TROLLING & THE FIRST AMENDMENT: PROTECTING INTERNET SPEECH IN THE ERA OF CYBERBULLIES & INTERNET DEFAMATION

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TABLE OF CONTENTS

> "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects."[1]
>
> - Judge Dalzell

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1. Am. Civ Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) *aff'd*, 521 U.S. 844 (1997).

I. INTRODUCTION

The advent of the Internet and the mass proliferation of Internet access has forever changed how Americans exercise their First Amendment speech rights. Access to the traditional forums of print, radio, and television is necessarily limited to those speakers who are able to overcome financial, regulatory, or other barriers to entry.[2] Even when a speaker gains access to the forum, the audience is limited to a subset of subscribers.[3] In contrast, the Internet is unparalleled in its ability to facilitate free or low-cost speech to a potential audience of more than three billion people.[4] Consequently, "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."[5]

However, the ubiquitous nature of Internet speech presents unique challenges to the canons of First Amendment jurisprudence. Unlike traditional speech, Internet speech takes place in a digital environment where both speakers and listeners can participate via computers, smartphones, and other electronic devices. These electronic devices are a means of access to a speech forum, "the Internet," where the identities of participants are easily shrouded in anonymity or false identities.[6]

An Internet speaker's ability to hide or misrepresent his identity poses a significant enforcement obstacle for a defamed, harassed, threatened, or otherwise injured party.[7] The party may be unable to confront or hold an anonymous speaker accountable without going through extensive efforts to "unmask" the speaker's identity.[8] The instances are countless in which an individual has been targeted for abuse by anonymous Internet speech.[9]

A relatively modern and increasingly common form of anonymous,

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2. *See* Robert G. Picard & Bum Soo Chon, *Managing Competition Through Barriers to Entry and Channel Availability in the Changing Regulatory Environment*, 6 INT'L J. ON MEDIA MGMT. 168, 169 (2004) (finding barriers to broadcasting markets include "government policies, capital requirements, economies of scale, product differentiation, switching costs, [and] limited access to distribution channels . . . .").

3. For example, in the case of radio, to those who can pick up the frequency, and in the case of cable television, to those viewers who have paid or "subscribed" to access.

4. *Internet Users*, INTERNET LIVE STATS, http://www.internetlivestats.com/internet-users/ (last visited Mar. 23, 2016).

5. *Am. Civ. Liberties Union v. Reno*, 929 F. Supp. at 881.

6. The phenomena of "catfishing" is a highly publicized example of how pervasive and easy it is to engage in Internet speech using a false identity. Catfishing occurs when an Internet speaker "sets up a false personal profile on a social networking site for fraudulent or deceptive purposes." *Catfish*, MERRIAM-WEBSTER'S DICTIONARY, http://www.merriam-webster.com/dictionary/catfish (last visited Mar. 23, 2016). There is also a television show currently in its fourth season that documents people who have been "catfished" or are "catfishing." *Catfish: The TV Show*, MTV, http://www.mtv.com/shows/catfish-the-tv-show (last visited Mar. 15, 2016).

7. *See* Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 231–32 (2008) (arguing that the Communications Decency Act "leaves no one legally accountable for injuries caused by anonymous postings on the Internet.").

8. Emily Bazelon, *How to Unmask the Internet's Vilest Characters,* N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/24/magazine/mag-24lede-t.html.

9. *See, e.g.*, *Statistics*, STOPTECHNOBULLYING.ORG, www.stoptechnobullying.org/statistics.php (last visited Mar. 15, 2016) (citing 50% of individuals aged 12-24 having experienced digitally abusive behavior).

abusive Internet speech is "trolling."[10] In the context of web speech, a "troll" is an online user who purposefully posts provocative, offensive, or insulting speech in order to draw a reaction from others.[11] Detecting when one is being "trolled" on the Internet is often an impossible task considering the anonymity of the speaker, and the ambiguity of text.[12] A jest may appear as a threat, sarcasm as defamation, or criticism as bullying.[13]

Therefore, it is unsurprising to find numerous failed attempts to prosecute protected Internet speech which, when publicized, has the dual effect of chilling future speech and deterring injured parties from taking legal action.[14]

Nonetheless, the right to anonymous speech on the Internet is being challenged by businesses, individuals, and government legal action.[15] First, the battlefield of the perpetual "war on terror" has shifted online.[16] United States government agencies such as the National Security Agency ("NSA") acting through the Foreign Intelligence Surveillance Court ("FISA Court") collect Internet data, including Internet Protocol ("IP") addresses, search results, and emails.[17] In 2012 there were 1,856 applications for such information through the FISA Court, of which none were denied.[18] The information is requested of people living in the United States for foreign surveillance purposes without their knowledge.[19] Additionally, the rapid growth in online commerce and marketing has prompted companies to take legal action to protect their reputation and products from online defamation.[20]

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10. Christopher Dicky, *Why Popular Science Canceled Its Comments Sections*, NEWSWEEK (Sept. 27, 2013, 10:24 PM), www.newsweek.com/2013/09/27/why-popular-science-canceled-its-comments-sections-238028.html.

11. Eric Benson, *The Evolution of a Troll*, N.Y. MAG., (Apr. 5, 2013), http://nymag.com/news/intelligencer/trolling-2013-4/.

12. Irene E. McDermott, *Trolls, Cyberbullies, and Other Offenders*, 20 SEARCHER 7, 7–11 (2012).

13. *Id.*

14. *See, e.g.*, David Lieberman, *Case Tests Limits of Anonymity on Web*, USATODAY, Aug. 25, 2009, at 3B (discussing "Skanks in NYC" case and its implications on web speech); Jonathan Turley, *Death of a Troll: Suicide Highlights the Perils and Prosecution of Anonymous Speech*, JONATHANTURLEY.ORG (Oct. 14, 2014), http://jonathanturley.org/2014/10/14/death-of-a-troll-suicide-highlights-the-perils-and-prosecution-of-anonymous-speech/. Jonathan Turley is the J.B. and Maurice C. Shapiro Professor of Public Interest Law and the Director of the Environmental Law Advocacy Center at George Washington University Law School.

15. *Online Anonymity and Identity*, ACLU, https://www.aclu.org/issues/free-speech/internet-speech/online-anonymity-and-identity (last visited Mar. 23, 2016) ("[T]he right to remain anonymous has been under steady attack in the online world. Governments and corporations have attempted to unmask unpopular speakers through subpoenas directed at the websites they visit."); David Post & Bradford C. Brown, *On the Horizon: Your Right to Remain Anonymous Is Eroding*, INFORMATIONWEEK (Dec. 9, 2002), http://www.informationweek.com/on-the-horizon-your-right-to-remain-anonymous-is-eroding/d/d-id/1017107.

16. Matthew Hay Brown, *U.S. War on Terror Focuses on New Battlefield: The Internet*, BALT. SUN (Jan. 14, 2012), http://articles.baltimoresun.com/2012-01-14/news/bs-md-baxam-homegrown-terrorist-20120114_1_state-department-designated-terrorist-group-terror-group-foreign-terrorist-organization; Alia E. Dastagir, *Internet Has Extended Battlefield in War on Terror*, USATODAY (May 5, 2013, 9:55PM), www.usatoday.com/story/news/nation/2013/05/05/boston-bombing-self-radicalization/2137191/; Scott Pelley, *Terrorists Take Recruitment Effort Online: On the Use of the Internet to Recruit Jihadists*, CBS NEWS (Mar. 2, 2007), www.cbsnews.com/news/terrorists-take-recruitment-efforts-online/.

17. Bill Mears & Halimah Abdullah, *What Is the FISA Court?*, CNN (Jan. 17, 2014, 2:21 PM), http://www.cnn.com/2014/01/17/politics/surveillance-court/.

18. *Id.*

19. *Id.*

20. *See* Josh Harkinson, *Yelp Is Pushing a Law to Shield Its Reviewers From Defamation Suits*, MOTHER JONES (July 20, 2015, 5:05 AM), http://www.motherjones.com/politics/2015/07/yelp-slapp-lawsuit-

The shift to e-commerce forced many states to enact laws to protect the identity of Internet speech from Strategic Lawsuits Against Public Participation (SLAPPs) and lawsuits by private companies aimed at chilling speech or intimidating competitors and individuals into refraining from criticizing them.[21] However, businesses must be afforded an avenue to obtain the identities of parties engaged in Internet defamation or other actionable behavior in order to hold them accountable.[22] The difficulty lies in protecting Internet speech without foreclosing on an aggrieved party's right to take legal action.[23]

As more people communicate through social media websites, there has been a surge of cases where judges attempt to apply traditional legal tests concerning defamation, harassment, and true threats in the context of Internet speech.[24] The result is an evolving Internet speech landscape in which the Supreme Court has resisted setting forth a new test for evaluating impermissible Internet speech.[25]

The tension between protecting anonymous Internet speech and providing plaintiffs and governments the legal tools necessary to prosecute wrongdoers will continue to intensify as Internet speech replaces traditional speech forums. As a result, the Supreme Court will be petitioned to hear more cases like *U.S. v. Elonis*, where Internet speech challenges traditional First Amendment jurisprudence.[26] The Court's reticence created a vacuum characterized by jurisdictional splits on anonymous Internet speech issues with salient First Amendment implications.[27]

This Note argues that the Supreme Court should not continue ignoring the elephant in the room because doing so will allow the chilling of Internet speech and give way to legislative encroachment. The Court should be more aggressive in defining the contours of permissible Internet speech in order to provide much needed guidance to circuit courts that have been "hopelessly

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legislation-speak-free-act (discussing a proposed federal bill to clamp down on Strategic Lawsuits Against Public Participation (SLAPPs)).

21. *Anti-SLAPP Laws*, REP. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anti-slapp-laws-0 (last visited Mar. 23, 2016).

22. Courts cannot issue injunctions against John Does and while Internet Protocol ("IP") addresses identify the computer, they do not identify the user. Cale Guthrie Weissman, *What Is an IP Address and What Can It Reveal About You?*, BUS. INSIDER (May 18, 2015, 4:45 PM), http://www.businessinsider.com/ip-address-what-they-can-reveal-about-you-2015-5.

23. MARK D. RISK ET AL., AM. BAR ASS'N SEC. OF LABOR AND EMP'T LAW, CYBERSMEAR: IT'S WHAT THE INTERNET IS FOR, RIGHT? 15 (2005), http://apps.americanbar.org/labor/techcomm/mw/Papers/2005/barber.pdf ("[W]hether one is posting truthful and constitutionally protected information, or attempting to defraud the investing public, no one can dispute that the Internet has made it considerably easier for one's voice to be heard by others.").

24. *E.g.*, J.S. ex rel. Snyder v. Blue Mountain Sch Dist., 650 F.3d 915 (3d Cir. 2011); *In re* Anonymous Online Speakers, 661 F.3d 1168 (9th Cir. 2011); Seldon v. Magedson, No. 11 CIV. 6218 PAC MHD, 2012 WL 4475274, at *1 (S.D.N.Y. July 10, 2012) *report and recommendation adopted*, No. 11 CIV. 6218 PAC MHD, 2012 WL 4475020 (S.D.N.Y. Sept. 28, 2012); D.C. v. R.R., 106 Cal. Rptr. 3d 399 (Cal. Ct. App. 2010).

25. *See e.g.*, Elonis v. United States, 134 S. Ct. 2001, 2004 (2015) (stating that "[g]iven the disposition here, it is unnecessary to consider any First Amendment issues.").

26. *Id.*

27. *See* Marc Fuller, *Jurisdictional Issues in Anonymous Speech Cases*, 31 COMM. LAW. 23, 23 (2015), www.americanbar.org/publications/communications_lawyer/2015/january/jurisdictional_issues.html (discussing the importance of "jurisdictional considerations in the protection of anonymous speech.").

fractured" on a variety of Internet speech issues.[28]

Part II of this Note examines seminal Supreme Court decisions regarding anonymous speech in traditional forums. Part III discusses how courts have attempted to strike a balance between the right to speak anonymously on the Internet and the need to identify tortfeasors and in the process created a jurisdictional split and inconsistent results. Part IV recommends that the Supreme Court should articulate a clear standard for unmasking anonymous Internet speakers and avoid evaluating future Internet speech cases within the existing First Amendment jurisprudential framework. The Internet as a forum for communication is *sui generis* and demands nothing less.

II. BACKGROUND

A. Levels of Scrutiny as Applied to Different Types of Speech

Existing First Amendment jurisprudence categorizes speech into three levels of protection: unprotected speech, semi-protected speech, and protected speech.[29] Obscene speech,[30] child pornography,[31] true threats,[32] fighting words,[33] incitement to crime,[34] and tortious speech[35] have been, historically-speaking, unprotected by the First Amendment and can therefore be prohibited for any rational purpose.[36] In contrast, political speech,[37] hate speech,[38] and

28. *E.g.*, Mark Joseph Stern, *Judges Have No Idea What to Do About Student Speech on the Internet*, SLATE (Feb. 18, 2016, 5:15 PM), http://www.slate.com/articles/technology/future_tense/2016/02/in_bell_v_itawamba_county_school_board_scotus_may_rule_on_the_first_amendment.html.

29. *See* Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 891–94 (1991) (describing the different levels of speech protection afforded by the First Amendment).

30. *See* Miller v. California, 413 U.S. 15, 24 (1973) (holding the standard to determine whether material is obscene is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

31. *See* New York v. Ferber, 458 U.S. 747, 765 (1982) (finding that child pornography is "a category of material the production and distribution of which is not entitled to First Amendment protection.").

32. *See* Virginia v. Black, 538 U.S. 343, 363 (2003) (holding that "[t]he First Amendment permits [a State] to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.").

33. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (affirming appellant's conviction under the statute prohibiting the use of offensive words towards another in a public place because "face-to-face words" are likely to cause a "breach of the peace").

34. *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (holding that speech may not be punished on the grounds of its dangerous tendencies unless it involves direct advocacy of imminent lawless activity which is likely to occur).

35. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (finding that, "public figures and public officials may not recover for the tort[s] of intentional infliction of emotional distress[, slander, or libel] by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. . . ."); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 324 (1974) (holding that "the state interest in compensating injury to the reputation of private individuals is [] greater than for public officials and public figures . . . . [and that] [s]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent.").

36. Galloway, *supra* note 29, at 893 ("The Court has held that some communications are outside the

pornography[39] are afforded the highest protection under the First Amendment in the form of strict scrutiny.[40] Commercial speech is to a certain extent protected, depending on the particular speech and context, under an intermediate scrutiny analysis.[41] The Court applies the appropriate level of scrutiny to the statute or ordinance in question depending on the type of speech and the category it falls under.[42] The Court determines how speech is categorized based on the content, the speaker's intent, and the forum.[43]

B. The Supreme Court's Protection of Anonymous Speech in Traditional Forums

In *Talley v. California*, the Supreme Court invalidated an ordinance that barred leafleting without listing the names and addresses of the people who prepared, distributed, or sponsored them.[44] The Court found that the ordinance's identification requirement would unnecessarily burden the distribution of information and freedom of expression.[45] It cited to historical instances, such as the publication of the Federalist Papers under fictitious names, where anonymity had been "assumed for the most constructive purposes."[46]

More than thirty years later, in *McIntyre v. Ohio Elections Commission*, the Supreme Court reiterated its holding in *Talley* and found that Ohio's statutory prohibition against the distribution of anonymous campaign literature violated the First Amendment.[47]

However, both *Talley* and *McIntyre* were cases involving political speech, and as such, the Court applied strict scrutiny to both laws, thereby requiring a *compelling* government interest (as opposed to important or reasonable), and

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First Amendment. If, in a particular case, the government action affects only such unprotected expression, the First Amendment is not applicable and no first amendment violation is possible. In such cases, the government may usually impose regulations, including prohibitions of the unprotected speech, if the regulations satisfy substantive due process rationality review.").

37. *See* Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (holding that state imposed limitations on campaign contributions "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

38. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (finding that, "[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.").

39. Pornography is protected as long as it is not obscene as set forth by the *Miller* Test in *Miller v. California*, 413 U.S. 15, 24 (1973), and generally speaking by the requirement that laws regulating speech be content-neutral unless they pass strict scrutiny.

40. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1997), http://www2.law.ucla.edu/volokh/scrutiny.htm.

41. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (reversing a judgment that upheld as constitutional appellee's regulation that completely banned promotional advertising by an electrical utility, such as appellant, because the regulation impermissibly restrained appellant's First Amendment right of free speech).

42. Volokh, *supra* note 40.

43. *Id.*

44. Talley v. California, 362 U.S. 60, 64 (1960).

45. *Id.* at 65.

46. *Id.*

47. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

no less restrictive alternative to accomplish that interest.[48]

In 2002, the Supreme Court decided *Watchtower Bible v. Village of Stratton* and extended its protection for anonymous political speech to religious speech.[49] The Court found that despite the important interests of protecting residents' privacy and preventing fraud and crime, the permit requirement burdens more speech than necessary to achieve those interests.[50] Despite recognition of these interests as legitimate, the Court emphasized the need to find a balance between the problems that the permit requirement was attempting to address, namely to protect Stratton's elderly citizens from fraud, and the effect of burdensome regulations on First Amendment rights.[51] The Court found that the permit requirement forced a canvasser to be identified via an application process, which was made available for public inspection, and thereby resulted in "a surrender of the anonymity [that the] Court has protected."[52]

To date, the Supreme Court has yet to hear a case where the right to anonymous speech on the Internet has been directly implicated. However, the Court has decided important Internet speech cases regarding obscenity.[53] In doing so, it applied the traditional levels of scrutiny (strict, intermediate, and rational basis) to laws that implicated First Amendment concerns.[54]

In *American Civil Liberties Union v. Reno*, the Court held key provisions of the Communications Decency Act (CDA) unconstitutional and found "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet.[55] The Court applied First Amendment protection as it has in traditional forums to Internet speech and held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and less restrictive alternatives were available.[56]

While *Reno* did not involve anonymous speech, the Court did recognize inherent problems with regulating Internet speech.[57] For example, the inherent difficulty in identifying the audience and protecting minors from harmful speech without suppressing speech which adults have a constitutional right to receive and to address to one another.[58]

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48. *See id.* at 357 ("Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech"); *Talley v. California*, 362 U.S. at 64 ("Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited . . . .").

49. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

50. *Id.*

51. *Id.* at 163.

52. *Id.* at 153.

53. *See* Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 870 (1997) (finding CDA provisions protecting minors from harmful material on the Internet were facially overbroad in violation of the First Amendment); *see also* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656 (2004) (holding that that ISPs and civil liberties groups were likely to prevail on claim that COPA violated the First Amendment by burdening adults' access to some protected speech).

54. *See Reno*, 521 U.S. at 870 (applying strict scrutiny to the Communications Decency Act after finding the statute discriminated based on the content of speech).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 876 ("The Court found no effective way to determine the age of a user who is accessing

In *Ashcroft v. American Civil Liberties Union*, the Court again rejected a congressional attempt to regulate Internet pornography to protect minors.[59] Congress passed the Child Online Protection Act (COPA) to prevent minors from accessing pornography online.[60] The Court upheld a preliminary injunction against enforcement of COPA because Congress had not met its burden to show that the statute's requirements were more effective than other methods, such as web filters, at preventing minors from accessing pornography.[61] The majority found that there was no showing by Congress that COPA was the least restrictive alternative available to accomplish Congress' goal of protecting children from pornography.[62]

> In considering this question, a court assumes that certain protected speech may be regulated, and then asks: what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished . . . . [T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.[63]

The Court's decision in *Ashcroft* recognizes the uniquely ubiquitous nature of the Internet as a forum for communication where children can gain access to adult content by obtaining a credit card and where existing filter technologies are incapable of precision censorship.[64]

In both *Reno* and *Ashcroft*, the Court recognized that the features of speech on the Internet pose substantial obstacles in identifying the speaker and the speaker's audience.[65] Although the Court wrestled with the anonymity problem in the context of an overbroad statute, it did not need to address the scope of First Amendment protection to anonymous Internet speech to decide the cases.[66] Like in *Elonis*, the Court has repeatedly avoided articulating a First Amendment jurisprudential standard tailored to the unique nature of the Internet as a speech forum.[67]

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material through e-mail, mail exploders, newsgroups, or chat rooms.").

59. Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656 (2004).

60. *Id.* at 659.

61. *Id.* at 673.

62. *Id.*

63. *Id.* at 666.

64. *Id.* at 657–59.

65. *Id.* at 656; Reno v. Am. Civ. Liberties Union, 521 U.S. 844 (1997).

66. *Id.*

67. *See* Elonis v. United States, 134 S. Ct. 2819 (2014) (reasoning that petitioner's case could be decided on grounds that did not implicate the First Amendment).

III. ANALYSIS

A. Using Elonis v. United States as a Case Study in Consideration of the Incompatibility of Traditional First Amendment Jurisprudence with Internet Speech.

The United States Supreme Court recently granted certiorari and decided *Elonis v. U.S.*[68] The case concerned alleged threatening comments made on Facebook by the defendant against his ex-wife, former employer, and co-workers, in violation of a federal statute proscribing transmitting threatening communications in interstate or foreign commerce.[69] The trial court found Elonis guilty of making threatening communications over interstate lines under 18 U.S.C. § 875(c), based on comments he posted on Facebook.[70] The Third Circuit Court of Appeals upheld his conviction under the objective intent standard, finding that there was sufficient evidence to support a finding that his posts[71] were a true threat.[72] The Appellate Court looked to Supreme Court decisions regarding true threats in the context of traditional speech forums to define the "intent" requirement.[73]

The issues before the Supreme Court were: (1) whether a conviction of threatening another person requires proof of the defendant's subjective intent to threaten and (2) whether it is enough to show that a "reasonable person" would regard the statement as threatening.[74]

The *Elonis* case offers a glimpse of the potential problems in litigating Internet speech cases under existing First Amendment Supreme Court jurisprudence. Although the defendant was not speaking anonymously, determining if his posts were true threats or as the defendant claimed, "original rap lyrics,"[75] turned on what standard of intent the court adopted.[76] The Court applied the objective standard of intent it had adopted in previous Internet speech cases.[77] It did not matter if the speaker himself intended to

68. *Id.*

69. United States v. Elonis, 730 F.3d 321, 323–27 (3d Cir. 2013).

70. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, Elonis v. United States 134 S. Ct. 2819 (2014), *and rev'd*, 135 S. Ct. 2001 (2015).

71. Defendant's posts include: "If I only knew then what I know now . . . I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder," and "[t]ook all the strength I had not to turn the bitch ghost. Pull my knife, flick my wrist, and slit her throat. Leave her bleedin' from her jugular in the arms of her partner . . . ." United States v. Elonis, 135 S. Ct. 2001, 2006–16 (2014).

72. *Elonis*, 730 F.3d at 335.

73. The appellate court relied heavily on *R.A.V. v. City of St. Paul* and *Virginia v. Black* to refute the defendant's contention that to convict on the basis of a true threat there must be a finding that the speaker had the subjective intent of conveying a threat. *Id.* at 328–30.

74. Lyle Denniston, *Argument Analysis: Taking Ownership of an Internet Rant*, SCOTUSBLOG (Dec. 1, 2014, 2:13 PM), http://www.scotusblog.com/2014/12/argument-analysis-taking-ownership-of-an-internet-rant/.

75. Rachel Raczka, *The Supreme Court Is Tackling Facebook, Rap Lyrics, and the First Amendment*, BOSTON.COM (Dec. 8, 2014, 9:39 AM), http://www.boston.com/news/nation/2014/12/08/the-supreme-court-tackling facebook-rap-lyrics-and-the-first amendment/kkMo8U6HwcAh7vTLLCzMWP/story.html.

76. *Elonis*, 730 F.3d at 332 ("We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c).").

77. *Id.* at 329–33.

communicate a threat, but rather if a "reasonable person" would find the speech to be threatening.[78]

> While contemporary speakers may exercise more control over their online identities, their ability to control the distribution of their communications is severely constrained. The nature of social networks permits a message intended for one or more specific listeners to be distributed among countless unintended recipients in the blink of an eye, often without the speaker's knowledge or consent.[79]

However, there is a jurisdictional split concerning the appropriate standard of intent for prosecuting true threats over the Internet and how to apply it.[80] The First Circuit adopted a speaker-centered standard under which a defendant may be convicted for making a threat if "he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[81] The Second Circuit found that a true threat conviction was sufficiently supported if the jury found that the speaker had "a specific intent to communicate a threat to injure."[82]

The Ninth and Fourth Circuits adopted a standard that requires a finding that the speaker intended to threaten.[83] In contrast, the Fifth, Eighth, and Eleventh Circuits have adopted a reasonable listener or recipient test that focuses on whether an objectively reasonable recipient would interpret the message as a threat.[84]

The jurisdictional split highlights two important points. First, courts differ on whether to focus the "true threats" test on the subjective or objective intent of the speaker, the recipient's interpretation of the message, and/or whether the recipient standard is objective or subjective. Second, courts have struggled to obtain uniformity because the Supreme Court has not provided sufficient clarity.[85]

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78. "Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from 'the fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening." *Id.* at 330 (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)).

79. Brief for The Thomas Jefferson Center for The Protection of Free Expression et al. as Amici Curiae Supporting Petitioner, United States v. Elonis, 134 S. Ct. 2819 (2014) (No. 13-983).

80. Eugene Volokh, *The Supreme Court Doesn't Decide When Speech Becomes a Constitutionally Unprotected "True Threat"*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/the-supreme-court-doesnt-decide-when-speech-becomes-a-constitutionally-unprotected-true-threat/.

81. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997).

82. United States v. Kelner, 534 F.2d 1020, 1023 (2d Cir. 1976).

83. *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 308 (citing United States v. Francis, 164 F.3d 120, 122 (2d Cir. 1999) and United States v. Patillo, 438 F.2d 13, 15–16 (4th Cir. 1971)).

84. United States v. Daughenbaugh, 49 F.3d 171, 173–74 (5th Cir. 1995) ("The plain language of the letters was sufficient to place a reasonable recipient in apprehension."); United States v. J.H.H., 22 F.3d 821, 827–28 (8th Cir. 1994) ("In evaluating this testimony, we ask whether an objectively reasonable recipient would view the message as a threat."); United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) ("The question is whether there was sufficient evidence to prove . . . that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm upon or to take the life of the persons named in the statute.").

85. *See* Rothman, *supra* note 83, at 302 (arguing that the Court's "minimal guidance has left each

Applying a reasonable person standard to speech that takes place on the Internet will have a chilling effect on speech.[86] If the objective standard of intent is applied to determine a true threat over the Internet, there is a substantial likelihood that a "reasonable person" somewhere in the world will view the speech as threatening, even if the actual speaker really meant it as a joke, or in Elonis' case as a "rap lyric."[87]

Like in *Elonis*, jurors are asked to apply the reasonable person standard, and the jurors' determination of what is reasonable will vary by town, city, and state.[88] In this context, the reasonable person standard as applied to interpreting Internet speech will inevitably yield results that are heavily dependent on one's familiarity with the violent nature of rap lyrics.[89] In a situation where the jury's personal experiences and taste in music may determine the outcome of the trial, the *voir dire* process may be outcome determinative and result in inconsistent convictions. Personal proclivities and preferences should not dictate the outcome of First Amendment protection to Internet speech.

Imagine a not-so-fictional scenario where someone tweets "tomorrow I will kill everyone during the new batman premier in Colorado people will die for the glory of le 9Gag army !!!"[90] To many "reasonable recipients" this tweet will constitute a true threat and under the Fifth, Eighth, and Eleventh Circuits' standard may be successfully prosecuted.[91] However, if the jury is familiar with 9Gag[92] or similar "trolling" websites,[93] the tweet will almost certainly fall short of a true threat because their interpretation of the speech in question would be informed by their knowledge of the forum in which the speech was made (i.e. there will be sufficient context).

The objective intent standard is thus problematic because, in the context of Internet speech, it is almost impossible to apply with uniformity, and even if such uniformity were achieved, the chilling effect on speech would in many instances outweigh the interest protected.[94]

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circuit to fashion its own test").

86. *See* Elonis v. United States, 135 S. Ct. 2001, 2011 (2014) (clarifying that while a "'reasonable person' standard is a familiar feature of civil liability in tort law," it is nonetheless "inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing") (internal quotations omitted).

87. *Id.*

88. *Id.*

89. *See* Matthew R. Hodgman, *Class, Race, Credibility, and Authenticity Within the Hip-Hop Music Genre*¸ 4–2 J. SOC. RES. 402, 406 (2013) (identifying rapper Bubba Sparxxx as a rare representative of an "authentic" non-urban rapper).

90. Damon Poeter, *Internet Trolls Insert Themselves Into 'Dark Knight' Shooting Tragedy*, PC MAG. (Jul. 20, 2012, 12:48 PM), http://www.pcmag.com/article2/0,2817,2407431,00.asp.

91. *See generally* United States v. Daughenbaugh, 49 F.3d 171, 173–74 (5th Cir. 1995) (discussing the Fifth Circuit's standard for prosecuting threats); United States v. J.H.H., 22 F.3d 821, 827–28 (8th Cir. 1994) (distinguishing "true threats" from constitutionally protected speech under the Eighth Circuit's standard); United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (adopting a reasonable recipient standard to evaluate whether the speech in question constitutes a true threat).

92. 9GAG, http://9gag.com/ (last visited Mar. 23, 2016).

93. *E.g.*, REDDIT, https://www.reddit.com (last visited Mar. 23, 2016); 4CHAN, http://www.4chan.org/ (last visited Mar. 23, 2016).

94. *See* Paul Larkin & Jordan Richardson, *True Threats and the Limits of First Amendment Protection*,

For example, consider the following statement: "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[95] This statement could constitute a true threat and therefore fall outside of First Amendment protection if it were made on the Internet under the objective standard. If someone posted this statement on Facebook or other social media websites today, the reaction would stand in stark contrast with the reaction of those who had contextual knowledge at the time it was originally said.[96] Facebook users would probably have little to no context within which to consider this statement because unlike face-to-face communications, the Internet is an unsuitable forum from which to discern context.[97] In modern parlance, "LBJ" may be understood as basketball star LeBron James rather than President Lyndon Baines Johnson[98] and therefore add further confusion to the reasonableness of a true threat interpretation. Linguistic interpretation is a mostly subjective endeavor, and without context Internet speech is vulnerable to judicial and legislative overreach and overregulation.

Context on the Internet is almost always non-existent, and the speaker's intent is nearly impossible to conclusively determine, which goes directly to this Note's argument that the Supreme Court should resist applying traditional First Amendment jurisprudence to Internet speech. A speaker can make threats and always claim that it was not his actual intent to threaten anyone and that it was merely a poem, a rap lyric, prose, etc.[99]

As a result, many "true threats" would go unpunished, and the Internet could deteriorate into a forum where bullies inflict fear on others. Some Internet speech scholars argue that this has already happened, especially in the context of cyberbullying.[100] Conversely, too much speech could be punished, which may cause a chilling effect on the constitutionally protected speech on the Internet.[101] Such an effect is antithetical to the Supreme Court's underlying policy rationale for striking down various statutes as restricting more speech

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HERITAGE FOUND. (Dec. 8, 2014), http://www.heritage.org/research/reports/2014/12/true-threats-and-the-limits-of-first-amendment-protection (arguing that the objective test for what constitutes a true threat is a negligence standard, which is inconsistent with the dictates of the First Amendment).

95. Watts v. United States, 394 U.S. 705, 706 (1969). Other courts considering true-threats cases have focused on certain elements of *Watts*, including: (1) the fact that the comments were made accompanying a political debate; (2) the conditional nature of the threat; and (3) the context of the speech, as apparently several listeners laughed after Watts spoke. David Hudson, *True Threats*, FIRST AMEND. CTR. (May 12, 2008), http://www.firstamendmentcenter.org/true-threats.

96. *Id.*

97. *See* Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43 (2011) (arguing that context is often lost in Internet speech and there is very little jurisprudence clarifying the issue).

98. *When You See the Initials "LBJ", Who Do You Think of?* IGN ENT'T INC. (Dec. 28, 2012), http://www.ign.com/boards/threads/when-you-see-the-initials-lbj-who-do-you-think-of.452815017/page-2. *But see Watts*, 394 U.S. 705 (1969) (finding that Defendant's alleged threat against President Lyndon Baines Johnson "LBJ" was not a true threat but rather crude political hyperbole).

99. *See Elonis*, 135 S. Ct. at 2002 (showing that the defendant argued that the alleged Facebook threats were actually original rap lyrics).

100. *See* Smith Sydney, *Cyberbullying in Schools: Chapter 157 Updates the Law on Suspension for Online Conduct*, 44 MCGEORGE L. REV. 591, 591–92 (2013) (discussing the epidemic of online cyber bullying).

101. *See infra*, note 102 (discussing the importance of the Supreme Court's overbreadth doctrine as a prophylactic remedy aimed at preventing or minimizing the "chilling" of constitutionally protected speech).

than necessary under both an overbreadth and least restrictive alternative analysis.[102]

In sum, the Court's decision to leave the Internet speech issue unaddressed in *Elonis v. U.S.* could have a chilling effect on Internet speech.[103]

B. Court Decisions Regarding Anonymous Speech on the Internet

Courts are increasingly adjudicating cases in which the freedom of speech and the speaker's right to remain anonymous conflict with a plaintiff's ability to protect himself from tortious conduct. One recurring tension lies in an Internet speaker's wish to remain anonymous versus a plaintiff's need to identify or "unmask" the speaker in order to hold the speaker liable in a court of law.[104] Without guidance from the Supreme Court on how to apply traditional First Amendment tests to Internet speech or a modern test that properly accounts for the unique forum that is the Internet, jurisdictional splits have formed that threaten to chill Internet speech.[105]

Columbia Ins. Co. v. seescandy.com is a seminal case in determining how and when a plaintiff can unmask an anonymous online speaker.[106] The case involved a trademark infringement suit against an anonymous or unknown defendant pertaining to an Internet domain name.[107] The plaintiff requested the court issue an order of limited discovery so that the defendant's identity could be ascertained so as to be able to serve him or her.[108]

The court set forth a four-part test for granting limited discovery to disclose the identity of anonymous Internet tortfeasors.[109] First, the plaintiff should identify the anonymous party with enough specificity to allow for a determination as to whether the defendant is a real person or entity subject to suit in federal court.[110] Second, the plaintiff must "identify all previous steps taken to locate the elusive defendant" to show that plaintiff has made a good-faith effort to comply with the requirements of service of process.[111] Third, the plaintiff needs to establish that his suit could withstand a motion to dismiss.[112]

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102. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991) ("First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a "chilling effect.").

103. *See generally* Brief for The Thomas Jefferson Center for the Protection of Free Expression, The Pennsylvania Center for the First Amendment et al. as Amici Curiae Supporting Petitioner, Elonis v. United States, 135 S. Ct. 2001 (2014) (NO. 13-983) (noting potential effect *Elonis* decision would have on free Internet speech); *see also* Denniston, *infra* note 115 (noting that the Supreme Court is not fully addressing the free Internet speech issue).

104. Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?* 50 B. C. L. REV. 1373, 1373–74 (2009).

105. Ruthann Robson, *The Difficulty of Discussing the Facebook Threats Going to Supreme Court in* Elonis v. United States, LAW PROFESSOR BLOGS NETWORK (Aug. 28, 2014), http://lawprofessors.typepad.com/conlaw/2014/08/the-difficulty-of-discussing-the-facebook-threats-going-to-supreme-court-in-elonis-v-united-states.html.

106. Columbia Ins. Co. v. seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

107. *Id.* at 580–81.

108. *Id.*

109. *Id.*

110. *Id.* at 578.

111. *Id.* at 579.

112. *Id.*

Fourth, the plaintiff should file a request for discovery that:

> [A]long 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 and for which there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible.[113]

The court's opinion touches upon the primary and still unresolved issues concerning anonymous Internet speech.[114] The decision came down more than a decade ago, yet little-to-no progress has been made in clarifying or uniformly applying First Amendment jurisprudence in the context of Internet speech.[115] Judge Jensen stated that "with the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line."[116] The opinion goes on to address the problem that "the tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information," and injured parties are "likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor."[117] Judge Jensen found that the need to permit filing against anonymous defendants must be "balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously."[118] The opinion concludes with a poignant policy consideration that underscores the danger of allowing plaintiffs free rein to unmask anonymous Internet speakers: "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."[119]

Although the cause of action in *seescandy.com* was trademark infringement, Judge Jensen's articulation of a standard for unmasking anonymous Internet speakers has served as a foundation for subsequent cases concerning Internet defamation and libel.[120] However, courts have differed in

113. *Id.* at 580.

114. *Id.*

115. *See* Lindsay J. Gower, Blue Mountain School District v. J. S. Ex Rel. Snyder*: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?* 64 ALA. L. REV. 709, 710 (2013) (arguing that the Supreme Court should clarify the law regarding off-campus Internet speech); *see also* Lyle Denniston, *Opinion Analysis: Internet Threats Still in Legal Limbo?* SCOTUSBLOG (June 1, 2015, 1:49 PM), http://www.scotusblog.com/2015/06/opinion-analysis-internet-threats-still-in-legal-limbo/ (stating that "[a]nother issue left unanswered by the Roberts opinion was whether the threats law, when applied to speech along the lines of Elonis's postings, would violate the First Amendment's protection of free speech").

116. *Columbia Ins. Co.*, 185 F.R.D. at 578.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d 1168 (9th Cir. 2011) (denying a writ of mandamus in a case involving allegedly false postings against a business on the Internet); Doe v. Cahill, 884 A.2d 451 (Del. 2005) (reversing an order to reveal the identity of an Internet poster based on the court's analysis that "no reasonable person would have interpreted the statements as anything other than opinion"); Dendrite Int'l, Inc. v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001) (affirming a decision to deny

how to best balance the right to speak anonymously and the right to hold responsible parties accountable for their tortious conduct.[121]

Without further guidance from the Supreme Court, jurisdictional splits will persist, leading to inconsistent outcomes that chill Internet speech. Circuit courts have tried to fill the void left by the Court's avoidance of the issue. Circuits have articulated balancing test variances from *seescandy.com* in order to further a policy of discouraging and preventing lawsuits aimed at bullying anonymous online speakers and intending to chill speech.[122]

The primary jurisdictional split concerning how to apply the balancing test has developed around two standards: the *Dendrite* test[123] and the *Cahill* test.[124] In cases involving efforts by a party to identify anonymous online speakers, courts have generally continued to follow a pattern of applying the high-burden *Dendrite*[125] and *Cahill* tests where any kind of expressive speech is at issue.[126]

In *Dendrite Int'l, Inc. v. Doe No. 3*, a company brought a defamation claim against "John Doe" defendants for messages posted on a Yahoo! bulletin board.[127] The anonymous messages entailed false accusations that the president of Dendrite was secretly and unsuccessfully attempting to sell the company, and other comments concerning the company's change in "revenue recognition accounting."[128] All the online posts were made after the company disclosed a quarterly earnings report that was subsequently criticized via investment news articles, which provided fodder for gossip and underscored the context in which the anonymous online speakers had made their comments.[129] The company sought discovery compelling the Internet service provider to disclose the defendants' identities, but the court denied the company's subpoena to disclose the identity of the anonymous speakers.[130]

The New Jersey Appellate Court cited to *Talley* and *McIntyre* in support of a speaker's right to anonymity and *Reno* to extend the right to Internet speech.[131] The court found that the right to discovery of John Doe No. 3's

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disclosing the identity of an Internet poster because the trial court did not abuse its discretion).

121. "Although courts may be converging on standards for curbing the use of libel suits to breach the right to speak anonymously, the piecemeal, state-by-state development of standards continues to make the scope of protection for John Does uncertain. Regardless of how high courts set the bar for plaintiffs for obtaining a John Doe's identity, these new standards will provide insufficient protection to anonymous online speech unless judges apply existing libel doctrines in ways that are responsive to the distinctive culture of Internet discourse." Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn From John Doe?*, 50 B.C. L. REV. 1373, 1380 (2009).

122. *See id*. (arguing that these balancing tests are designed to differentiate legitimate defamation claims from "cyberslapps," or frivolous suits aimed at preventing speech).

123. *Dendrite*, 342 N.J. Super. at 134.

124. *Cahill*, 884 A.2d at 451.

125. *See generally In re* Anonymous Online Speakers, 661 F.3d 1168 (describing the high burden that needs to be met for the test).

126. *Id.*

127. *Dendrite*, 342 N.J. Super. at 134.

128. *Id.* at 145.

129. *Id.*

130. *Id.*

131. *Id.* at 148.

identity turned on whether his statements were defamatory[132] and adopted the four-part test from *Columbia Ins. Co. v. seescandy.com* to determine whether Dendrite's complaint would survive a motion to dismiss.[133]

The court found that Dendrite's defamation claim met the "bare minimum requirements" for a defamation claim and would survive a motion to dismiss.[134] However, the lower court's denial of Dendrite's discovery request was affirmed because Plaintiffs "failed to establish a sufficient nexus between John Doe No. 3's statements and Dendrite's allegations of harm."[135] The court found:

> The key principle in defamation/free expression cases is the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. The law of defamation exists to achieve the proper balance between protecting reputation and protecting free speech. Thus, the purpose of the law of defamation is to strike the right balance between protecting reputation and preserving free speech.[136]

The test set forth essentially required a showing of sufficient evidence to establish a *prima facie* case of defamation.[137] This standard for determining the circumstances under which an anonymous Internet speaker may be unmasked is known as the *Dendrite* standard[138] and is one of the two most popular tests for such requests.[139]

Four years later, in *Doe v. Cahill*, the Supreme Court of Delaware adopted and modified the *Dendrite* test and held that the defamed plaintiff must first satisfy a "summary judgment" standard before unmasking the anonymous defendant through discovery.[140] In *Cahill*, the plaintiff was an elected town council member who brought a defamation claim, along with his wife, against four anonymous ("John Doe") defendants for statements made on an Internet blog concerning his "mental deterioration," "character flaws," and

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132. *Id.* at 149.

133. *Id.*

134. *Id.* at 155.

135. *Id.* at 159.

136. *Id.* at 140.

137. *Id.* at 141 ("The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants.").

138. First, the plaintiff must try to notify the poster that he is the subject of efforts to learn his identity. Second, the plaintiff must identify the exact statements that plaintiff contends are actionable. Third, the plaintiff must establish that its claim would withstand a motion to dismiss for failure to state a claim, and must produce sufficient evidence supporting each element of its claim to make out a prima facie case. Fourth, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Id.*

139. The other test is the *Doe v. Cahill* test, known as the *Cahill* test, which is a modified version of the *Dendrite* test. Doe v. Cahill, 884 A.2d 451 (Del. 2005); "In cases involving efforts by a party to identify anonymous online speakers, courts have generally continued to follow a pattern of applying the high-burden Dendrite and Cahill tests where any kind of expressive speech is at issue." Steven Zansberg et al., *Internet Law: Anonymous Online Speakers to Single Publication Rule*, AM. BAR ASS'N SEC. OF FIRST AMENDMENT & MEDIA LITIG., Sept. 17, 2012, at 1.

140. *Cahill*, 884 A.2d at 465.

"paranoia."[141]

The court's spirited discussion concerning the unique nature of the Internet as a forum for communication which demands an appropriate standard of protection for anonymous speech warrants recitation.

> The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Unlike thirty years ago, when "many citizens [were] barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers [could] dominate the marketplace of ideas" the internet now allows anyone with a phone line to "become a town crier with a voice that resonates farther than it could from any soapbox." Through the internet, speakers can bypass mainstream media to speak directly to "an audience larger and more diverse than any the Framers could have imagined."[142]

The court expressly declined to adopt a "good faith" standard due to concerns that if they set the standard for "unmasking" anonymous speakers too low it would chill future Internet speakers from exercising their First Amendment right to speak anonymously.[143] The "good faith" standard merely requires that a suit be brought for a legitimate and legally recognizable cause of action supported by facts, as opposed to a suit being brought merely for purposes of intimidation, harassment, or frivolously.[144]

The judge stated that "the possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all."[145] Thus, the court modified the *Dendrite* four-prong standard to two prongs where: (1) "the plaintiff must make reasonable efforts to notify the defendant and (2) must satisfy the summary judgment standard."[146]

There remains considerable disagreement with, and modification to, both the *Cahill* and *Dendrite* test. The *Cahill* test was questioned and ultimately disregarded in *McMann v. Doe*, a case involving a real estate developer's privacy and defamation claims against an anonymous website creator.[147] Before deciding the case in favor of John Doe under FRCP 12(b)(6) failure to state a claim upon which relief can be granted, the *McMann* court outlined problems with the *Cahill* standard that are worth noting.[148]

First, the court took issue with the fact that under the *Cahill* test a plaintiff need not show malice in order to obtain a subpoena, which directly conflicts

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141. *Id.* at 454.
142. *Id.* at 455–56.
143. *Id.* at 457.
144. *See* Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1983) (finding that the Plaintiff had a good faith belief both that this was a meritorious cause of action and that there was good ground to support it as against each of the defendants).
145. *Cahill*, 884 A.2d at 457.
146. *Id.* at 461.
147. McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006).
148. *Id.*

with the Supreme Court's defamation jurisprudence requiring evidence of malice as an essential element of making a *prima facie* case concerning defamation of public figures.[149] Second, the court found that the *Cahill* test's summary judgment standard would require too much detail since sufficient facts are required to withstand summary judgment, which without discovery, including John Doe's identity, the plaintiff would be unable to obtain.[150]

Moreover, another example of variation can be found in the Ninth Circuit's ruling in *In re Anonymous Online Speakers*.[151] In that case, the petitioners, who were anonymous online speakers, brought writ of mandamus action to vacate a district court order to disclose their identities even though they were not parties to the suit.[152] The court began by acknowledging that online anonymous speech stood on equal footing with traditional anonymous speech depending on the particular circumstances and type of speech.[153] In doing so, the court essentially equivocated about protecting online anonymous speech based on particular facts. Thus, the court applied the traditional categorical tests of free speech analysis to Internet anonymous speech. In other words, whether the test should be *Cahill*, *Dendrite*, or a variation thereof, depended on what kind of anonymous speech is being litigated, with political speech at the apex of First Amendment protection.[154]

The *In re Anonymous Online Speakers* opinion rejected the district court's adoption of the *Cahill* standard as excessive because, unlike in *Cahill*, the anonymous speakers were not engaging in political speech.[155] The Ninth Circuit seemed satisfied with issuing protective orders that provided different levels of disclosure for different categories of documents such as "For Attorneys' Eyes Only" and left it up to the district court to fashion a suitable arrangement that protected the anonymous online speakers' identities.[156] However, because the district court applied a higher standard than was necessary and still found the disclosure of the anonymous speakers' identity to be constitutional, there was no clear error in its decision and was thus affirmed.[157]

Other courts have declined to adopt a new standard for protecting anonymous online speakers altogether. In *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev.*, the trial court relied heavily on a law review article arguing that there are already sufficient safeguards in place to protect online speakers' anonymity.[158]

149. *Id.* at 267.
150. *Id.*
151. *In re* Anonymous Online Speakers, 661 F.3d 1168 (9th Cir. 2011).
152. *Id.*
153. *Id.* at 1173.
154. *Id.*
155. *Id.* at 1177.
156. *Id.*
157. *Id.*
158. The court cites to Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 801 (2004), throughout its opinion in support of its refusal to adopt an existing standard or articulate a new standard for protecting anonymous online speech. Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 Phila. Ct.

The "commentator" as the court addressed the article's author, argued that the limited additional protection afforded to anonymous speech by new standards is outweighed by the threat of "grafting new tests onto existing rules" to other constitutional provisions such as due process and equal protection.[159] In particular, the article warned that imposing a heightened discovery standard may adversely and disproportionately affect plaintiffs who lack access to advanced discovery and trial tools.[160] The court agreed:

> This court accepts the notion that the implementation of new standards for cases involving plaintiff's efforts to learn the identities of anonymous internet posters will likely do more harm than good. Further, this court believes that a balancing of John Does' First Amendment rights against the plaintiff's rights to the information sought is built into our Commonwealth's existing civil procedure. Accordingly, this court will not apply the Dendrite or the Cahill standards.[161]

In sum, the *Dendrite*[162] test for disclosing the identity of anonymous Internet speakers for purposes of litigation derived in large part from *seescandy.com*.[163] The *Cahill* test is a modified version of the *Dendrite* test in that it similarly calls for notice to the anonymous online speaker but requires the plaintiff to survive a hypothetical summary judgment before granting disclosure of the defendant's identity.[164]

However, courts such as the court of appeals in *In re Anonymous Online Speakers* continue to apply the traditional framework of First Amendment analysis which fails to distinguish Internet speech as requiring heightened scrutiny and fails to recognize that the Internet is unlike traditional forums.[165] The Ninth Circuit merely looked to the substance of the anonymous Internet speech to determine the appropriate test for disclosing the identity of the speaker in light of traditional First Amendment analysis.[166] For example, if anonymous Internet speakers are engaged in political speech, as the First Amendment grants the greatest protection to political speech, the court will apply the *Dendrite* or *Cahill* standard.[167] The implication is that other types of speech that have historically enjoyed less constitutional protection would not be afforded similar protection from unmasking.

Disagreement among the judiciary regarding which standard to apply, and

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Com. Pl. LEXIS 1, at *35 (Pa. C.P. Jan. 4, 2006).

159. Vogel, *supra* note 158.

160. *Id.*

161. *Klehr Harrison Harvey Branzburg & Ellers, LLP*, 2006 Phila. Ct. Com. Pl. LEXIS 1, at *30–31.

162. Dendrite Int'l, Inc. v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001).

163. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 580–81 (N.D. Cal. 1999).

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

165. *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011).

166. *Id.* "In *In re Anonymous Online Speakers*, the Ninth Circuit required that lower courts first examine the nature of the expressive speech at issue to determine the level of protection to accord the speaker's identity. . . . In contrast, where the 'speech' at issue is alleged to constitute copyright infringement, courts generally apply the low-burden tests, particularly those established in *Sony Music Entertainment Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), and *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999)." Zansberg et al. *supra* note 139.

167. Zansberg et al., *supra* note 139.

additional modifications to either the *Cahill* or *Dendrite* test, creates uncertainty regarding the scope of protection for anonymous online speech.[168] Even more troublesome is the fact that lower courts like in *JPA Dev.*, have failed to adopt or articulate any test for protecting anonymous speech on the Internet.[169] The following is an excerpt from the law review article cited in the *JPA Dev.* opinion that stands in direct contrast to this Note's argument advocating a new or heightened standard for unmasking anonymous Internet speech:

> Though well intentioned, the rush to apply new standards [to discovery issues related to anonymous posters to the Internet] should be slowed. The threat to core First Amendment free speech rights from too readily identifying anonymous speakers is real, and should be taken seriously by the courts. At the same time, however, the new standards offer little real protection for anonymous speech beyond what the courts can provide under existing rules. In exchange for this limited benefit, however, the grafting of new tests onto existing rules threatens to compromise the values protected by other constitutional provisions, including due process, equal protection, and the right to a trial by jury. In particular, application of an out-come determinative heightened discovery standard singles out one class of plaintiffs who are systematically deprived of the litigation procedures, specifically discovery and trial, that are available to other plaintiffs, including plaintiffs with claims that are similar in all regards except that they allege harm by plaintiffs who did not act anonymously.[170]

The aforementioned position articulated by Professor Vogel succinctly describes the reasoning behind some courts' refusal to fashion new standards to Internet speech and is squarely contrary to the recommendation of this Note.[171] If the Court does not "graft new rules," Internet speech censorship and self-censorship may become the new norm.

C. Legislative Overreach

Legislative overreach is another consequence of the Supreme Court's absence in addressing First Amendment concerns in the context of anonymous online speakers. Where the Court fails to act, the legislature will attempt to fill the void. State legislatures have passed or attempted to pass statutes that unmask anonymous online speakers in a supposed effort to combat cyberbullying.[172]

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168. *See* Joshua Rich, *You Don't Know My Name:* In re Anonymous Online Speakers *and the Right to Remain Cloaked in Cybserspace*, 45 LOY. L.A. L. REV. 325, 335–36 (2011) (discussing how various jurisdictions have developed similar but inconsistent standards for plaintiffs to meet before unmasking their opponents).

169. Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 Phila. Ct. Com. Pl. LEXIS 1, at *35 (Pa. C.P. Jan. 4, 2006).

170. *Id.* (citing Vogel, *supra* note 158, at 801).

171. Vogel, *supra* note 158, at 801.

172. *See* People v. Marquan M., 19 N.E.3d 480, 488 (2014) (noting that "[u]nlike traditional bullying,

Cyberbullying statutes have been found unconstitutional on numerous occasions where courts have struck them down as overbroad and/or vague.[173] However, advocates of cyberbullying statutes will continue to push for legislation to protect teenagers from malicious and anonymous Internet speech.[174] The constitutionality of cyberbullying statutes is outside the scope of this Note, but cyberbullying statutes are relevant to anonymous online speakers in that they are designed to suppress speech that is usually anonymous via social networking websites.[175]

However, some legislation has sought to protect anonymous online speakers. For example, many state legislatures have enacted anti-SLAPP laws (Strategic Litigation Against Public Participation) that prohibit or sanction frivolous lawsuits aimed at intimidating or silencing an anonymous speaker at the discovery phase of litigation.[176] To date, approximately twenty-eight states have enacted anti-SLAPP statutes.[177] "The anti-SLAPP statutes make it easier and thus cheaper to terminate such a lawsuit at early stages."[178] These statutes are necessary because:

> [B]y the time the judge rules on a motion to dismiss, expensive, time-consuming, and potentially embarrassing discovery will already have taken place. An anti-SLAPP statute allows a motion to strike early on in free expression claims, which saves time and money, protects speech, and can even be brought by a non-party asserting a right to remain anonymous.[179]

In conclusion, without guidance from the Supreme Court regarding the

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which usually takes place by a face-to-face encounter, defendant used the advantages of the Internet to attack his victims from a safe distance, 24 hours a day, while cloaked in anonymity"); Chenda Ngak, *New York Lawmakers Propose Ban on Anonymous Online Comments*, CBS NEWS (May 24, 2012, 11:46 AM), www.cbsnews.com/news/new-york-lawmakers-propose-ban-on-anonymous-online-comments/; S.B. 6779, 2012 N.Y. State Assembly (N.Y. 2012), http://assembly.state.ny.us/leg/?default_fld&bn=S06779&term=2011&Text=Y; Josh Peterson, *Illinois State Senator Pushes Anti-Anonymity Bill*, THE DAILY CALLER (Feb. 21, 2013, 3:42 AM), http://dailycaller.com/2013/02/21/illinois-state-senator-pushes-anti-anonymity-bill/; Angela Hatton, *No More Bullying?*, WKMS (Oct. 2, 2009), http://www.publicbroadcasting.net/wkms/news.newsmain/article/0/1/1561435/WKMS.Local.Features/No.More.Bullying.

173. *See Marquan M.*, 19 N.E.3d at 488 (finding "Albany County's Local Law No. 11 of 2010—as drafted—is overbroad and facially invalid under the Free Speech Clause of the First Amendment"); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216–17 (3d Cir. 2001) (invalidating an overly broad school anti-bullying policy); United States v. Cassidy, 814 F. Supp. 2d 574, 576 (D. Md. 2011) (finding federal cyberstalking statutes was a content based restriction that unlawfully limited speech protected by the First Amendment); George F. du Pont, *The Criminalization of True Anonymity in Cyberspace*, 7 MICH. TELECOMM. & TECH. L. REV. 191, 201 (2000–01) (arguing that legislatures tend to overreact to perceived cyber threats and thereby draft legislation that is overbroad and criminalize protected forms of speech).

174. Emily Poole, *Hey Girls, Did You Know? Slut-Shaming on the Internet Needs to Stop*, 48 U.S.F. L. REV. 221 (2013) (arguing that current legislation is not sufficient in preventing and remedying cyberbullying and "slut shaming" harms, and that Congress should amend the Communication Decency Act to hold ISPs liable for harmful Internet speech).

175. *E.g.* "Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written or electronic communication, in a manner likely to harass or cause alarm." ALA. CODE § 13A-11-8(b)(1)(a) (2016).

176. James A. Burns Jr., *Battling the Unknown: Online "Cybersmears" by Anonymous Employees,* 28 EMP. REL. L.J. 47, 62 (2002).

177. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Mar. 23, 2016).

178. Miller, *supra* note 7, at 253.

179. *Id.*

level of protection that should be afforded to anonymous online speakers under the First Amendment, legislatures will feel at liberty and/or compelled to fill the legal void. While some statutes like anti-SLAPP provisions may prove beneficial to anonymous online speakers, there remains a considerable risk of legislative overreach in the form of cyberbullying, cyberstalking, or even anti-anonymous online comment legislation at the behest of e-businesses like Yelp.[180]

IV. RECOMMENDATION

The Supreme Court should articulate or adopt a First Amendment standard tailored to the Internet that balances the right to speak anonymously with the need for plaintiffs to "unmask" defendants.[181] Further, because the Court's First Amendment jurisprudence has adopted a policy of combating bad speech with more speech[182] and because the Internet is a forum where speech is highly susceptible to legislative overreach,[183] frivolous lawsuits, and contextual misunderstanding, the Court should adopt a standard that mirrors strict scrutiny.

The Court should not continue to apply traditional First Amendment tests to Internet speech cases because those tests were created in the context of specific forms and forums of communication such as face-to-face speech, newspapers, radio, television, public demonstrations, and school speech. For each of these forums the Court set forth a new test or refashioned an existing test in light of the medium of communication. The Internet, due to its ubiquity and accessibility, should have been afforded the same unique consideration as television and radio when those forums first presented First Amendment jurisprudential controversies.

If the Court fails to fashion a new test to protect Internet speech, particularly anonymous Internet speech, or fails to tailor existing First Amendment tests to the Internet as a new forum, lower courts will continue to fashion their own tests. As the circuit courts continue to create jurisdictional splits based on their understanding of the First Amendment as applied to Internet speech, whether anonymous or not, the consequence will be chilled Internet speech. Jurisdictional splits chill Internet speech because of the uncertainty regarding the applicable law and the potentially unlimited reach of said speech.

For example, if an anonymous Internet speaker posts a blog statement from one particular state within a jurisdiction that has adopted anti-SLAPP

180. Peterson, *supra* note 172.

181. Miller, *supra* note 7, at 252 (arguing that "[u]niform standards could come from a Supreme Court ruling addressing the issue from a constitutional perspective, but in the meantime lower courts must develop standards").

182. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

183. *See* du Pont, *supra* note 173, at 195 ("Even though cyberspace does not fit neatly into existing constitutional categories, courts have found that these recent anti-anonymity statutes, regardless of whether they are aimed at cyberspace, are too broad and violate the First Amendment.").

provisions and injures a party or parties located in jurisdictions that have no anti-SLAPP provisions, the uncertainty regarding the protection afforded will dissuade the speaker from exercising his speech rights. To an extent, this is already occurring where millennials and young professionals are regularly reminded to be careful what they say or "post" online because the consequences and potential audiences are unknown. The result is that the Internet will lose its identity as a forum for communication with endless possibilities for the free exchange of ideas and opinions.

Speech on the Internet is already scrutinized as if it were made face-to-face, where individuals with varying tolerance for "offensive" or "intolerant" speech seek to identify, persecute, and, in some cases, prosecute Internet speakers who voice unpopular or contrarian views. The end product is a codification and reaffirmation of existing social values on the Internet at the expense of the free exchange of ideas that the Supreme Court has articulated to be at the heart of First Amendment jurisprudence.

One aforementioned threat to Internet speech is cyberbullying laws. The media coverage concerning these laws and the subsequent punishment dealt out to students and other Internet speakers chill Internet speech and encourage self-censorship. Students who, outside of school, express their opinions on the Internet regarding other students, administrators, and social issues face lawsuits under newly minted cyberbullying laws under the guise of "protecting the victim." Cyberbullying laws run contrary to the Court's articulation that the remedy to bad speech is more speech.[184] Rather, Cyberbullying laws punish bad speech via lawsuits, suspensions, and public shaming via media and social media.[185] This Note stands firmly with the Supreme Court in advocating that the solution to bad speech is more speech, not less speech.

Another consequence of the Court's failure to fashion a new test to protect Internet speech is the emergence of Internet social justice warriors ("SJWs"). Social justice warriors launch Internet campaigns to identify, smear, and attack (sometimes physically) Internet speakers who voice opinions or make statements that are contrary to their personal beliefs.[186] The threat of SJWs to Internet speech is the Internet version of a heckler's veto that the Supreme Court cautioned about and rejected in many of its First Amendment decisions.[187] Without legal protection from the Court, Internet speakers who

184. *Whitney*, 274 U.S. at 377; Syndey, *supra* note 100, at 591–92 (discussing some cyberbullying laws and their limitations on speech).

185. *See e.g.*, Sydney, *supra* note 100, at 594 (discussing California cyberbullying laws and how they interact with the First Amendment in the public education context).

186. Joshua Goldberg, *How Social Justice Warriors Are Creating an Entire Generation of Fascists*, THOUGHT CATALOG (Dec. 5, 2014), http://thoughtcatalog.com/joshua-goldberg/2014/12/when-social-justice-warriors-attack-one-tumblr-users-experience/.

187. *See* Reno v. Am. Civ Liberties Union, 521 U.S. 844, 849 (1997) (finding the CDA unconstitutional in part because "most Internet forums are open to all comers and that even the strongest reading of the 'specific person' requirement would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech"); Cohen v. Cal., 403 U.S. 15, 15 (1971) ("There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.").

voice unpopular or "offensive" opinions are likely to self-censor in order to avoid becoming a target for hecklers.

Therefore, to obtain an anonymous speaker's identity, the party requesting disclosure should be required to provide substantial and objective evidence regarding the context in which the speech was given. The requirement should be akin to a summary judgment standard adopted in *Cahill* requiring a reasonable degree of certainty as to the context of the speech before unmasking an anonymous online speaker.[188]

Furthermore, summary judgment would be an appropriate standard because the Court should err on the side of caution by articulating a standard that would value anonymous speech in the context of the Internet in the same manner that the Court has protected anonymous speech in traditional forums. It is better to have some unprotected speech occur than to stifle or chill protected speech because the harm from the latter, particularly the inhibition of communication and a free exchange of ideas, is incompatible with democratic governance.[189]

V. CONCLUSION

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[190]

This Note argues for a test similar to *Cahill*'s summary judgment standard that is fashioned in light of the Internet's distinct features.[191] The maladies that accompany the freedom to speak anonymously online, such as cyberbullying or "trolling," are magnified due to the wide accessibility of Internet speech.[192] The fact that hundreds of millions of people can instantaneously access the same information leads to social media and news frenzies over what is said on the web.[193] As a result, the Internet as a forum for anonymous communication is especially vulnerable to attempted regulation and frivolous litigation that could undermine or circumvent the Court's protection for anonymous speech.[194]

The Court's protection for anonymous speech is rooted in a historical understanding of the importance of the free exchange of ideas both good and

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

189. *Reno*, 521 U.S. at 885 ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

190. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

191. *Cahill*, 884 A.2d at 460 ("We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously.").

192. Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Internet Speech*, COMM. LAW., Fall 2000, at 3–4.

193. *See* Samantha Frederickson, *Guarding the Unnamed Writers of the Internet: As Anonymous Web Speech Proliferates, Free-Speech Law Is Evolving*, NEWS MEDIA & L., Fall 2008, at 34 (describing the rising tension between First Amendment lawsuits and the blogosphere).

194. *See* Jamie Williams, *Tell the FEC Not to Amp Up Internet Regulations*, ELEC. FRONTIER FOUND. (Jan. 12, 2015), https://www.eff.org/deeplinks/2015/01/tell-fec-not-amp-internet-regulations (discussing the threat of litigation and chilling effect of regulation on internet speech).

bad to a healthy democracy.[195] The Internet, unlike newspapers, television, or radio, is the quintessential democratic forum, where access to speak is not contingent upon money and power but rather on the desire to speak and access to the web.[196] The Internet contains the greatest potential for the free exchange of ideas.[197] Therefore, it should be afforded the greatest protection from any attempt to chill or suppress speech, no matter how unpleasant.

195. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

196. *See* Reno v. Am. Civ Liberties Union, 521 U.S. 844, 853 (1997) ("Any person or organization with a computer connected to the Internet can 'publish' information.").

197. *See* Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501 (2013) (arguing that due to the threat of Internet overregulation, anonymity should be sacrificed to preserve the Internet's unlimited creative potential and exchange of ideas).