and Step 2 of the "Anonymous Public Concern Test" are designed to protect anonymous speech and place an extremely high hurdle for defamation plaintiffs. However, if a plaintiff is able to meet both of these requirements, especially the balancing, then courts should allow them to proceed under this AOL standard.[290] By allowing plaintiffs to put forth only a "legitimate, good faith basis" for a claim, most plaintiffs will be able to proceed with enforcing a subpoena on an ISP.[291]

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[286] AOL, 2000 WL 1210372 *8.
[287] Id.
[288] Id. at *8.
[289] Cahill, 884 A.2d at 458.
[290] AOL, 2000 WL 1210372 *8.
[291] Id. at *8.

This easy hurdle for plaintiffs does not come at the price of anonymous speech since the balancing test rigorously defends anonymous speech. If a plaintiff gets to this stage of the analysis there is good reason to speculate that they not only actually have more than a "legitimate, good faith basis" for their suit, but a winnable defamation case.[292] If a defamation plaintiff gets to this stage and cannot meet the AOL requirements then their case falls into the category of a seriously flawed lawsuit.[293]

B. Application of the "Anonymous Public Concern Test"

This section serves to illustrate three different types of statements this new "Anonymous Public Concern Test" may confront. What follows is an analysis of three different statements from the Cahill case involving anonymous online postings about Councilman Cahill.[294] Each of the comments analyzed presents a different analysis under the "Anonymous Public Concern Test." This analysis underscores why this proposed test is the best approach when dealing with anonymous speakers' and plaintiffs' rights.

Quote 1: "If only Councilman Cahill was able to display the same leadership skills energy and enthusiasm toward the revitalization and growth of the fine town of Smyrna as Mayor Schaeffer has demonstrated! While Mayor Schaeffer has made great strides toward improving the livelihood of Smyrna's citizens, Cahill has devoted all of his energy to being a divisive impediment to any kind of cooperative movement."[295]

Application of Test:

1) Does this qualify as "matters of public concern?"[296] Answer: Yes.

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[292] Id. at *8.
[293] Id.
[294] Cahill, 879 A.2d at 946, 948.
[295] Id. at 946.
[296] Pickering, 391 U.S. at 568

This commentary deals with political issues within a local community and the political ability of a city councilman. The subject of this speech is similar to that in Pickering in that it deals with an important local issue, namely the capability of Councilman Cahill to serve his constituency.[297]

2) Balancing Plaintiff's Rights Against Anonymous Speaker's Rights: Answer: The courts balancing in this scenario should favor the anonymous speaker.

The speech at issue is political speech which is important to the community and to citizens of Smyrna. It addresses local politics that is affecting the community and represents a citizen's thoughts on local issues. Most importantly if this speaker's identity was revealed his or her speech may be chilled. This is the type of speech that anonymity is designed to protect.

The plaintiff's interest here is uncovering the identity of the speaker so the plaintiff can proceed with a defamation suit. However, the commentary here is not the type that would warrant a plaintiff trying to clear his name. Rather, it seems that a plaintiff seeking a defamation suit in this type of case may have an interest in finding out the identity of their political foe, which, in turn, could lead to retributive actions on the part of the plaintiff—something that would chill this speech. This fear of retribution is more palpable in this case since this involves local politics which is more focused on a particular community that national or even state politics. The plaintiff has a relative weak interest in forcing the ISP to reveal the identity of the anonymous speaker. Conversely, the anonymous speaker has great interest in preserving their identity, especially given the nature of the speech. Therefore the balancing in this case favors the anonymous speaker and the ISP will not be forced to reveal the identity of the online blogger.

[297] Id. at 564-567.

3) AOL Test[298]: Answer: No application of the AOL test since the defendant speaker's right to remain anonymous outweighs the plaintiff's right to uncover the defendant's identity in Step 2.[299]

If for some reason the court balanced this speech in favor of the plaintiff and AOL was applied the plaintiff would probably still fail.[300] Given that the speech in question is political opinion it would be difficult for the plaintiff to put forth a "good faith" claim.[301] This demonstrates how this extra layer of analysis still protects the anonymous speaker.

Quote 2: "You're right about Cahill's wife. Word is she left him…couldn't have sex because he has Hepititis [sic] C. Now she's living in Dover with her BIG blond girlfriend and they both go out to the bars most nights trying to pick up guys. I saw her the [sic] out the other night trying to pick up some guys. The guy was so drink [sic] he didn't even know how…looking [sic] she was and they left together."[302]

Application of Test:

1) Does this qualify as "matters of public concern?"[303] Answer: No.

This commentary is entirely personal in nature and concerns the Councilman's marriage and relationship with his wife. The information concerning the Councilman having Hepatitis C is private and does not concern a matter related to his role as a politician. While this posting may be interesting to some readers for the sensational comments made, this does not rise to the level of public concern. The Court should skip the balancing step and go straight to the AOL test.[304]

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[298] AOL, 2000 WL 1210372 *8.
[299] Id.
[300] Id.
[301] Id.
[302] Cahill, 879 A.2d at 948. Original ellipsis used in the actual case used in this statement.
[303] Pickering, 391 U.S. at 568
[304] AOL, 2000 WL 1210372 *8

2) Balancing Plaintiff's Rights Against Anonymous Speaker's Rights: Answer: No balancing necessary since the statements do not meet the requirements of "matters of public concern."[305]

Even if this court did find that the information in this comment was "matters of public concern" the balancing would still favor the plaintiff.[306] The defendant's comments are not those that are of interest to the community, nor is there a risk that the anonymous speaker would be subjected to retribution. The plaintiff has a strong interest in clearing his name; and this lawsuit is probably motivated by that goal. The state has an "overriding state interest" in this situation since they would want to enforce a subpoena in a case where there was clearly malicious defamation not motivated by any important political or community concern.[307]

3) AOL Test[308]: Answer: The test favors the plaintiff.

The statements at issue would qualify for a "good faith basis" for a defamation claim under AOL.[309] The statements at issue are derogatory and personal in nature. This is an example of how this "Anonymous Public Concern Test" would not provide any protection for true defamation by anonymous speakers. In this scenario the ISP would be required to reveal the names of the anonymous online speakers.

Quote 3: "Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration. Cahill is a prime example of failed leadership his eventual ousting is exactly what Smyrna needs in order to move forward

[305] Pickering, 391 U.S. at 568.
[306] Id. at 568.
[307] McIntyre, 514 U.S. at 347.
[308] AOL, 2000 WL 1210372 *8
[309] Id. at *8.

and establish a community that is able to thrive on economic stability and common pride in its town."[310]

Application of Test:

1) Does this qualify as "matters of public concern?"[311] Answer: Yes.

This commentary speaks largely to the ability of Councilman Cahill to perform his political duties. It speaks directly to his service as a politician and public servant to the community. However, unlike the commentary in Quote 1 this comment does include a personal statement concerning the mental health of the councilman. This speech addresses "matters of public concern" since he is a public official.[312] However, unlike the pure political speech found in Quote 1, this comment is potentially defamatory. Additionally this postings regarding the Councilman's inability to serve seems to be predicated upon this belief of his failing mental health.

2) Balancing Plaintiff's Rights Against Anonymous Speaker's Rights: Answer: This is a closer call, but this should favor the defendant.

In examining the comments in this quotation it is clear that the speaker is addressing concerns over the Councilman's abilities as a politician. The public may be interested in these facts and this information may be important for the community at large. The potential chilling effect that exposing the true identity of the speaker is similar to that in Quote 1.[313]

The speaker's commentary concerning the Councilman's mental health presents potential defamation issues. The plaintiff would argue that he has an interest in discovering the identity of

[310] Cahill, 879 A.2d at 946. Quote 2 is actually a continuation of Quote 1. However, for purposes of this analysis they have been broken into two separate comments to illustrate how the "Anonymous Public Concern Test" works.
[311] Pickering, 391 U.S. at 568
[312] Id. at 568.
[313] Cahill, 879 A.2d at 946.

this speaker in order for the plaintiff to clear his name. Stating that a politician is mentally ill is different than stating that he is politically inept.

However, since this quotation deals with as assertion regarding the mental health of the Councilman there is a potential "overriding state interest" here in revealing the identity of the speaker.[314] Mental health of public officials is a matter that should be important to the public. This is a different scenario than saying that a private individual is mentally ill, or even a well-known celebrity, is mentally ill. Mental illness in a political figure is public interest and public concern. This goes to the ability of an individual to serve his or her community and perform their job satisfactorily. Therefore, in this analysis the plaintiff's interests should be outweighed by the defendant's right to speak anonymously.

AOL Test[315]: Answer: Another close call, but the defendant should prevail.

Like the balancing test mentioned above, the AOL test presents a closer call. In this particular case the court should not have to reach this level of analysis because the defendant's interest in anonymous speech does outweigh the plaintiff's interest. The plaintiff in this test would focus on the mental health commentary and show that this made qualify as a "good faith" defamation claim under the AOL standard.[316] The court, however, should focus on the plaintiff's status as a politician and argue that this commentary is the type that politicians are regularly subjected to. This political position of the plaintiff would illustrate that this is not a regular defamation claim. This is a claim made by a politician in relation to an issue that, if true, is a major public interest. As mentioned above the court in this case should not even reach this step.

[314] McIntyre, 514 U.S. at 347.
[315] AOL, 2000 WL 1210372 *8
[316] Id.

Conclusion

Anonymous speech has been important to the development of the United States Constitution and is important today.[317] However, neither anonymous speakers nor defamation plaintiffs should be given free rein in our legal system. In enforcing ISP subpoenas courts must strive to strike a balance between these two interests and achieve a just result that values plaintiffs' rights to sue and anonymous bloggers' right to speak. While both federal and state courts in the U.S. have tried to grapple with this problem none have created a workable solution that treats plaintiffs and speakers equally. The "Anonymous Public Concern Test" best addresses this problem and should be utilized by courts.

This issue of anonymous speech does not stop with online defamation suits and ISP subpoenas. As the Internet grows into a large space for public discourse other issues have and will arise. Perhaps the rubric set forth in this study can provide some structural guidance in how courts should address these problems. Further research is needed in areas concerning anonymous online postings in criminal cases and by third party witnesses. Both of these topics illustrate how wide anonymous speech's impact goes and the types of difficult situations courts find themselves in.

Additionally, more research needs to be produced in refining the balancing of anonymous speakers' rights verses those of defamation plaintiffs. Courts need to have a more systemized approach in evaluating these issues. This study seeks to address some of those concerns, but there is still room for advancement in this area. As the Twenty-First Century moves on new problems with anonymous speech will arise. Nonetheless, it is important for courts to place

[317] Talley, 362 U.S. at 65; McIntyre, 514 U.S. at 360.

those speakers' rights in the same category as the anonymous speech that first supported the First Amendment and Constitution.[318]

Incorporating public concern in to the analysis of ISP subpoena enforcement is an ideal method of protecting important online speech. The biggest issue with any speech regulation is the potential chilling effect. Online defamation suits run the risk of creating a situation where legitimate commentary on the Internet is silenced by offended plaintiffs who are sensitive to any perceived criticism. This new test protects important anonymous online speech while not allowing defamation to hide behind a wide shield of protection.

[318] McIntyre, 514 U.S. at 360-367.